LEXSEE 2004 U.S. DIST. LEXIS 13053

SUMMIT PROPERTIES, INC., an Oregon corporation., Plaintiff, v. NEW TECHNOLOGY ELECTRICAL CONTRACTORS, INC., a Delaware corporation, and INTEGRATED ELECTRICAL SERVICES, a Delaware corporation, Defendants/Third-Party Plaintiffs, v. MILESTONE INVESTMENT CO., LLC; WILLIAM A COLEMAN, and CD CROUSER, Third-Party Defendants.

CV-03-748-ST, CV-03-6394-ST

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

2004 U.S. Dist. LEXIS 13053

July 2, 2004, Decided

SUBSEQUENT HISTORY: Adopted by, Summary judgment granted, in part, summary judgment denied, in part by *Summit Props., Inc. v. New Tech. Elec. Contrs., Inc., 2004 U.S. Dist. LEXIS 24415 (D. Or., Nov. 19, 2004)*

DISPOSITION: **[*1]** Recommended that Plaintiff's motion for summary judgment be granted; New Tech's and IES' motion for summary judgment be denied and Milestone's, Coleman's and Crouser's motion for summary judgment be granted against New Tech and IES' Second (breach of fiduciary duty), Third (fraud), Fourth (negligent misrepresentation) and Fifth (conspiracy) Third-Party Claims.

COUNSEL: For Summit Properties, Incorporated, an Oregon corporation, Plaintiff: Erin C. Lagesen, LEAD ATTORNEY, Joel A. Mullin, LEAD ATTORNEY, Stoel Rives, LLP, Portland, OR.

For New Technology Electrical Contractors, Incorporated, a Delaware corporation, Integrated Electrical Services, a Delaware corporation, Defendants: Glenn A. Ballard, Jr., Bracewell & **[*2]** Patterson LLP, Houston, Tx.

For New Technology Electrical Contractors, Incorporated, a Delaware corporation, Integrated Electrical Services, a Delaware corporation, Defendants: David G. Hosenpud, Leah C. Lively, Lane Powell Spears Lubersky, LLP, Portland, OR.

For New Technology Electrical Contractors, Incorporated, a Delaware corporation, Integrated Electrical Services, a Delaware corporation, ThirdParty Plaintiffs: David G. Hosenpud, Leah C. Lively, Lane Powell Spears Lubersky, LLP, Portland, OR.

For C.D. Crouser, William A. Coleman, Milestone Investment Co., L.L.C., ThirdParty Defendants: Arnold L. Gray, LEAD ATTORNEY, Stewart Sokol & Gray, LLC, Portland, OR.

For C.D. Crouser, William A. Coleman, Milestone Investment Co., L.L.C., ThirdParty Defendants: Robert B. Coleman, LEAD ATTORNEY, Stewart Sokol & Gray, Portland, OR.

JUDGES: Janice M. Stewart, United States Magistrate Judge.

OPINION BY: Janice M. Stewart

OPINION

FINDINGS AND RECOMMENDATIONS

STEWART, Magistrate Judge:

INTRODUCTION

On June 4, 2003, plaintiff, Summit Properties, Inc. ("Summit"), filed a Complaint alleging claims against defendants, New Technology Electrical Contractors, Inc. ("New Tech") and **[*3]** its parent company, Integrated Electrical Services ("IES"). On January 26, 2004, that

case, entitled *Summit Prop. v. New Tech. Elec. Contractors, Inc.*, CV-03-748-ST, was consolidated with *Integrated Elec. Serv. v. Milestone Inv. Co., L.L.C.*, CV-03-6394-ST (docket # 57). [1] The parties dispute the validity of a lease that Summit, as landlord, allegedly entered into with New Tech and IES, as tenants, for the property located at 6950 N.E. Campus Way, Hillsboro, Oregon ("the Campus Way Property").

1 On April 4, 2003, New Tech and IES filed a petition in Texas state court entitled *Integrated Electrical Services and New Technology Electrical Contractors, Inc., v. Milestone Investment Co, L.L.C., Summit Properties, Inc., William A. Coleman, and C.D. Crouser* ("Texas lawsuit"). Mullin Dec, Exhibit 3. That case was ultimately removed to federal court in Texas and then transferred to this court. All references to docket entries are references to the docket in the lead case, *Summit Prop. v. New Tech. Elec., Inc.*, CV-03-748-ST.

[*4] I. Summit's Claims

Summit's First Amended Complaint (docket # 42) alleges four claims against New Tech and/or IES:

> First Claim: Declaratory judgment under *28 U.S.C. § 2201* to establish that the lease entered with New Tech is binding and neither void *ab initio* nor voidable;
>
> Second Claim: Declaratory judgment to establish that IES is obligated under the lease;
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> Third Claim: Breach of the lease agreement by New Tech; and
>
> Fourth Claim: Breach of the lease agreement by IES.

II. New Tech and IES' Affirmative Defenses, Counterclaims, and Third-Party Claims

New Tech and IES' Answer to the First Amended Complaint (docket # 48) alleges four affirmative defenses to enforcement of the lease: Statute of Frauds; lack of authority; nonexistent corporate entity as the tenant; and fraudulent inducement by Summit, Milestone Investment Co., L.L.C. ("Milestone), William Coleman ("Coleman") and C.D. Crouser ("Crouser").

Additionally, New Tech and IES allege several counterclaims against Summit and third-party claims against Milestone, Coleman, and Crouser:

> First Claim: Declaratory judgment to establish that the lease **[*5]** lacks authority from New Tech and IES and is unenforceable under the Statute of Frauds and that New Tech and IES and are not liable for breach of the lease:
>
> Second Claim: Breach of fiduciary duty by Coleman and Crouser; [2]
>
> Third Claim: Fraud by Coleman, Crouser, Summit, and Milestone;
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> Fourth Claim: Negligent misrepresentation by Coleman, Crouser, Summit, and Milestone;
>
> Fifth Claim: Conspiracy by Summit, Milestone, Coleman, and Crouser to defraud New Tech and IES and to induce Coleman and Crouser to breach their fiduciary duties to New Tech and IES; and
>
> Sixth Claim: Recovery of attorneys fees incurred in this action.

2 New Tech/IES' Second Claim is addressed to the "Individual Defendants." New Tech/IES' Answer, P 64. Its Third and Fourth Claims are addressed to the "Individual Defendants," as well as Milestone. *Id* at PP 66, 68. Therefore, this court construes New Tech and IES' Second Claim as alleging a breach of fiduciary duty only by Coleman and Crouser, not Milestone.

[*6] III. Summit's Affirmative Defenses

Summit's Reply to New Tech's and IES' Counterclaims (docket # 49) alleges three affirmative defenses: failure to state a claim; estoppel; and waiver.

IV. Milestone, Coleman, and Crouser's Affirmative Defenses and Counterclaim

Not to be bested, Milestone, Coleman and Crouser allege eight affirmative defenses to New Tech and IES' third-party claims (docket # 64): failure to state a claim; failure to state a claim for attorneys fees; estoppel; waiver; knowledge by New Tech and IES of matters related to the Campus Way Property lease or leases that invalidates their breach of fiduciary duty, fraud, misrepresentation, and conspiracy claims; ratification; laches; and unclean hands.

Additionally, Milestone, Coleman and Crouser allege a counterclaim against New Tech and IES for attorneys fees incurred in this action and the Texas lawsuit.

V. Jurisdiction

Summit is an Oregon corporation with its principal place of business in Portland, Oregon. First Amended Complaint, P 1. IES and New Tech are Delaware corporations with their principal places of business in Houston, Texas. *Id* at PP 2-3. Milestone is an Oregon corporation. **[*7]** New Tech/IES' Answer to First Amended Complaint, P 40. Coleman and Crouser are residents of Oregon. *Id* at P 41. Thus, there is complete diversity of citizenship between the plaintiff, defendants and third-party defendants. The matter in controversy exceeds $ 75,000.00 exclusive of interests and costs, satisfying diversity jurisdiction under *28 U.S.C. § 1332(a)*.

VI. Motions

Summit moves for summary judgment (docket # 76) on its First and Third Claims against New Tech and against all of New Tech and IES' counterclaims. In turn, New Tech and IES move for summary judgment (docket # 80) against all of Summit's claims and ask that IES be dismissed from this case. Finally, Milestone, Coleman and Crouser move for summary judgment (docket # 89) against all of New Tech and IES' counterclaims, except their Sixth Claim for attorneys fees.

For the reasons stated below, the motions should be granted in part and denied in part. As a result, the lease should be enforced against New Tech, but IES' liability under the lease remains for trial. Additionally, the various claims of wrongdoing by New Tech and IES against Coleman, Crouser, Milestone, and Summit should **[*8]** be dismissed.

LEGAL STANDARDS

FRCP 56(c) authorizes summary judgment if "no genuine issue" exists regarding any material fact and "the moving party is entitled to judgment as a matter of law." The moving party must show an absence of an issue of material fact. *Celotex Corp. v. Catrett, 477 U.S. 317, 323, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986)*. Once the moving party does so, the nonmoving party must "go beyond the pleadings" and designate specific facts showing a "genuine issue for trial." *Id at 324*, citing *FRCP 56(e)*. The court must "not weigh the evidence or determine the truth of the matter, but only determines whether there is a genuine issue for trial." *Balint v. Carson City, 180 F.3d 1047, 1054 (9th Cir 1999)* (citation omitted). A "'*scintilla* of evidence,' or evidence that is 'merely colorable' or 'not significantly probative,'" does not present a genuine issue of material fact. *United Steelworkers of Am. v. Phelps Dodge Corp., 865 F.2d 1539, 1542 (9th Cir), cert denied, 493 U.S. 809, 107 L. Ed. 2d 20, 110 S. Ct. 51 (1989)* (emphasis **[*9]** in original) (citation omitted).

The substantive law governing a claim or defense determines whether a fact is material. *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 631 (9th Cir 1987)*. The court must view the inferences drawn from the facts "in the light most favorable to the nonmoving party." *Id* (citation omitted). Thus, reasonable doubts about the existence of a factual issue should be resolved against the moving party. *Id at 631*.

FACTS

I. New Tech and IES' Early History

In 1983, New Technology Electrical Contractors, Inc. ("New Tech (OR)") was incorporated in Oregon. Coleman Aff, P 2. [3] Coleman, formally a journeyman electrician, spent years building New Tech (OR) into a successful electrical contractor serving, among others, the high technology industry in and around Hillsboro, Oregon. *Id.*

3 All the parties submitted exhibits attached to affidavits or declarations prepared by counsel. Therefore, citations to exhibits are identified by the last name of the attorney-affiant or attorney-declarant (except in the case of one attorney who shares the same name as a party; in that case, the full name of the attorney has been used to avoid confusion) and citations are to the exhibit number (or exhibit letter). All other

> citations are to various affidavits, declarations, and depositions submitted by the parties. These affidavits, declarations, and depositions are identified by the last name of the affiant, declarent, or deponent, and citations are to the paragraph(s) of the affidavit or declaration and to the page number(s) of the deposition.

[*10] IES is a national corporation generally referred to as a "roll-up company," which means that it seeks to increase its business by purchasing locally-owned companies and rolling them up into a larger parent company. Ramm Dec, P 9. IES has purchased numerous locally-owned electrical contracting companies throughout the United States. *See id.*

On June 8, 1999, Coleman (and the other owners) sold New Tech (OR) to IES through an Agreement and Plan of Merger (the "Merger Agreement"). Hamilton Aff, Exhibit A. Pursuant to the Merger Agreement, New Tech (OR) was merged with and into New Technology Acquisition Corporation in accordance with the laws of the state of Delaware. *Id* at Exhibit A, p. 6.

On October 16, 2001, New Technology Acquisition Corporation changed its name to New Technology Electrical Contractors, Inc., a Delaware corporation (and the defendant known as "New Tech" in this case). *Id* at Exhibit E, p. 2.

After the sale to IES, Coleman remained the president of New Technology Acquisition Corporation, and later New Tech, by virtue of Section 2.3 and Schedule 2.3 of the Merger Agreement. *Id* at Exhibit A, pp. 4 & 42. Pursuant to a then-existing employment agreement **[*11]** with New Tech, Coleman, as president, was given certain duties and authority:

> Mr. Coleman shall perform such specific duties and shall exercise such specific authority as may be assigned to him from time to time by the board of directors. In performing his duties, Mr. Coleman shall be subject to the direction and control of the board of directors. Mr. Coleman further agrees that he will, in all aspects of his employment, comply with the instructions, policies, and rules of New Tech established from time to time by New Tech.

