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21 **UNITED STATES BANKRUPTCY COURT**  
22 **CENTRAL DISTRICT OF CALIFORNIA**  
23 **LOS ANGELES DIVISION**

24 In re:  
25 ZETTA JET USA, INC., a California corporation,  
26 Debtor.

24 Lead Case No.: 2:17-bk-21386-SK  
25 Chapter 7  
26 Jointly Administered With:  
27 Case No.: 2:17-bk-21387-SK

28 In re:  
29 ZETTA JET PTE, LTD., a Singaporean  
30 corporation,  
31 Debtor.

28 Adv. Proc. No. 2:19-ap-01383-SK

29 **TRUSTEE’S OPPOSITION TO**  
30 **DEFENDANT LI QI’S MOTION TO**  
31 **DISMISS COUNTS I, II, VII, VIII,**  
32 **AND IX OF AMENDED**  
33 **ADVERSARY COMPLAINT**

34 JONATHAN D. KING, solely in his capacity as  
35 Chapter 7 Trustee of Zetta Jet USA, Inc. and Zetta  
36 Jet PTE, Ltd.,  
37 Plaintiff,

34 [Relates to Docket Nos. 232, 239]

38 v.  
39 YUNTIAN 3 LEASING COMPANY  
40 DESIGNATED ACTIVITY COMPANY f/k/a  
41 YUNTIAN 3 LEASING COMPANY LIMITED,  
42 YUNTIAN 4 LEASING COMPANY  
43 DESIGNATED ACTIVITY COMPANY f/k/a  
44 YUNTIAN 4 LEASING COMPANY LIMITED,  
45 MINSHENG FINANCIAL LEASING CO., LTD.,  
46 MINSHENG BUSINESS AVIATION LIMITED,  
47 EXPORT DEVELOPMENT CANADA, LI QI,

38 Next Hearing:  
39 Date: August 11, 2021  
40 Time: 9:00 a.m. (PDT)  
41 Place: Courtroom 1575  
42 255 East Temple Street  
43 Los Angeles, CA 90012

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UNIVERSAL LEADER INVESTMENT LIMITED, GLOVE ASSETS INVESTMENT LIMITED, and TRULY GREAT GLOBAL LIMITED,  
WELLS FARGO BANK NORTHWEST, N.A., in its capacity as trustee to Yuntian 3 Trust dated September 20, 2016 (formed and administered in Utah) and its capacity as trustee of Yuntian 4 Trust dated September 20, 2016 (formed and administered in Utah); TVPX ARS, INC., in its capacity as trustee to Zetta MSN 9688 Statutory Trust dated September 20, 2016 (formed as Wyoming statutory trust), Zetta MSN 9606 Statutory Trust dated September 20, 2016 (formed as Wyoming statutory trust), collectively Nominal Defendants,  
Defendants.

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**TABLE OF CONTENTS**

INTRODUCTION ..... 1

BACKGROUND ..... 3

    I. The Debtors’ operations were in California..... 3

    II. Li creates an on-going relationship with California, including a California company with California operations and by signing agreements showing long-term California effects. .... 3

    III. Li conducted Zetta-related business in California or directed toward California. .... 4

    IV. Li has personally appeared in California state court and these bankruptcy proceedings. .... 4

    V. Li is the alter ego of Defendants over which this Court has personal jurisdiction. .... 5

    VI. The focus of the relevant transactions and obligations of Li and his alter egos were in the United States. .... 6

LEGAL STANDARD ..... 7

ARGUMENT ..... 8

    I. This Court should allow jurisdictional discovery before deciding this motion. .... 8

    II. This Court has personal jurisdiction over Li to enforce the automatic stay..... 8

    III. This Court also has personal jurisdiction directly over Li on all other claims. .... 10

    IV. This Court has vicarious personal jurisdiction over Li. .... 14

        A. California law applies under binding Ninth Circuit precedent. .... 14

        B. Under either California or BVI law, this Court has personal jurisdiction over Li. 19

    V. For similar reasons, the Amended Complaint states a claim for vicarious liability against Li. .... 25

    VI. This Court already granted the Trustee’s motion for alternative service, and Li was properly served in accordance with the Court’s order. .... 27

CONCLUSION ..... 27

**TABLE OF AUTHORITIES**

	<b>Page(s)</b>
<b>Cases</b>	
<i>ADO Fin., AG v. McDonnell Douglas Corp.</i> , 931 F. Supp. 711 (C.D. Cal. 1996) .....	14, 15, 23, 24
<i>Ahcom, Ltd. v. Smeding</i> , 2008 WL 1701731 (N.D. Cal. Apr. 10, 2008) .....	16
<i>Am. Tel. &amp; Tel. Co. v. Compagnie Bruxelles Lambert</i> , 94 F.3d 586 (9th Cir. 1996).....	17
<i>Application Grp., Inc. v. Hunter Grp., Inc.</i> , 61 Cal. App. 4th 881 (Cal. Ct. App. 1998) .....	18
<i>Ballard v. Savage</i> , 65 F.3d 1495 (9th Cir. 1995).....	12
<i>Barantsevich v. VTB Bank</i> , 954 F. Supp. 2d 972 (C.D. Cal. 2013).....	17
<i>In re Bernard L. Madoff Inv. Sec. LLC</i> , 583 B.R. 829 (Bankr. S.D.N.Y. 2018).....	18
<i>Bleu Prod., Inc. v. Bureau Veritas Consumer Prod. Servs. (Hong Kong) Ltd.</i> , 2009 WL 649061 (C.D. Cal. Mar. 9, 2009) .....	19
<i>Blizzard Ent., Inc. v. Joyfun Inc Co., Ltd.</i> , 2020 WL 1972284 (C.D. Cal. Feb. 7, 2020).....	24
<i>In re Brace</i> , 2017 WL 1025215 (B.A.P. 9th Cir. Mar. 15, 2017) .....	17, 25
<i>Burger King Corp. v. Rudzewicz</i> , 471 U.S. 462 (1985).....	12
<i>Cannon Mfg. Co. v. Cudahy Packing Co.</i> , 267 U.S. 333 (1925).....	15
<i>Chunghwa Telecom Glob., Inc v. Medcom, LLC</i> , 2016 WL 5815831 (N.D. Cal. Oct. 5, 2016).....	11, 13, 24, 25
<i>City &amp; Cty. of San Francisco v. Purdue Pharma L.P.</i> , 491 F. Supp. 3d 610 (N.D. Cal. 2020) .....	20
<i>Clearone Commc’ns, Inc. v. Bowers</i> , 651 F.3d 1200 (10th Cir. 2011).....	10

1 *Concat LP v. Unilever, PLC,*  
 2 350 F. Supp. 2d 796 (N.D. Cal. 2004) .....20

3 *Disability Rts. Montana, Inc. v. Batista,*  
 4 930 F.3d 1090 (9th Cir. 2019).....7

5 *Dole Food Co. v. Watts,*  
 6 303 F.3d 1104 (9th Cir. 2002).....11

7 *Fin. Express LLC v. Nowcom Corp.,*  
 8 2008 WL 11342755 (C.D. Cal. Mar. 6, 2008) .....24

9 *First Nat. City Bank v. Banco Para El Comercio Exterior de Cuba,*  
 10 462 U.S. 611 (1983).....16

11 *First United Methodist Church of San Jose v. Atl. Mut. Ins. Co.,*  
 12 1995 WL 150429 (N.D. Cal. Mar. 29, 1995).....19

13 *Flynt Distrib. Co. v. Harvey,*  
 14 734 F.2d 1389 (9th Cir. 1984).....16

15 *Fru-Con Const. Corp. v. Sacramento Mun. Util. Dist.,*  
 16 2007 WL 2384841 (E.D. Cal. Aug. 17, 2007) .....17

17 *Gencor ACP Limited v Glenn Bryan Dalby,*  
 18 2000 WL 1881279 (Ch) .....26

19 *Gilchrist v. Gen. Elec. Cap. Corp.,*  
 20 262 F.3d 295 (4th Cir. 2001).....10

21 *GT Sec., Inc. v. Klastech GmbH,*  
 22 2014 WL 2928013 (N.D. Cal. June 27, 2014) .....11

23 *Harris Rutsky & Co. Ins. Servs. v. Bell & Clements Ltd.,*  
 24 328 F.3d 1122 (9th Cir. 2003).....8, 16

25 *Herring Networks, Inc. v. AT&T Servs., Inc.,*  
 26 2016 WL 4055636 (C.D. Cal. July 25, 2016) .....12

27 *Hyperion Fund, L.P. v. Samarium Tech. Grp., Ltd.,*  
 28 2009 WL 10699441 (C.D. Cal. Jan. 29, 2009) .....17

*Iconlab, Inc. v. Bausch Health Cos.,*  
 828 F. App'x 363 (9th Cir. 2020) .....17

*Indep. Elec. Supply Inc. v. Solar Installs, Inc.,*  
 2018 WL 6092800 (N.D. Cal. Nov. 21, 2018)..... *passim*

1 *Jes Solar Co. Ltd. v. Tong Soo Chung*,  
 2 725 F. App'x 467 (9th Cir. 2018), *amended on denial of reh'g*, 716 F. App'x  
 3 635 (9th Cir. 2018).....10, 14

4 *Johnson v. Serenity Transp., Inc.*,  
 5 141 F. Supp. 3d 974 (N.D. Cal. 2015) .....7, 14, 23, 24

6 *Katzir's Floor & Home Design, Inc. v. M-MLS.com*,  
 7 394 F.3d 1143 (9th Cir. 2004).....19

8 *Kayne v. Ho*,  
 9 2010 WL 4794824 (C.D. Cal. Nov. 15, 2010).....23, 24

10 *Kayne v. Ho*,  
 11 2013 WL 12120081 (C.D. Cal. Nov. 4, 2013).....18

12 *L.A. Terminals, Inc. v. City of Los Angeles*,  
 13 2020 WL 8028241 (C.D. Cal. Dec. 21, 2020) .....22, 23

14 *M.O. Dion & Sons, Inc. v. VP Racing Fuels, Inc.*,  
 15 2019 WL 4750116 (C.D. Cal. Sept. 27, 2019).....24, 25

16 *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*,  
 17 243 F. Supp. 2d 1073 (C.D. Cal. 2003).....15

18 *In re Millennium Seacarriers, Inc.*,  
 19 419 F.3d 83 (2d Cir. 2005).....9

20 *In re Moshen*,  
 21 2010 WL 6259979 (B.A.P. 9th Cir. Dec. 21, 2010) .....18, 25

22 *In re Nat'l Audit Def. Network*,  
 23 332 B.R. 896 (Bankr. D. Nev. 2005) .....15

24 *In re Packaged Seafood Prod. Antitrust Litig.*,  
 25 338 F. Supp. 3d 1118 (S.D. Cal. 2018).....17

26 *Palumbo Design, LLC v. 1169 Hillcrest, LLC*,  
 27 2019 WL 10944852 (C.D. Cal. Dec. 3, 2019) .....25

28 *Peterson v. Highland Music, Inc.*,  
 140 F.3d 1313 (9th Cir. 1998).....11

*Platypus Wear, Inc. v. Bad Boy Europe Ltd.*,  
 2018 WL 3706876 (S.D. Cal. Aug. 2, 2018) ..... *passim*

*Prest v Petrodel Resources Ltd*  
 [2013] UKSC 34 .....26, 27

1 *S.E.C. v. Hickey*,  
 2 322 F.3d 1123 (9th Cir. 2013).....14, 16

3 *Schwarzenegger v. Fred Martin Motor Co.*,  
 4 374 F.3d 797 (9th Cir. 2004).....14

5 *In re Schwarzkopf*,  
 6 626 F.3d at 1037.....17, 25

7 *Shinde v. Nithyananda Found.*,  
 8 2014 WL 12597121 (C.D. Cal. Aug. 25, 2014).....23, 24

9 *In re Simon*,  
 10 153 F.3d 991 (9th Cir. 1998).....9, 10

11 *Soares v. Lorono*,  
 12 2015 WL 151705 (N.D. Cal. Jan. 12, 2015) .....25

13 *Softbank Content Servs. Inc. v. MPO Canada Inc.*,  
 14 225 F. App’x 687 (9th Cir. 2007) .....18

15 *Sonora Diamond Corp. v. Superior Ct.*,  
 16 83 Cal. App. 4th 523 (2000).....19

17 *Stahl v. Victoria Holding AG*,  
 18 221 F.3d 1349 (9th Cir. 2000).....8

19 *Tatung Co. v. Shu Tze Hsu*,  
 20 43 F. Supp. 3d 1036 (C.D. Cal. 2014).....12

21 *Towe Antique Ford Found. v. I.R.S.*,  
 22 999 F.2d 1387 (9th Cir. 1993).....14, 16

23 *In re Turner*,  
 24 2007 WL 7238117 (B.A.P. 9th Cir. Sept. 18, 2007).....14, 17, 25

25 *Twentieth Century Fox Int’l Corp. v. Scriba*,  
 26 385 F. App’x 651 (9th Cir. 2010) .....8

27 *Underwood v. Hilliard (In re Rimsat, Ltd.)*,  
 28 98 F.3d 956 (7th Cir. 1996).....9, 10

*US Fire Pump Co., LLC v. Alert Disaster Control (Middle E.) Ltd.*,  
 2021 WL 296073 (M.D. La. Jan. 28, 2021).....15, 16

*US Philips Corp. v. KXD Tech., Inc.*,  
 2014 WL 12564095 (C.D. Cal. June 24, 2014) .....13

*Vizio, Inc. v. LeEco V. LTD.*,  
 2018 WL 5303078 (C.D. Cal. July 27, 2018) .....18, 23, 24

1 *In re Vrabel*,  
2 2005 WL 6960238 (B.A.P. 9th Cir. June 17, 2005) .....10, 13

3 *In re Wells*,  
4 2017 WL 4768106 (B.A.P. 9th Cir. Oct. 10, 2017), *aff'd*, 735 F. App'x 375  
(9th Cir. 2018).....13

5 **Statutes**

6 11 U.S.C. § 362.....9

7 11 U.S.C. § 541.....9

8 United States Code Title 14 .....4

9 **Other Authorities**

10 Federal Rule of Civil Procedure 4.....15

11  
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1 INTRODUCTION

2 Defendant Li Qi (“Li”) invested in a private jet company, Zetta Jet PTE, Ltd. (“Zetta PTE”),  
3 that he knew was merely a holding company for a California airline operated through a California  
4 subsidiary, Zetta Jet USA, Inc. (“Zetta USA”). Li, through three BVI entities—Defendants  
5 Universal Leader Investment Limited (“Universal Leader”), Glove Assets Investment Limited  
6 (“Glove Assets”), and Truly Great Global Limited (“Truly Great”)—entered into agreements that  
7 expressly contemplated that Zetta USA would sublease the aircraft at issue, that Zetta USA would  
8 license them to ensure the planes could operate in the US under FAA regulations, and Zetta USA  
9 would operate them from its base in California.

10 Li structured these transactions through his three nominee entities to try to insulate himself  
11 from liability. But Li essentially concedes that they were no more than three names on a single  
12 shared bank account. Li entirely controlled the three entities. They had no other directors, officers,  
13 or employees. They apparently conducted no other business than the transactions with the Debtors.  
14 They kept no corporate records. They had no respect for corporate formalities. In contemporaneous  
15 correspondence, Li referred to their actions as *his* actions, their investments as *his* investments, and  
16 their money as *his* money. Simply put, they had no existence separate from Li, and they had no  
17 purpose other than to try to shield Li from liability. When Zetta PTE and Zetta USA ultimately  
18 failed due to the actions of fraudster Geoff Cassidy (the former managing director of Zetta PTE),  
19 Li then directed litigation from California to try to enjoin the bankruptcy proceedings in California.

20 Li has now moved to dismiss the Amended Adversary Complaint (the “Amended  
21 Complaint”) based on lack of personal jurisdiction, insufficient service of process, and failure to  
22 state a claim. Each of Li’s arguments fails. This Court has personal jurisdiction over Li for at least  
23 three independent reasons.

24 First, the Court has personal jurisdiction over Li to enforce the automatic stay because Li  
25 personally appeared in the bankruptcy cases while simultaneously working to enjoin those  
26 proceedings through an improper proceeding in Singapore. The Court separately has jurisdiction  
27 because Li acted with knowledge of an injunction (namely the automatic stay) and with intent to  
28 violate the injunction.

1 Second, the Court has personal jurisdiction over the other claims against Li because of Li's  
2 activities in and directed at California that form the basis for the Amended Complaint. Li reached  
3 out to create a continuing relationship with Zetta USA, which owned and operated Plane 6 and 7  
4 and which Li previously conceded was the operational entity for Zetta PTE. Li also conducted Zetta  
5 PTE business while in California and directed his attorneys and representatives to seek to enjoin  
6 the bankruptcy proceedings from California. Furthermore, Li personally appeared and participated  
7 in the bankruptcy case without objecting to personal jurisdiction. The Trustee's claims arise from  
8 these acts and contacts. Li cannot meet his burden to show that jurisdiction in these circumstances  
9 would be unreasonable.

10 Third, this Court has personal jurisdiction over Li through the three entities, whose  
11 amenability to personal jurisdiction is not questioned. Li argues that BVI law, not California law,  
12 applies to alter ego jurisdiction. Li is wrong. A century of US Supreme Court, Ninth Circuit, and  
13 district court precedent holds that the forum state's law controls. Under California law, the  
14 complaint pleads personal jurisdiction. Li is both the alter ego of the three entities and was the  
15 guiding force behind their acts, both of which independently support personal jurisdiction here.

16 For much the same reason, the Amended Complaint also states a claim for alter ego liability  
17 against Li. The same analysis and the same binding Ninth Circuit precedent holds that the forum  
18 state's law applies to claims seeking to hold an individual liable for his alter ego's actions. The  
19 Amended Complaint meets the pleading burden here. Even if BVI law did apply, and it does not,  
20 the Trustee provides an affidavit showing that BVI law would allow the Trustee to bring claims  
21 directly against Li because his entities are merely his agents, they acted as his nominees in the  
22 transactions at issue, and he arguably breached his fiduciary duties by directing payments to them.

23 Li also makes a half-hearted attempt to revisit this Court's decision permitting alternative  
24 service on Li. This Court already decided that issue. And Li does not assert that the Trustee failed  
25 to comply with this Court's alternative service order. Li's arguments should be rejected again.

26 But all of this may be premature. If the Court has any doubts whatsoever about whether Li  
27 has contested any factual issues relevant to personal jurisdiction, the proper first step would be to  
28 grant the Trustee's separate motion for limited jurisdictional discovery. (Dkt. No. 255.)

**BACKGROUND**

**I. The Debtors’ operations were in California.**

Geoff Cassidy, the Debtors’ former board member and managing director, is a known fraudster. (¶¶ 74-76.)<sup>1</sup> Cassidy entered the private jet charter business in Singapore, but under FAA regulations he needed a partner to operate flights in the United States. (¶¶ 77-78.) James Seagrim and Matt Walter owned a successful, revenue-generating charter airline (“AAM”) incorporated in and operating from California. (¶¶ 27, 31-32, 79.) In 2014, a representative of Cassidy approached Seagrim and Walter about creating a new, combined airline. (¶¶ 81-82.) Ultimately, Cassidy, Seagrim, and Walter incorporated Zetta PTE in Singapore in July 2015; AAM filed with the FAA to conduct authorized operations under the business name “Zetta Jet.” (¶ 83.) Zetta’s operations, as Li himself has recognized, were in California. (¶ 51.)

**II. Li creates an on-going relationship with California, including a California company with California operations and by signing agreements showing long-term California effects.**

Li’s involvement shows extensive connections to California. Li was an investor in and director of Zetta PTE, which he has previously described “as merely ‘a holding company, while [Zetta USA] was where the Debtors ‘operated their airline in California.’” (¶ 51.) Li and his alter egos entered into agreements that he knew would result in Zetta USA operating planes in California. Zetta PTE’s “California operations” as Li has called them (Declaration of Joseph Roselius (“Roselius Decl.”), attached as Exhibit A, Ex. 1 ¶ 2 (Jan. 4, 2019 Declaration of Li Qi)) were referenced in contracts that Li signed. And those contracts “contemplated future . . . substantial consequences in California.” (¶ 45.) For example, the agreements referenced that the planes could be “subleased to ‘ADVANCED AIR MANAGEMENT, INC.’[.]” (*See, e.g.*, Am. Compl. Ex. B1 § 3.17; Am. Compl. Ex. B2 § 3.17; Am. Compl. Ex. D § 3.17.) Debtor Zetta USA was “known as Advanced Air Management, Inc. (‘AAM’) until it was purchased by Zetta PTE[.]” (¶ 27.) Both were California companies with California operations. (¶¶ 27, 79.) The agreements also provided that Zetta PTE “may sublease the aircraft to Advanced Air Management, Inc. (‘AAM’) and

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<sup>1</sup> All paragraph citations are to the Amended Complaint (Dkt. No. 232) unless otherwise stated. All emphasis is added unless otherwise stated.