Robert Coleman Aff, Exhibit 9, p. 5.

The Merger Agreement appointed Crouser as New Tech's Vice President of Finance. Hamilton Aff, Exhibit A, p. 42.

After the sale to IES, New Tech continued to do business as it had previously. Coleman Aff, P 4; Crouser Aff, P 4. However, Coleman and Crouser reported to IES' Regional Operating Officer ("ROO"), Dick Muth ("Muth"), as well as others within the IES chain of command, such as Bob Weik ("Weik"), Muth's immediate superior; Ben Mueller ("Mueller"), Weik's immediate superior and IES' Chief Operating Officer ("COO")); and David Ramm ("Ramm"), IES' Chief Executive Officer ("CEO"). Coleman Aff, P 4; Crouser **[*12]** Aff, P 4; Coleman Depo, pp. 81, 89-90, 93. Ramm also served as New Tech's sole director. Ramm Dec, P 8.

II. The First Lease

At the time of the Merger Agreement, New Tech was the lessee in two buildings owned by Milestone. Mullin Dec, Exhibit 1, pp. 38 & 59. Coleman owned Milestone, New Tech's lessor. Hamilton Aff, Exhibit A, p. 47.

In 1999 and 2000 after the Merger Agreement, while still housed in Milestone's buildings, New Tech's business began to grow. Crouser Aff, P 5. As a result, IES decided to restructure its regional governance structure. *Id*; Coleman Aff, P 5; Ramm Dec, PP 6-7. That restructuring plan included creating a new "Northwest" region to be run by Coleman as IES' ROO. *Id.*

In early 2001, Ramm, Mueller, and Muth met with Coleman in Portland, Oregon. Coleman Aff, P 6; Coleman Depo, pp. 40-42; Ramm Dec, PP 5-6. They discussed Coleman serving as IES' ROO and whether New Tech had adequate facilities for its operations. Coleman Aff, P 6; Coleman Depo, pp. 40-42; Ramm Dec, PP 5-6. Based on a tour of Milestone's buildings leased by New Tech, they determined that the facilities were not adequate. Coleman Aff, P 6; Ramm Dec, PP 5-7; Coleman Depo, pp. **[*13]** 40-42. Ramm and Coleman discussed whether to move New Tech into an uncompleted facility on the Campus Way Property also owned by Milestone, and Ramm told Coleman "lets go, or words to that effect." Ramm Dec, P 7; Coleman Depo, pp. 40-42. However, Ramm also told Coleman to prepare a package of documents on the move for IES' approval, including the tenant improvements that would be

necessary. Coleman Aff, P 10.

Coleman and Crouser prepared documents concerning the tenant improvements and comparing New Tech's options of staying in its present Milestone-owned buildings or moving to the Campus Way Property with a lease dated April 1, 2001. *Id* at P 11; Crouser Aff, P 7. In late January or early February 2001, they claim that they sent these documents to Muth, their immediate superior at IES, intending for Muth to take them to an IES meeting in Houston scheduled for February 2001. Coleman Aff, P 11; Crouser Aff, P 7; Coleman Depo, pp. 25-27. According to Coleman, Muth never got these documents or lost them because he did not bring them with him to the February 2001 IES meeting. Coleman Depo, pp. 25-27. Coleman sent the documents, except the lease, to Muth again on March 20, 2001, as **[*14]** shown by the date on a fax cover sheet accompanying the documents. Robert Coleman Aff, Exhibit 12; Coleman Aff, P 13.

During this period of time prior to April 1, 2001, Crouser also sent the package of documents to IES' senior-counsel, Ray Holan ("Holan"), and spoke with other IES officers regarding the Campus Way lease. Crouser Aff, P 8; Crouser Depo, pp. 35-36; Coleman Depo, pp. 49-50.

On April 18, 2001, Coleman traveled to Houston, Texas to meet with IES' officials and interview for the position of IES' ROO, as discussed at the prior meeting in Oregon. Coleman Aff, P 14. After the interview, Coleman was appointed as IES' Northwest ROO, and he stayed in Houston to attend IES meetings in his new capacity. *Id*; Robert Coleman Aff, Exhibit 15 (notes taken by Coleman while at the IES meeting on April 18, 2001).

While in Houston on April 18, 2001, Coleman hand-delivered a copy of the Campus Way Property documents, including the lease, to Weik. Coleman Aff, P 15; Coleman Depo, pp. 97, 120-21. According to Coleman, the lease was unsigned and dated April 1, 2001, as had been all earlier drafts. Coleman Aff, PP 12, 15. Ramm, Mueller, Weik, and Coleman reviewed the documents. *Id* **[*15]** at P 16; Coleman Depo, p. 28. Mueller orally approved New Tech's move to the Campus Way Property and the improvements necessary for New Tech to use that facility. Coleman Aff, P 16, Mueller Depo, p. 14. Coleman's notes from the IES Regional Leadership meeting on April 18, 2001, state that "Ben [Mueller] said go ahead on Building," (Mueller Dec, Exhibit 1, p. 99; Robert Coleman Aff, Exhibit 15), which was a reference to New Tech's lease of the Campus Way Property. Coleman Depo, pp. 122-24.

After receiving Mueller's approval, Coleman returned to Portland and signed the lease of the Campus Way Property on behalf of Milestone. Coleman Aff, PP 18, 24. Crouser signed the lease on behalf of "New Tech Electric, Inc.," which, as Coleman admits, was the wrong name for New Tech. Crouser Aff, P 10; Coleman Depo, pp. 166-67. The executed lease was dated April 1, 2001 (Mullin Dec, Exhibit 1, p. 32), even though it was signed on or after April 18, 2001. Coleman Aff, P 24. Coleman explains that all draft leases prepared since early 2001 were dated April 1, 2001, because he anticipated that it would be approved during IES' February meeting. Coleman Aff, PP 12, 24.

The lease was for a seven year **[*16]** period beginning on October 1, 2001, and could be "amended or modified" only in writing. Mullin Dec, Exhibit 1, pp. 1 & 32.

After the lease was signed, Milestone began paying for the improvements required for New Tech to occupy the premises. Coleman Aff, P 19; Crouser Aff, P 11. New Tech performed the improvements itself, and was paid 10% profit above its costs by Milestone. Coleman Aff, P 19; Crouser Aff, P 11.

III. Lease Addendum, Second/Modified Lease & Assignment

After the lease was signed and the improvements were underway, Summit learned that the Campus Way Property was for sale and being marketed by Grub & Ellis, a real estate broker, as subject to a seven-year lease with New Tech. Mullin Dec, Exhibit 1, p. 146. Before deciding to buy the property, Summit sought to fulfill its duties of due diligence by thoroughly investigating the circumstances surrounding the lease. In a report forwarded by Summit's president, Yoshio Kurosaki ("Kurosaki"), to Summit's Board members on July 18, 2001 (*id* at 143), Grub & Ellis alerted potential purchasers that "IES is not a financial guarantor of the lease, but does represent a strong financial backer, committed to the success **[*17]** of the company [New Tech]." *Id* at 150. However, in an e-mail dated July 19, 2001, to the real estate broker handling the transaction with Summit, Coleman wrote that "New Tech is a D.B.A. of IES and when I, as an officer of New Tech, am signing

on behalf of IES [*sic*]. So IES is the guarantee [*sic*]. That's what I've just been told." Lagesen Dec in Opposition to Defendant's Motion for Summary Judgment ("Lagesen Dec in Opposition"), Exhibit 1, p. 1. Additionally, on August 6, 2001, Milestone's attorney wrote to Summit as follows:

> Apparently your client has misunderstood certain comments regarding which specific entity is obligated under the [Campus Way Property lease]. This letter serves to clarify the identity of the party obligated to perform the duties of the tenant under the lease.
>
> * * *
>
> The lease agreement . . . identified [Milestone] as the landlord and [New Tech] as the sole tenant. This lease is in full force and effect. The signature block clearly indicates that New Tech Electric, Inc. is the tenant under the agreement with no evidence of any subsidiary or parent company of New Tech Electric, Inc. as having signed the lease or having any authority **[*18]** to execute this lease on behalf of New Tech. The lease contains no references to any guarantor or guaranty of this lease. *Therefore, by way of clarification, I wish to reiterate that New Tech Electric, Inc. is the only tenant and sole obligee of the tenant's duties as provided in this lease.* Mr. Coleman confirmed to me that New Tech generates revenue more than adequate to meet its obligation under the lease.

Hamilton Aff, Exhibit J, pp. 1-2 (emphasis added).

After reviewing the lease and receiving these reports, Summit requested certain modifications to the lease. Crouser Depo, p. 44; Mullin Dec, Exhibit 1, p. 103. A broker for Grub & Ellis met with Kurosaki and informed Coleman by letter dated August 14, 2001, that Summit would lift its remaining contingencies and submit a deposit if certain modifications were made in the lease, including a clarification that the lessee was "New Tech Electric, Inc. a wholly owned subsidiary of Integrated Electrical Services." Mullin Dec, Exhibit 1, p. 101.

To provide the clarification as to the name of the tenant, on August 16, 2001, Holan sent the following letter addressed to Summit:

> New Technology Electrical Contractors, Inc **[*19]** (formerly known as New Technology Acquisition Corporation), a Delaware corporation, is a wholly owned subsidiary of Integrated Electrical Services, Inc.

Id at 142.

A few hours later, Coleman faxed Summit four replacement pages to the lease that made several changes, including identifying the tenant as "New Technology Electrical Contractors, Inc., a wholly owned subsidiary of Integrated Electrical Services, Inc." *Id* at 165. Kurosaki Depo, pp. 181-82. An unsigned copy of these documents ("Second/Modified Lease") [4] was placed in the New Tech lease file maintained by IES in Houston. Mullin Dec, Exhibit 1, pp. 112-125; Supp Warnock Aff, P 6.

> 4 The parties dispute the legal effect of these four replacement pages. Summit argues this was a modification. New Tech and IES believe it created a second lease, not just a modification of the first lease. As discussed below, whether these four pages were a modification of this lease or a second lease does not affect the outcome of the parties' motions.

The **[*20]** next day, August 17, 2001, Summit informed Milestone that it had "become comfortable with the financial situation of the tenant" and would remove the contingencies it previously placed on the purchase if Milestone agreed to an attached Lease Addendum and certain construction warranties. Mullin Dec, Exhibit 1, p. 103. The Lease Addendum requires the tenant to give 12 months' notice of an intent to renew following expiration of the seven-year lease term (rather than six months as set out in the lease); use of the Arbitration Service of Portland, rather than the American Arbitration Association, to arbitrate any dispute over the market rate for a renewal terms; the insertion of the word "casualty" in section 5(b) of the lease to clarify the type of insurance the tenant was required to maintain; and a change in the name of the tenant from "New Tech Electric, Inc." to "New Technology Electrical Contractors, Inc., a

Delaware Corporation." *Id* at 105. On August 17, 2001, Coleman signed a copy of the Lease Addendum on behalf of Milestone and Crouser signed it on behalf of "New Technology Electrical Contractors, Inc., dba New Tech Electric Inc." *Id;* Crouser Depo, pp. 44-45.

Before signing **[*21]** the Lease Addendum, Crouser claims that he discussed it with IES' senior counsel, Holan, who was responsible for managing real estate at IES and who also held the title of Assistant Secretary of New Tech. Crouser Depo, pp. 45-46; Harris Depo, pp. 10-11; Mullin Dec, Exhibit 1, p. 2 (giving Holan's title as Assistant Secretary of New Tech). However, Holan does not remember reviewing the Lease Addendum and did not have authority to approve any lease or addendum. Holan Aff, P 3.

Summit then made an offer to buy the Campus Way property, as did several other prospective purchasers. Coleman Depo, pp. 157-58. Summit closed on the purchase and took formal assignment of the lease ("the Assignment") on September 27, 2001, four days before New Tech was to begin occupying the premises. Kurosaki Dec, P 6; Mullin Dec, Exhibit 1, p. 141. A signed copy of the Assignment was placed in the New Tech lease file maintained by IES in Houston. Mullin Dec, Exhibit 1, p. 141; Summit's Concise Statement P 8 (admitted by defendants).