1 operational control of the Aircraft may be given to AAM for the conduct of operations under Part  
2 135 of the Aeronautics Regulations of Title 14 of the United States Code of Federal Regulation[.]”  
3 (Am. Compl. Ex. A § 14.1(1)(e); Am. Compl. Ex. C § 14.1(1)(e).) Agreements list AAM as the  
4 “OPERATOR” of the aircraft. (*See, e.g.*, Am. Compl. Ex. C at Ex. J.) Then, as planned from the  
5 beginning, the relevant planes were in fact “subleased . . . to Zetta USA to operate the aircraft.”  
6 (¶ 254.)

7 **III. Li conducted Zetta-related business in California or directed toward California.**

8 On top of the contracts referenced above and in the Amended Complaint, Li “also traveled  
9 to California in connection with Zetta Jet business.” (¶ 48.) For example, “after the Debtors filed  
10 the chapter 11 cases, Li traveled to California to attend an emergency board of directors meeting  
11 for Zetta PTE[.]” (*Id.*) The meeting never occurred, but “Li stayed at a hotel in California” and  
12 “regularly communicated with his lawyers” “while his lawyers met with the Debtors’ lawyers in  
13 Los Angeles to negotiate a restructuring strategy.” (*Id.*) Also while in California, “Li instructed his  
14 Hong Kong lawyers to jointly retain counsel with Cassidy and cause Truly Great to join Cassidy’s  
15 Singapore action to obtain an injunction to enjoin the chapter 11 cases in violation of the stay.”  
16 (*Id.*) Then “Li further directed his Hong Kong lawyers from California to submit a letter . . . on his  
17 behalf to be attached to Cassidy’s affidavit filed in support of the requested injunction.” (*Id.*)

18 Li also directed communications to California relevant to the allegations here. For example,  
19 “Li directed communications to California residents who were also founders of Zetta Jet who had  
20 email signatures that included ‘California.’” (¶ 52.) Li also had phone calls with those same  
21 founders, including “a phone conversation in which he said that his fiduciary obligations to Zetta  
22 Jet did not matter to him.” (¶ 52.)

23 **IV. Li has personally appeared in California state court and these bankruptcy**  
24 **proceedings.**

25 Although Li now claims that this Court has no personal jurisdiction over him, when Li was  
26 a plaintiff bringing claims related to the same events at issue here, he “argued that he had a  
27 ‘fundamental right to access the courts [*sic*] system . . . to pursue civil claims in California’ related  
28 to the same events alleged in the Complaint involving the Debtors.” (¶ 44.) Li then personally

1 appeared and participated in these bankruptcy proceedings. Many of Li’s filings do not mention  
2 anything about appearing specially or objecting to personal jurisdiction. (*See, e.g.*, Case No. 2:17-  
3 bk-21386-SK, Dkt. Nos. 69, 405.) His lawyers likewise appeared generally without any objection  
4 to personal jurisdiction. (Case No. 2:17-bk-21386-SK, Dkt. No. 434.) Those general appearances  
5 represent that “Mr. Li Qi” has retained those attorneys “to appear and participate in the above-  
6 entitled action on [his] behalf[.]” (*Id.*)

7 **V. Li is the alter ego of Defendants over which this Court has personal jurisdiction.**

8 There is no dispute that this Court has personal jurisdiction over Universal Leader, Truly  
9 Great, and Glove Assets. As described in the Complaint and further supported here, those  
10 companies are Li’s alter egos. Li treated those companies “as a single entity such that the  
11 individuality and separateness between them ceased.” (¶ 55.) For example, Li “had Glove Assets  
12 sign the relevant agreements in connection with the purchase of Plane 6 . . . but all payments flowed  
13 through and to Universal Leader.” (¶ 61.) “Similarly, although Universal Leader made the transfer  
14 of funds for Li’s investments in Zetta PTE, Truly Great received the ownership interest in Zetta  
15 PTE’s shares.” (*Id.*) During the relevant transactions, the entities were referred to interchangeably.  
16 (Roselius Decl. Exs. 2 and 3 (email correspondence referring to “UL/Glove”).)

17 He also “treated [their] assets . . . as his own” by, for example, referring “to all his various  
18 investments in the Debtors as if he had made those investments personally rather than through the  
19 various entities.” (¶ 56.) “During . . . negotiations, Li would refer to the shares being given in  
20 exchange for [Truly Great’s] investment as being to him, not Truly Great.” (¶ 320.) Li wrote the  
21 following in an email: “Until now, *I* invest the company about 119m USD, so when Geoff [Cassidy]  
22 come to ask another 15m USD to be bridge money, *I* don’t agree, *I* have put one huge egg to one  
23 basket, big risk . . . . But I said *I* need another 10% shares, this is not to buy the shares, this is for  
24 the risk, otherwise it is too unfair[.]” (*Id.*) In fact, Li referred to this as “*personal money*.” (¶¶ 134-  
25 35.) And Li said that Cassidy should “repay *me* [i.e., Li] first not mengshen and avic[.]” (¶ 236; *see*  
26 *also* ¶ 237.) Universal Leader and Truly Great have previously represented that “loans” nominally  
27 from those entities were actually through Li. (Roselius Decl. Ex. 4 ¶¶ 23-26, 38 (California state  
28 court complaint).) Even more, in email correspondence after compliance questions from HSBC

1 about certain Zetta payments that Cassidy represented were “loan repayment[s] to Universal  
2 Leader,” Li wrote the following: “it is only a *personal loan* zettajet repay to *me* for 1.5 years, what  
3 are you f\*\*king need ?f\*\*k you.f\*\*k your whole family .f\*\*k .rubbish HSBC sg .trash.” (Roselius  
4 Decl. Ex. 5.)<sup>2</sup> Li’s counsel also referred the \$55 million payment to Universal Leader as Li wanting  
5 to receive \$55 million because that is the way Li and Cassidy agreed between themselves. (Roselius  
6 Decl. Ex. 3.)

7 The companies had the same offices and employees. Glove Assets, Universal Leader, and  
8 Truly Great used the same office which was Li’s address in Shanghai. (*Compare* Am. Compl. Exs.  
9 A, C, E, F; Li Decl. Ex. C ¶ 12.2 (listing the same notice addresses), *with* Ex. J to Roselius Decl.  
10 in Support of Mot. for Alt. Service (Dkt. No. 66), at 165, 167-68 (listing Li’s address in Shanghai).)  
11 What is more, they also used *Li’s home address*. (*See id.*; *compare* Ex. 12, ¶ 10.2, to Request for  
12 Judicial Notice (Dkt. No. 240 at 476) (listing notice address in Hong Kong), *with* Ex. A to Roselius  
13 Decl. in Support of Mot. for Alt. Service (Dkt. No. 66), at 2 (listing Li’s address in Hong Kong).)  
14 Nor did the companies have any employees other than Li, and “all of their business is conducted  
15 through or at the direction of Li.” (¶ 60.) Li was a director, officer, and employee for all the entities,  
16 and there is overlapping ownership. (¶¶ 36, 37, 39-41, 58, 222, 224, 253, 318.) Li has also  
17 previously identified himself as Truly Great’s “*Sole* Director[.]” (Roselius Decl. Ex. 6 (Exhibit A  
18 to first amended state court complaint at 60).) Contemporaneous email communications state that  
19 “glove assets does not have any bank account.” (Roselius Decl. Ex. 7.) Li has previously identified  
20 himself as “the beneficial owner of [Truly Great].” (Roselius Decl. Ex. 11.)

21 **VI. The focus of the relevant transactions and obligations of Li and his alter egos were in**  
22 **the United States.**

23 The focus of all the obligations that the Trustee seeks to avoid, and thus the payments made  
24 to the Defendants on account of those obligations, was in the United States.

25 Zetta USA’s Part 135 certificate, issued by the FAA and required to operate commercial  
26 charter flights in the US, was critical to every financing deal. (¶¶ 8, 178.) The Master Leases  
27 *required* the planes to be FAA registered. (¶ 178.) And the Master Leases required the planes to be

28 \_\_\_\_\_  
<sup>2</sup> The asterisks are not in the original. The Trustee has inserted asterisks out of respect for the Court.

1 immediately subleased to Zetta USA and operated under its Part 135 certificate. (¶¶ 254, 269.)

2 The transactions closed in the US. (¶ 11.) The obligations were thus incurred in the US, US  
3 owner trustees served as principal contract counterparties, and all closing payments were made into  
4 and through US bank accounts. (*Id.*) The parties required that the refinancing transactions occur in  
5 the US, with US contract parties, to ensure FAA qualification for the aircraft to generate revenue and  
6 pay the loans. (*Id.*) The refinancing transaction closed in the US, all closing proceeds flowed through  
7 the US, the parties chose US corporate trusts to execute the financing documents as contract principals  
8 in the US to qualify under FAA regulations, and subsequent payments under the financing documents  
9 were likely made through banks that were subject to US laws or through US-based intermediary  
10 correspondent banks. (*Id.*)

11 Other facts indicate a strong US nexus. Under the finance leases, the planes had to be  
12 maintained at a US base. (¶ 178.) The security interests were all filed with the FAA in the US.  
13 (¶ 269.) Finally, the Defendants required that the Debtors make payments to US bank accounts or  
14 required that all payments be made in US dollars that required, at minimum, that transfers of funds  
15 be made through US intermediary or correspondent banks. (¶ 406.)

### 16 LEGAL STANDARD

17 To survive a 12(b)(6) motion to dismiss, a plaintiff need only “provide a short and plain  
18 statement of the claim showing the pleader is entitled to relief which contains sufficient factual  
19 matter, accepted as true, to state a claim to relief that is plausible on its face.” *Disability Rts.*  
20 *Montana, Inc. v. Batista*, 930 F.3d 1090, 1096 (9th Cir. 2019) (cleaned up). “To meet this burden,  
21 the nonconclusory factual content of [a] complaint and reasonable inferences from that content,  
22 must be at least plausibly suggestive of a claim entitling the plaintiff to relief.” *Id.* (cleaned up). A  
23 court “must take all allegations of material fact as true and construe them in the light most favorable  
24 to the nonmoving party.” *Id.* at 1097. On a 12(b)(6) motion, a court may not rely “on facts outside  
25 the four corners of the” complaint. *Johnson v. Serenity Transp., Inc.*, 141 F. Supp. 3d 974, 986  
26 (N.D. Cal. 2015).

27 “When a defendant moves to dismiss for lack of personal jurisdiction, the plaintiff bears the  
28 burden of demonstrating that the court has jurisdiction over the defendant.” *Platypus Wear, Inc. v.*

1 *Bad Boy Europe Ltd.*, 2018 WL 3706876, at \*4 (S.D. Cal. Aug. 2, 2018) (cleaned up). “However,  
2 this demonstration requires that plaintiff make only a prima facie showing of jurisdictional facts to  
3 withstand the motion to dismiss.” *Id.* (cleaned up). And a court “must resolve disputed jurisdictional  
4 facts in the plaintiff’s favor, taking the allegations in the plaintiff’s complaint as true.” *Id.* “If the  
5 defendant adduces evidence controverting the allegations in the complaint, however, the plaintiff  
6 must come forward with facts, by affidavit or otherwise, supporting personal jurisdiction.” *Id.*  
7 (cleaned up). Again, “[c]onflicts between the parties over statements contained in the affidavits  
8 must be resolved in the plaintiff’s favor.” *Id.* (cleaned up).

## 9 ARGUMENT

### 10 I. This Court should allow jurisdictional discovery before deciding this motion.

11 As set forth in the Trustee’s motion for jurisdictional discovery, (Dkt. No. 255), Li denied  
12 or contested several allegations relating to jurisdictional issues, (Dkt. Nos. 239, 239-1). For  
13 example, Li disputed the Defendants’ ownership structure, employees, directors, and officers;  
14 capitalization; bank accounts and intercompany transfers; maintenance of corporate formalities; the  
15 nature of his trip to California in September 2017; and his direction of the Singapore lawsuit seeking  
16 to enjoin the bankruptcy proceedings in California while in California. (*Id.*) The Trustee thus seeks  
17 limited jurisdictional discovery from Li. (Dkt. No. 255.) The Trustee believes that his allegations  
18 already establish personal jurisdiction over Li both directly and through his alter egos. But before  
19 the Court reaches that issue, it should grant the Trustee jurisdictional discovery on the issues  
20 identified in his motion. (*Id.* at 9-10.) It would be an abuse of discretion to deny the Trustee’s  
21 request if the “record is simply not sufficiently developed . . . to determine whether the alter ego  
22 . . . test [is] met” for the purpose of establishing personal jurisdiction. *Harris Rutsky & Co. Ins.*  
23 *Servs. v. Bell & Clements Ltd.*, 328 F.3d 1122, 1135 (9th Cir. 2003); *see also Twentieth Century*  
24 *Fox Int’l Corp. v. Scriba*, 385 F. App’x 651, 653 (9th Cir. 2010) (same); *Stahl v. Victoria Holding*  
25 *AG*, 221 F.3d 1349, at \*1 (9th Cir. 2000) (same).

### 26 II. This Court has personal jurisdiction over Li to enforce the automatic stay.

27 Under the Bankruptcy Code, the filing of a petition “operates as a stay, applicable to all  
28 entities” to a variety of actions, including any act “to exercise control over property of the estate.”

1 11 U.S.C. § 362(a)(3). “The district court in which the bankruptcy case is commenced obtains  
2 exclusive in rem jurisdiction over all of the property of the estate.” *In re Simon*, 153 F.3d 991, 996  
3 (9th Cir. 1998); *see also* 11 U.S.C. § 541(a). This jurisdiction “creates a fiction that the property—  
4 regardless of actual location—is legally located within the jurisdictional boundaries of the district  
5 in which the court sits.” *Simon*, 153 F.3d at 996.

6 The automatic stay enjoins foreign proceedings that would impact the administration of the  
7 bankruptcy case. *Id.* at 996 (“The efficacy of the bankruptcy proceeding depends on the court’s  
8 ability to control and marshal assets of the debtor”) (quoting *Underwood v. Hilliard (In re Rimsat,*  
9 *Ltd.*), 98 F.3d 956, 961 (7th Cir. 1996)). A bankruptcy court may act against a foreign party to  
10 protect the bankruptcy estate from foreign acts intended to disrupt the administration of the  
11 bankruptcy estate. *Id.*

12 The *Simon* decision is instructive here. In *Simon*, the Ninth Circuit held that a foreign  
13 creditor could be held liable for a violation of the discharge injunction when it instituted foreign  
14 proceedings to collect against the debtor.<sup>3</sup> *Id.* at 993. The Ninth Circuit rejected the argument that  
15 the bankruptcy court lacked jurisdiction over the discharge injunction violation because the  
16 creditor’s participation was for the limited basis of filing a proof of claim, noting that the  
17 Bankruptcy Code authorizes limited appearances only under narrowly circumscribed conditions  
18 that were inapplicable to the case. *Id.* at 997. The Ninth Circuit stated, “Hong Kong-Shangai fully  
19 participated in the *Simon* bankruptcy, thus surrendering to United States jurisdiction.” *Id.* The law  
20 as set forth in *Simon* is consistent with the law in other circuits. *See, e.g., Rimsat*, 98 F.3d at 961  
21 (holding that a foreign receiver in a St. Kitts and Nevis receivership was liable for violating the  
22 automatic stay when he went to the foreign court to obtain enhanced powers over the debtor after  
23 creditors filed an involuntary chapter 11 petition); *In re Millennium Seacarriers, Inc.*, 419 F.3d 83,  
24 98 (2d Cir. 2005) (“Parties may, by their conduct, submit themselves to the bankruptcy court’s  
25 jurisdiction”).

26 Here, Li’s personal participation in the Debtors’ bankruptcy cases is even more extensive

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28 <sup>3</sup> That the *Simon* case concerned the discharge injunction and not the automatic stay is irrelevant, as the Ninth Circuit explained that “there is no functional difference between the automatic stay . . . and the [discharge injunction].” *Simon*, 153 F.3d at 996.

1 than the creditor's participation in *Simon*. Li entered a notice of appearance (Case No. 2:17-bk-  
2 21386-SK, Dkt. No. 68) and actively litigated the issue of whether the Trustee should be appointed  
3 (Case No. 2:17-bk-21386-SK, Dkt. No. 69). This Court thus has personal jurisdiction over Li for  
4 the automatic stay claim. *See In re Vrabel*, 2005 WL 6960238, at \*3 (B.A.P. 9th Cir. June 17, 2005)  
5 (holding that a party "submitted to the bankruptcy court's exercise of jurisdiction over her by virtue  
6 of her extensive, voluntary participation in debtor's bankruptcy case" and that she "waiv[ed] any  
7 defect in the court's exercise of such jurisdiction" by filing a response that was "akin to a responsive  
8 pleading"); *see also Jes Solar Co. Ltd. v. Tong Soo Chung*, 725 F. App'x 467, 471–72 (9th Cir.  
9 2018) (holding that defendant waived personal jurisdiction where they filed motions without any  
10 indication that they were making a special appearance), *amended on denial of reh'g*, 716 F. App'x  
11 635 (9th Cir. 2018). And when Li lost that motion, he turned to the Singapore court to stymie the  
12 US bankruptcy proceedings, thus acting with the evident purpose of "imperil[ing] the orderly  
13 administration of the bankruptcy proceeding." *See Rimsat*, 98 F.3d at 961. Accordingly, the  
14 bankruptcy court has jurisdiction over Li to enforce the automatic stay. *Simon*, 153 F.3d at 993;  
15 *Rimsat*, 98 F.3d at 961.

16 Separately, Li is also subject to the jurisdiction of the bankruptcy court to enforce the  
17 automatic stay because he acted with knowledge of an injunction (the automatic stay) and with the  
18 intent to violate the injunction. *See, e.g., Clearone Commc'ns, Inc. v. Bowers*, 651 F.3d 1200, 1214-  
19 15 (10th Cir. 2011) ("nonparties who reside outside the territorial jurisdiction of a district court  
20 may be subject to that court's jurisdiction' for the purposes of contempt proceedings if, 'with actual  
21 notice of the court's order, they actively aid and abet a party in violating that order'") (citing  
22 *Waffenschmidt v. MacKay*, 763 F.2d 711, 714 (5th Cir. 1985), and *SEC v. Homa*, 514 F.3d 661,  
23 673-75 (7th Cir. 2008)); *Gilchrist v. Gen. Elec. Cap. Corp.*, 262 F.3d 295, 301 (4th Cir. 2001)  
24 (same)).

25 **III. This Court also has personal jurisdiction directly over Li on all other claims.**

26 The Ninth Circuit has a three-part test for determining specific jurisdiction:

27 "(1) The non-resident defendant must purposefully direct his activities or  
28 consummate some transaction with the forum or resident thereof; or  
perform some act by which he purposefully avails himself of the privileges

1 of conducting activities in the forum, thereby invoking the benefits and  
2 protections of its laws;

3 (2) the claim must be one which arises out of or relates to the defendant’s  
4 forum-related activities; and

5 (3) the exercise of jurisdiction must comport with fair play and substantial  
6 justice, i.e. it must be reasonable.”

7 *Dole Food Co. v. Watts*, 303 F.3d 1104, 1111 (9th Cir. 2002). The plaintiff must make only a prima  
8 facie showing of the first two prongs of the test for specific jurisdiction. *GT Sec., Inc. v. Klastech*  
9 *GmbH*, 2014 WL 2928013, at \*5-6 (N.D. Cal. June 27, 2014). The Amended Complaint satisfies  
10 those two prongs. If the plaintiff makes that prima facie showing, the burden shifts to the defendant  
11 to “present a compelling case that the presence of some other considerations would render  
12 jurisdiction unreasonable.” *Dole Food*, 303 F.3d at 1114. Defendants “have a ‘heavy burden’[.]”  
13 *Chunghwa Telecom Glob., Inc v. Medcom, LLC*, 2016 WL 5815831, at \*6 (N.D. Cal. Oct. 5, 2016).  
14 Li fails to satisfy that heavy burden on the third prong.

15 First, Li purposefully directed actions to California, purposefully availed himself of the  
16 privilege of conducting activities in California, and invoked the benefits and protections of  
17 California’s laws. In fact, Li has argued that he has a “fundamental right to access the courts [*sic*]  
18 system . . . to pursue civil claims in California” related to the same events alleged in the Amended  
19 Complaint involving the Debtors. (¶ 44.) The relevant contracts here contemplated “substantial  
20 consequences in California,” their terms “expressly referenced certain effects in California,” and  
21 the “parties’ actual course of dealing included regular communications to and from California.” (¶  
22 45.) This is more than enough to show purposeful availment given that the “critical issue is whether  
23 the contract evidences a substantial relationship with the forum based on prior negotiations,  
24 contemplated future consequences, and the terms of the contract.” *GT Sec., Inc.*, 2014 WL 2928013,  
25 at \*8 (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475-76 (1985)); *see also Peterson v.*  
26 *Highland Music, Inc.*, 140 F.3d 1313, 1320 (9th Cir. 1998) (stating that documents gave “rise to a  
27 strong inference that defendants engaged in negotiations with California companies . . . , that they  
28 probably wrote letters and made telephone calls to the California offices of these companies in  
conducting their negotiations, that they quite possibly traveled to California as a part of these  
negotiations,” and that “[c]ontract negotiations are classic examples of the sort of contact that can

1 give rise to *in personam* jurisdiction”).

2 “[W]ith respect to interstate contractual obligations, . . . parties who ‘reach out beyond one  
3 state and create continuing relationships and obligations with citizens of another state’ are subject  
4 to regulation and sanctions in the other State for the consequences of their activities.” *Burger King*,  
5 471 U.S. at 473. “Li has also traveled to California in connection with Zetta Jet business.” (¶ 48.)  
6 While in California, “Li regularly communicated with his lawyers” while they “met with the  
7 Debtors’ lawyers in Los Angeles to negotiate a restructuring strategy.” (*Id.*) Also while in  
8 California, “Li instructed his Hong Kong lawyers to jointly retain counsel with Cassidy and cause  
9 Truly Great to join Cassidy’s Singapore action to obtain an injunction to enjoin the chapter 11 cases  
10 in violation of the stay.” (*Id.*) Li also committed intentional acts expressly aimed at California that  
11 caused harm that Li knew was likely to be suffered in California, namely by seeking an injunction  
12 that he knew would frustrate the Trustee’s ability to prosecute the bankruptcy proceedings as well  
13 as seek to recover property of the estate. *See Herring Networks, Inc. v. AT&T Servs., Inc.*, 2016  
14 WL 4055636, at \*6 (C.D. Cal. July 25, 2016).

15 Second, the claims arise from or relate to Li’s forum-related activities. “The Ninth Circuit  
16 employs a ‘but for’ test” when evaluating this second element. *Tatung Co. v. Shu Tze Hsu*, 43 F.  
17 Supp. 3d 1036, 1049 (C.D. Cal. 2014) (citing *Ballard v. Savage*, 65 F.3d 1495, 1500 (9th Cir.  
18 1995)). “The question, therefore, is this: but for [Li’s] contacts with the United States and  
19 California, would [the Trustee’s] claims against [Li] have arisen?” *Ballard*, 65 F.3d at 1500. “Here,  
20 there is no serious dispute that the claims against [Li] would not have arisen but for [Li’s] California  
21 activities—namely, the activities related to [Zetta USA], a California-based corporation” (*Tatung*,  
22 43 F. Supp. 3d at 1050) and Zetta Jet PTE, a company that Li has previously represented as having  
23 “California operations.” (Roselius Decl. Ex. 1 ¶ 2.)

24 Third, Li has not met his heavy burden to show that personal jurisdiction would be  
25 unreasonable. Courts consider these seven factors when considering reasonableness: “(1) the extent  
26 of the defendants’ purposeful interjection into the forum state, (2) the burden on the defendants of  
27 defending in the forum state, (3) the extent of the conflict with the sovereignty of the defendants’  
28 state, (4) the forum state’s interest in adjudicating the dispute, (5) the most efficient resolution of

1 the controversy, (6) the importance of the forum to the plaintiff’s interest in convenient and  
2 effective relief, and (7) the existence of an alternative forum.” *Chunghwa Telecom*, 2016 WL  
3 5815831, at \*6. The Trustee has shown purposeful availment, so the first factor favors the Trustee.  
4 *Id.* The second factor supports the Trustee because the burden on Li of litigating in California is  
5 slight. After all, Li has claimed he has a right to litigate in California courts and has done so in  
6 cases related to the events at issue here as a plaintiff. The third factor supports the Trustee because  
7 Li has not identified any conflict between California and Hong Kong law. *Id.* The fourth factor  
8 favors the Trustee because “California has a strong interest in providing an effective means of  
9 redress for its residents from unlawful conduct.” *Id.* The fifth factor is at worst a draw, because two  
10 key witnesses (Seagrim and Walter) are in California, though Li and Cassidy are not.<sup>4</sup> The sixth  
11 factor supports the Trustee because it is important “to have this dispute resolved here.” *Id.* Finally,  
12 for all the reasons above, California is the preferable forum.

13 In any event, Li has waived any personal jurisdiction argument through his conduct in these  
14 bankruptcy cases. *See In re Wells*, 2017 WL 4768106, at \*3 (B.A.P. 9th Cir. Oct. 10, 2017), *aff’d*,  
15 735 F. App’x 375 (9th Cir. 2018) (“A defendant may...waive [a personal jurisdiction] defense as a  
16 result of his course of conduct during litigation.”); *see also US Philips Corp. v. KXD Tech., Inc.*,  
17 2014 WL 12564095, at \*7 (C.D. Cal. June 24, 2014). As stated above (*supra* at 9-11), Li has  
18 participated and made filings in the bankruptcy proceedings that have not noted any objections to  
19 personal jurisdiction. (*See, e.g.*, Case no. 2:17-bk-21386-SK, Dkt. No. 405.) His lawyers have  
20 likewise made general appearances without objecting to personal jurisdiction. (Case No. 2:17-bk-  
21 21386-SK, Dkt. No. 434.) Those general appearances represent that “Mr. Li Qi” has retained those  
22 attorneys “to appear and participate in the above-entitled action on [his] behalf[.]” (*Id.*) Li has thus  
23 waived any objection to personal jurisdiction. *See In re Vrabel*, 2005 WL 6960238, at \*3 (holding  
24 that a party “submitted to the bankruptcy court’s exercise of jurisdiction over her by virtue of her  
25 extensive, voluntary participation in debtor’s bankruptcy case” and she “waiv[ed] any defect in the  
26 court’s exercise of such jurisdiction” by filing a response that was “akin to a responsive pleading”);

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28  

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<sup>4</sup> Any documents are likely available electronically and thus are equally accessible and convenient in any jurisdiction.

1 *see also Jes Solar*, 725 F. App'x at 471–72 (holding that defendant waived personal jurisdiction  
2 where they filed motions without any indication that they were making a special appearance).

3 **IV. This Court has vicarious personal jurisdiction over Li.**

4 It is undisputed that Glove Assets, Universal Leader, and Truly Great are subject to personal  
5 jurisdiction in this Court. “If a corporation is an alter ego of an individual or another corporation,  
6 then the district court may disregard the corporate form and exercise personal jurisdiction over the  
7 other individual or entity.” *ADO Fin., AG v. McDonnell Douglas Corp.*, 931 F. Supp. 711, 715  
8 (C.D. Cal. 1996) (collecting binding Ninth Circuit cases). As shown below, Glove Assets,  
9 Universal Leader, and Truly Great are Li’s alter egos. This Court thus has personal jurisdiction  
10 over Li.

11 **A. California law applies under binding Ninth Circuit precedent.**

12 Li contends that the Restatement choice-of-law analysis governs and requires the  
13 application of BVI law to determine whether Li is subject to alter ego jurisdiction. Li is wrong.

14 The Ninth Circuit does not apply the Restatement choice-of-law analysis even in federal  
15 question cases to evaluate alter ego in these circumstances. Instead, under binding Ninth Circuit  
16 law, this Court must “apply the law *of the forum state* in determining whether a corporation is an  
17 alter ego of an individual.” *S.E.C. v. Hickey*, 322 F.3d 1123, 1128 (9th Cir. 2013); *see also Towe*  
18 *Antique Ford Found. v. I.R.S.*, 999 F.2d 1387, 1391 (9th Cir. 1993) (same); *Johnson v. Serenity*  
19 *Transp., Inc.*, 141 F. Supp. 3d 974, 984 n.1 (N.D. Cal. 2015) (holding that even in a case of “original  
20 federal jurisdiction,” a “federal court looks to the law of *the forum state*” to determine “whether  
21 alter ego liability applies”). The same is true in bankruptcy courts: “The law of the *forum state* is  
22 used to determine whether an entity is an alter ego of an individual.” *In re Turner*, 2007 WL  
23 7238117, at \*5 (B.A.P. 9th Cir. Sept. 18, 2007). That is because where, as in bankruptcy court,  
24 “there is no applicable federal statute governing personal jurisdiction, the district court applies the  
25 law *of the state in which the district court sits.*” *Schwarzenegger v. Fred Martin Motor Co.*, 374  
26 F.3d 797, 800 (9th Cir. 2004).

27 Although the Trustee prevails on both liability and personal jurisdiction grounds, this Court  
28 should disregard almost every case Li cites because they do not evaluate alter ego jurisdiction.

1 Instead, they evaluate alter ego liability. But jurisdictional alter ego is different from liability alter  
2 ego. *See Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 243 F. Supp. 2d 1073, 1100 (C.D.  
3 Cal. 2003) (holding that “whether or not [the case’s] facts establish[ed] corporate alter ego for  
4 purposes of liability, they satisf[ied] the due process jurisdictional inquiry”); *see also Indep. Elec.*  
5 *Supply Inc. v. Solar Installs, Inc.*, 2018 WL 6092800, at \*4 (N.D. Cal. Nov. 21, 2018); *ADO*, 931  
6 F. Supp. at 717; 7 Callmann on Unfair Comp., Tr. & Mono. § 24:5 (4th Ed.) (“The question of  
7 whether to pierce the corporate veil for jurisdictional purposes is determined by the jurisdictional  
8 law of the forum state, rather than by the corporation law of the place of incorporation.”).

9 The Federal Rules of Civil Procedure and important policy considerations compel the use  
10 of forum alter ego law for jurisdictional issues. Federal Rule of Civil Procedure 4(k)(1), for  
11 instance, “provides that a federal court’s jurisdiction is determined in reference to the jurisdiction  
12 of the forum state’s courts, which in turn is defined in the state’s long-arm statute.” *US Fire Pump*  
13 *Co., LLC v. Alert Disaster Control (Middle E.) Ltd.*, 2021 WL 296073, at \*10–11 (M.D. La. Jan.  
14 28, 2021); *see also Platypus Wear, Inc. v. Bad Boy Eur. Ltd.*, 2018 WL 3706876, at \*8 n.1 (S.D.  
15 Cal. Aug. 2, 2018) (“California law analyzing personal jurisdiction is appropriate because Rule  
16 4(k)(1)(a) allows personal jurisdiction over defendants ‘subject to the jurisdiction of a court of  
17 general jurisdiction in the state where the district court is located.’”). “The scope of both federal  
18 and state court jurisdiction is, in other words, a creature of the forum state’s law.” *US Fire Pump*,  
19 2021 WL 296073, at \*11; *see also In re Nat’l Audit Def. Network*, 332 B.R. 896, 903 (Bankr. D.  
20 Nev. 2005). And “it is the forum state, rather than the state of incorporation, that has the ‘valid  
21 interest in the jurisdictional reach of the forum state’s court (and, derivatively through Rule 4 . . . ,  
22 the federal courts in that state).” *US Fire Pump*, 2021 WL 296073, at \*11 (quoting *Int’l Bancorp,*  
23 *L.L.C. v. Societe Des Baines De Mer Et Du Cercle Des Etrangers A Monaco*, 192 F. Supp. 2d 467,  
24 477 (E.D. Va. 2002), *aff’d on other grounds*, 329 F.3d 359 (4th Cir. 2003)).

25 This concept underlies a century of Supreme Court law. *See, e.g., Cannon Mfg. Co. v.*  
26 *Cudahy Packing Co.*, 267 U.S. 333, 337–38 (1925) (holding that the substantive law of the state of  
27 incorporation does not affect the issue of personal jurisdiction in the forum state); *First Nat. City*  
28 *Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 621–22 (1983) (“[t]o give

1 conclusive effect to the law of the chartering state in determining whether the separate juridical  
2 status of its instrumentality should be respected would permit the state to violate with impunity the  
3 rights of third parties . . . while effectively insulating itself from liability in foreign courts”).

4 California law—as a matter of binding Ninth Circuit law and sound policy—therefore must  
5 apply to the jurisdictional alter ego issues relevant here. Otherwise, the “application of foreign law  
6 to the jurisdictional issue could cause the substantive law of another nation to abrogate the  
7 jurisdictional reach of” California. *US Fire Pump*, 2021 WL 296073, at \*11. “Because the exercise  
8 of personal jurisdiction must comport with the Due Process Clause, this result could also allow  
9 foreign law to negate the breadth and scope of the Due Process Clause.” *Id.*<sup>5</sup>

10 Li incorrectly speculates that the Ninth Circuit only applied forum law in *Hickey* and *Towe*  
11 because the relevant corporations were incorporated in the forum. (Dkt. No. 239 at 31 n.6.) But  
12 those cases say no such thing. And Li provides no support for the proposition that this Court may  
13 disregard binding law based on his hunch that the Ninth Circuit did not mean what it said.

14 In any event, the Ninth Circuit has repeatedly applied California law to alter ego regardless  
15 of the state of incorporation. For example, the Ninth Circuit considered alter ego allegations against  
16 a UK parent corporation and a UK subsidiary corporation in *Harris Rutsky*. It held that “[w]here,  
17 as here, there is no applicable federal statute governing personal jurisdiction, ***the law of the state***  
18 ***in which the district court sits applies.***” 328 F.3d at 1129. This was true even though the  
19 corporations were incorporated in the UK, not California. The Ninth Circuit likewise applied  
20 California law to determine alter ego jurisdiction over “individual residents of New York” through  
21 their relationship with “New York corporations[.]” *Flynt Distrib. Co. v. Harvey*, 734 F.2d 1389,  
22 1392-93 (9th Cir. 1984). The Ninth Circuit again applied California law on alter ego for foreign  
23 corporations in *Iconlab, Inc. v. Bausch Health Cos.*, 828 F. App’x 363, 364 (9th Cir. 2020), which  
24 applied California alter ego law to a company incorporated in New York.

25 California district courts follow binding Ninth Circuit law and so regularly do the same.  
26

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27 <sup>5</sup> If the Court were to find that *substantive* federal common law on alter ego applies—a position that no party has  
28 advocated for—the result would not change. *See, e.g., Ahcom, Ltd. v. Smeding*, 2008 WL 1701731, at \*3 (N.D. Cal.  
Apr. 10, 2008) (denying summary judgment on alter ego “because there is no meaningful difference between the two  
and federal courts regularly look to state law for guidance” when applying the substantive alter ego law).

1 See, e.g., *Hyperion Fund, L.P. v. Samarium Tech. Grp., Ltd.*, 2009 WL 10699441, at \*1, 6 (C.D.  
2 Cal. Jan. 29, 2009) (evaluating and finding alter ego liability under California law even though the  
3 relevant company, as here, was incorporated in the BVI); *In re Packaged Seafood Prod. Antitrust*  
4 *Litig.*, 338 F. Supp. 3d 1118, 1143 n.23 (S.D. Cal. 2018) (stating that “[f]ederal courts apply the  
5 law of the forum state to determine whether a corporation is an alter ego of an individual” and  
6 applying California law even though the relevant company was not incorporated in California);  
7 *Barantsevich v. VTB Bank*, 954 F. Supp. 2d 972, 979, 988 (C.D. Cal. 2013) (applying California  
8 law to evaluate alter ego even though the relevant company was Russian); *Fru-Con Const. Corp.*  
9 *v. Sacramento Mun. Util. Dist.*, 2007 WL 2384841, at \*2 (E.D. Cal. Aug. 17, 2007) (applying  
10 California alter ego law even though the relevant company was incorporated in Missouri). Even  
11 Li’s own citations support the Trustee. For example, in *Am. Tel. & Tel. Co. v. Compagnie Bruxelles*  
12 *Lambert*, 94 F.3d 586, 591 (9th Cir. 1996), the Ninth Circuit analyzed alter ego under California  
13 law even though the relevant company was incorporated in Pennsylvania and its parent company  
14 in Belgium. See Appellee’s Brief in *Compagnie Bruxelles Lambert*, 1994 WL 16014964, at 3 (Dec.  
15 29, 1994).

16 Li is also wrong that California bankruptcy courts do not apply California law to alter ego.  
17 Li concedes that the “Ninth Circuit has applied forum alter ego law outside the bankruptcy context”  
18 to determine liability. (Dkt. No. 239 at 31.) But binding Ninth Circuit law shows that forum alter  
19 ego law applies in bankruptcy cases too. In *In re Schwarzkopf*, a bankruptcy case, the Ninth Circuit  
20 held that “[i]n determining whether alter ego liability applies, we apply the law of the *forum state*.”  
21 626 F.3d 1032, 1037 (9th Cir. 2010). In *In re Turner*, 2007 WL 7238117, at \*5 (B.A.P. 9th Cir.  
22 Sept. 18, 2007), the B.A.P. also held that the “law of the *forum state* is used to determine whether  
23 an entity is an alter ego of an individual.” So too in *In re Brace*, 2017 WL 1025215, at \*7 (B.A.P.  
24 9th Cir. Mar. 15, 2017), which held that in “determining whether the alter ego doctrine applies to  
25 eliminate any distinction between an entity and an individual controlling or dominating that entity,  
26 we apply the law of the forum state.” In *In re Moshen*, 2010 WL 6259979, at \*1 n.4, \*1 n.7 (B.A.P.  
27 9th Cir. Dec. 21, 2010), the B.A.P. again cited California alter ego law when discussing alter ego  
28 allegations against an Egyptian corporation and a Delaware LLC. As a result, binding Ninth Circuit

1 law requires this Court to apply California law on alter ego in bankruptcy cases, just as in other  
2 cases.

3 This Court should apply California law even if the California choice-of-law rules apply  
4 because California has a greater interest than the BVI in this case. Under California’s governmental  
5 interest test, “California law will be applied unless the foreign law conflicts with California law  
6 and California and the foreign jurisdiction have significant interests in having their law applied.”  
7 *Application Grp., Inc. v. Hunter Grp., Inc.*, 61 Cal. App. 4th 881, 896 (Cal. Ct. App. 1998) (quoting  
8 *S.A. Empresa v. Boeing Co.*, 641 F.2d 746, 749 (9th Cir. 1981)). “Where significant interests  
9 conflict, the court must assess the ‘comparative impairment’ of each state’s policies. *Id.* (quoting  
10 *S.A. Empresa*, 641 F.2d at 749). “The law applied will be that of the state whose policies would  
11 suffer the most were a different state’s law applied.” *Id.* (quoting *S.A. Empresa*, 641 F.2d at 749).

12 Li makes no argument why the BVI has *any* interest in whether a California court has  
13 personal jurisdiction over a *Hong Kong/Shanghai* resident. On the other hand, “California’s  
14 governmental interest in preventing abuse of the corporate form to accomplish fraud exceeds any  
15 interest to the contrary in this case.” *Softbank Content Servs. Inc. v. MPO Canada Inc.*, 225 F.  
16 App’x 687, 689 (9th Cir. 2007). California also “has a strong interest . . . in providing an effective  
17 means of redress for its residents[.]” *Kayne v. Ho*, 2013 WL 12120081, at \*5 (C.D. Cal. Nov. 4,  
18 2013) (cleaned up). And California likewise “has a strong interest in protecting its businesses[.]”  
19 *Vizio, Inc. v. LeEco V. LTD.*, 2018 WL 5303078, at \*23 (C.D. Cal. July 27, 2018) (granting alter  
20 ego jurisdiction over a foreign company under California law); *In re Bernard L. Madoff Inv. Sec.*  
21 *LLC*, 583 B.R. 829, 845 (Bankr. S.D.N.Y. 2018) (applying New York law rather than BVI law to  
22 evaluate alter ego for a BVI company because New York had stronger connections to the claims).  
23 California courts thus apply California law even when evaluating alter ego allegations for foreign  
24 corporations. *See, e.g., Sonora Diamond Corp. v. Superior Ct.*, 83 Cal. App. 4th 523, 536 (2000)  
25 (evaluating alter ego allegations against a Nevada corporation under California law); *Katzir’s Floor*  
26 *& Home Design, Inc. v. M-MLS.com*, 394 F.3d 1143, 1148 (9th Cir. 2004) (evaluating alter ego  
27 allegations against a Canadian corporation under California law); *Bleu Prod., Inc. v. Bureau Veritas*  
28 *Consumer Prod. Servs. (Hong Kong) Ltd.*, 2009 WL 649061, at \*5 (C.D. Cal. Mar. 9, 2009)

1 (evaluating alter ego on foreign corporations under California law).