IV. New Tech's Move and Activities at the Campus Way Property

New Tech and Coleman, now IES' Northwest ROO, moved their offices to the Campus Way Property in late **[*22]** September or early October of 2001, commensurate with the October 1, 2001 beginning of the lease. Coleman Aff, P 20; Crouser Aff, P 12. After the lease term began, Holan called Crouser to request that Milestone relieve New Tech of its obligations under the two leases for the buildings it previously occupied. Coleman Aff, P 21; Crouser Aff, P 13; Mullin Dec, Exhibit 1, p. 74; Coleman Depo, pp. 69-70; Crouser Depo, p. 27. Milestone complied by letter dated October 1, 2001 (Mullin Dec, Exhibit 1, p. 74), even though one of the prior leases continued through November 2004. *Id* at 38. A copy of the letter confirming Milestone's concession was placed in the New Tech Lease File maintained by IES at its corporate headquarters in Houston. *Id.*

Shortly after the move, Robert Stalvey ("Stalvey"), the COO of IES' Electrical Division who had replaced Mueller, attended New Tech's open house celebrating its move to the Campus Way Property. Stalvey Depo, pp. 61-62; Coleman Aff, P 22; Crouser Aff, P 14. Stalvey was introduced to Kurosaki, Summit's president. Coleman Aff, P 22; Crouser Aff, P 14; Stalvey Deposition, pp. 61-62. At the time, Stalvey knew that the Campus Way Property was subject **[*23]** to a lease between New Tech and Milestone, that Coleman had built the building, and that it was subject to a new lease following the sale of the building to Summit. *Id*; Summit's Concise Statement, P 9 (admitted by defendants). Ramm and Weik were copied on Stalvey's correspondence memorializing the visit. Mullin Dec, Exhibit 1, p. 106. In this letter, dated October 17, 2001, and addressed to Coleman at the Campus Way Property, Stalvey wrote:

> The new facility is just awesome. It was immediately apparent that much thought and planning went into the project. I have no doubt that it will serve New Tech very efficiently and will improve everyone's spirit and attitude.
>
> * * *
>
> I could see, hear, and even feel a sense of family, dedication, integrity and moral conviction that makes me extremely proud that New Tech is part of the IES team.

Id.

IES publicized New Tech's move in its newsletter. Mullin Dec, Exhibit 7, p. 2. Signs identifying IES and New Tech as the tenant of the Campus Way Property were displayed prominently on the side of the building. Second Crouser Aff, P 3; Lagesen Dec in Opposition, Exhibit 6. Pursuant to the lease, New Tech paid the rent, property **[*24]** taxes, maintenance costs, and insurance on the property during this period. Kurosaki Dec, P 8. IES occupied a portion of the building for its Northwest region operations and also paid at least some portions of the monthly rent under the lease, as well as other expenses associated with maintenance and operation. Second Crouser Aff, PP 3-4. In the Texas lawsuit, New Tech and IES indicated that "IES pays all of the rent for the Lease in question from Houston, Harris County,

Texas," (Mullin Dec Exhibit 3, p. 3) and that the lease payments were "authorized and directed from Houston." *Id* at Exhibit 8, p. 2. IES also paid portions or all of the salaries of the employees working on IES' Northwest regional operations at the Campus Way Property. Second Crouser Aff, P 2.

V. New Tech's Business Problems

New Tech's economic fortunes deteriorated after its move to the Campus Way Property, coinciding with the collapse of the Oregon high-tech market it served. Coleman Aff, P 23. As a result of New Tech's loss of business, IES directed New Tech to sublet some or all of the Campus Way building. Mullin Dec. Exhibit. 1, pp. 1, 13, 16. New Tech began that process in about July 2002 **[*25]** (*id* at 17) and continued through late June 2003. *Id* at 11-12; Carlson Depo, pp. 15, p. 20. Given the bleak economic conditions in the Sunset Corridor where the Campus Way Property is located, New Tech's brokers, Cushman & Wakefield, could identify only one prospective tenant for the property. Carlson Depo, pp. 17-20. The effort to sublet the property eventually failed, and New Tech asked that the signs advertising the space available for sublet be removed in late June 2003. *Id* at 21.

By 2002, Stalvey asked Coleman, Crouser, and Milestone several times for a copy of the lease on the Campus Way Property. Stalvey Aff, P 2. However, Stalvey did not receive a copy of the lease until August 2002, when he traveled to Oregon in order to fire Coleman. *Id.* Stalvey claims he did not look at it at that time, but instead placed it in his briefcase. *Id.*

VI. IES' Investigation

Coleman signed a severance agreement with IES on September 3, 2002 (Mullin Dec at Exhibit 1, p. 108), but IES' Lease Committee did not review the lease for the Campus Way Property until sometime in 2003. Warnock Aff, P 7. IES' investigators concluded that the lease was executed without the **[*26]** requisite corporate authority. Dennis Depo, p. 62. The participants in IES' investigation, however, never spoke to many of the main actors involved in the lease transaction -- or at least did not ask them about all the events surrounding the lease -- including Holan (by then former senior counsel to IES), Mueller [5] (by then former president of IES' electrical division, who had approved the move), Ramm (by then former CEO of IES and former sole director of New Tech), Coleman (New Tech's former president and IES' former ROO), Crouser (New Tech's former CFO and former IES regional controller) or Kurosaki (Summit's president). Dennis Depo, pp. 40, 73; Stalvey Depo, pp. 10 - 11; Ramm Dec, P 11. The investigation also did not include a review of the New Tech lease file maintained at IES' corporate headquarters, which included an unsigned copy of the lease (Mullin Dec, Exhibit 1, pp. 112-25), the memoranda submitted by New Tech to IES regarding the reasons for, and economics of, the move (*id* at 87-93 & 94-97), the Assignment (*id* at pp. 140-41; Summit's Concise Statement P 8 (admitted by defendants)) and the release of New Tech from further obligations on the former properties (Mullin **[*27]** Dec, Exhibit 1, p. 12). Dennis Depo, pp. 30, 33-34, 66, 69, 73; Stalvey Depo, p. 51.

5 Stalvey apparently asked Mueller some questions about the lease sometime in 2002. Stalvey Depo, pp. 10- 11. Stalvey testified that, unlike Dee Dennis who led a later investigation, he did contact Mueller, who told him "basically what" Mueller testified in his deposition. *Id* at 11.

VII. New Tech and IES' Legal Actions and Departure from the Campus Way Property

On April 4, 2003, New Tech and IES served Summit with a complaint in the Texas lawsuit alleging that the misconduct of Coleman and Crouser rendered the lease "void *ab initio* or voidable." Mullin Dec, Exhibit 3. On July 10, 2003, New Tech delivered the keys to the Campus Way Property to Summit, together with prorated July rent (covering three days). Kurosaki Dec, P 9. Since then, New Tech has performed none of its lease obligations. *Id.*

New Tech moved into a property that is leased in the name of Murray Electrical Contractors, Inc. ("Murray"), **[*28]** an IES subsidiary headquartered in Roseburg Oregon. Lagesen Dec in Opposition, Exhibit 1, p. 29; Summit's Concise Statement in Response to New Tech/IES' Concise Statement Made in Support of its Motion for Summary Judgment, P 9. Murray signed that lease on June 30, 2003. Lagesen Dec in Opposition, Exhibit 1, p. 29. Murray's President at the time, Gary Swanson, who is now New Tech's president, had no knowledge that the lease was signed in Murray's name and was never consulted on the subject by the Houston-based lawyer who signed the lease in Murray's name. Swanson Deposition, pp. 4, 8, 17-18.

Although Summit signed a listing agreement on July 23, 2003 to re-lease the Campus Way Property (Mullin Dec. Exhibit. 1, p. 208), it has not found a new tenant. Jacosmuhlen Depo, pp. 8-9. As of April 1, 2004, Summit argues that it has lost rent under its lease with New Tech in the amount of $ 313,790, and it continues to lose rent at the rate of $ 35,450 per month. Kurosaki Dec. P 11.

DISCUSSION

I. Validity of the Lease as to New Tech (Summit's First Claim, New Tech/IES' First Claim)

Summit seeks a declaratory judgment that the lease and its subsequent revisions are valid **[*29]** and enforceable, while New Tech proffers a variety of reasons why the lease is void *ab initio* or voidable. As discussed below, some of these reasons do not withstand analysis and other reasons present disputed fact issues. Nevertheless, based on its ratification defense, Summit is entitled to summary judgment that the lease is valid and enforceable against New Tech.

A. Identity of the Lessee

1. Lease

The original lease, dated April 1, 2001, was signed by Crouser on behalf of "New Tech Electric, Inc." New Tech maintains that "New Tech Electric, Inc." did not exist on April 1, 2001, and does not exist today. Instead, on April 1, 2001, New Tech was named New Technology Acquisition Corporation (a Delaware Corporation), which was the company created when New Tech (OR), Coleman's original company, was purchased by IES on June 8, 1999. Therefore, New Tech argues that the original lease was entered into by a nonexistent party, which violates general corporate law. *Huson v. Portland & Southeastern Ry. Co., 107 Or 187, 220, 211 P 897, 907 (1923)* (corporations are not liable for contracts signed before they came into existence). Despite the wrong name, **[*30]** Summit argues the lease is binding on New Tech because "New Tech Electric, Inc." is a registered business name of New Tech. Additionally, Summit maintains that New Tech continued to use the names "New Tech Electric, Inc." or New Tech Electric even after it leased the Campus Way Property.

The facts support Summit's position. Oregon law specifically authorizes corporations to conduct business and execute leases under assumed business names. *See ORS 648.005* & *648.010*. Indeed, Oregon law prohibits an entity from transacting business under an assumed business name unless the person has registered it. *ORS 648.007*. According to business registration forms filed with the Oregon Secretary of State, New Tech registered "New Tech Electric, Inc." as its assumed business name in 1983. Mullin Dec, Exhibit 10, pp. 1-2. New Tech made a renewal payment to maintain the registration of that assumed business name as recently as February 23, 2004. *Id* at 2.

Furthermore, when IES was conducting the research necessary to perform due diligence before purchasing New Tech, it learned that New Tech's assumed business name was "New Tech Electric, Inc." Robert Coleman Aff, Exhibit 9, p. 3. New Tech and **[*31]** IES' own counsel conceded this issue at oral argument, indicating that any argument New Tech is not the same entity as "New Tech Electric, Inc." is meritless. [6]

> 6 Indeed, New Tech may not have legal grounds to seek summary judgment in this case if it seriously maintains that it is not the same entity as "New Tech Electric, Inc." If an entity conducts business under an assumed name without registering it, it lacks standing to maintain a cause of action for the benefit of the business.*ORS 648.135*.

Even after the lease for the Campus Way Property was signed, New Tech regularly conducted its business as "New Tech Electric, Inc." For example, New Tech regularly paid its rent for the Campus Way Property to Summit on checks with a return label from "New Tech Electric, Inc." Mullin Dec, Exhibit 1, pp. 76-86. "New Tech Electric, Inc." (along with IES) was written on the signs in front of the Campus Way Property. Lagesen Dec in Opposition, Exhibit 6. "New Tech Electric" (along with IES) was posted on vans operated by **[*32]** New Tech. *Id* at Exhibit 4. New Tech was listed as "New Tech Electric" in a phonebook entry from December 2004. *Id* at Exhibit 5. Coleman's and Crouser's severance agreements each state that "New Tech. Electric, Inc." is one of the parties and Holan signed each document on behalf of "New Tech Electric, Inc." *Id* at Exhibit 1, pp. 108 & 111. Similarly, in forms prepared in order to make a banking deal without the full agreement of New Tech's Board of Directors, dated June 18, 2003, the corporation is identified as "New Tech Electric, Inc." *Id* at 209. Attached to the consent form is a "U.S. Bank Certificate

of Corporate Authority," dated June 18, 2003, in the name of "New Tech Electric, Inc." *Id* at 210.

New Tech existed as a corporate entity, but simply entered into the lease using one of its legally registered fictitious names. There is no doubt that Crouser was identifying "New Tech Electric, Inc.," and therefore New Tech, as the signatory to the original lease. The issue of whether he could or did properly do so is another matter, as discussed below.

2. Lease Addendum

Crouser signed the Lease Addendum on August 17, 2001, on behalf of "New Tech Electrical **[*33]** Contractors, Inc. d/b/a New Tech Electric, Inc." However, New Technology Acquisition Corporation did not change its name to "New Technology Electrical Contractors, Inc." (a Delaware Corporation) until October 16, 2001. Therefore, New Tech argues that the Lease Addendum is not binding on it.

However, the Lease Addendum, which was signed by Crouser on behalf of "New Tech Electrical Contractors, Inc. d/b/a New Tech Electric, Inc.," clearly identifies "New Tech Electric, Inc." as a signatory, which, as discussed above, identifies New Tech. Thus, New Tech is a party to the Lease Addendum.

3. Second/Modified Lease

Finally, New Tech argues it is not bound by the Second/Modified lease made as a result of Coleman's fax on August 16, 2001, backdated to April 1, 2001, and signed by Crouser on behalf of "New Technology Electrical Contractors, Inc., a wholly owned subsidiary of Integrated Electrical Services, Inc." New Tech notes that it was still operating as New Technology Acquisition Corporation at that time.

The Second/Modified Lease does not contain an assumed business name of New Tech because New Tech was operating at that time then as New Technology Acquisition Corporation. **[*34]** However, it is basic hornbook law that: "A mistake in setting out the name of a corporation in an instrument is not fatal where the identity of the corporation is apparent." 7 William Meade Fletcher et al., FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 3014 (perm ed, rev vol 2003). Here there is no issue of material fact that when Crouser signed the Second/Modified Lease, he was signing on behalf of the entity previously known as New Tech Electrical Contractors, regardless of whether its actual corporate name at that time was New Technology Acquisition Corporation.

B. Proper Corporate Approval of the Lease

New Tech argues that the lease lacked proper corporate authority. Summit responds that Coleman, as an affiliate with a personal interest in the lease, was required to pass the lease to his superiors at IES, who were required to present the lease to the IES general counsel and board for approval. Summit maintains that Coleman fulfilled this duty by mailing copies of the lease to Muth and Holan and reviewing it in person with Ramm, Mueller, and Weik at their Houston meeting on April 18, 2001.

This court concludes that neither party is entitled to summary judgment **[*35]** on this issue due to material issues of fact. Even if Coleman passed the draft lease to his superiors at IES, as he claims, it is disputed whether this was sufficient to comply with the actual corporate procedures.

Some testimony indicates that New Tech and IES' executives thought the proper procedure for a local official and affiliate to enter into a lease with IES or one of its subsidiaries was for the affiliate to pass it onto his regional superiors, who would then handle the remainder of the approval process and inform the affiliate of the result. *See* Dennis Depo, p. 42; Stalvey Depo, pp. 79-80; Weik Depo, pp. 21-22.

On the other hand, IES and New Tech have submitted an affidavit from Robert Stalvey, who was a high level IES official during many of the events in question (Kurosaki Dec, P 7), which demonstrates that the lease and its modifications violated IES' leasing policies in several respects. Stalvey Aff, P 3; *see also* Warnock Supp Aff, PP 2-3. [7] According to IES, the length of the term of affiliate leases was limited to five years (now three years). Stalvey Aff, P 3; Warnock Supp Aff, P 2. IES' policy prohibited affiliated leases from being signed by employees **[*36]** of the affiliated party and required pre-approval from the General Counsel. Stalvey Aff, P 3; Warnock Supp Aff, P 2. In most instances, these affiliated leases were also signed by the General Counsel, who was also an officer of the subsidiary company, although a few are signed by the parties as part of an acquisition or with pre-approval.

Warnock Supp Aff, P 2. Also, IES required that affiliated leases be approved by both the Accounting Department and the Legal Department. Stalvey Aff, P 3; Warnock Supp Aff, P 2. Finally, affiliated leases were subject to final review and approval by IES' Board of Directors, and all affiliate leases had to be reviewed at this level before any lease could be considered validly executed with full authority. *Id.* According to Warnock, at the time in question, such leases were also typically executed by the General Counsel, John Wombuell, rather than by the parties involved on both sides of the transaction. Warnock Supp Aff, P 2. The Campus Way property lease and its subsequent modifications violated all of these provisions. Stalvey Aff, P 3; Warnock Supp Aff, PP 2-3; Holan Aff, P 3 (indicating Holan does not recall receiving a copy of the lease). [8] **[*37]**

7 IES also submitted an affidavit from its current Vice President, Curt Warnock ("Warnock"), that alleges the Campus Way Property lease violated IES' affiliate leasing policies in the same way Stalvey claims it did. Warnock Supp Aff, PP 2-3. However, Warnock did not begin working for IES until July 2001 (Lagesen Dec in Support of Plaintiff's Motion for Partial Summary Judgment ("Lagesen Dec in Support"), Exhibit 1, p. 4), and his affidavit provides no other explanation of the basis of his knowledge of IES' affiliate leasing policies in April 2001, when the original lease was signed. Therefore, Warnock's opinions cannot support the argument the original lease was entered into in violation of IES corporate procedures. However, his affidavit does support the argument the lease's subsequent modifications were inappropriately made because they occurred after his arrival at IES.

8 Summit cites *Federal Election Comm'n v. Toledano, 317 F.3d 939, 949-50 (9th Cir 2002)*, in support of its argument that Holan's lack of memory does not raise a material issue of fact as to whether he reviewed the lease. However, this case is much different than in *Toledano*. The affiant and deponent, Toledano, was found not to have created a material issue of fact where he repeatedly used phrases like "I don't recall." *Id.* However, Toledano did remember at least some of the matters he was being questioned about. *See id.* On the other hand, Holan does not remember receiving the lease at all. This is sufficient to create a material issue of fact in comparison to Coleman's claims that he sent the document to Holan.

[*38] Summit does have room to argue that these procedures for affiliate leases were not in place at the time the Campus Way Property lease and its subsequent modifications were signed. For example, Summit submitted an IES document entitled "Actions Requiring Legal Department Approval," labeled as "revised". on October 18, 2001, which contains a section on affiliate transactions with several of the procedures IES claims were in place earlier in 2001. Robert Coleman Aff, Exhibit 26. However, this does not resolve the factual dispute created by Stalvey's affidavit.

Accordingly, a genuine issue of fact remains as to whether the lease was properly entered into by Crouser and thereby binding on New Tech. However, as discussed below, the lease is nonetheless valid and enforceable based on its ratification by New Tech.

C. Estoppel and Apparent Authority

Even if the lease did not receive proper corporate approval, Summit contends that Crouser had apparent authority to sign the lease and that New Tech is estopped from denying the validity of the lease based on Coleman's representations.

1. Legal Standard

The common law concept of estoppel is recognized in Oregon as a means **[*39]** of holding a principle accountable for the acts of its agents:

> Stating the rule as one of estoppel, where a principal has, by his voluntary act, placed an agent in such a situation that a person of ordinary prudence conversant with business usages and the nature of the particular business is justified in assuming that such agent has authority to perform a particular act and deals with the agent upon that assumption, the principal is estopped as against such third person from denying the agent's authority; he will not be permitted to prove that the agent's authority was, in fact, less extensive than that with which he apparently was clothed. This rule is based upon the principle that where one of two innocent parties must

> suffer from the wrongful act of another, the loss should fall upon the one who, by his conduct, created the circumstances which enabled the third party to perpetrate the wrong and cause the loss.

Real Estate Loan Fund Oregon Ltd. v. Hevner, 76 Or App 349, 355-56, 709 P.2d 727,731-732 (Or App 1985) (citations omitted).

For estoppel to apply, there must:

> (1) be a false representation; (2) it must be made with knowledge of the **[*40]** facts; (3) the other party must have been ignorant of the truth; (4) it must have been made with the intention that it should be acted upon by the other party; (5) the other party must have been induced to act upon it[.]

Day v. Advanced M & D Sales, Inc., 336 Or 511, 518-19, 86 P3d 678, 682 (2004) (internal citations and quotations omitted).

Oregon also recognizes the rule that a corporation can be liable for the acts of its agents based on the agent's apparent authority:

> [A] principal may be held bound to a third person for an act of the agent completely outside the agent's implied (or express) authority if the principal has clothed the agent with apparent authority to act for the principal in that particular. In other words, the principal permits the agent to appear to have the authority to bind the principal. We have stated the elements necessary to establish apparent authority in *Jones v. Nunley, 274 Or. 591, 595, 547 P.2d 616 (1976)*:
>
> > Apparent authority to do any particular act can be created only by some conduct of the principal which, when reasonably interpreted, causes a third party to believe that the principal **[*41]** consents to have the apparent agent act for him on that matter. The third party must also rely on that belief.

Wiggins v. Barrett & Assoc., Inc., 295 Or. 679, 687-688, 669 P.2d 1132, 1139 (1983).

Although apparent authority "does not include all of the usually stated elements of equitable estoppel, particularly with regard to the requirement of change of position; nevertheless, both doctrines are employed to prevent one from proving an important fact to be something other than what by act or omission he has led another party justifiably to believe." *Id at 688-89, 669 P.2d at 1140* (internal quotations, citations, and footnotes omitted); *see also id at 689 n 3, 669 P.2d at 1140* (explaining the differing conceptual bases of estoppel and apparent authority).

Apparent authority can be created in a number of ways, including the principal appointing the agent to a managing position. "A managing agent is presumed to have the authority to do those acts which managing agents normally do, unless the principal has by some action given notice to third parties of the limitations on the agent's authority." *Filter v. City of Vernonia, 64 Or. App. 559, 563, 669 P.2d 350, 352 (Or. App. 1983),* **[*42]** citing *RESTATEMENT (SECOND) AGENCY § 8, comment c, 27, 159*. Oregon follows the rule that "persons dealing with a known agent have a right to assume, in the absence of information to the contrary, that the agency is general," not subject to specific restrictions. *Real Estate Loan Fund Oregon Ltd., 76 Or. App. at 358, 709 P.2d at 733*, quoting *Start v. Shell Oil Co., 202 Or. 99, 107, 260 P.2d 468 (1954)* & *Rae v. Heilig Theatre Co., 94 Or. 408, 413, 185 P. 909 (1919)*. However, a third-party has no right to rely on the apparent authority of an agent if he knows that the agent has no actual authority or is aware of facts that should put the third party on inquiry. *Portland v. Am. Surety Co., 79 Or 38, 43-44, 153 P 786, 787 (1916).*

Whether apparent authority exists is "usually a question for the finder of fact." *Lockwood v. Wolf Corp., 629 F.2d 603, 609 (9th Cir 1980)*.

2. Application

New Tech argues that Crouser's position as Vice President of Finance did not cloak him with apparent authority to bind it to a lease. *See Du Bois-Matlack Lumber Co. v. Henry D. Davis Lumber Co., et. al., 149 Or. 571, 575, 42 P.2d 152, 154 (1935)* **[*43]** ("unless so provided by the by-laws or expressly authorized by the Board of Directors, the president of a domestic corporation has no inherent power to make, accept or indorse for the corporation any bill, note or bond, which will be binding upon the company"). However, Summit does not claim that it relied solely on Crouser's title. Instead, Summit contends that New Tech and IES made specific representations concerning the lease which reasonably led it to believe that they consented to Crouser acting on their behalf.

New Tech next argues that Crouser did not have apparent authority because Summit never spoke about the lease to anyone at IES or New Tech, other than Coleman. Kurosaki Depo, pp. 25-28; pp. 83-84. Whether Summit communicated directly with anyone at IES or New Tech is irrelevant. What matters is whether third parties, such as Summit, reasonably relied on representations made to the general public. *See Pokorny v. Williams, 199 Or. 17, 41, 260 P.2d 490, 501 (1953)* ("As to third persons, a principal is bound by his agent's acts, not only when executed pursuant to actual authority, but also when within the scope of his apparent authority arising from the manner **[*44]** in which his principal has held him out to the *public*" (emphasis added)); *see also* Robert J. McGaughey, Oregon Corporate Law Handbook § 6.07, p. 170 (1999), quoting *Blairex Lab., Inc. v. Clobes, 599 N.E.2d 233, 236 (Ind App 1992)* ("For the third person to reasonably believe the agent possessed the authority, the principal need not communicate with the third person directly. Placing the agent in a position to perform acts or to make representations is sufficient to clothe the agent with apparent authority").