2 Li again confuses alter ego liability with alter ego jurisdiction by citing *Leitner v. Sadhana*  
3 *Temple of New York, Inc.*, 2014 WL 12588643, at \*14 (C.D. Cal. Oct. 17, 2014). That case is about  
4 liability, not jurisdiction. On top of that, its facts and reasoning are inapplicable because it was a  
5 reverse veil-piercing case: the plaintiffs were trying to find the New York *corporation* liable  
6 through a defendant *shareholder*. *Id.* at \*16. It is simply irrelevant.

7 **B. Under either California or BVI law, this Court has personal jurisdiction over Li.**

8 Under California law, which this Court must apply under binding Ninth Circuit precedent,  
9 this Court has personal jurisdiction over Li through his entities on two independent bases: (i) as an  
10 alter ego of his entities and (ii) as the guiding force behind those entities. Even if BVI law did apply,  
11 and it does not, this Court likewise has personal jurisdiction over Li under BVI law.

12 **i. This Court has jurisdiction over Li under California vicarious jurisdiction law.**

13 Under California alter ego law, “the court must determine (1) that there is such unity of  
14 interest and ownership that the separate personalities of the corporation and the individuals no  
15 longer exist and (2) that failure to disregard the corporation would result in fraud or injustice.”  
16 *Platypus Wear*, 2018 WL 3706876, at \*8. “Whether alter-ego applies is a question of fact which  
17 necessarily varies according to the circumstance of each case.” *First United Methodist Church of*  
18 *San Jose v. Atl. Mut. Ins. Co.*, 1995 WL 150429, at \*11 (N.D. Cal. Mar. 29, 1995) (quoting *Inst. of*  
19 *Veterinary Pathology, Inc. v. California Health Labs., Inc.*, 116 Cal.App.3d 111, 119 (1981)).  
20 “Because the facts relating to personal jurisdiction are intertwined with the merits of its claims, a  
21 plaintiff need only make a prima facie showing of alter ego liability.” *Platypus Wear*, 2018 WL  
22 3706876, at \*8 (citing *Data Disc*, 557 F.2d at 1285). “To establish a prima facie case, [a] plaintiff  
23 need only demonstrate facts that if true would support jurisdiction over the defendant.” *Concat LP*  
24 *v. Unilever, PLC*, 350 F. Supp. 2d 796, 812 (N.D. Cal. 2004).

25 Courts consider these factors when evaluating the first requirement, unity of interest:  
26 “(1) inadequate capitalization, (2) commingling of funds and other assets, (3) disregard of corporate  
27 formalities and failure to maintain an arm’s length relationship, (4) holding out by one entity that  
28 is liable to the debts of the other, (5) identical equitable ownership, (6) use of the same offices and

1 employees, (7) lack of segregation of corporate records, (8) manipulating assets between entities  
2 so as to concentrate the assets in one and the liabilities in another, and (9) identical directors and  
3 officers.” *City & Cty. of San Francisco v. Purdue Pharma L.P.*, 491 F. Supp. 3d 610, 635 (N.D.  
4 Cal. 2020). A plaintiff need not show that all the factors are present. In fact, it is enough to show a  
5 bare majority of the factors. *Indep. Elec. Supply*, 2018 WL 6092800, at \*9.

6 These factors support the Trustee:

- 7 ■ (1) Inadequate Capitalization and (2) Commingling:
- 8 ○ All the Li entities commingled funds because they used the same, single Universal Leader  
9 bank account. For example, contemporaneous email communications state that “*glove*  
10 *assets does not have any bank account.*” (Roselius Decl. Ex. 7.)
- 11 ○ Li’s declaration likewise only identifies one bank account for Universal Leader but does  
12 not identify any bank account for any other entity. (Li Decl., Dkt. No. 239-1 ¶ 12.)
- 13 ○ The Minsheng Refinancing is further evidence of commingling because it shifted payment  
14 from Glove Assets to Universal Leader and part of liability from Universal Leader to Glove  
15 Assets. (¶ 289.)
- 16 ○ There is no evidence that Glove Assets or Truly Great were capitalized at all.
- 17 ■ (3) Disregard of Corporate Formalities/Arm’s Length and (4) Entity Liability: Li routinely  
18 ignored the separate existence of the three entities and himself, did not engage in arm’s length  
19 negotiations, and the entities held each other to each’s liabilities.
- 20 ○ Although “Universal Leader made the transfer of funds for Li’s investments in Zetta PTE,  
21 Truly Great received the ownership interest in Zetta PTE’s shares.” (¶ 61; *see also* ¶¶ 14,  
22 17, 55, 57, 59, 131, 176.)
- 23 ○ Even more, “[d]uring negotiations, Li would refer to the shares being given in exchange for  
24 [Truly Great’s] investment as being to him, not Truly Great.” (¶ 320.) For example, Li wrote  
25 the following in an email: “Until now, *I* invest the company about 119m USD, so when  
26 Geoff [Cassidy] come to ask another 15m USD to be bridge money, *I* don’t agree, *I* have  
27 put one huge egg to one basket, big risk.... But I said *I* need another 10% shares, this is not  
28 to buy the shares, this is for the risk, otherwise it is too unfair[.]” (*Id.*) In fact, Li referred to

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this as “*personal money*.” (¶¶ 134-35.) And Li said that Cassidy should “repay *me* [i.e., Li] first not mengshen and avic[.]” (¶ 236; *see also* ¶ 237.)

- o Li “had Glove Assets sign the relevant agreements in connection with the purchase of Plane 6...but all payments flowed through and to Universal Leader.” (¶ 61.)
- o Cassidy and Universal Leader also agreed to a priority split of Zetta PTE’s profits (¶ 247) that Li referred to as a profit split to be given to “*me*” (i.e., Li): “if in the future, zettajet has profit to split, I think *I*...will be have compensate, it should be written down, for example, if profit is X, (X\*10%) will be given you & *me*” (¶ 237). Cassidy, in turn, “thanked ‘uncle’ Li for his earlier support, and told him that ‘We are partners and we are the priority over the banks.’” (¶¶ 136, 231.) Li also “demanded that the Debtors pay \$55 million out of closing proceeds to Universal Leader for Plane 7.” (¶ 235.)
- o Universal Leader and Truly Great have previously represented that “loans” nominally from those entities were actually through Li. (Roselius Decl. Ex. 4 ¶¶ 23-26, 38.)
- o In email correspondence after compliance questions from HSBC about certain Zetta payments that Cassidy represented were “loan repayment[s] to Universal Leader,” Li wrote the following: ““it is only a *personal loan* zettajet repay to *me* for 1.5 years,what are you f\*\*king need ?f\*\*k you.f\*\*k your whole family .f\*\*k .rubbish HSBC sg .trash.” (Roselius Decl. Ex. 5.)
- o The Amended Complaint likewise alleges that “Li treated the assets of the Li Entities has his own.” (¶ 56.) “For example, Li referred to all of his various investments in the Debtors as if he had made those investments personally rather than through the various entities.” (*Id.*) Li has not challenged this allegation.
- o During the relevant transactions, the entities were referred to interchangeably. (Roselius Decl. Exs. 2 and 3 (email correspondence referring to “UL/Glove”).) Further, Li’s counsel stated that “BETWEEN LI QI AND GEOFF/ZETTA, LI QI WANTS TO RECEIVE \$55M. THAT IS THE WAY GEOFF AND LI QI HAS AGREED BETWEEN THEMSELVES . . . .” and further refers to “The financier WHICH IS LI QI - \$55M.” (*Id.*)

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- There is no indication that separate meeting minutes were kept for the different entities, the entities are all BVI corporations, the entities were incorporated within just over one year of each other (Roselius Decl. Exs. 8, 9, and 10) and they all use the same law firm. *See L.A. Terminals, Inc. v. City of Los Angeles*, 2020 WL 8028241, at \*7 (C.D. Cal. Dec. 21, 2020).
- **(5) Equitable Ownership:** The Complaint alleges that “Glove Assets is owned and controlled by Li” (¶ 39), that “Universal Leader is owned and controlled by Li” (¶ 41), and that while “Truly Great is nominally owned by Li’s mother” it is “in fact controlled and dominated by Li, who is the sole director” (¶ 37).
- **(6) Use of Same Offices/Employees:**
  - Glove Assets and Universal Leader used the same office. (Am. Compl. Exs. A and C (listing the same notice addresses for both).)
  - What is more, they also used *Li’s home address*. (*See* Ex. 12 to Dkt. No. 240 at page 476 of 1050).)
  - The entities also have the same employees: none except for Li. (¶ 60.)
- **(7) Lack of Segregation of Corporate Records:** The Amended Complaint alleges that “the Li Entities failed to maintain adequate corporate records separately for each entity.” (¶ 57.) Li did not challenge this allegation. Nothing suggests that Li kept corporate records at all, let alone properly segregated them.
- **(8) Manipulating Assets:** Among other things also described above, Li “had Glove Assets sign the relevant agreements in connection with the purchase of Plane 6...but all payments flowed through and to Universal Leader.” (¶ 61.)
- **(9) Identical Directors/Officers:**
  - Li was a director, officer, and employee for all the entities, and there is overlapping ownership. (¶¶ 36, 37, 39, 40, 41, 58, 222, 224, 253, 318.)
  - In fact, everything suggests that Li was the only director, officer, or employee. Li was the only signatory on all the relevant documents. Li has previously identified himself as “the beneficial owner of Truly Great Global Limited[.]” (Roselius Decl. Ex. 11.) Li has also

1 previously identified himself as Truly Great’s “*Sole* Director[.]” (Roselius Decl. Ex. 6  
2 (Exhibit A to first amended state court complaint at 60).)

3 The Court must “presume[ these] allegations of jurisdictional facts are true and decide[ ] all  
4 factual disputes in [the Trustee’s] favor.” *ADO*, 931 F. Supp. at 718. And these allegations show  
5 that Li “controls [the entities] to such a degree as to render [them] mere instrumentalit[ies.]” *L.A.*  
6 *Terminals*, 2020 WL 8028241, at \*7.

7 Failure to find alter ego here would also result in fraud or injustice, the second alter ego  
8 requirement. Nothing in the complaint, Li’s motion, or Li’s declaration suggests that Glove Assets  
9 or Truly Great *ever* had any assets. Thus those entities have been judgment proof from the start,  
10 and likely “lack[] the tangible assets to satisfy any potential judgment[.]” *Kayne v. Ho*, 2010 WL  
11 4794824, at \*9 (C.D. Cal. Nov. 15, 2010); *see also Indep. Elec. Supply*, 2018 WL 6092800, at \*9  
12 (same); *Shinde v. Nithyananda Found.*, 2014 WL 12597121, at \*5 (C.D. Cal. Aug. 25, 2014)  
13 (same). It would likewise “allow [Li] to escape liability[.]” *L.A. Terminals*, 2020 WL 8028241, at  
14 \*7; *see also Vizio*, 2018 WL 5303078, at \*19 (same). On top of that, Li would be unjustly enriched  
15 by benefiting from a sham corporate form to retain funds he wrongfully obtained. *See Serenity*  
16 *Transp.*, 141 F. Supp. 3d at 986. Thus, “[i]f the allegations against [Li and his entities] prove to be  
17 true, then adhering to the fiction of their separate existence would permit an abuse of corporate  
18 privilege.” *Platypus Wear*, 2018 WL 3706876, at \*8.

19 California federal courts regularly find alter ego jurisdiction based on similar allegations.  
20 *See, e.g., Platypus Wear*, 2018 WL 3706876, at \*8–9 (finding alter ego jurisdiction where, among  
21 other things, the defendant was “the sole owner, stockholder, and managing director,” the “two  
22 companies shar[ed] the same office and employees, operate[d] the same type of business, and [the  
23 defendant] freely transferred assets between them,” and the companies “failed to observe corporate  
24 formalities”); *Kayne*, 2010 WL 4794824, at \*2, 9-10; *ADO*, 931 F. Supp. at 718; *Indep. Elec.*  
25 *Supply*, 2018 WL 6092800, at \*4; *Vizio*, 2018 WL 5303078, at \*19, 22; *Chunghwa Telecom*, 2016  
26 WL 5815831, at \*5; *Shinde*, 2014 WL 12597121, at \*5; *Blizzard Ent., Inc. v. Joyfun Inc Co., Ltd.*,  
27 2020 WL 1972284, at \*9 (C.D. Cal. Feb. 7, 2020); *Serenity Transp.*, 141 F. Supp. 3d at 985.

28 Moreover, the plaintiffs in many of those cases had access to discovery to aid their alter ego

1 allegations, which the Trustee does not yet have. *See, e.g., ADO*, 931 F. Supp. at 718. “Because the  
2 facts regarding other evidence supporting [the Trustee’s] alter ego theory . . . are exclusively within  
3 Defendants’ control and the parties have not yet commenced discovery, it would be inappropriate  
4 for the Court to grant Defendants’ motion without allowing [the Trustee] an opportunity to obtain  
5 discovery as to those other factors.” *Fin. Express LLC v. Nowcom Corp.*, 2008 WL 11342755, at  
6 \*3 n.3 (C.D. Cal. Mar. 6, 2008).

7 This Court also has personal jurisdiction over Li for a separate reason under California law:  
8 he was the “guiding spirit” behind the challenged corporate activity here. Under California law,  
9 “[w]hen a defendant corporate-employee was the ‘guiding spirit’ behind the wrongful conduct or  
10 the ‘central figure’ in the challenged corporate activity, courts [may] exercise personal jurisdiction  
11 even in instances when the fiduciary shield would normally limit jurisdiction.” *M.O. Dion & Sons,*  
12 *Inc. v. VP Racing Fuels, Inc.*, 2019 WL 4750116, at \*6 (C.D. Cal. Sept. 27, 2019). “This exception  
13 applies when the officer is a primary participant in the alleged wrongdoing or had control of, and  
14 direct participation in the alleged activities.” *Id.* (cleaned up). Li was a primary participant, had  
15 control of, and directly participated in the alleged activities here. Indeed, Li has previously  
16 represented that he was the “Director of [Truly Great] and Universal Leader and was authorized to  
17 act and did act on their behalf in connection with transactions” related to this case. (Roselius Decl.  
18 Ex. 4 ¶ 3.) As a result, this Court has personal jurisdiction over him. *See, e.g., M.O. Dion & Sons,*  
19 *2019 WL 4750116*, at \*6-7; *Palumbo Design, LLC v. 1169 Hillcrest, LLC*, 2019 WL 10944852, at  
20 \*11 (C.D. Cal. Dec. 3, 2019); *Indep. Elec. Supply*, 2018 WL 6092800, at \*11; *Chunghwa Telecom,*  
21 *2016 WL 5815831*, at \*6.

22 **ii. This Court would have jurisdiction over Li under BVI law for the same reasons**  
23 **that the Amended Complaint states a claim against Li for vicarious liability under**  
24 **BVI law.**

25 As described above, BVI law is not relevant to the scope of this Court’s jurisdiction. But  
26 even if BVI law somehow applied, this Court would still have jurisdiction over Li for the same  
27 reasons discussed below with respect to vicarious liability.  
28

1 **V. For similar reasons, the Amended Complaint states a claim for vicarious liability**  
2 **against Li.**

3 As with alter ego jurisdiction, in determining whether alter ego liability applies, Ninth  
4 Circuit bankruptcy courts “apply the law of the forum state.” *In re Schwarzkopf*, 626 F.3d at 1037;  
5 *see also In re Turner*, 2007 WL 7238117, at \*5 (same); *In re Brace*, 2017 WL 1025215, at \*7  
6 (same). This is true regardless of whether the relevant company was incorporated in California. For  
7 example, in *In re Moshen*, 2010 WL 6259979, at \*1, \*1 n.7, the B.A.P. cited California alter ego  
8 law when discussing alter ego allegations against an Egyptian corporation and a Delaware LLC.  
9 California law thus applies to alter ego liability in this bankruptcy case. *See, e.g., Soares v. Lorono*,  
10 2015 WL 151705, at \*3, \*19 (N.D. Cal. Jan. 12, 2015) (in review of alter ego allegations made in  
11 a bankruptcy adversary proceeding, the court found that “California law . . . *must* apply” to alter  
12 ego allegations against Cook Islands companies). Therefore, the Trustee has established alter ego  
13 liability against Li for the same reasons described in Section B(i) above.

14 Alternatively, if this Court finds that BVI law applies, it should still find Li Qi liable under  
15 three separate theories. First, under BVI law, a company’s principal can be liable under an agency  
16 theory. (Declaration of Nicholas Charles Burkill, attached as Exhibit B, ¶¶ 16-17.) As a result, a  
17 “company’s actions can result in personal liability of the individual to third parties” when the  
18 individual “was the principal of a company and . . . the company was the individual’s agent.” (*Id.*  
19 ¶ 17.) As detailed above, Li controlled the entity defendants here, a key factor identified by BVI  
20 law. (*Id.* ¶ 29-32.) Second, “where a company receives money as a nominee for an individual, BVI  
21 law does not permit the existence of that nominee arrangement to prevent the individual from being  
22 liable for the receipt of the money by his nominee.” (*Id.* ¶ 19.) Li treated the money paid to these  
23 entities as his own, as described above. Third, “an individual who is under an existing legal  
24 obligation or liability which he deliberately evades or whose enforcement he deliberately frustrates  
25 is liable even if he interposes a company.” (*Id.* ¶ 20.) If Li breached his fiduciary duties as a director  
26 of Zetta PTE, that existing fiduciary duty could constitute the “existing legal obligation or liability”  
27 sufficient to permit piercing the corporate veil. (*Id.* ¶¶ 49-50.) These three theories are similar to  
28 the concept of “alter ego” under US law in that they allow individuals themselves rather than  
companies only to be held liable. (*Id.* ¶ 22.)

1 This Court should not confuse the substance of claims with their labels, especially when the  
2 phrase “‘alter ego’ as used in England and the BVI is different from the concept used in the US.”  
3 (*Id.*) Putting aside the label “alter ego,” English and BVI law have found individuals liable in  
4 analogous situations regardless of corporate form. In *Gencor ACP Limited v Glenn Bryan Dalby*,  
5 2000 WL 1881279 (Ch), for example, the defendant “wholly owned and controlled” an “off shore  
6 company . . . in which nobody else had a beneficial interest.” (*Id.* ¶ 30.) The defendant argued that  
7 “he should not be liable to account for commission paid to [that company] because he did not  
8 receive it: it went straight to the [company].” (*Id.*) The court rejected this argument, reasoning that  
9 it “would provide the easiest possible escape from the rigours of equity’s strict principles of  
10 accountability.” (*Id.*) “All that would be required would be for the profiting director to ensure that  
11 he diverts the profit into his own creature company.” (*Id.*) Most importantly, the court found the  
12 following facts (which are materially identical to this case):

13 “The facts of this case are that [the company] was an offshore company which was wholly  
14 owned and controlled by [the defendant] and in which nobody else had any beneficial  
15 interest. Everything it did was done on his directions alone. . . . Its only function was to  
16 make and receive payments. It was in substance little other than [the defendant’s] offshore  
bank account held in a nominee name.”

17 (*Id.*)

18 This analysis was reaffirmed in *Prest v Petrodel Resources Ltd* [2013] UKSC 34. (*Id.* ¶ 31.)  
19 There, the court found that the *Gencor* court “refused to be deterred by the legal personality of the  
20 company from finding the true facts about its legal relationship” with the defendant. (*Id.*) *Prest* also  
21 recognized that “receipt by a company will count as receipt by the shareholder if the company  
22 received it as his agent or nominee[.]” (*Id.* ¶ 35.) And to decide that question was not a matter of  
23 law, but fact-intensive: “To decide that question, it was necessary to establish the facts which  
24 demonstrated the true legal relationship between [the defendant] and [the company].” (*Id.*) Those  
25 facts included the defendant’s “ownership and control” of the company, the circumstances and the  
26 source of the receipt, and the “nature of the company’s other transactions if any.” (*Id.*) Therefore,  
27 there are multiple bases under BVI law to recover transfers from Li directly under the facts alleged  
28 in the Amended Complaint. (*Id.* ¶¶ 45-51.)

1 **VI. This Court already granted the Trustee’s motion for alternative service, and Li was**  
2 **properly served in accordance with the Court’s order.**

3 For the reasons detailed in the Trustee’s briefing, (Dkt Nos. 65-67, 108-09), alternative  
4 service on Li was justified. This Court granted alternative service and ordered Li to be served. (Dkt.  
5 No. 139.) The Trustee served Li in accordance with that order. (Dkt. No. 143.)