Through their conduct, New Tech and IES represented both to the public and to Summit that the lease was valid and, hence, that Crouser had authority to enter into the lease on behalf of New Tech. Although Coleman owned Milestone, he also was the president of New Tech, and represented during correspondence and negotiations with Summit that the lease was valid. At the very least, he failed to disabuse the notion that the lease was valid; when he faxed Summit the Second/Modified lease, for example, he did not deny the validity of the lease. Moreover, prior to purchasing the Campus Way Property, Summit questioned the identity of the tenant and its relationships **[*45]** to IES and requested changes in the lease that clarified New Tech's corporate status. IES' Senior Counsel, Holan, responded to Summit by verifying that New Tech was IES' wholly owned subsidiary. By virtue of the Grub and Ellis' report and the prior letter from Milestone's attorney, Summit knew that IES was not a guarantor of the lease. However, IES had the opportunity when responding to Summit's inquiry to disabuse Summit of any notion that the lease was valid. It did not do so. Instead, it impliedly confirmed the validity of the lease.

Nevertheless, New Tech contends that Summit could not reasonably rely on these representations for several reasons. First, it points to the suspicious backdating of the lease. However, there is no evidence Summit was aware of any backdating of the original lease. Perhaps Summit should have known that the Second/Modified Lease and the Lease Addendum were backdated as they were requested after their signature date of April 1, 2001. Nonetheless, based on Milestone and New Tech's renovations of the Campus Way Property, along with Coleman's personal attestations, Summit could have reasonably believed that a binding lease was already in place when it purchased **[*46]** the property. Because Summit was only requesting minor changes in the lease, and the term had not yet begun, it is at least a jury issue as to whether Summit was reasonable in relying on the backdated lease modifications.

Second, New Tech contends that Summit could not reasonably rely on Coleman's representations because he had an inherent conflict in a lease between his own company, Milestone, and his employer, New Tech. However, Ramm's Declaration establishes that it was not uncommon for IES' subsidiaries to be housed in buildings that were owned or controlled by the president of that subsidiary company. Ramm Dec, P 9. In roll-up companies, such as IES, the owner of a company purchased and made a subsidiary is often allowed to remain president of the subsidiary, and the roll-up company saves money by keeping its subsidiary in the premises he owns. *Id.* Thus, this issue involves disputed facts.

Finally, New Tech argues Summit could not have reasonably relied on the lease without requesting an "estoppel certificate" under P 23 of the Campus Way Property lease, which allows the landlord, or anyone

designated by the landlord, to request a statement that "this Lease is unmodified **[*47]** and in full force and effect." Mullin Dec, Exhibit 1, p. 31. The problem with this argument is that Summit was not the landlord prior to the Assignment on September 27, 2001. Summit could not have asked for an estoppel certificate until after it had relied on representations in order to purchase the property. Even if Summit had asked for Milestone to designate it as an entity that could ask for an estoppel certificate, Coleman or Crouser are the persons who would most likely have provided the certificate. More importantly, New Tech had already signed the Lease Addendum on August 17, 2001, which reaffirmed its lease obligations. Therefore, it was not unreasonable for Summit to have failed to ask for an estoppel certificate.

Accordingly, a genuine issue of material fact remains as to whether Crouser had apparent authority to enter into the lease agreements and whether Summit reasonably relied on that authority.

In contrast to apparent authority, estoppel requires proof of the additional element that the third party "change its position such that it would be unjust for the principal to go back on his manifestation." *Real Estate, 76 Or. App. at 359, 709 P.2d at 734*, quoting **[*48]** *Wiggins, 295 Or. at 689 n 3, 669 P.2d at 1132 n 3*. By purchasing the property, Summit changed its position in reliance on New Tech and IES' representations. However, for the same reasons concerning apparent authority, a material issue of fact exists as to whether New Tech should be estopped from denying the validity of the lease.

D. Ratification

Even if the evidence is not sufficient to support an apparent authority or estoppel theory, Summit maintains that New Tech's conduct after moving into the premises amounted to ratification of the lease. Therefore, Summit maintains it is entitled to summary judgment as to the validity and enforceability of the lease.

1. Legal Standard

"Ratification is the affirmance of an unauthorized act professedly done on the principal's account." *Larkin v. Appleton, 274 Or. 671, 677, 548 P.2d 499, 503 (1976)* (citations omitted). Ratification requires: (1) the existence of a principal; (2) an act done by a purported agent; (3) knowledge of the material facts by the principal; and (4) an intent by the principal to ratify the act. *Robertson v. Jessup, 96 Or. App. 349, 352, 773 P.2d 385, 387 (Or. App. 1989)*. **[*49]** Ratification may be either express or implied.*Id.*

The general rule for implied ratification in Oregon is as follows:

> If a principal, when fully notified thereof, neglects promptly to disavow an act or contract of his agent in excess of his authority, such silence will usually be interpreted as an implied ratification, and particularly so if the failure speedily to repudiate such conduct or agreement might impose upon the other party loss or injury.

Kneeland v. Shroyer, 214 Or. 67, 93, 328 P.2d 753, 765 (1958).

"Implied ratification may take many forms: it may occur where a corporation retains the benefits of an unauthorized act, where a corporation acquiesces in an unauthorized act, or where some other conduct by a corporation demonstrates affirmance." McGaughey, *supra*, § 6.08, at 173. A corporation must have full knowledge of the material facts surrounding the agent's unauthorized act. *Alldrin v. Lucas, 260 Or. 373, 382, 490 P.2d 141, 145 (1971)*. Silent acquiescence with full knowledge of the material facts may amount to a ratification if continued for an unreasonable length of time, especially in cases where silence operates **[*50]** to prejudice innocent parties. *Id; Reid v. Alaska Packing Co., 47 Or. 215, 220, 83 P. 139, 141 (1905)*.

A corporation is deemed to have "knowledge" of those facts which its officers and agents, acting within the scope of their offices or employment, have acquired knowledge or been given notice. *Fleishhacker v. Portland News Pub. Co., 158 Or. 476, 487, 77 P.2d 141, 146 (Or 1938)*; *see also* 3 Fletcher, *supra*, § 790. However, "it is well settled that an officer or agent, dealing with a corporation or his principal on his own account, is not presumed to communicate knowledge which it would be to his interest to conceal, and the corporation or principal is not chargeable with such knowledge." *First Nat'l Bank of Blaine v. Blake, 60 F. 78, 79 (CC Or 1894)*; *see also Weber v. Richardson, 76 Or. 286, 292, 147 P. 522, 524 (1915)* & 3 Fletcher, *supra*, § 819.

If a corporation ratifies part of a transaction, such as by accepting benefits, it is generally considered to have ratified all of the transaction. *Phillips v. Colfax Co., Inc., 195 O.r 285, 298, 243 P.2d 276, 282 (1952)* (citation omitted). "A ratification **[*51]** relates back to the time when the unauthorized act was done and makes it as effective from that time as though it had been originally authorized." *Id at 296, 243 P.2d at 281*. The question of whether ratification occurred is normally a question of fact for the factfinder. *Michel v. ICN Pharmaceuticals, Inc., 274 Or. 795, 804, 549 P.2d 519, 524 (1976)*.

Ratification and equitable estoppel are similar, but distinguishable. Some acts that amount to estoppel may also amount to ratification, but ratification may be complete without any element of estoppel. *Kneeland, 214 Or. at 93, 328 P.2d at 765*. "Ratification follows the unauthorized act, and estoppel [is] based on [a] principal's inducement to another to act to his prejudice." *Depot Realty Syndicate v. Enter. Brewing Co., 87 Or. 560, 575-76, 171 P. 223, 224 (1918)*.

2. Application

Summit contends that because New Tech occupied the Campus Way Property from October 2001 until July 2003, it ratified the lease by reaping its benefits. New Tech responds in part by citing *Am. Timber & Trading Co. v. Niedermeyer, 276 Or. 1135, 558 P.2d 1211 (1976)*, for **[*52]** the principle that an affiliated lease must be absolutely fair to the corporation in order to permit ratification. New Tech contends that the parties' experts sufficiently dispute the fairness of the lease to preclude summary judgment.

The fairness requirement in *American Timber* is not an issue here. New Tech confuses the common law concept of ratification with the test for approval of a self-interested transaction.

Oregon courts have accepted the common law concept of ratification set out in the *RESTATEMENT OF AGENCY § 94* (1932), that "an affirmance of an unauthorized transaction may be inferred from a failure to repudiate it." *Michel, 274 Or. at 805, 549 P.2d at 524*, citing *Kneeland, 214 Or. at 94, 328 P.2d at 765* (approving the RESTATEMENT's rule). Common law ratification is frequently used to force corporations to meet the terms of an unauthorized contract, often without any discussion of the fairness of the contract. *See, e.g., Michel, 274 Or. at 804, 549 P.2d at 524*; *Kneeland, 214 Or. at 85, 328 P.2d at 766*. This is the type of ratification for which the legal standards set out above apply. It is also the type **[*53]** of ratification Summit is contending occurred.

The type of ratification involving fairness as discussed in *American Timber* is usually applied when an officer or director makes a self-interested transaction, and then when sued for a breach of fiduciary duty by his fiduciary corporation, asserts that the corporation ratified his actions. This type of ratification occurs not through the common law ratification discussed in the *RESTATEMENT OF AGENCY § 94*, but instead through the relevant state procedures for ratifying a self-interested transaction. [9]

> 9 In Oregon the traditional rule is that a corporation can void a contract made with one of its officers or directors if the contract was not approved by a disinterested majority of the board of directors or a vote of the stockholders, even if the contract was made in good faith and without regard to the fairness of the transaction. *Am. Timber, 276 Or. at 1146, 558 P.2d at 1218*. Oregon courts have also applied a more liberal rule that the contract will be enforced if the transaction is shown to be affirmatively fair to the corporation.*Id.* In the case of directors (but not officers), the rules for ratification of a self-interested transaction are codified in *ORS 60.361*.
>
> Other states have adopted different standards. Delaware, for example, has codified a detailed test for ratification of an interested director or officer transaction. *See Del Code title 8, § 144* (2003).

[*54] In Oregon, it is somewhat unclear whether, as in this case, a corporation (New Tech) can void a contract made with a self-interested officer (Coleman for Milestone) when the test for approval of a self-interested transaction is not met and some third-party (Summit) is seeking to enforce the contract. It is even less clear whether a corporation can void such a contract when the elements of traditional common law ratification are satisfied.

American Timber analyzed both types of ratification when determining whether an officer was liable to his former employer for a breach of fiduciary duty by giving

his interest in other companies to his employer in exchange for certain corporate assets. *276 Or. at 1146-48, 558 P.2d at 1219*. After rejecting the officer's claim that the self-interested transaction met the statutory standards for approval, the court went on to discuss whether the officer's defense that the corporation "expressly or impliedly ratified the exchange agreement and the employment contract, that it is estopped from denying that these contracts were authorized." *Id at 1147, 558 P.2d at 1219*. Although the court confused its terminology when it **[*55]** equated traditional common law ratification with estoppel, which are slightly different concepts as discussed previously, this analysis does not seem to indicate that the self-interested transaction test trumps traditional ratification principles.

Other states which have more directly addressed the issue have found that traditional ratification principles still apply when self-interested transactions are involved. For example, the Tenth Circuit has stated that Delaware's test for approval of a self-interested transaction "does not rule out other ways for removing the cloud of wrongdoing, such as common law ratification of the interested director transaction." *Robert A. Wachsler, Inc., v. Florafax Int'l, Inc., 778 F.2d 547, 551 (10th Cir 1985)*.

This court is not convinced that the self-interested transaction test trumps common law ratification principles in Oregon. Although Oregon has not codified a test for self-interested transactions by officers, its test for directors, *ORS 60.361*, does not set out the only means of ratification when directors have a conflict of interest. The language of *ORS 60.361* is phrased negatively by stating that no interested director contract **[*56]** will be voidable by the corporation "solely" because an interested director is involved, if certain conditions are met. The statute thus does not define, in absolute terms, all the steps that can validate a self-interested director contract. *See Wachsler, 778 F.2d at 551* (reaching a similar result when analyzing similar language in a Delaware statute for director and officer self-interested transactions). There is no reason to believe that the common law test for approval of a self-interested officer contract is any more exclusive than the test for contracts involving a director. This is especially the case when a third-party is seeking to enforce a self-interested officer contract, and the elements of Oregon's common law ratification are met because the corporation knowingly accepted the benefits of the contract after the third-party became involved.

Therefore, it is not necessary to discuss whether a disinterested majority of New Tech's Board of Directors approved the lease, or whether the lease was fair. If Summit can demonstrate that the elements of common law ratification are met, then the lease should be enforceable against New Tech.

The evidence cited by Summit **[*57]** overwhelmingly demonstrates that New Tech and IES were aware of the material facts surrounding the lease. Ramm, IES' CEO and New Tech's sole director, specifically testified that he said "let's go" during his visit to Portland in early 2001 when asked for a decision on whether to move New Tech into Milestone's building (Ramm Dec, P 7); he knew New Tech was moving into a new building owned by Coleman or one of his companies, and therefore that IES' subsidiary would be leasing space in Coleman's buildings, when he accepted an invitation from Coleman to attend New Tech's open house around October 1, 2001 (*id* at P 10); and he stated that "both I as IES CEO/President and Ben Mueller as the Chief Operating Officer, reviewed the plan for New Electric to move out of its existing lease space and into a new lease space at the Campus Way property owned by Bill Coleman or his company. We approved this basic plan[.]" *Id* at P 12. IES and New Tech have not presented any evidence to counter Ramm's sworn statements beyond Warnock's conclusory opinion that he is a biased witness. Warnock Supp Aff, P 8. Warnock's opinion alone is not enough to create a material issue of fact on this ratification **[*58]** issue. *See Nat'l Union Fire Ins. Co of Pittsburgh, PA v. Argonaut Ins. Co., 701 F.2d 95, 97 (9th Cir 1983)* ("Neither a desire to cross-examine an affiant nor an unspecified hope of undermining his or her credibility suffices to avert summary judgment").

Furthermore, IES cannot raise an issue that the lease lacked proper corporate authority because it was unaware of the lease until the Lease Committee discovered it or Stalvey obtained a copy of it. Prior to receiving a copy of the lease in August 2002, Stalvey had ample knowledge such an agreement was in place and that IES and New Tech were benefitting under the lease. Indeed, Stalvey visited the premises himself for New Tech's open house in the fall of 2001. Furthermore, copies of the lease and reports concerning the lease were found in the files of unbiased IES employees in the accounting and legal departments. At the very least, IES ratified the lease by doing nothing between August 2002, when Stalvey obtained a copy of the lease, and 2003 when the Lease

Committee reviewed the lease. *See Michel, 274 Or. at 805, 549 P.2d at 525* (concluding that corporation's failure to repudiate a settlement agreement **[*59]** within 20 days of knowledge of its terms resulted in ratification). IES and New Tech's counsel admitted at oral argument that it was sheer negligence for IES' Lease Committee not to have reviewed the lease prior to 2003, even though Stalvey obtained a copy in August 2002.

Finally, the evidence also demonstrates that at the very least, New Tech and IES acquiesced to the lease. Both New Tech and IES' employees occupied the Campus Way Property for a period of almost two years, with both companies engaging in numerous activities to maintain the premises, advertise them, and take advantage of them. Under these circumstances, by accepting even a portion of the benefits under the lease, both companies ratified all of the lease transaction.

Ratification is usually an issue best left to the factfinder, but no material issues of fact exist regarding whether New Tech and IES ratified the lease. Therefore, to the extent the lease is otherwise enforceable, the lease is valid as to New Tech without regard to any failures to adhere to internal corporate procedure in approving the lease.

E. Statute of Frauds

Attacking from a different angle, New Tech contends that the lease and its subsequent **[*60]** modifications are void under Oregon's Statute of Frauds, *ORS 41.580*, which states, in relevant part:

> In the following cases the agreement is void unless it . . . is in writing and subscribed by the party to be charged, or by the lawfully authorized agent of the party . . .
>
> (e) An agreement for the leasing for a longer period than one year, or for the sale of real property, or of any interest therein.
>
> (f) An agreement concerning real property made by an agent of the party sought to be charged unless the authority of the agent is in writing.

ORS 41.580.

New Tech argues that the lease concerned real property, but was not signed by New Tech, the party to be charged, and the agent who executed it had no written authority.

1. Not signed by a Party

As under its view of general corporate law, New Tech first argues that, the lease, Lease Addendum, and the Second/Modified Lease were not signed in New Tech's actual name. This argument fails. *ORS 648.005* and *648.010* specifically authorize corporations to conduct business, and execute leases, under assumed business names. As discussed above, the original lease is valid because it was signed in the name of "New **[*61]** Tech Electric, Inc.," one of New Tech's registered assumed business names since at least 1983. Additionally, New Tech continued to use the names "New Tech Electric, Inc." or New Tech Electric even after it leased the Campus Way Property. This evidence is sufficient to establish that New Tech was the party involved in the transaction..

Similarly, the Lease Addendum, which was signed by Crouser on behalf of "New Tech Electrical Contractors, Inc. d/b/a New Tech Electric, Inc.," clearly identifies New Tech Electric, Inc. as a signatory, which in turn identifies New Tech.

As discussed previously, the Second/Modified Lease does not contain an assumed business name of New Tech at the time it was signed because New Tech was operating then as New Technology Acquisition Corporation. However, when Crouser signed the Second/Modified Lease, he clearly attempted to bind the entity for which he was CFO, which was previously known as New Tech Electrical Contractors, regardless of whether its actual corporate name at that time was New Technology Acquisition Corporation.

2. Authority of Agent in Writing

New Tech maintains that Crouser, as an agent of New Tech, did not have written authority **[*62]** to enter into the lease. [10] In support of its argument, New Tech

cites *Capital Development Co. v. Port of Astoria, 109 F.3d 516 (9th Cir 1996)* which granted summary judgment based on Oregon's Statute of Frauds because an employee of the municipal corporation (its assistant director) signed a lease without written authority to bind the corporation. New Tech also points out that in Oregon, a member of the board of directors of a corporation must have written authority to enter into an agreement covered by the Statute of Frauds. *Coleman v. Perry Center for Children, 43 Or. App. 775, 779, 604 P.2d 424, 426 (Or. App. 1979).* Additionally, one joint venturer in a joint venture must obtain written authorization from his co-venturer in order to enter into an agreement covered by the Statute of Frauds. *Stone-Fox, Inc., v. Vandehey Dev. Co., 290 Or. 779, 626 P.2d 1365, 1366-67 (1981).*

> 10 The record does not contain the Bylaws of New Tech which may or may not give Crouser that authority.

[*63] Summit responds that *Capital Development* is not applicable because Crouser was an executive officer who signed the lease, not a mere agent or employee. In addition, Summit cites general corporate law treatises and Delaware precedents that do not apply the Statute of Frauds to agreements entered into by a corporation's executive officer, whose acts are deemed to be the acts of the corporation itself. *Hessler, Inc. v. Farrell, 226 A.2d 708, 712 (Del 1967)* ("Since a corporation can act only through its officers and agents, a statutory requirement that the authority to act be in writing does not apply to the corporation's principal executive officers. Their action is that of the corporation, itself, and no express authority in writing is required to justify their acts" (citing 2 CORBIN ON CONTRACTS, § 526 (now 4 CORBIN § 23.7 (1997)); *see also 18B Am Jur 2d, Corporations § 1524* (2003) ("the rule followed generally is that a statutory provision requiring written authority to enter into a contract or to execute an instrument required to be in writing does not apply to the contracts and instruments executed by executive officers **[*64]** of a corporation").

Other states have followed Delaware and recognized the exception to the Statute of Frauds for agreements entered into by corporate executive officers. *See, e.g., Jeppi v. Brockman Holding Co., 34 Cal.2d 11, 17, 206 P.2d 847, 850 (Cal 1949)*; *Rosenblum v. New York Cent. Ry. Co., 162 Pa. Super. 276, 279, 57 A.2d 690, 691 (Pa. Super 1948)*. The Ninth Circuit has also indicated in *dicta* that there might be an exception to the Statute of Frauds in the case of executive officers because "the executive officer of a corporation is something more than an agent. He is the representative of the corporation itself." *E.K. Wood Lumber Co. v. Moore Mill & Lumber Co., 97 F.2d 402, 408 (9th Cir 1938).*

Oregon courts have not addressed whether an exception to the Statute of Frauds exists for executive or other corporate officers. Considering the general trend, especially the precedents from Delaware and neighboring California, this court finds it likely that Oregon would recognize an exception for executive officers. The holding in *Coleman* regarding directors does not discourage adoption of this exception for executive officers because **[*65]** it is black letter law that "a director has no individual power of action as does an officer." 2 Fletcher, *supra*, § 271. Similarly, the holding in *Stone-Fox* regarding joint venturers is not an obstacle because the nature of a joint venture is cooperative, such that an exception to the Statute of Frauds for one joint venturer's actions would not be appropriate. An executive officer is in a far more authoritative position.

Crouser signed the original lease, the Lease Addendum, and the Second/Modified Lease with the title "CFO." Mullin Dec, Exhibit 1, pp. 32, 105, 139. During this same period, he was also New Tech's Vice President of Finance. By virtue of these two positions, Crouser was an executive officer of New Tech, unlike the mere employee/assistant director in *Capital Development*. Accordingly, the Statute of Frauds does not apply to the lease or its subsequent modifications.

3. Part Performance & Shielding Fraud

Summit argues that even if the lease and subsequent documents were originally invalid because Crouser lacked written authority to enter into them, the parties have partially performed the lease, removing it from the Statute of Frauds. Summit also **[*66]** maintains that even if all its other arguments fail, the Statute of Frauds should not prevent enforcement of the lease because in Oregon, the Statute of Frauds "is not to be applied in such a way as to shield actual fraud or aid its perpetration." *Clark v. Portland Trust Bank, 221 Or. 339, 355, 351 P.2d 51, 59 (1961)* (citation omitted). It is unnecessary for this court to reach either of these two arguments because the Statute of Frauds issue is inapplicable by virtue of Crouser's position as an executive officer of New Tech.

F. Backdating of the Lease

New Tech repeatedly argues that the enforceability of the lease is somehow suspect because it recites that it was "entered into on April 1, 2001" when, in fact, it was not signed until April 18, 2001 or later. Summit responds that no legal precedents invalidate a lease for backdating, and regardless, Summit's claims against New Tech and IES began with its purchase of the property on September 27, 2001, after several changes were made to the lease at Summit's request, and New Tech's occupation of the premises pursuant to the lease beginning October 1, 2001.

Despite New Tech's argument, the backdating of the **[*67]** lease alone does not invalidate it or defeat Summit's claims. There is no dispute that the lease and its subsequent modifications were signed before New Tech and IES occupied the Campus Way Property on October 1, 2001.

G. Modification of the Lease

New Tech also argues that the lease is somehow unenforceable because of the circumstances surrounding the completion of the Lease Addendum and the Second/Modified Lease. This argument is rejected.

Crouser signed both the Lease Addendum and the last page of the four pages Coleman faxed Summit, which substitute as the Second/Modified Lease. As previously discussed, Crouser signed these documents on behalf of New Tech. The Lease Addendum is clearly a modification which was permitted by the original lease. While the Second/Modified lease is perhaps unorthodox in form, it demonstrates New Tech's acceptance of some sort of contract containing the terms in the fax, which was in turn accepted by Milestone. It is unnecessary to determine whether the Second/Modified Lease was in fact a second lease or a modification of the original lease because it would be enforceable against New Tech in either case.

H. Conclusion

There remains **[*68]** a material issue of fact as to whether New Tech entered into the lease and its subsequent modifications according to the internal corporate procedures required by IES. There is also a material issue as to whether Summit's estoppel or apparent authority arguments make the lease enforceable. However, because no material issue of fact exists as to whether New Tech and IES ratified the lease, it is enforceable against New Tech regardless of whether Crouser and Coleman properly entered into the lease and its subsequent modifications. Additionally, the Statute of Frauds, the backdating of the lease, and the circumstances surrounding the completion of the Lease Addendum and the Second/Modified Lease do not invalidate the lease. Therefore, the lease is enforceable against New Tech.

II. Breach of the Lease by New Tech (Summit's Third Claim; New Tech/IES' First Claim)

New Tech has never disputed that if the lease is valid, it has not performed its lease obligations since July 3, 2003. Moreover, New Tech has never contended that Summit failed to perform any of its obligations as landlord. Accordingly, because this court finds that the lease is valid, each of the elements for a **[*69]** finding of the breach of lease are present and Summit is entitled to summary judgment that New Tech has breached the lease. *See Sunset Fuel & Eng'g Co. v. Compton, 97 Or App 244, 248, 775 P.2d 901, 903, rev denied, 308 Or. 466, 781 P.2d 1215 (1989)* ("We hold that the tenant, by failing to pay rent timely, forfeits his estate in the real property, but remains liable for damages for breach of the agreement to rent the premises in the future").