6 **CONCLUSION**

7 For the reasons above, the Trustee requests that the Court deny Li’s motion to dismiss  
8 entirely.

9 DATED: June 3, 2021

Respectfully submitted,

**DLA PIPER LLP (US)**

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**EXHIBIT A**

**(Declaration of Joseph Roselius)**

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20 Attorneys for Jonathan D. King  
21 as Chapter 7 Trustee

22 **UNITED STATES BANKRUPTCY COURT**  
23 **CENTRAL DISTRICT OF CALIFORNIA**  
24 **LOS ANGELES DIVISION**

25 In re:  
26 ZETTA JET USA, INC., a California  
27 corporation,  
28 Debtor.

Lead Case No.: 2:17-bk-21383-SK  
Chapter 7  
Jointly Administered With:  
Case No.: 2:17-bk-21387-SK

In re:  
ZETTA JET PTE, LTD., a Singaporean  
corporation,  
Debtor.

Adv. Proc. No. 2:19-ap-01383-SK

JONATHAN D. KING, solely in his capacity  
as Chapter 7 Trustee of Zetta Jet USA, Inc. and  
Zetta Jet PTE, Ltd.  
Plaintiff,

**DECLARATION OF JOSEPH A.  
ROSELIUS IN SUPPORT OF  
THE TRUSTEE'S OPPOSITION TO  
DEFENDANT LI QI'S MOTION TO  
DISMISS COUNTS I, II, VII, VIII, AND  
IX OF AMENDED ADVERSARY  
COMPLAINT**

v.  
YUNTIAN 3 LEASING COMPANY  
DESIGNATED ACTIVITY COMPANY f/k/a  
YUNTIAN 3 LEASING COMPANY  
LIMITED, YUNTIAN 4 LEASING  
COMPANY DESIGNATED ACTIVITY

1 COMPANY f/k/a YUNTIAN 4 LEASING  
 2 COMPANY LIMITED, MINSHENG  
 3 FINANCIAL LEASING CO., LTD.,  
 4 MINSHENG BUSINESS AVIATION  
 5 LIMITED, EXPORT DEVELOPMENT  
 6 CANADA, LI QI, UNIVERSAL LEADER  
 7 INVESTMENT LIMITED, GLOVE ASSETS  
 8 INVESTMENT LIMITED, and TRULY  
 9 GREAT GLOBAL LIMITED,  
 10 WELLS FARGO BANK NORTHWEST,  
 11 N.A., in its capacity as trustee to Yuntian 3  
 12 Trust dated September 20, 2016 (formed and  
 13 administered in Utah) and its capacity as  
 14 trustee of Yuntian 4 Trust dated September 20,  
 15 2016 (formed and administered in Utah);  
 16 TVPX ARS, INC., in its capacity as trustee to  
 17 Zetta MSN 9688 Statutory Trust dated  
 18 September 20, 2016 (formed as Wyoming  
 19 statutory trust), Zetta MSN 9606 Statutory  
 20 Trust dated September 20, 2016 (formed as  
 21 Wyoming statutory trust), collectively Nominal  
 22 Defendants,  
 23  
 24 Defendants.

25 **DECLARATION OF JOSEPH A. ROSELIUS IN SUPPORT OF**  
 26 **THE TRUSTEE’S OPPOSITION TO DEFENDANT LI QI’S MOTION TO DISMISS**  
 27 **COUNTS I, II, VII, VIII, AND IX OF AMENDED ADVERSARY COMPLAINT**

28 I, Joseph A. Roselius, hereby declare as follows:

1. I am over the age of 18 and have personal knowledge of the facts set forth below and, if called upon to testify, would and could competently testify to the matters set forth in this declaration (the “Declaration”).

2. I am a partner at the law firm DLA Piper LLP (US) and counsel to the duly appointed Chapter 7 trustee, Jonathan D. King (“Trustee”), in the jointly administered bankruptcy cases (these “Chapter 7 Cases”) of Zetta Jet USA, Inc. (“Zetta USA”) and Zetta Jet PTE, Ltd. (“Zetta PTE”, and together with Zetta USA, the “Debtors”) and the Plaintiff in the above-captioned adversary proceeding. I am licensed to practice law in the State of Illinois.

3. I submit this Declaration in support of the *Trustee’s Opposition to Defendant Li Qi’s Motion to Dismiss Counts I, II, VII, VIII, and IX of Amended Adversary Complaint*.

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4. Attached hereto as **Exhibit 1** is a true and correct copy of a December 28, 2018 declaration by Li Qi (“Li”) filed in *Truly Great Global Ltd. v. Seagrim*, No. BC694919 (Superior Court of California, County of Los Angeles) on January 4, 2019.

5. Attached hereto as **Exhibit 2** is a true and correct copy of email correspondence, including an email on August 3, 2016 stating that “I have therefore amended to name the Buyer as co-insured; to allow the Buyer to make the claim as well and receive the insurance proceeds so as to be able to pay UL/Glove.” The Trustee has redacted bank account information.

6. Attached hereto as **Exhibit 3** is a true and correct copy of email correspondence, including an email on September 8, 2016 stating “[o]f this \$80m, \$55m will go to an account designated by UL/Glove.” Further, Li’s counsel states that “BETWEEN LI QI AND GEOFF/ZETTA, LI QI WANTS TO RECEIVE \$55M. THAT IS THE WAY GEOFF AND LI QI HAS AGREED BETWEEN THEMSELVES . . . .” and further refers to “The financier WHICH IS LI QI - \$55M.” The Trustee has redacted bank account information.

7. Attached hereto as **Exhibit 4** is a true and correct copy of the California state court complaint filed in *Truly Great Global Ltd. v. Seagrim*, No. BC694919 (Superior Court of California, County of Los Angeles) on February 21, 2018.

8. Attached hereto as **Exhibit 5** is a true and correct copy of email correspondence, including an April 11, 2017 email from Li.

9. Attached hereto as **Exhibit 6** is a true and correct copy of California state court first amended complaint filed in *Truly Great Global Ltd. v. Seagrim*, No. BC694919 (Superior Court of California, County of Los Angeles) filed on January 25, 2019.

10. Attached hereto as **Exhibit 7** is a true and correct copy of email correspondence, including a September 11, 2016 email stating “glove assets does not have any bank account.” The Trustee has redacted bank account information.

11. Attached as **Exhibit 8** is a true and correct copy of a BVI company search report for Glove Assets Investment Limited.

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12. Attached hereto as **Exhibit 9** is a true and correct copy of a BVI company search report for Truly Great Global Limited.

13. Attached hereto as **Exhibit 10** is a true and correct copy of a BVI company search report for Universal Leader Investment Limited.

14. Attached hereto as **Exhibit 11** is a true and correct copy of a September 18, 2017 letter from lawyers representing Li filed as Exhibit 20 to the affidavit of Geoffrey Cassidy in Singapore that states that “Mr Li is the beneficial owner of Truly Great Global Limited[.]”

I declare under penalty of perjury that the foregoing is true and correct. Executed June 3, 2021, in Evanston, Illinois.

  
\_\_\_\_\_  
JOSEPH A. ROSELIUS

**EXHIBIT 1**

**(Declaration of Li Qi Filed in *Truly Great Global Ltd. v. Seagrim*, No. BC694919 (Superior Court of California, County of Los Angeles))**

1 BRIAN K. CONDON (SBN 138776)  
JOHN C. ULIN (SBN 165524)  
2 TIFFANY M. IKEDA (SBN 280083)  
3 ARNOLD & PORTER KAYE SCHOLER LLP  
777 South Figueroa Street, Forty-Fourth Floor  
4 Los Angeles, California 90017-5844  
Telephone: 213.243.4000  
5 Facsimile: 213.243.4199  
6 Attorneys for Plaintiffs  
7 Truly Great Global Ltd. and Universal Leader  
Investment Ltd.  
8

9 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

10 **COUNTY OF LOS ANGELES**

11  
12 TRULY GREAT GLOBAL LTD. a British  
Virgin Islands Company; and UNIVERSAL  
13 LEADER INVESTMENT LTD., a British  
Virgin Islands Company,

14 Plaintiffs,

15 v.

16 JAMES NOEL HALSTEAD SEAGRIM, an  
17 individual; STEPHEN MATTHEW  
WALTER, an individual; GEOFFREY  
18 OWEN CASSIDY, an individual; and DOES  
1 through 10,

19 Defendants.  
20

Case No. BC694919  
Assigned to Judge Lia Martin

**DECLARATION OF LI QI IN SUPPORT OF  
PLAINTIFFS' OPPOSITION TO  
DEFENDANTS JAMES SEAGRIM AND S.  
MATTHEW WALTER'S MOTION FOR AN  
ORDER REQUIRING AN UNDERTAKING  
AND STAYING THE ACTION**

Date: January 17, 2019  
Time: 9:00 a.m.  
Dept: 16

[Action Filed: February 21, 2018]

1 I, Li Qi, declare as follows:

2 1. I act as Director of Plaintiffs Truly Great Global Ltd. (“Truly Great Global”) and  
3 Universal Leader Investment Ltd. (“Universal Leader”), and I make this Declaration in support of  
4 Plaintiffs’ Opposition to Defendants James Seagrim and S. Matthew Walter’s Motion for an Order  
5 Requiring an Undertaking and Staying the Action. I make this declaration based upon personal  
6 knowledge or, where stated, information and belief, as to the facts herein. I have reviewed the  
7 statements in this declaration in Mandarin Chinese. If called as a witness, I could and would  
8 competently testify thereto.

9 2. Between February 2016 and June 2017, I served as a director of Plaintiffs Truly  
10 Great Global and Universal Leader, through which my family companies made substantial  
11 investments in and became a shareholder of Zetta Jet PTE, a Singapore entity with California  
12 operations. During that time, my family companies invested \$39 million in loans and equity in  
13 Zetta Jet, in addition to an aircraft acquisition transaction on which Universal Leader received  
14 regular installment payments. The other shareholders and founders of Zetta Jet were James  
15 Seagrim, Matthew Walter and Geoffrey Cassidy.

16 3. In early June 2017, Defendants Seagrim, Walter, and Cassidy represented to me that  
17 Zetta Jet was in a cash crunch and needed funds as a bridge loan, which would be repaid from  
18 financing that the company was seeking. Defendants told me that the company was profitable and  
19 had a valuation of \$700 million or more. Defendants also suggested to me that without an  
20 additional loan the company may not repay its existing loans from my family companies.

21 4. At the same time, Defendants Seagrim, Walter, and Cassidy did not inform me of the  
22 true dire financial condition of the company, the true extent of creditor demands, their true  
23 intentions for the company or the funds, or the mismanagement or lack of controls at the company.

24 5. Defendants Seagrim and Walter also did not inform me that they would take personal  
25 cash payments from the funds loaned by Universal Leader, or that they had taken \$1 million each in  
26 payments from the company in September 2016. I believed that the loan would be used for the  
27  
28

1 benefit of Zetta Jet, and I did not know or agree that Seagrim and Walter would take the funds for  
2 their personal use.

3 6. I relied on the statements made and information provided by Defendants Seagrim,  
4 Walter, and Cassidy, and my prior experience in loaning and investing funds with the company, in  
5 agreeing to have Universal Leader loan an additional \$15 million to Zetta Jet in late June 2017.

6 7. Had I known all of the facts or Defendants' intentions for the company or the use of  
7 the funds, I would not have had Universal Leader make the \$15 million loan to Zetta Jet.

8 8. Universal Leader has been harmed by extending a \$15 million loan to what was  
9 likely to be an insolvent company with no reasonable possibility of repayment.

10 9. In approximately September 2017, I participated in a Zetta Jet Board meeting in  
11 Hong Kong. There was no discussion or vote during the meeting of an authorization to put the  
12 company into bankruptcy. I did not agree to put the company into bankruptcy and I do not believe  
13 Geoffrey Cassidy agreed. I believed from the meeting that the company wished to hire counsel to  
14 provide advice on available bankruptcy protections. The Shareholders Agreement requires  
15 unanimous consent of the shareholders for a liquidation or reorganization of the company.

16 10. I have never told Seagrim and Walter that that Truly Great Global and Universal  
17 Leader lack any viable claims against them as individual defendants. I did tell the defendants when  
18 they put the company into bankruptcy that I would come after them for the money that they took  
19 from my family companies.

20  
21 I declare under penalty of perjury under laws of the State of California that the foregoing is  
22 true, and correct. Executed this 28 day of December 2018, at Vancouver, Canada.

23 

24 \_\_\_\_\_  
25 Li Qi

**PROOF OF SERVICE**

I am over eighteen years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 777 South Figueroa Street, Forty-Fourth Floor, Los Angeles, California 90017-5844.

On January 4, 2019, I served the following document(s): **DECLARATION OF LI QI IN SUPPORT OF PLAINTIFFS’ OPPOSITION TO DEFENDANTS JAMES SEAGRIM AND S. MATTHEW WALTER’S MOTION FOR AN ORDER REQUIRING AN UNDERTAKING AND STAYING THE ACTION** I served the document(s) on the following person(s):

Will S. Skinner	Mackenzie W. Smith
Erik D. Slechta	Laurie Alberts Salita
Sandra L. Weiherer	Skinner Law Group
SKINNER LAW GROUP	101 Lindenwood Drive, Suite 225
21600 Oxnard Street, Suite 1760	Malvern, PA 19355
Woodland Hills, CA 91367	Tel: (484) 875-3160
Tel: (818) 710-7700 /Fax: (818) 710-7701	<a href="mailto:smith@skinnerlawgroup.com">smith@skinnerlawgroup.com</a>
<a href="mailto:skinner@skinnerlawgroup.com">skinner@skinnerlawgroup.com</a>	<a href="mailto:salita@skinnerlawgroup.com">salita@skinnerlawgroup.com</a>
<a href="mailto:slechta@skinnerlawgroup.com">slechta@skinnerlawgroup.com</a>	
<a href="mailto:weiherer@skinnerlawgroup.com">weiherer@skinnerlawgroup.com</a>	
Counsel for Defendants, James Noel Halstead	Counsel for Defendants, James Noel
Seagrim and Stephen Matthew Walter	Halstead Seagrim and Stephen Matthew
	Walter

The documents were served by the following means:

**By U.S. mail.** I enclosed the document(s) in a sealed envelope or package addressed to the person(s) at the address(es) in Item 3 and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with this business’ practice for collecting and processing correspondence for mailing. On the same day the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid. I am employed in the county where the mailing occurred. The envelope or package was placed in the mail at Los Angeles, California.

**By Overnight Delivery/Express Mail.** I enclosed the documents and an unsigned copy of this declaration in a sealed envelope or package designated by United Postal Service addressed to the persons at the address(es) listed in Item 3, with delivery fees prepaid or provided for. I placed the sealed envelope or package for collection and delivery, following our ordinary business practices. I am readily familiar with this business’ practice for collecting and processing correspondence for express delivery. On the same day the correspondence is collected for delivery, it is delivered to a courier or driver authorized by United Postal Service to receive documents.

**By Electronic Service (E-mail).** Based on a court order or an agreement of the parties to accept service by electronic transmission, I transmitted the document(s) and an unsigned copy of this declaration to the person(s) at the electronic notification address(es) listed in Item 3 on January 4, 2019, before 11:59 p.m. PST. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

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**STATE:** I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: January 4, 2019

Signature: *Vicky Apodaca*  
Vicky Apodaca

**EXHIBIT 2**

**(Aug. 3, 2016 Email Correspondence)**

Case 2:19-ap-01383-SK Doc 257-3 Filed 06/03/21 Entered 06/03/21 11:47:15 Desc  
Salem Ibrahim <saalem@salemlaw.org.sg>  
Sent: Thursday, August 4, 2016 2:10 AM Exhibit 210 Re: Selius Declaration Page 2 of 12  
To: 'David Lin' <dlin@cplin.com.hk>; 'Vicky' <vicky@cplin.com.hk>; 'Zetta Jet GC' <gcassidy@zettajet.com>  
Cc: 'Liqi' <liqiqi@yahoo.com>; 'Iman Ibrahim' <iman@salemlaw.org.sg>; 'Shing Yng' <sy@salemlaw.org.sg>; janet.chung@cplin.com.hk  
Subject: RE: SPA for 9606 & 9688  
Attach: SPA 9606 Ver 7 - amended by Salem on 3Aug16.pdf; SPA 9606 Ver 7 CLEAN - amended by Salem on 3Aug16.docx

Hi David,

As requested, tracked in pdf and clean in word

9688 follows.

Kind Regards,  
Salem [London]

---

**From:** David Lin [mailto:dlin@cplin.com.hk]  
**Sent:** Thursday, 4 August, 2016 8:34 AM  
**To:** salem@salemlaw.org.sg; 'Vicky'; 'Zetta Jet GC'  
**Cc:** 'Liqi'; 'Iman Ibrahim'; 'Shing Yng'; janet.chung@cplin.com.hk  
**Subject:** RE: SPA for 9606 & 9688

Thanks but kindly send us the full document with additions as requested in our email dated 2 August.

David Lin 練紹良  
C P Lin & Co 練松柏律師行  
19B United Centre  
95 Queensway  
Admiralty  
Hong Kong  
T +852 2581 9959  
F +852 2581 2797

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**From:** Salem Ibrahim [mailto:saalem@salemlaw.org.sg]  
**Sent:** Thursday, August 04, 2016 3:32 PM  
**To:** 'David Lin' <dlin@cplin.com.hk>; 'Vicky' <vicky@cplin.com.hk>; 'Zetta Jet GC' <gcassidy@zettajet.com>  
**Cc:** 'Liqi' <liqiqi@yahoo.com>; 'Iman Ibrahim' <iman@salemlaw.org.sg>; 'Shing Yng' <sy@salemlaw.org.sg>; janet.chung@cplin.com.hk  
**Subject:** RE: SPA for 9606 & 9688

Hi David,

The rest of the amendments were fine. Hence I sent the one relevant page.

Kind Regards,  
Salem

Case 2:19-ah-01383-SK Doc 257-3 Filed 06/03/21 Entered 06/03/21 11:47:15 Desc  
Exhibit 2 to Roselius Declaration Page 3 of 12  
**From:** David Lin [<mailto:dlin@cpln.com.hk>]  
**Sent:** Thursday, 4 August, 2016 2:57 AM  
**To:** [salem@salemllaw.org.sg](mailto:salem@salemllaw.org.sg); 'Vicky'; Zetta Jet GC  
**Cc:** 'Liqi'; 'Iman Ibrahim'; 'Shing Yng'; [janet.chung@cpln.com.hk](mailto:janet.chung@cpln.com.hk)  
**Subject:** RE: SPA for 9606 & 9688

Dear all,

At this stage where signing is hopefully imminent, Instead of dealing on a clause by clause basis, which is inefficient for both clients and lawyers, could I please request for the rest of the agreement to be completed per my email dated 2 August, so I could obtain client's instructions in one go, many thanks. it would be best if I refrain from comments until then.

David Lin 練紹良  
C P Lin & Co 練松柏律師行  
19B United Centre  
95 Queensway  
Admiralty  
Hong Kong  
T +852 2581 9959  
F +852 2581 2797

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**From:** Salem Ibrahim [<mailto:salem@salemllaw.org.sg>]  
**Sent:** Wednesday, August 03, 2016 7:06 PM  
**To:** 'Vicky' <[vicky@cpln.com.hk](mailto:vicky@cpln.com.hk)>; 'Zetta Jet GC' <[gcassidy@zettajet.com](mailto:gcassidy@zettajet.com)>  
**Cc:** 'Liqi' <[liqiqi@yahoo.com](mailto:liqiqi@yahoo.com)>; 'Iman Ibrahim' <[iman@salemllaw.org.sg](mailto:iman@salemllaw.org.sg)>; 'Shing Yng' <[sy@salemllaw.org.sg](mailto:sy@salemllaw.org.sg)>; [dlin@cpln.com.hk](mailto:dlin@cpln.com.hk); [janet.chung@cpln.com.hk](mailto:janet.chung@cpln.com.hk)  
**Subject:** RE: SPA for 9606 & 9688  
**Importance:** High

Dear David,

Pending instructions from Geoff, here are the proposed amendments to the warranty clause.

Under your amendments, the Lease payments continue if the agreement is terminated per clause 3.2. but you have limited the exception to clause 3.2 (1) to the case where the Seller makes the insurance claim. That means that if the Seller does not make the insurance claim (which decision you have made to be that of the Seller alone) despite there be some material damage, the sale has to go through at \$55m without Zetta having the benefit of the insurance proceeds and continuing to receive payment under the Lease.

I have therefore amended to name the Buyer as co-insured; to allow the Buyer to make the claim as well and receive the insurance proceeds so as to be able to pay UL/Glove. This way, UL/Glove does not get the double benefit of receiving \$55m under the SPA plus full payments under the Lease.