III. Liability of IES Under the Lease (Summit's Second Claim; New Tech/IES' First Claim)

IES argues it is entitled to summary judgment because it was neither a party to nor a guarantor of the lease with Milestone or Summit. Furthermore, IES submits that it is separately incorporated from New Tech and cannot be reached to satisfy its subsidiary's obligations.

Although IES did not sign or guarantee the lease, Summit alleges that IES is nonetheless liable under the lease on two theories. First, New Tech is IES' alter ego, such that Summit can pierce the corporate veil and reach IES to satisfy New Tech's obligations. Second, New Tech acted as IES' agent in signing the lease. Due to factual disputes on **[*70]** each of these theories, Summit contends that IES is not entitled to summary judgment.

A. Piercing IES' Corporate Veil

1. Legal Standard

In order to pierce the corporate veil and collect a corporate debt from a shareholder, "the plaintiff must allege and prove not only that the debtor corporation was

under the actual control of the shareholder but also that the plaintiff's inability to collect from the corporation resulted from some form of improper conduct on the part of the shareholder." *Amfac Foods, Inc. v. Int'l Sys. & Controls Corp., 294 Or. 94, 108-09, 654 P.2d 1092, 1101-02 (1982)*. As restated by the Oregon Court of Appeals:

> There are three criteria for imposing liability on a shareholder:
>
> (1) The shareholder must have controlled the corporation;
>
> (2) the shareholder must have engaged in improper conduct in his exercise of control over the corporation; and
>
> (3) the shareholder's improper conduct must have caused plaintiff's inability to obtain an adequate remedy from the corporation.

Rice v. Oriental Fireworks Co., 75 Or. App. 627, 633, 707 P.2d 1250, 1255 (Or App 1985).

2. Application

a. Control

[*71] With respect to the first part of the test requiring shareholder control, *Amfac* explains that:

> The shareholder's alleged control over the corporation must not be only potential but must actually have been exercised in a manner either causing the plaintiff to enter the transaction with the corporation or causing the corporation's default on the transaction or a resulting obligation. Likewise, the shareholder's conduct must have been improper either in relation to the plaintiff's entering the transaction or in preventing or interfering with the corporation's performance or ability to perform its obligations toward the plaintiff.

294 Or. at 108-109, 654 P.2d at 1101-1102.

There is no question here that IES actively controlled New Tech's business and was responsible for Summit entering into the lease with New Tech. IES was New Tech's sole owner; IES' CEO (Ramm) was New Tech's sole director; and New Tech's officers reported to IES' officials. IES officials reviewed the lease and ordered Coleman to proceed. IES' Senior Counsel (Holan) sent Summit a letter clarifying New Tech's status as an IES subsidiary at the same time that Summit was asking for a modification **[*72]** of the lease to clarify New Tech's corporate relationship with IES. This is sufficient to satisfy the first part of the test.

b. Improper Conduct

The second part of the test requires improper conduct, such as inadequate capitalization of the debtor corporation, milking the shareholder, misrepresentation by the shareholder to a creditor, commingling of assets, and failure to hold out the corporations to the public as separate enterprises. *Id at 109-110, 654 P.2d at 1102-03*. A failure to observe corporate formalities is also grounds for piercing the corporate veil. *See, e.g., Salem Tent & Awning Co. v. Schmidt, 79 Or. App. 475, 482, 719 P.2d 899, 903 (1986)*.

The evidence in this case does not reveal that New Tech was undercapitalized, commingled funds, or failed to observe corporate formalities. On the other hand, IES and New Tech did share several corporate officers, such as Coleman, as well as buildings, vehicles, and signage. This sharing could demonstrate a failure to hold the two companies out to the public as separate enterprises. Furthermore, the manner in which IES appears to have ordered New Tech to interact with its subsidiaries, such **[*73]** as Murray, may also demonstrate a failure to respect corporate formalities. This conflicting evidence may be sufficient to deny summary judgment to IES, but this court need not resolve that issue because the third prong of the *Amfac* test cannot be met.

c. Causation and Adequate Remedy

In addition to proving New Tech was controlled by IES, Summit must also demonstrate "that the plaintiff's *inability to collect from the corporation* resulted from some form of improper conduct on the part of the shareholder." *Amfac, 294 Or. at 108, 654 P.2d at 1101* (emphasis added). "The disregard of a legally established corporate entity is an extraordinary remedy which exists as a last resort, *where there is no other adequate and available remedy to repair the plaintiff's injury." Id. at*

103, 654 P.2d at 1098 (emphasis added).

> Other potentially available theories of recovery include statutory remedies, *see, e.g., ORS 57.231*, as well as estoppel, quasi contract, creditors' bill, and, finally, the theory that the shareholder, by the shareholder's own conduct, has acted so as to create direct liability as an actor by virtue of the shareholder's **[*74]** own participation in the conduct which gave rise to the creditor's cause of action.

Id.

Even if IES ordered New Tech to move out of the Campus Way Property (which is disputed), and thereby engaged in improper conduct that caused Summit's harm, Summit has submitted no evidence to demonstrate that New Tech is unable to pay the damages for which it is potentially liable under this suit. Furthermore, Summit alleges another potentially available theory of recovery against IES based on New Tech acting as IES' agent, as discussed below. Because "it is not necessary to disregard the separate corporate status to impose liability upon the shareholder for obligations not met by the corporation," (*id.*) IES' motion for summary judgment should be granted as to the theory of liability premised upon piercing New Tech's corporate veil. [11]

> 11 If New Tech is found at a later date to be judgment proof due to a lack of assets, this court's decision on piercing the corporate veil should not be considered the law of the case.

[*75] B. New Tech as IES' Agent

Summit also alleges that IES is liable for breach of the lease because New Tech acted as its agent when entering into the lease. As discussed next, this claim presents a factual dispute that cannot be resolved on summary judgment.

1. Legal Standards

Holding a parent corporation liable for the acts of its subsidiary based on agency theory, the Oregon Supreme Court applied the following agency principles:

> In general no formality is necessary for the appointment of an agent to contract on behalf of his principal. There is no particular mode or method which must be adhered to in order to create or establish agency. Regardless of the terms used by the parties, or by what name the transaction is designated, if the facts fairly disclosed that one party is acting for or representing another, by the latter's authority the agency exists.
>
> Whether an agency has in fact been created is a question of law and is to be determined by the relations of the parties as they exist under their agreements or acts. If relations exist which will constitute an agency, it will be an agency whether the parties understood the exact nature of the relation **[*76]** or not.
>
> Similarly . . . An agency may be implied from attending circumstances and the apparent relations and conduct of the parties.

Elvalsons v. Indus. Covers, Inc., 269 Or. 441, 453-454, 525 P.2d 105, 111 (1974) (internal citations and quotations omitted).

2. Application

According to Ramm, the Campus Way Property lease was entered into "in order for New Tech Electric to accommodate its own growth plan while serving as the 'hub' for the new Northwest Region [of IES], and in order for Bill Coleman to manage the new Northwest Region as ROO." Ramm Dec, P 7. Ramm added that both he and Mueller approved the lease "in order to achieve the IES company goal of expanding IES' Portland presence and creating a regional hub in Portland." id. at P 12. These statements raise a material issue of fact as to whether IES directed New Tech as its agent to enter into the lease both for New Tech's benefit and in order for IES to have a location for its regional offices. Indeed, if IES paid no rent for the premises, as IES argues, that would further support the proposition that New Tech was acting as IES' agent. Although IES claims that it was simply subleasing **[*77]** the portion of the premises used for its regional offices, P 21 of the Campus Way Property lease prohibited subletting without the written consent of the landlord (Mullin Dec, Exhibit 1, p. 30). Summit did not

provide such written consent.

In addition to the activities surrounding the original lease, Summit has submitted other evidence that demonstrates New Tech regularly acts as an agent of IES rather than making its own independent decisions. For example, when New Tech moved out of IES' offices, it moved into premises leased by another IES subsidiary, Murray.

Therefore, a material issue of fact exists as to whether New Tech was acting as IES' agent when it entered into the lease with Milestone. As a result, IES' request to be dismissed from this lawsuit should be denied.

IV. Liability of Summit, Coleman, Crouser, and Milestone for Fraud, Negligent Misrepresentation, and Conspiracy

A. Fraud & Negligent Misrepresentation (New Tech/IES' Third & Fourth Claims)

Summit, Milestone, Coleman and Crouser seek summary judgment against the claims alleging fraud and negligent misrepresentation for failing to inform New Tech and IES in advance that they were entering **[*78]** into the Campus Way Property lease and its subsequent modifications, and further failing to get the appropriate approvals for doing so. New Tech and IES' Answer to First Amended Complaint, PP 66, 68. New Tech and IES allege they were misled by this omission to their detriment and have been damaged as a result. *Id.*

ORS 12.110(1) provides a two-year statute of limitations for claims for both fraud and negligent misrepresentation. *Widing v. Schwabe, Williamson & Wyatt, 154 Or App 276, 282, 961 P.2d 889, 893 (Or App 1998)*. [12] The point at which the statute of limitations begins to run is:

> when the plaintiff knows or in the exercise of reasonable care should have known facts which would make a reasonable person aware of a substantial possibility that each of the three elements (harm, causation, and tortious conduct) exists. We emphasize that this is an objective test. In most cases, the inquiry will concern what a plaintiff should have known in the exercise of reasonable care. In such cases, the relevant inquiry is how a reasonable person of ordinary prudence would have acted in the same or similar situation. Relevant to this analysis will be a plaintiff's **[*79]** failure to make a further inquiry if a reasonable person would have done so. The discovery rule does not protect those who sleep on their rights, but only those who, in exercising the diligence expected of a reasonable person, are unaware that they have suffered legally cognizable harm.

Id at 283, 961 P.2d at 893, quoting *Gaston v. Parsons, 318 Or. 247, 256, 864 P.2d 1319 (1994)*.

12 Because this court has jurisdiction over the parties, Oregon law governs the tort claims for fraud and negligent misrepresentation, rather than Delaware where New Tech is incorporated:

> Corporations and individuals alike enter into contracts, commit torts, and deal in personal and real property. Choice of law decisions relating to such corporate activities are usually determined after consideration of the facts of each transaction . . . In such cases, the choice of law determination often turns on whether the corporation had sufficient contacts with the forum state, in relation to the act or transaction in question, to satisfy the constitutional requirements of due process. The internal affairs doctrine has no applicability in these situations. Rather, this doctrine governs the choice of law determinations involving matters *peculiar* to corporations, that is, those activities concerning the relationships *inter se* of the corporation, its directors, officers and shareholders.

McDermott Inc. v. Lewis, 531 A.2d 206, 214-215 (Del 1987)

[*80] IES and New Tech originally filed their

Texas lawsuit against Summit, Milestone, Coleman and Crouser on April 4, 2003. Therefore, the fraud and negligent misrepresentation claims claims are barred if this filing date is more than two years after IES and New Tech knew or reasonably should have known about the lease. [13]

> 13 None of the parties dispute that the date the Texas lawsuit was filed marks the end of the two year period of the statute of limitations.

New Tech and IES argue that they did not become aware of the lease until after April 1, 2001 [14] and did not even see the lease until August 2002 when Stalvey returned from his trip to Portland to fire Coleman. Stalvey Aff, P 2. However, New Tech and IES have not submitted any evidence to counter Ramm's sworn statements that he visited New Tech's offices in early 2001, was aware at that time of the plans to move New Tech into buildings owned by Coleman, and told Coleman to get a package of documents together on the lease proposal. New Tech and IES cannot **[*81]** raise a material issue of fact over whether they were unaware of the substantial possibility of the lease arrangements when Ramm, New Tech's sole director and IES' CEO, was aware of these matters. Additionally, Coleman sent materials detailing the Campus Way Property proposal to Muth on March 20, 2001, as shown by the date on the cover sheet accompanying the documents. These undisputed facts lead to the conclusion that the statute of limitations began to run prior to April 4, 2001. Accordingly, Summit and New Tech's fraud and negligent misrepresentation claims against all parties are barred by the statute of limitations.

> 14 New Tech and IES' memorandum states that they did not become aware of facts that would make them aware of the lease until after "April 1, 2003." Presumably this is a typographical error and should be read as "April 4, 2001."

V. Liability of Coleman and Crouser for Breach of Fiduciary Duty (New Tech/IES' Second Claim)

The parties' briefing exhibits confusion over the bases of **[*82]** New Tech's claim for breach of fiduciary duty against Coleman and Crouser. After reviewing the pleadings, this court construes New Tech's claim for breach of fiduciary duty against Coleman to be based on his self-dealing (by entering into the lease by and through Milestone in order to increase the value of his property so he could sell it to Summit) and his lack of authorization to enter into the lease. *See* New Tech and IES' Answer to Second Amended Complaint, P 64. The claim against Crouser is based on his signing the original lease and its subsequent modifications "without the authority or knowledge" of IES or New Tech. *Id.*

A. Lack of Authority

1. Legal Standards

The law of the State of Delaware, New Tech's place of incorporation, applies to New Tech's breach of fiduciary duty claim. [15] It is a claim relating to intra-corporate duties and obligations which are governed by the law of the state of incorporation. *See McDermott, 531 A.2d at 214-15*.

> 15 New Tech and IES' Answer only alleges a breach of fiduciary duty owed New Tech. New Tech/IES' Answer, P 64 ("Crouser also signed both the Campus Way Lease and the Second Lease without the authority or knowledge of IES or New Technology in violation of his fiduciary duty. In doing so, the Individual Defendants breached their fiduciary duty owed to their employer, New Technology. Breach of this fiduciary duty caused damages to New Technology[.]")

[*83] In Delaware, the "principles and limitations of agency law carry over into the field of corporate employment not only to officers and directors but also to key managerial personnel." *Sci. Accessories Corp. v. Summagraphics Corp., 425 A.2d 957, 962 (Del 1980)*. Delaware recognizes that a corporate agent may have either actual or apparent authority of the corporation:

> The authority of an agent may fall generally into two categories, actual and apparent. The actual authority of an agent of a private corporation in turn lends itself to dichotomy. It may consist of express authority granted the agent either by statute, corporate charter, by-law, or corporate action by the stockholders or Board of Directors. Or it may amount to implied authority, another way of saying that certain powers spring by necessary inference from those expressly granted.

> A second broad category of authority is not actual authority, being neither express nor implied. This class is commonly labeled apparent authority. In nature and effect, when a private corporation is the principal, it amounts to that authority which, though not actually granted, the principal knowingly or negligently permits **[*84]** the agent to exercise or which it holds him out as possessing. Thus in respect to apparent authority, when an agent of a corporation possesses such authority, the corporation is bound by the act of the agent within the scope of his apparent authority as to any person who believes and has reasonable ground to believe that the agent has such authority and in good faith deals with him. In such a case the corporation will be bound to the same extent precisely as if the apparent authority were real or actual authority.
>
> The issue of actual authority, whether express or implied, is decided solely by scrutinizing the relationship of the agent and the corporation.

Petition of Mulco Prod., Inc., 50 Del. 28, 11 Terry 28, 123 A.2d 95, 103 (Del 1956). [16]

16 Although it is not the governing law on this claim, Oregon law is roughly the same as Delaware:

> Actual authority to act for another may be express or implied. Express authority, of course, is just what it says. It is that authority which the principal confers upon the agent in express terms. The express authority given to an agent to do a certain thing carries with it the implied authority to do such other things as are reasonably necessary for carrying out the given task.

Wiggins, 295 Or at 686-87.

[*85] 2. Application

New Tech argues that neither Ramm nor Mueller had the authority to permit Crouser or Coleman to bind New Tech to the lease, and the latter two knew this. Additionally, New Tech points out that Holan, the only IES official with whom Coleman and Crouser claim they discussed the Lease Addendum, states that he does not remember any such discussion and had no authority to approve it anyway. New Tech also points out that Coleman admitted in his deposition that he never got approval from IES or New Tech before signing the lease. Coleman himself admits that when Milestone and New Tech entered into the lease, it touched off a "bidding war" over the price at which he and Milestone were able to sell the Campus Way Property. Coleman Depo, pp. 157-58.

Coleman and Crouser respond they were acting as agents of New Tech and IES based on the amount of control the two corporations had over their actions. They contend that they did not execute the lease until after April 18, 2001, when they received final approval from IES in Houston to do so. They also argue that Ramm, New Tech's sole Director and IES' CEO, and Mueller, IES' COO, had the authority to authorize the execution **[*86]** of the lease. With full knowledge of the terms of the lease, including Milestone and Coleman's personal interest in it, Ramm gave his consent during his January 2001 visit to Portland and Mueller gave his consent on April 18, 2001 in the IES meetings in Houston. Coleman and Crouser add that other officials were also informed of the details of the transaction, including Muth and Holan through the materials mailed to them and Weik through briefings given in Houston.

As discussed previously, there is a material issue of fact as to the content of New Tech and IES' procedures for the approval of affiliate leases at the time the lease was made. Additionally, there is a material issue of fact as to whether Ramm or Mueller had the actual authority to approve the lease. Stalvey claims that they did not. There is also a dispute as to whether such affiliate leases were orally approved by Ramm and Mueller in the past such that IES might have given them the apparent authority to approve the lease.

Therefore, there are simply too many outstanding issues to decide on summary judgment that Coleman and Crouser either properly entered into the lease or

reasonably relied on Ramm and Mueller's permission.

[*87] B. Ratification

Coleman and Crouser argue that even if they breached their fiduciary duties as officers of New Tech by signing the lease and subsequent documents without authority, New Tech and IES expressly ratified their actions.

1. Legal Standard

In Delaware, the effect of ratification of an agent's act is broad:

> One way of conceptualizing that effect is that it provides, after the fact, the grant of authority that may have been wanting at the time of the agent's act. Another might be to view the ratification as consent or as an estoppel by the principal to deny a lack of authority. *See RESTATEMENT (SECOND) OF AGENCY § 103 (1958).* In either event the effect of informed ratification is to validate or affirm the act of the agent as the act of the principal. *Id § 82*.

Lewis v. Vogelstein, 699 A.2d 327, 334-335 (Del Ch 1997).

Additionally, "when what is 'ratified' is a director conflict transaction," or an officer conflict transaction, Delaware has a statute, found in *§ 144 of the Delaware General Corporation Law*, that "may bear on the effect" of traditional ratification. *See id at 335.* **[*88]** That statute states:

> (a) No contract or transaction between a corporation and 1 or more of its directors or officers, or between a corporation and any other corporation, partnership, association, or other organization in which 1 or more of its directors or officers, are directors or officers, or have a financial interest, shall be void or voidable solely for this reason, or solely because the director or officer is present at or participates in the meeting of the board or committee which authorizes the contract or transaction, or solely because any such director's or officer's votes are counted for such purpose, if:
>
> (1) The material facts as to the director's or officer's relationship or interest and as to the contract or transaction are disclosed or are known to the board of directors or the committee, and the board or committee in good faith authorizes the contract or transaction by the affirmative votes of a majority of the disinterested directors, even though the disinterested directors be less than a quorum; or
>
> (2) The material facts as to the director's or officer's relationship or interest and as to the contract or transaction are disclosed or are known to the shareholders **[*89]** entitled to vote thereon, and the contract or transaction is specifically approved in good faith by vote of the shareholders; or
>
> (3) The contract or transaction is fair as to the corporation as of the time it is authorized, approved or ratified, by the board of directors, a committee or the shareholders.

Del Code title 8, § 144 ("*§ 144*").

2. Application

Because Crouser is not accused of a self-interested

transaction, he does not have to satisfy the standards set out in *§ 144*. Accordingly, any failure by Crouser to obtain proper corporate approval of his actions is ameliorated by New Tech and IES' ratification of the Campus Way Property lease. As discussed earlier, there is significant evidence that New Tech and IES continued to occupy and engage in business activities on the Campus Way property even after becoming aware of the lease. Therefore, New Tech's claim for a breach of fiduciary duty should be denied as to Crouser.

However, Coleman's defense of ratification raises more complicated issues. There may be some question as to whether common law ratification alone is available to avoid liability for breach of fiduciary duty because **[*90]** all activities by New Tech to ratify the lease occurred after Coleman and Milestone assigned the lease to Summit. However, even if Coleman must satisfy *§ 144*, he has still demonstrated that statute was met. Ramm, the sole Director of New Tech and an individual with no self-interest in the transaction, knew of the material facts of Coleman's relationship to the lease and authorized the lease. Ramm specifically testified that he said "let's go" in a January 2001 meeting when asked for a decision on whether to move New Tech into Milestone's building (Ramm Dec, P 7); he knew New Tech was moving into a new building owned by Coleman or one of his companies, and therefore that IES' subsidiary would be leasing space in Coleman's building, when he accepted an invitation from Coleman to attend New Tech's open house around October 1, 2001 (*id* at P 10); and he stated that "both I as IES CEO/President and Ben Mueller as the Chief Operating Officer, reviewed the plan for New Electric to move out of its existing lease space and into a new lease space at the Campus Way property owned by Bill Coleman or his company. We approved this basic plan[.]" *Id* at P 12. Under these circumstances, Ramm **[*91]** ratified the lease as required by *§ 144(a)(1)*. [17] Therefore, New Tech's claim for a breach of fiduciary duty also should be denied as to Coleman.

> 17 Although facially *§ 144(a)(1)* seems to require a vote by a majority of the disinterested directors, Ramm's approval of the lease as New Tech's sole director, even if not made in an formal vote, is adequate here. *See Wachsler, 778 F.2d at 552 n 6* (hypothesizing that if 100% of a company's stock was owned by its directors, and all the directors knew and approved of a self-interested contract and allowed the corporation to accept the contract's benefits, "it would be extremely difficult to say there had not been a ratification. This would be true despite the lack of either a formal board vote or a formal shareholder vote").

VI. Conspiracy of Summit, Milestone, Coleman & Crouser (New Tech and IES' Fifth Claim)

Conspiracy is not a "separate theory of recovery" in Oregon. *Granewich v. Harding, 329 Or. 47, 53, 985 P.2d 788, 792 (1999)*, **[*92]** citing *Bonds v. Landers, 279 Or. 169, 175, 566 P.2d 513, 516 (1977)* and *Bliss v. S. Pac. Co., 212 Or. 634, 642, 321 P.2d 324, 328 (1958)*. Thus, because Summit, Milestone, Coleman and Crouser are entitled to summary judgment against the fraud, negligent misrepresentation, and breach of fiduciary duty claims due to the statute of limitations, then they "cannot be jointly liable for another's tortious conduct" for these activities through a conspiracy claim. *Id.*

RECOMMENDATIONS

For the reasons stated above:

1. Summit's motion for summary judgment (docket # 76) should be GRANTED as to its First Claim (for declaratory judgment under *28 U.S.C. § 2201* to establish that the lease entered with New Tech is binding and neither void *ab initio* nor voidable by New Tech) and Third Claim (for breach of the lease agreement by New Tech), as well as against New Tech's First (declaratory judgment) Counterclaim and New Tech and IES' Third (fraud), Fourth (negligent misrepresentation), and Fifth (conspiracy) Counterclaims;

2. New Tech's and IES' motion for summary judgment (docket # 80) should be DENIED; and

3. Milestone's, Coleman's **[*93]** and Crouser's motion for summary judgment (docket # 89) should be GRANTED against New Tech and IES' Second (breach of fiduciary duty), Third (fraud), Fourth (negligent misrepresentation), and Fifth (conspiracy) Third-Party Claims.

As a result, the following claims will remain for trial:

> Summit's Second Claim: Declaratory judgment to establish that IES is obligated under the lease;

Summit's Fourth Claim: Breach of the lease agreement by IES;

IES' First Claim: Declaratory judgment as to IES' liability under the lease;

New Tech/IES' Sixth Claim: Recovery of attorneys fees incurred in this action; and Milestone, Coleman, and Crouser's Counterclaim against New Tech and IES for attorneys fees.

SCHEDULING ORDER

Objections to these Findings and Recommendation(s), if any, are due **July 23, 2004.** If no objections are filed, then the Findings and Recommendation(s) will be referred to a district court judge and go under advisement on that date.

If objections are filed, then the response is due within 10 days after being served with a copy of the objections. When the response is due or filed, whichever date is earlier, the Findings and Recommendation(s) **[*94]** will be referred to a district court judge and go under advisement.

DATED this 2nd of July.

/s/ Janice M. Stewart

United States Magistrate Judge