As I indicated, I have no input yet from Geoff as he is flying, but we can progress this to the close.

Kind regards,  
Salem

**Confidentiality:** This message is intended for the recipient named above. It may contain confidential or privileged information. If you are not the intended recipient, please notify the sender immediately by replying to this message and then delete it from your system. Do not read, copy, use or circulate this communication.

**Disclaimer:** Internet communications are not secure. While every reasonable effort has been made to ensure that this communication has not been tampered with, Salem Ibrahim LLC and/or the sender cannot be responsible for alterations made to the contents without its express consent. If you wish to receive a hard copy of this message for comparison or should you require any other form of confirmation of the contents of this message, please contact the sender. Opinions, conclusions and other information in this message that do not relate to official business of the company shall be understood as neither given nor endorsed by Salem Ibrahim LLC.

---

**From:** Salem Ibrahim [<mailto:salem@salemlaw.org.sg>]  
**Sent:** Wednesday, 3 August, 2016 11:16 AM  
**To:** 'Vicky'; 'Zetta Jet GC'  
**Cc:** 'Liqi'; 'Iman Ibrahim'; 'Shing Yng'; 'dlin@cpllin.com.hk'; 'janet.chung@cpllin.com.hk'  
**Subject:** RE: SPA for 9606 & 9688

Dear Vicky,

I have provided my input and wait for Geoff to get off the plane to respond. We can move fast from here.

Kind Regards,  
Salem {London}

---

**From:** Vicky [<mailto:vicky@cpllin.com.hk>]  
**Sent:** Wednesday, 3 August, 2016 8:57 AM  
**To:** 'Zetta Jet GC'; [salem@salemlaw.org.sg](mailto:salem@salemlaw.org.sg)  
**Cc:** 'Liqi'; 'Iman Ibrahim'; 'Shing Yng'; [dlin@cpllin.com.hk](mailto:dlin@cpllin.com.hk); [janet.chung@cpllin.com.hk](mailto:janet.chung@cpllin.com.hk)  
**Subject:** RE: SPA for 9606 & 9688

Dear both,

Please confirm receipt of the email below. We await your prompt reply.

Regards,  
David Lin  
(issued by Vicky, assistant to David Lin)  
C. P. Lin & Co.  
Solicitors & Notaries  
Unit B, 19th Floor, United Centre,  
95 Queensway, Admiralty,  
Hong Kong.  
T +852 25819959  
F +852 25812797

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Case 2:16-qp-01383-SK Doc 257-3 Filed 06/03/21 Entered 06/03/21 11:47:15 Desc  
Sent: Tuesday, August 02, 2016 3:46 PM Exhibit 2 to Roselius Declaration Page 5 of 12  
From: Vicky [mailto:vicky@cpln.com.hk]  
To: 'Zetta Jet GC'; 'salem@salemlaw.org.sg'  
Cc: 'Liqi'; 'Iman Ibrahim'; 'Shing Yng'; 'dlin@cpln.com.hk'; 'janet.chung@cpln.com.hk'  
Subject: RE: SPA for 9606 & 9688

Dear Salem & Geoff,

Further to our correspondence, we have reported to client and he is now amenable to the condition precedent as reinstated. We have added a sub-clause to reiterate the survival of the original Lease. Please see attached.

As mentioned the timing of Delivery is still unspecified. As this is a function of the financing process, please let us have your proposal draft in relation to both aircrafts for our client's approval.

Upon the completion of schedules etc. our client is keen to move forward. We look forward to your response.

Regards,  
David Lin  
(issued by Vicky, assistant to David Lin)]  
C. P. Lin & Co.  
Solicitors & Notaries  
Unit B, 19th Floor, United Centre,  
95 Queensway, Admiralty,  
Hong Kong.  
T +852 25819959  
F +852 25812797

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**From:** Liqi [mailto:liqiqi@yahoo.com]  
**Sent:** Saturday, July 30, 2016 1:03 PM  
**To:** Zetta Jet GC  
**Cc:** D Lin; salem@salemlaw.org.sg; Vicky; Iman Ibrahim; Shing Yng; janet.chung@cpln.com.hk  
**Subject:** Re: SPA for 9606 & 9688

...Now I can go to SPA often because of Sale and Purchase Agreement.

**From:** Zetta Jet GC  
**Sent:** Saturday, July 30, 2016 12:56 PM  
**To:** Liqi  
**Cc:** D Lin ; salem@salemlaw.org.sg ; Vicky ; Iman Ibrahim ; Shing Yng ; janet.chung@cpln.com.hk  
**Subject:** Re: SPA for 9606 & 9688

Sale and purchase agreement

Sent from my iPhone  
On 30 Jul 2016, at 12:55 PM, Liqi <liqiqi@yahoo.com> wrote:

Quick question: why the subject is SPA? Sauna?

**From:** Zetta Jet GC  
**Sent:** Saturday, July 30, 2016 12:49 PM  
**To:** D Lin

Hi David

I think Salem is traveling back to Singapore from London at the moment, I'll continue to chase him.

Just for everyone's info we are starting the loan documents for the Loan with Minsheng now, with an estimate closing of 15-20th Aug °

Regards

Geoff

Sent from my iPhone

On 30 Jul 2016, at 12:32 PM, D Lin <[dlin@cpllin.com.hk](mailto:dlin@cpllin.com.hk)> wrote:

Salem please let us know whether you are available for call today thanks. One way or another our client would like to conclude matter soon.

David Lin 練紹良  
C P Lin & Co 練松柏律師行  
19B United Centre  
95 Queensway  
Admiralty  
Hong Kong  
T +852 2581 9959  
F +852 2581 2797

On 29 Jul 2016, at 19:09, D Lin <[dlin@cpllin.com.hk](mailto:dlin@cpllin.com.hk)> wrote:

Salem, afraid I am incommunicado for the next 90 minutes or so. Please feel free to call me after 9:30 PM Hong Kong time.

David Lin 練紹良  
C P Lin & Co 練松柏律師行  
19B United Centre  
95 Queensway  
Admiralty  
Hong Kong  
T +852 2581 9959  
F +852 2581 2797

On 29 Jul 2016, at 18:21, D Lin <[dlin@cpllin.com.hk](mailto:dlin@cpllin.com.hk)> wrote:

My number +852 9475 9797

David Lin 練紹良  
C P Lin & Co 練松柏律師行  
19B United Centre  
95 Queensway  
Admiralty  
Hong Kong  
T +852 2581 9959  
F +852 2581 2797

Attachments.

Kind Regards,  
Salem

---

**From:** Salem Ibrahim [<mailto:salem@salemlaw.org.sg>]  
**Sent:** Friday, 29 July, 2016 10:55 AM  
**To:** 'Vicky'  
**Cc:** 'Geoffery Cassidy'; 'Iman Ibrahim'; 'Shing Yng';  
'[dlin@cplin.com.hk](mailto:dlin@cplin.com.hk)'; '[janet.chung@cplin.com.hk](mailto:janet.chung@cplin.com.hk)'  
**Subject:** RE: SPA for 9606 & 9688  
**Importance:** High

Dear David,

Noted with thanks. You have made a new amendment in this draft by deleting the conditions precedent in entirety.

This means that if there was a loss, Seller keeps the insurance monies and buyer takes the aircraft as is where is including if there was a total loss and pays the full purchase price?? Do you intend this to be the case as again as you would be hurting Zetta? Even if you did not intend this, seller's insurers after paying the claim would be subrogated and would insist if there was a total loss or a constructive total loss of the Aircraft or for that any loss at all, step in the Seller's shoes in the SPA and force payment of the full purchase price as recovery of the monies paid out under the claim. You again hurt Zetta of which Li Qi is a shareholder. I ask you to be mindful of the laws of subrogation and its impact.

I have reinstated the clause and amplified what was already understood in my initial draft as your current proposed amendment is a bad deal breaker.

Kind regards,  
Salem

---

**From:** Vicky [<mailto:vicky@cplin.com.hk>]  
**Sent:** Friday, 29 July, 2016 9:19 AM  
**To:** [salem@salemlaw.org.sg](mailto:salem@salemlaw.org.sg)  
**Cc:** 'Geoffery Cassidy'; 'Iman Ibrahim'; 'Shing Yng';  
'[dlin@cplin.com.hk](mailto:dlin@cplin.com.hk)'; '[janet.chung@cplin.com.hk](mailto:janet.chung@cplin.com.hk)'  
**Subject:** RE: SPA for 9606 & 9688

Dear Salem,

Please see attached further revised draft documents for both aircrafts.

Your attention is drawn to clause 3.2, which has been deleted pursuant to client's instructions.

For the purpose of payment, please treat this as formal notification that the Seller hereby requests payment of Purchase Price be made to the following account, on or before Delivery :-

**Bank Name** HSBC, New York

**SWIFT Code** [REDACTED]

**Account No.** [REDACTED]

**Fed Wire No.** [REDACTED]

Beneficiary Bank: The Hongkong & Shanghai Banking Corporation Limited, Hong Kong Private Banking Division

**BIC:** [REDACTED]

Beneficiary detail: a/c [REDACTED]

name: UNIVERSAL LEADER

INVESTMENT LIMITED

Please [REDACTED] with full payment details

We await your advice in relation to the trust agreement etc., as mentioned in our last substantive email.

Regards,  
David Lin  
(issued by Vicky, assistant to David Lin)  
C. P. Lin & Co.  
Solicitors & Notaries  
Unit B, 19th Floor, United Centre,  
95 Queensway, Admiralty,  
Hong Kong.  
T +852 25819959  
F +852 25812797

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**From:** David Lin [<mailto:dlin@cplin.com.hk>]  
**Sent:** Thursday, July 28, 2016 5:53 PM  
**To:** [salem@salemlaw.org.sg](mailto:salem@salemlaw.org.sg); 'Vicky'; 'Janet Chung'  
**Cc:** 'Geoffery Cassidy'; 'Iman Ibrahim'; 'Shing Yng'  
**Subject:** RE: SPA for 9606 & 9688

Thanks Salem in that case let us seek instructions and revert.

David Lin 練紹良  
C P Lin & Co 練松柏律師行

Admiralty  
Hong Kong  
T +852 2581 9959  
F +852 2581 2797

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---

**From:** Salem Ibrahim [<mailto:salem@salemlaw.org.sg>]  
**Sent:** Thursday, July 28, 2016 5:17 PM  
**To:** 'David Lin' <[dlin@cplin.com.hk](mailto:dlin@cplin.com.hk)>; 'Vicky' <[vicky@cplin.com.hk](mailto:vicky@cplin.com.hk)>; 'Janet Chung' <[janet.chung@cplin.com.hk](mailto:janet.chung@cplin.com.hk)>  
**Cc:** 'Geoffery Cassidy' <[gassidy@zettajet.com](mailto:gassidy@zettajet.com)>; 'Iman Ibrahim' <[iman@salemlaw.org.sg](mailto:iman@salemlaw.org.sg)>; 'Shing Yng' <[sy@salemlaw.org.sg](mailto:sy@salemlaw.org.sg)>  
**Subject:** RE: SPA for 9606 & 9688

David,

Noted. Can I ask whether you are instructed that there is any breach at all to date? If not, we can kiv your insertion until closing.

I disagree with you on 12.2. It not a title issue. A potential cause of action surviving the Lease is a blot on Zetta and will raise many issues on due diligence and will cause delay.

In this case, Zetta is not an at large third party buyer. They have had control and management of this aircraft from day dot, so there can be no complaint or responsibility for the aircraft condition. That is why I asked you if there are any breaches of the Lease at present. I have acted for aviation lenders before and there will be a long list of queries and due diligence that will have to answered. Also, the cost of borrowing may go up marginally because of what you want to insert. So why do we want to hurt Zetta?

I ask you to please let us know if there are any breaches of the Lease.

Kind Regards  
Salem

c.c. Geoff: Can you discuss this with Li Qi. He is a shareholder of Zetta. Geoff this is not a conveyancing transaction and aviation lenders are sensitive to suving clauses in a Lease or previous purchase agreement. You borrowing cost will go up.

Case 2:19-ap-01363-SK Doc 258-3 Filed 06/03/21 Entered 06/03/21 11:47:15 Desc  
From: David Lin [mailto:dlin@cclin.com.hk]  
Sent: Thursday, 28 July 2016 9:51 AM  
Exhibit 2 to Rosefus Declaration Page 10 of 12  
To: salem@salemlaw.org.sg; 'Vicky'; Janet Chung  
Cc: 'Geoffery Cassidy'; 'Iman Ibrahim'; 'Shing Yng'  
Subject: RE: SPA for 9606 & 9688

Thanks Salem, in that case there is an easy way to deal with the situation and gives what your client requires:

Clause 10 – to add Provided that the buyer is free to assign this agreement for the purpose of obtaining financing. Consent given on the spot as requested.

Clause 12.2 – to add that any antecedent breach does not affect closing of the transaction and delivery and remedy lies solely with the buyer in personam without any blotch on the title.

David Lin 練紹良  
C P Lin & Co 練松柏律師行  
19B United Centre  
95 Queensway  
Admiralty  
Hong Kong  
T +852 2581 9959  
F +852 2581 2797

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**From:** Salem Ibrahim [mailto:salem@salemlaw.org.sg]  
**Sent:** Thursday, July 28, 2016 4:27 PM  
**To:** 'Vicky' <vicky@cclin.com.hk>; 'David Lin' <dlin@cclin.com.hk>; 'Janet Chung' <janet.chung@cclin.com.hk>  
**Cc:** 'Geoffery Cassidy' <gcassidy@zettajet.com>; 'Iman Ibrahim' <iman@salemlaw.org.sg>; 'Shing Yng' <sy@salemlaw.org.sg>  
**Subject:** RE: SPA for 9606 & 9688

Dear David,

Thank you for your amendments. I comment to amendments to 2 important clauses and reproduce the footnotes I made

*10.Reinstated the verbiage. You may not understand, but you client knows that this aircraft will be refinanced. That requires the assignment of this agreement by way of security to the lender. This is the practice in the aviation*

industry. Unless there is some reason why Li Qi may want to withhold his consent, Recital C is not necessary. Page 11 of 12  
Exhibit 2 to Consent Declaration  
shareholder, why can he not give his consent now? Why is there a need to make this transaction less bankable for Zetta??

12.2 I am inserting verbiage you have used in recital C as your amendment here is inconsistent with Recital C. If there is already a breach for which Li Qi wants a remedy, please be upfront and say it now instead of inserting this type of wording. I ask again, why is there a need to make this transaction less bankable for Zetta??

Please let me have your response.

Kind Regards,  
Salem

### **SALEM IBRAHIM LLC**

**Advocates & Solicitors | Notaries Public | Commissioners for Oaths**  
79 Robinson Road #16-06 CPF Building Singapore 068897 Tel: (65) 62261233 Fax: (65) 62260988 Website: [www.salemlaw.org.sg](http://www.salemlaw.org.sg)

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**From:** Vicky [<mailto:vicky@cplin.com.hk>]  
**Sent:** Thursday, 28 July, 2016 2:59 AM  
**To:** [salem@salemlaw.org.sg](mailto:salem@salemlaw.org.sg); 'David Lin'; 'Janet Chung'  
**Cc:** 'Geoffery Cassidy'; 'Iman Ibrahim'; 'Shing Yng'  
**Subject:** RE: SPA for 9606 & 9688

Dear Salem,

We refer to your email below and attach herewith revised Aircraft Sale and Purchase Agreement in relation to MSN 9606 with minor amendments for your feedback. Once the contents are agreed, we believe it would only require minor additional work for the other aircraft.

In relation to the documents entered into between Wells Fargo and Mr. Li, and Geoff and Mr. Li, please let us know how you prefer to terminate those. We trust that these should not be dealt with in the tripartite agreements.

Regards,  
David Lin

Solicitors & Notaries  
Unit B, 19th Floor, United Centre,  
95 Queensway, Admiralty,  
Hong Kong.  
T +852 25819959  
F +852 25812797

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**From:** Salem Ibrahim [<mailto:salem@salemlaw.org.sg>]  
**Sent:** Tuesday, July 26, 2016 7:41 PM  
**To:** 'David Lin'; 'Janet Chung'  
**Cc:** 'Janet Chung'; Geoffery Cassidy; Iman Ibrahim; Shing Yng  
**Subject:** SPA for 9606 & 9688

Dear David & Janet,

Attached you will find the drafts (word & pdf) for 9606 and 9688 for your review, input, comments.

Kind Regards,  
Salem {London Base}

## **SALEM IBRAHIM LLC**

**Advocates & Solicitors | Notaries Public | Commissioners for Oaths**  
79 Robinson Road #16-06 CPF Building Singapore 068897 Tel: (65) 62261233 Fax: (65) 62260988 Website: [www.salemlaw.org.sg](http://www.salemlaw.org.sg)

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<SPA 9606 Ver 5 - amended by Salem post CPL  
amendments on 29Jul16.pdf>

<SPA 9606 Ver 5 - amended by Salem post CPL  
amendments on 29Jul16.docx>

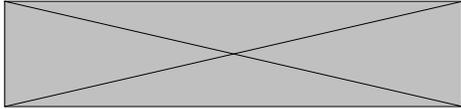
**EXHIBIT 3**

**(Sept. 8, 2016 Email Correspondence)**

**From:** Geoffrey Cassidy <gcassidy@zettajet.com>  
**Sent:** Friday, September 9, 2016 3:05 PM  
**To:** 'Liqi' <liqiqi@yahoo.com>  
**Subject:** RE: SPAs 9606.9688, Minsheng Refinance

Hi Uncle.  
Sign at the spots for Universal Leader and Glove.

Are you in HK or Shanghai? After they will need to be sent to the other lawyers in HK.  
Regards



**GEOFFERY CASSIDY** | Managing Director

MOBILE +65 9625 5666  
DUTY MANAGER +65 9173 2611  
OFFICE +65 6483 8870  
SKYPE geoffery.cassidy  
WEB zettajet.com

Zetta Jet Pte Ltd, 700 West Camp Road, #04-10 JTC Aviation One, Singapore 797649

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**From:** Liqi [mailto:liqiqi@yahoo.com]  
**Sent:** Friday, 9 September, 2016 3:05 PM  
**To:** Geoffrey Cassidy <gcassidy@zettajet.com>  
**Subject:** Re: SPAs 9606.9688, Minsheng Refinance

so many place can sign, where should I sign?

**From:** Geoffrey Cassidy  
**Sent:** Friday, September 9, 2016 2:22 PM  
**To:** 'Liqi'  
**Subject:** FW: SPAs 9606.9688, Minsheng Refinance

Hi Liqi,  
This is the last document to sign and then we get the drawdown of funds Monday / Tuesday.  
Thank you for all your help and support, nearby there.  
Regards



**GEOFFERY CASSIDY** | Managing Director

MOBILE +65 9625 5666  
DUTY MANAGER +65 9173 2611  
OFFICE +65 6483 8870  
SKYPE geoffery.cassidy  
WEB zettajet.com

Zetta Jet Pte Ltd, 700 West Camp Road, #04-10 JTC Aviation One, Singapore 797649

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Call  
Call from mobile  
Send SMS  
Add to Skype  
You'll need Skype CreditFree via Skype

---

**From:** Salem Ibrahim [<mailto:salem@salemlaw.org.sg>]  
**Sent:** Friday, 9 September, 2016 2:13 PM  
**To:** 'D Lin' <[dlin@cplin.com.hk](mailto:dlin@cplin.com.hk)>  
**Cc:** 'Janet Chung' <[janet.chung@cplin.com.hk](mailto:janet.chung@cplin.com.hk)>; 'Liqi' <[liqiqi@yahoo.com](mailto:liqiqi@yahoo.com)>; 'Geoffery Cassidy' <[gcassidy@zettajet.com](mailto:gcassidy@zettajet.com)>; 'Iman Ibrahim' <[iman@salemlaw.org.sg](mailto:iman@salemlaw.org.sg)>; 'Shing Yng' <[sy@salemlaw.org.sg](mailto:sy@salemlaw.org.sg)>  
**Subject:** RE: SPAs 9606.9688, Minsheng Refinance

Dear David,

Attached 1 pair of agreements for each of 9606,9688 in execution form.

Please arrange execution asap. For the Deed, it must be returned complete. For the SLB, we are happy for the signature page only to be returned.

After signing, please scan, email to us with originals to be sent to us immediately to Holman Fenwick Willan.

Here are the signing instructions and specific on originals and delivery as well as the role of Holman Fenwick Willan.

QUOTE:  
Please arrange for execution of the documents [IN BLUE INK and on single sided paper](#) by the relevant authorised signatory **in accordance with our signing instructions below** (these are deeds so we must follow the protocol, ensure the signatures are witnessed and the signature blocks fully filled out, one whole signed, undated document to be sent in the pdf) (requisite number of originals set out next to the document).

Document	Parties	No. Originals	Dispatch of originals
----------	---------	---------------	-----------------------

Deed of Termination MSN 9606	1. Wells Fargo (Lessor) 2. Zetta Jet Pte. Ltd. (Lessee) 3. Universal Leader Investment Limited (Beneficiary)	4	All originals sent to HFW at address below
Deed of Termination MSN 9688	1. Wells Fargo (Lessor) 2. Zetta Jet Pte. Ltd. (Lessee) 3. Glove Assets Investment Limited (Beneficiary)	4	All originals sent to HFW at address below

### Execution instructions

Please execute the documents in accordance with the following instructions:

- (a) Print the document in full (single sided) in the number specified above for the relevant company;
- (b) Arrange for each applicable execution clause to be signed by the relevant authorised signatories and witnessed as applicable (where indicated) in all the printed copies of the document. Please **do not date** the document(s);
- (c) Send by email one copy of each executed whole document (i.e. the document and the signed execution page together) by reply to this email and persons copied hereto; and
- (e) Send the originals by courier to the address and in the number set out above as soon as practicable after execution and include tracking details for the courier. For documents to be sent to HFW:

FAO Luke Liberda  
Holman Fenwick Willan  
15<sup>th</sup> Floor, Tower One Lippo Centre  
89 Queensway  
Hong Kong

By returning copies of each signed document:

- You confirm that you printed and signed (or arranged for the signing of) each whole document in the form attached to this email;
- We will be authorised to hold the copies of each signed document to the order of the executing party pending closing when each document will be released by Holman Fenwick Willan to all other parties and it is agreed that upon closing the company on whose behalf the document was signed will be bound by the terms of each document and Holman Fenwick Willan are authorised to release the copies of each signed document to all other parties and to date each document accordingly;
- In the case of any document which is a deed, you confirm that its release and dating constitutes delivery of the deed by the person on whose behalf the deed was signed;
- You agree that you will send each whole original signed document to us as soon as practicable after it is signed;
- You agree that we will assemble the correct number of originals as specified above, using the counterparts returned to us; and
- You confirm that you have all requisite authorisations in order to give the confirmations and authorisations to sign each document on behalf of the relevant company and bind it to the terms contained therein.

UNQUOTE

Kind Regards,

Salem Ibrahim

**SALEM IBRAHIM LLC**

Advocates & Solicitors | Notaries Public | Commissioners for Oaths

79 Robinson Road #16-06 CPF Building Singapore 068897 Tel: (65) 62261233 Fax: (65) 62260988 Website:

[www.salemlaw.org.sg](http://www.salemlaw.org.sg)

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---

**From:** Salem Ibrahim [<mailto:salem@salemlaw.org.sg>]  
**Sent:** Thursday, 8 September, 2016 9:33 PM  
**To:** 'D Lin'  
**Cc:** 'Janet Chung'; 'Liqi'; 'Geoffery Cassidy'; 'Iman Ibrahim'; 'Shing Yng'  
**Subject:** RE: SPAs 9606.9688, Minsheng Refinance

David,

Parties to the Finance Lease labelled "Aircraft Lease Agreement" are,

- (1) Well Fargo, Lessor, as Owner Trustee for Minsheng Entity; and
- (2) TVPX, Lessee, as Lease Trustee for Zetta Entity

Your payment of \$55m will be remitted from International Aircraft Title Services Inc ("IATS").

Kind Regards,  
Salem

---

**From:** D Lin [<mailto:dlin@cplin.com.hk>]  
**Sent:** Thursday, 8 September, 2016 8:48 PM  
**To:** Salem Ibrahim  
**Cc:** Janet Chung; Liqi; Geoffery Cassidy; Iman Ibrahim; Shing Yng  
**Subject:** Re: SPAs 9606.9688, Minsheng Refinance

Thanks Salem, kindly let me know the name and parties of the document governing the lease finance as stated below.

**Bank:** HSBC Bank, New York, USA

**(Field 56a) SWIFT code:** [REDACTED]

**Federal routing code:** [REDACTED]

**For credit to:** a/c no. [REDACTED]

**(Field 57a) THE HONGKONG & SHANGHAI BANKING CORPORATION LIMITED, HONG KONG PRIVATE BANKING DIVISION**

**BIC:** [REDACTED]

**In favour of:** UNIVERSAL LEADER INVESTMENT LIMITED

**(Field 59) A/C** [REDACTED]

**With Message:** Please send [REDACTED] to [REDACTED] with full payment details

**(Field 70)**

David Lin 練紹良  
C P Lin & Co 練松柏律師行  
19B United Centre  
95 Queensway  
Admiralty  
Hong Kong  
T +852 2581 9959  
F +852 2581 2797

On 8 Sep 2016, at 19:36, Salem Ibrahim <[salem@salemlaw.org.sg](mailto:salem@salemlaw.org.sg)> wrote:

Dear David & Geoff,

It was a very helpful conference call and I think we can summarise it as follows:

- 1 In short, Minsheng is providing lease finance to Zetta and will refinance \$80m by purchase of 9606 and 9688.
- 2 Of this \$80m, \$55m will go to an account designated by UL/Glove.
- 3 Of the balance, US\$12,410,240 to Minsheng to satisfy the obligation to pay the fees for the 4 new Challenger 650;
- 4 Various fees and charges (escrow lender lawyers), and
- 5 The residual to Zetta.

Geoff has indicated he will instruct Wells Fargo on behalf of UL, Glove, on the payment of \$55m to an account designated by UL/Glove.

David, you will give me the details of the bank account for UL/Glove to be inserted for closing.

Kind Regards,  
Salem

---

**From:** Salem Ibrahim [<mailto:salem@salemlaw.org.sg>]

**Sent:** Thursday, 8 September, 2016 5:34 PM

**To:** 'Janet Chung'; 'Liqi'; 'Geoffery Cassidy'; 'David Lin'

**Cc:** 'Iman Ibrahim'; 'Shing Yng'

**Subject:** RE: SPAs 9606.9688, Minsheng Refinance

David,

He is driving at the moment. What time is good for you?

Kind Regards,  
Salem

---

**From:** Salem Ibrahim [<mailto:salem@salemlaw.org.sg>]  
**Sent:** Thursday, 8 September, 2016 4:16 PM  
**To:** 'Janet Chung'; 'Liqi'; 'Geoffery Cassidy'; 'David Lin'  
**Cc:** 'Iman Ibrahim'; 'Shing Yng'  
**Subject:** RE: SPAs 9606.9688, Minsheng Refinance  
**Importance:** High

SEE MY ANSWERS IN CAPS BELOW. PLEASE LET ME KNOW IF YOU NEED FURTHER CLARIFICATION OR NEED TO DISCUSS.

KIND REGARDS,  
SALEM

---

**From:** Janet Chung [<mailto:janet.chung@cplin.com.hk>]  
**Sent:** Thursday, 8 September, 2016 3:48 PM  
**To:** 'Salem Ibrahim'; 'Liqi'; 'Geoffery Cassidy'; 'David Lin'  
**Cc:** 'Iman Ibrahim'; 'Shing Yng'  
**Subject:** RE: SPAs 9606.9688, Minsheng Refinance

Dear Salem,

To allow us to understand the Sale and Leaseback Purchase Agreement (the "SLB Purchase Agreement"), please enlighten us on following:-

1. The purchase consideration is US\$ 40 million under the SLB Purchase Agreement and the purchase price of 9606 is US\$55million under the SPA between Universal Leaders and Zetta. Please explain the relationship between the said figures. THE SLB ARISES THE PURCHASE AND FINANCE STRUCTURE FROM MINSHENG. THIS IS BETWEEN MINSHENG AND ZETTA. BETWEEN LI QI AND GEOFF/ZETTA, LI QI WANTS TO RECEIVE \$55M. THAT IS THE WAY GEOFF AND LI QI HAS AGREED BETWEEN THEMSELVES AND THAT'S THE WAY WE WROTE THE 2 SPAs. REMEMBER THAT THE SPA BETWEEN ZETTA AND GLOVE IS NOT DEAD AFTER UL RECEIVES \$55M. ZETTA CONTIUES TO PAY GLOVE UNDER THE SPA BUT AGREES TO PAY TITLE TO THE AIRCRAFT.
2. Pursuant to the arrangement as stipulated in Schedule 2 of the SLB Purchase Agreement, the Escrow Agent, upon receipt of the Seller's instruction shall apply the purchase consideration received from the Buyer under the SLB Purchase Agreement to the following accounts:-
  - (a) The financier WHICH IS LI QI - \$55M;
  - (b) Minsheng; and
  - (c) Zetta Jet.

We note our client is not a (direct) recipient of any part of the purchase consideration from the Escrow Agent and Zetta Jet is only receiving around 16% of the said purchase consideration. NOT CORRECT. YOUR CLIENT RECEIVES \$55M FROM WELL FARGO AT CLOSING AND YOU CAN GIVE A DIRECTION TO WELLS FARGO ON WHERE YOU WANT THE MONEY SENT. WELLS FARGO IS THE TRUSTEE AND YOUR CLIENT IS THE BENEFICIARY. Please let us know the exact source of fund and fund flow of payment of US\$55million under SPA to our client. SOURCE OF FUNDS IS MINSHENG FINANCIAL LEASING COMPANY LTD. THEY ARE A WELL KNOWN FINANCIAL INSITUTION IN THE PRC FOR AVIATION FINANCE.

- Case 2:19-ap-01383-SK Doc 257-4 Filed 06/03/21 Entered 06/03/21 11:47:15 Desc Exhibit 3 to Rosehus Declaration Page 8 of 11
3. An escrow agreement is entered between Wells Fargo (as Seller), Wells Fargo (as Buyer), Lessee and the Escrow Agent, where the Buyer, potentially, does not permit the proceeds of the consideration to the Escrow Agent. Our client is not a party of the Escrow Agreement. YOU ARE ACTING THROUGH WELLS FARGO. AS STATED IN MY EARLIER EMAIL, THERE WILL HAVE TO BE A DIRECTION FROM YOUR CLIENT TO WELLS FARGO AS TO WHERE TO PAY THE MONEY AND THE MONEY WILL GO FROM ESCROW AT CLOSING DIRECT TO YOUR CLIENTS' DESIGNATED BANK ACCOUNT. Assuming part of the consideration should flow to our client's account, we are wary that the Escrow Agent is under no obligation to take our client's interest into account. IATS AND WELLS FARGO AS ESCROW AGENTS HAVE BEEN DOING CLOSING, SALE, PURCHASE FOR ALL THE MAJOR LENDERS AND AIRCRAFT BUYER, SELLERS. THE BANKS ALSO PAY THE DRAWDOWN INTO ESCROW WITH IATS.
4. Pursuant to Clause 7(b), our client warrants the Buyer, inter alia, that the Aircraft is not subject to any encumbrances, has no damage history and the Manual and Technical Records are duly maintained. In view of the urgency of the matter, can Geoff and Zetta Jet give Universal Leader (and Gloves for 9688) warranties in relation to the above. YOU CAN PREPARE SOMETHING FOR ZETTA TO SIGN RE NO DAMAGE HISTORY AND THE MANUAL AND TECHNICAL RECORDS ARE DULY MAINTAINED (BUT SURPLUSAGE AS IT IS A PROVISION IN THE 2 LEASES). BUT ENCUMBRANCES CAN ONLY BE CREATED BY YOUR CLIENT. SO YOUR CLIENT CAN SPEAK TO THAT.

We look forward to receiving your feedback to the above soonest.

Kind regards,

Janet Chung  
By the Authority for and on behalf of  
David Lin

C P Lin & Co 練松柏律師行  
19B United Centre  
95 Queensway  
Admiralty  
Hong Kong  
T +852 2581 9959  
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**From:** Salem Ibrahim [<mailto:salem@salemlaw.org.sg>]  
**Sent:** Thursday, September 08, 2016 2:10 PM  
**To:** 'Liqi'; 'Geoffery Cassidy'; 'David Lin'; [janet.chung@cplin.com.hk](mailto:janet.chung@cplin.com.hk)  
**Cc:** 'Iman Ibrahim'; 'Shing Yng'  
**Subject:** RE: SPAs 9606.9688, Minsheng Refinance

Hello Li Qi,

Just spoke to David and he is on it. I expect that we should progress this in the next 1 hour.

Kind Regards,  
Salem

---

**From:** Liqi [<mailto:liqiqi@yahoo.com>]  
**Sent:** Thursday, 8 September, 2016 1:40 PM

yes, these things calling is best, maybe he is in meeting whole day.

**From:** Geoffery Cassidy  
**Sent:** Thursday, September 8, 2016 1:03 PM  
**To:** 'Salem Ibrahim'; 'David Lin'; [janet.chung@cplin.com.hk](mailto:janet.chung@cplin.com.hk)  
**Cc:** 'Iman Ibrahim'; 'Shing Yng'; 'Liqi'  
**Subject:** RE: SPAs 9606.9688, Minsheng Refinance

Hi Salem,  
Best to call David and hash it out quickly.

<image001.png>

**GEOFFERY CASSIDY** | Executive Director

MOBILE +65 9625 5666  
DUTY MANAGER +65 9173 2611  
OFFICE +65 6483 8870  
SKYPE geoffery.cassidy  
WEB [zettajet.com](http://zettajet.com)

Zetta Jet Pte Ltd, 700 West Camp Road, #04-10 JTC Aviation One, Singapore 797649

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<image002.jpg>Please consider the environment before printing this email.

Call  
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Add to Skype  
You'll need Skype CreditFree via Skype

---

**From:** Salem Ibrahim [<mailto:salem@salemlaw.org.sg>]  
**Sent:** Thursday, 8 September, 2016 12:54 PM  
**To:** 'David Lin' <[dlin@cplin.com.hk](mailto:dlin@cplin.com.hk)>; [janet.chung@cplin.com.hk](mailto:janet.chung@cplin.com.hk)  
**Cc:** 'Iman Ibrahim' <[iman@salemlaw.org.sg](mailto:iman@salemlaw.org.sg)>; [gassidy@zettajet.com](mailto:gassidy@zettajet.com); 'Shing Yng' <[sy@salemlaw.org.sg](mailto:sy@salemlaw.org.sg)>; Liqi <[liqiqi@yahoo.com](mailto:liqiqi@yahoo.com)>  
**Subject:** SPAs 9606.9688, Minsheng Refinance  
**Importance:** High

Dear David,

Greetings from Singapore.

1. Further to the SPAs signed for 9606, 9688, the Minsheng ("MS") workout is now near close and document finalisation for signing is scheduled for tomorrow.

2. Copies of the SPA were given to HFW who are acting for MS. To keep the documentation simple, they have prepared a Sale and Leaseback Purchase Agreement for each aircraft ("SLB") and a deed of termination ("DT").
  
3. Both drafts are attached and will mirror each other for both aircraft.
  
4. This will be an escrow closing with IATS. Wells Fargo will act for UL, Glove, against their written instructions for disposal of proceeds at closing. The instructions will be,
  - (a) payment of \$55m under the SPA for 9606;
  - (b) Payment of escrow fees of USD30,000;
  - (c) Payment of US\$12,410,240 (figure to be finally confirmed) to Minsheng;
  - (d) Payment of balance of the monies to Zetta Jet
  
5. Under the scheme, all documents will be pre-signed and lodged with IATS in escrow pending closing. At close, UL, will receive their \$55m against the release of the Bills of Sale and other documents they have signed. UL therefore assured payment at escrow.
  
6. For the payout (a) in paragraph 4 above, you would need to designate the bank account for the USD55m. Please let me have the details.
  
7. I will be liaising with you and Geoff, copied to LiQi, on refinements to the fund flow and the form of direction that UL, Glove to Wells Fargo. The principal would always be that UL receives USD55m at closing.
  
8. Everyone is struggling with timing at the moment because MS has a 3-day holiday next week from 15-17 September for Mid-Autumn Festival. The drawdown process is expected to take place on Monday and I emphasise, document closing is tomorrow. As such, we would all sincerely appreciate having your confirmation to the attached agreements so that engrossed versions can be urgently put in place.
  
9. If we need to speak, I can give dial-in numbers.

Kind Regards,  
<image003.jpg>  
Salem Ibrahim

**SALEM IBRAHIM LLC**

Advocates & Solicitors | Notaries Public | Commissioners for Oaths

79 Robinson Road #16-06 CPF Building Singapore 068897 Tel: (65) 62261233 Fax: (65) 62260988 Website:

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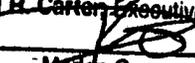
**EXHIBIT 4**

**(Complaint filed in *Truly Great Global Ltd. v. Seagrim*, No. BC694919 (Superior Court of California, County of Los Angeles))**

1 BRIAN K. CONDON (SBN 138776)  
2 Brian.Condon@arnoldporter.com  
3 TIFFANY M. IKEDA (SBN 280083)  
4 Tiffany.Ikeda@arnoldporter.com  
5 ARNOLD & PORTER KAYE SCHOLER LLP  
6 777 South Figueroa Street, Forty-Fourth Floor  
7 Los Angeles, California 90017-5844  
8 Telephone: 213.243.4000  
9 Facsimile: 213.243.4199

**FILED**  
Superior Court of California  
County of Los Angeles

**FEB 21 2018**

Sherril B. Carter, Executive Officer/Clerk  
By  Deputy  
Marlon Gomez

7 Attorneys for Plaintiffs  
8 Truly Great Global Ltd. and Universal Leader  
9 Investment Ltd.

10 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
11 **COUNTY OF LOS ANGELES**

12 **BC 694919**

13 TRULY GREAT GLOBAL LTD. a  
14 British Virgin Islands Company; and  
15 UNIVERSAL LEADER  
16 INVESTMENT LTD., a British Virgin  
17 Islands Company,

Case No.

**COMPLAINT FOR:**

18 Plaintiffs,

- 1. Fraud
- 2. Negligent Misrepresentation
- 3. Breach of Contract
- 4. Breach of Implied Covenant of Good Faith and Fair Dealing
- 5. Conversion
- 6. Money Had and Received

19 v.

20 JAMES NOEL HALSTEAD  
21 SEAGRIM, an individual; STEPHEN  
22 MATTHEW WALTER, an individual;  
23 GEOFFREY OWEN CASSIDY, an  
24 individual; and DOES 1 through 10,

**DEMAND FOR JURY TRIAL**

25 Defendants.

16

CIT/CASE: BC694919  
LEA/DEF#:

RECEIPT #: CCH621759108  
DATE PAID: 02/21/18 03:35 PM  
PAYMENT: \$435.00  
RECEIVED: 310

CHECK: \$435.00  
CASH: \$0.00  
CHANGE: \$0.00  
CARD: \$0.00

0107:17:70

~~RECEIVED~~

FEB 21 2018

Courtesy of the Virginia  
General Court of Chancery  
FILED

1 Plaintiffs Truly Global Great Ltd. and Universal Leader Investment Ltd. hereby  
2 allege, upon and information and belief, as follows:

3 **PARTIES**

4 1. Plaintiff Truly Great Global Ltd. (“Truly Great Global”) is a company  
5 incorporated under the laws of the British Virgin Islands.

6 2. Plaintiff Universal Leader Investment Ltd. (“Universal Leader”) is a  
7 company incorporated under the laws of the British Virgin Islands.

8 3. Li Qi (“Li Qi”) is a citizen of the People’s Republic of China, and  
9 resides in Hong Kong. His principal language is Mandarin Chinese. Mr. Li is a  
10 Director of Truly Great Global and Universal Leader and was authorized to act and  
11 did act on their behalf in connection with the transactions at issue in this case.

12 4. Defendant James Noel Halstead Seagrim, also known as James N. H.  
13 Seagrim and James Seagrim (“Seagrim”) is a citizen of the United States, and resides  
14 in San Jose, California.

15 5. Defendant Stephen Matthew Walter, also known as S. Matthew Walter  
16 and Matthew Walter (“Walter”) is a citizen of the United States, and resides in Los  
17 Angeles, California.

18 6. Defendant Geoffrey Owen Cassidy, also known as Geoffrey O. Cassidy  
19 and Geoffrey Cassidy (“Cassidy”) is a citizen of Australia, and resides in Singapore.

20 7. The true names and capacities, whether individual, corporate, or  
21 otherwise, of the defendants sued as Does 1 through 10 are presently unknown to  
22 Plaintiffs, who therefore sue these defendants by fictitious names. Plaintiffs will  
23 amend this Complaint to allege the true names and capacities of the defendants sued  
24 as Does 1 through 10 when they have been ascertained. In doing the acts and  
25 omissions alleged in this Complaint, Seagrim, Walter, and Cassidy, as well as Does 1  
26 through 10, were acting as agents, partners, joint venturers, and co-conspirators.  
27 Each of them committed such acts in the course and scope of such agency,  
28 partnership, joint venture, and conspiracy, and each of them agreed with, was aware

1 of, intended to, and cooperated with the others to defraud and commit the other acts  
2 alleged herein against Plaintiffs.

3 **VENUE**

4 8. Venue is proper in this Court under Code of Civil Procedure § 395.

6 **FACTUAL BACKGROUND**

7 9. This action arises out of fraudulent actions by defendants Seagrim,  
8 Walter, and Cassidy to procure a \$15 million loan in June 2017 from plaintiff  
9 Universal Leader, acting through its Director, Li Qi, for the private air charter  
10 business then operating as “Zetta Jet,” by misrepresenting and concealing the true  
11 financial condition and imminent insolvency of Zetta Jet.

12 10. Zetta Jet PTE Ltd. (a Singapore company), and its U.S. operating  
13 subsidiary Zetta Jet USA (sometimes collectively “Zetta Jet), were formed in July  
14 2015 and operated a private air charter business with its principal base of operations  
15 in Burbank, California. Zetta Jet was formed and initially owned by Seagrim, Walter,  
16 and Cassidy, who each owned equal one-third interests. Seagrim, Walter, and  
17 Cassidy also served as executives and ran the day-to-day operations, financing, and  
18 sales for the company.

19 11. In December 2015, Zetta Jet bought two Bombardier Global 6000  
20 aircraft through sale and purchase agreements from entities owned by Li Qi’s family  
21 and for which Li Qi acts as Director, Universal Leader and Glove Asset Management  
22 Ltd. (“Glove”).

23 12. In February 2016, Li Qi decided to make an investment in Zetta Jet. His  
24 family’s company, Truly Great Global, invested \$19 million in exchange for 100,000  
25 shares (10%) of Zetta Jet PTE, pursuant to a Subscription Agreement. In addition, in  
26 February 2016, his family’s company, Universal Leader, made a loan of \$10 million  
27 to Zetta Jet PTE. The parties also entered into a Shareholders’ Agreement.  
28

1           13. As a result of Truly Great Global's acquisition of shares in Zetta Jet  
2 PTE, Li Qi was nominated as a Director of Zetta Jet PTE and he served in that role.  
3 Li Qi was not an officer of Zetta Jet PTE, and he was not an officer or director of  
4 Zetta Jet USA. As such, Li Qi was not involved in the day-to-day management of  
5 Zetta Jet, its operations, or its finances. Defendants and other management of Zetta  
6 Jet often did not provide Li Qi with complete or accurate financial or operational  
7 information about the company, so that he could not fully comprehend the company's  
8 financial condition.

9           14. In July 2016, Universal Leader made an additional loan of \$10 million to  
10 Zetta Jet PTE.

11           15. In September 2016, the two 2015 aircraft sale and purchase agreements  
12 between Zetta Jet and Li Qi's family entities (Universal Leader and Glove) were  
13 restructured as sale-leaseback financing transactions. Wells Fargo Bank served as  
14 trustee for the beneficial owners, Universal Leader and Glove. The purchase prices  
15 for the two aircraft were \$48 million and \$55 million payable in installments with  
16 interest or in a lump sum.

17           16. Unbeknownst to Li Qi, at the time of the September 2016 restructuring  
18 Seagrim and Walter personally took cash distributions from the company on  
19 September 23, 2016 in the amount of \$1 million each. Truly Great Global did not  
20 receive a distribution, the Board of Zetta Jet PTE did not authorize these  
21 distributions, and Li Qi did not receive notice of or participate in any meeting or vote  
22 at which these distributions were authorized.

23           17. By September 2016, Li Qi's family entities had loaned \$20 million to  
24 Zetta Jet, invested \$19 million in equity, and financed Zetta Jet's acquisition of two  
25 aircraft at a purchase price of approximately \$103 million.

26           18. Zetta Jet made regular installment payments to Universal Leader under  
27 the aircraft financing transaction through July 2017.  
28

1           19. In June 2017, Defendants sought to induce Universal Leader to provide  
2 an additional loan of \$15 million to Zetta Jet. Seagrim, Walter, and Cassidy knew  
3 that Li Qi's family entities were already substantially invested in Zetta Jet and  
4 therefore at great risk if the company were to founder and/or to refuse to repay what it  
5 owed to Li Qi's family entities. To induce Universal Leader to make the loan,  
6 Seagrim, Walter, and Cassidy utilized this leverage to impose duress on Li Qi,  
7 through the threat that without the additional loan the company would not repay the  
8 \$20 million in loans Universal Leader had already made, or the approximately \$43  
9 million in aircraft financing payments (plus interest) still owed to Li Qi's family  
10 entities; they made numerous representations to Li Qi that they knew or should have  
11 known were false or misleading, or which they had no reasonable basis to believe  
12 were true; and they concealed material information from Li Qi.

13           20. In order to induce the \$15 million loan, Seagrim, Walter, and Cassidy  
14 represented to Li Qi in June 2017 that (a) Zetta Jet was in a temporary cash crunch,  
15 and that his funds were urgently needed as a bridge loan to other financing; (b) that  
16 Zetta Jet was arranging financing with a financial institution, and upon completion of  
17 that financing Universal Leader's loan would be repaid from those new funds with a  
18 priority over other creditors; (c) Zetta Jet was profitable, had a valuation of \$700  
19 million or more, and would continue to prosper and grow if Universal Leader would  
20 provide immediate bridge funding; and (d) that in consideration of the loan, Seagrim  
21 and Walter would transfer to Truly Great Global portions of their Zetta Jet shares,  
22 which Seagrim, Walter, and Cassidy represented had significant value.

23           21. At the same time, Seagrim, Walter, and Cassidy failed to disclose and  
24 concealed from Li Qi (a) the true dire financial condition of the company, (b) the true  
25 extent of unpaid creditor claims, and (c) the failure of Seagrim, Walter, and Cassidy,  
26 in their capacity as managers of Zetta Jet, to implement and maintain appropriate  
27 internal management controls at Zetta Jet, which led to what Seagrim and Walter  
28

1 have now alleged, in litigation filed by Seagrim and Walter themselves, to be  
2 unchecked misappropriation of Zetta Jet assets by Cassidy.

3 22. In particular, in order to induce the \$15 million loan from Universal  
4 Leader, the following representations, among others, were made to Li Qi:

5 a. On May 31, 2017, Cassidy told Li Qi that the company would  
6 default on its contract with Bombardier and if that occurred there is no way the  
7 company could repay the \$20 million in loans that Li Qi's company, Universal  
8 Leader, had already made to Zetta Jet in 2016.

9 b. On or about May 31, 2017, Cassidy told Li Qi that BNP was  
10 interested in introducing Zetta Jet to its customers who potentially were interested  
11 in making an investment of \$100 million to \$200 million in Zetta Jet at a valuation  
12 of \$800 million to \$1 billion, and that the deal would be finished by early  
13 November.

14 c. In or about June 2017, Defendants represented to Li Qi that Zetta  
15 Jet was arranging financing with a financial institution, and upon completion of  
16 that financing Universal Leader's loan would be repaid from those new funds with  
17 a priority over other creditors.

18 d. On June 5, 2017, Cassidy told Li Qi that Zetta Jet had a 2016  
19 valuation of \$700-850 million, and a 2017-2018 valuation of \$1.5 billion.

20 e. On June 13, 2017, Cassidy told Li Qi that both Seagrim and  
21 Walter signed letters agreeing to transfer shares to Li Qi in exchange for the \$15  
22 million loan.

23 f. On June 17, 2017, Seagrim told Li Qi that the company was "so  
24 close to great things," and "for the sake of this company" he and Walter would  
25 each give Li Qi shares totaling 10% to keep the company alive until a new  
26 investor comes in.

27 g. On June 17, 2017, Walter told Li Qi that an earlier proposal to  
28 offer Li Qi shares totaling 7% each was made "because it was the best thing to do

1 for the company” and Walter had been led to believe it was the “only option to get  
2 the \$15m” from Li Qi.

3 h. On June 19, 2017, when Li Qi was wavering on the loan and the  
4 proposed terms of the share transfer, Seagrim told Li Qi that if the company did  
5 not get the \$15 million “we will have to shut the airline down tomorrow morning”  
6 and Seagrim threatened to report to the FAA that the company was insolvent,  
7 causing its certificate to be cancelled.

8 i. On June 20, 2017, Cassidy sent an email to Seagrim and Walter  
9 noting loan payments “due today” on aircraft, with attachments showing \$3.9  
10 million in payments due, and stating, “best you hurry and conclude the deal with  
11 Liqi.” The email was copied to Li Qi.

12 j. On June 20, 2017, Seagrim told Li Qi that he had spoken to  
13 Walter and that they would agree to transfer more shares in the company, now  
14 totaling 20%, to Truly Great Global in exchange for the \$15 million loan, and that  
15 the additional shares would come from Seagrim personally.

16 k. On June 21, 2017, Li Qi received (from Zetta Jet’s office in  
17 Burbank, California) two share transfer agreements: one purportedly signed by  
18 Seagrim transferring 150,000 shares (15%) of Zetta Jet PTE stock to Truly Great  
19 Global, and another signed by Walter, transferring 50,000 shares (5%) of Zetta Jet  
20 PTE stock to Truly Great Global. However, the share transfer agreement that was  
21 purportedly signed and delivered by Seagrim to induce Universal Leader to make  
22 the loan was not signed by Seagrim but appeared to have been forged.

23 l. When Li Qi questioned whether Seagrim had actually signed the  
24 share transfer agreement, on June 22, 2017 Walter told Li Qi that Seagrim had  
25 signed the documents and put them on a Zetta Jet plane that flew from London to  
26 Los Angeles, and then someone in Los Angeles sent them by Fed Ex to Li Qi in  
27 Hong Kong.  
28

1 m. But on June 26, 2017, Walter told Cassidy that “Liqi notices  
2 James’s signature is different.” Li Qi told Seagrim, Walter, and Cassidy that  
3 Seagrim’s signature did not appear to be his own, and that Universal Leader would  
4 not fund the loan without confirmation. Despite that Seagrim’s signature appeared  
5 to have been forged, Seagrim then emailed Li Qi stating, “this is to confirm this is  
6 my signature.”

7 23. The foregoing representations by Defendants, and those referenced in  
8 paragraph 20 above, were either false, misleading, failed to disclose additional facts  
9 necessary to make the facts disclosed not misleading, and/or intended to create duress  
10 to induce Li Qi to loan additional funds to Zetta Jet.

11 24. Defendants conspired and agreed amongst themselves to induce Li Qi to  
12 loan the additional funds to Zetta Jet, and committed the foregoing acts, among  
13 others, pursuant to that agreement, and each of the Defendants was aware of, intended  
14 to, and engaged in a common scheme to defraud and commit the other acts alleged  
15 herein against Plaintiffs.

16 25. Li Qi, on behalf of Universal Leader, funded the \$15 million loan to  
17 Zetta Jet PTE on June 26, 2017, and a Confirmatory Deed of Loan was executed by  
18 all relevant parties.

19 26. As of the date Universal Leader funded the loan, the following facts had  
20 been concealed from Li Qi and Universal Leader, and were not disclosed by either  
21 Seagrim, Walter or Cassidy:

22 a. That the company’s true financial condition was far more dire  
23 than they had disclosed, and that the long-term need for capital would not be  
24 solved with a \$15 million bridge loan from Universal Leader.

25 b. That the extent of unpaid creditors’ claims against Zetta Jet far  
26 exceeded what was disclosed to Li Qi.

1 c. That after Zetta Jet obtained the loan proceeds from Universal  
2 Leader to make essential payments to Zetta Jet’s creditors, Seagrim and Walter  
3 would also take personal cash payments from those funds.

4 d. That, contrary to representations made to Li Qi, there was no  
5 reasonable prospect of Zetta Jet obtaining financing from a financial institution  
6 within the time and in the amount needed, and that the company was not  
7 “arranging financing” with a financial institution.

8 e. That Seagrim and Walter could not reasonably have believed that  
9 the company’s financial problems would be resolved by Universal Leader’s \$15  
10 million bridge loan because, among other things, Seagrim and Walter knew that  
11 they had failed, in their capacity as managers of Zetta Jet, to implement and  
12 maintain appropriate internal management controls. Indeed, the absence of such  
13 internal management controls have now been alleged, in litigation filed by  
14 Seagrim and Walter themselves, to have led to unchecked misappropriation of  
15 Zetta Jet assets by Cassidy.

16 27. Despite the representations made by Seagrim, Walter, and Cassidy  
17 regarding the critical need for and intended use of the loan proceeds, on July 7, 2017,  
18 just 11 days after Universal Leader funded the loan, Seagrim and Walter each  
19 personally received cash payments from Zetta Jet in the amounts of \$343,000 and  
20 \$350,000, respectively. Seagrim, Walter, and Cassidy had sought the additional \$15  
21 million loan from Universal Leader in order to enrich themselves and/or to reduce  
22 their own personal exposure for Zetta Jet’s debts.

23 28. Further, on July 11, 2017, just 15 days after Universal Leader funded the  
24 loan, and despite representations that it constituted bridge financing to address a  
25 temporary cash crunch, Seagrim admitted to Cassidy that Zetta Jet was a “dead  
26 company,” that “Zetta will be open [sic] up like a can of beans,” and that it was  
27 already “too late” to resolve its creditor issues.  
28

1           29. In a report dated August 17, 2017, company management noted that Zetta  
2 Jet had an ongoing problem with “cash flow management” caused by company  
3 management’s use of an ineffective management structure, an inadequate finance  
4 staff, a lack of processes and internal controls, and company management’s  
5 engagement in a 15-month audit process, all of which had led to the cash flow  
6 management problems.

7           30. At a Zetta Jet PTE Board meeting on August 17, 2017, Walter proposed  
8 to terminate Cassidy based on accusations that Cassidy had misappropriated assets of  
9 Zetta Jet. As a result, Li Qi was convinced by Seagram and Walter to terminate  
10 Cassidy as Managing Director. Cassidy remained a shareholder.

11           31. On September 5, 2017, a Board meeting of Zetta Jet PTE was held in  
12 Hong Kong. The meeting proceeded in English, without translation. The Board  
13 installed Michael Maher as Zetta Jet’s new CEO. During the meeting, Maher  
14 requested authorization to hire counsel to research and provide advice regarding  
15 available bankruptcy protections in Singapore and the United States should that  
16 become necessary. There was no discussion or vote during the meeting of an  
17 authorization to put the company into bankruptcy. Under the terms of the  
18 Shareholder Agreement, any such authorization would require the affirmative consent  
19 of all shareholders -- Seagram, Walter, Cassidy, and Truly Great Global.

20           32. On September 8, 2017, Seagram sent a proposed Zetta Jet PTE Board  
21 resolution to Li Qi. The draft resolution was written in English. Seagram knew that  
22 Li Qi’s primary language is Mandarin Chinese, and not English. Based upon the  
23 discussion at the September 5, 2017 Zetta Jet PTE Board meeting and representations  
24 made to him by Seagram, Li Qi understood that the draft resolution would authorize  
25 the hiring of legal counsel to research and provide advice about available bankruptcy  
26 protection in Singapore and the United States. Li Qi signed the resolution based upon  
27 Seagram’s representation that it was “per our vote the other day” -- in other words,  
28 that it authorized only the retention by Zetta Jet PTE of legal counsel to provide

1 advice about possible bankruptcy options in Singapore or the United States. Li Qi  
2 did not know, and was not told by Seagrim, Walter, or Maher, that they intended to  
3 use the resolution as purported authorization to cause Zetta Jet PTE to file a  
4 bankruptcy petition and to take the same action for its US subsidiary, Zetta Jet USA.  
5 If Li Qi had known that Seagrim, Walter, or Maher would use the resolution as  
6 purported authority to cause the companies to file for bankruptcy relief, he would not  
7 have signed the resolution.

8 33. The resolution did not authorize commencement of a bankruptcy filing  
9 by Zetta Jet PTE.

10 34. Even if the resolution had been written to authorize the filing of a  
11 bankruptcy petition, rather than to engage counsel to advise about possible  
12 bankruptcy options, and even if Defendants had not misled Li Qi into signing the  
13 resolution by misrepresenting how they intended to use the resolution, under the  
14 terms of the Shareholders Agreement, the resolution would not have been effective as  
15 an authorization to file bankruptcy, because, inter alia, it was not signed by Cassidy.

16 35. Between September 13 and September 15, 2017, Li Qi told Seagrim and  
17 Walter that he had obtained commitments to raise between \$60 and 90 million in  
18 funding for Zetta Jet, from new investors, and at a Board meeting that had been  
19 noticed for September 16, 2017, Li Qi intended to (a) seek the termination of Maher  
20 as CEO, (b) move the parent company from Singapore to Hong Kong, and (c) seek  
21 authorization to negotiate the terms of the new investments. However, on September  
22 15, 2017, before the Board meeting could occur and without notice to Li Qi, Seagrim,  
23 Walter, and Maher caused Zetta Jet PTE and Zetta Jet USA to file for bankruptcy,  
24 and the company has now ceased operations.  
25  
26  
27  
28

**FIRST CAUSE OF ACTION**

**(Fraud – Misrepresentation and Concealment)**

**(Against all Defendants)**

36. Plaintiffs incorporate by reference the allegations in paragraphs 1-35 above as though set forth in full.

37. In order to induce Universal Leader, through Li Qi, to make a \$15 million loan to Zetta Jet, Seagrim, Walter, and Cassidy represented to Li Qi in June 2017 that (a) Zetta Jet was in a temporary cash crunch, and that his funds were urgently needed as a bridge loan to other financing; (b) that Zetta Jet was arranging financing with a financial institution, and upon completion of that financing Li Qi’s loan would be repaid from those new funds with a priority over other creditors; (c) that Zetta Jet was profitable, had a valuation of \$700 million or more, and would continue to prosper and grow if Li Qi would provide immediate bridge funding; and (d) that in consideration of the loan, Seagrim and Walter would transfer to Li Qi portions of their Zetta Jet shares, which Seagrim, Walter, and Cassidy represented had significant value. Defendants made each of the representations to Li Qi set forth in paragraph 22 above, among others.

38. The Defendants’ representations were either false, misleading, failed to disclose additional facts necessary to make the facts disclosed not misleading, and/or intended to create duress to induce Li Qi to loan additional funds to Zetta Jet.

39. In addition, in order to induce Universal Leader, through Li Qi, to make a \$15 million loan to Zetta Jet in June 2017, Seagrim, Walter, and Cassidy failed to disclose and concealed from Li Qi (a) the true dire financial condition of the company, (b) the true extent of unpaid creditor claims, (c) the intended use of the funds for personal payments rather than company debts, and (d) the failure of Seagrim, Walter, and Cassidy, in their capacity as managers of Zetta Jet, to implement and maintain appropriate internal management controls at Zetta Jet, which led to what Seagrim and Walter have now alleged, in litigation filed by Seagrim and

1 Walter themselves, to be unchecked misappropriation of Zetta Jet assets by Cassidy.  
2 Defendants failed to disclose and concealed from Li Qi each of the facts set forth in  
3 paragraph 26 above, among others yet to be discovered.

4 40. Defendants conspired and agreed amongst themselves to induce  
5 Universal Leader, through Li Qi, to loan additional funds to Zetta Jet, and committed  
6 the foregoing acts, among others, pursuant to that agreement, and each of the  
7 Defendants was aware of, intended to, and engaged in a common scheme to defraud  
8 and commit the other acts alleged herein against Plaintiffs.

9 41. Defendants were the majority shareholders and operating executives of  
10 Zetta Jet, and were in possession of superior information regarding the company than  
11 Li Qi and his family entities, including minority shareholder Truly Great Global. As  
12 such, in entering into the loan with Universal Leader, Defendants owed a duty of full  
13 disclosure.

14 42. Li Qi, acting on behalf of Universal Leader, did not know that the  
15 representations were false and misleading, and was not aware of the concealed and  
16 undisclosed facts.

17 43. Defendants intended for Li Qi, Truly Great Global, and Universal  
18 Leader to rely on the representations they made, and Defendants intended to deceive  
19 them by concealing and failing to disclose the above facts.

20 44. Li Qi, Truly Great Global, and Universal Leader reasonably relied on  
21 Defendants misrepresentations and concealments to extend the \$15 million loan to  
22 Zetta Jet on June 26, 2017, and to accept the transfer of Defendants' additional  
23 200,000 shares of stock in Zetta Jet. Had Li Qi known the true or concealed facts, he  
24 would not have had Universal Leader make the loan to Zetta Jet.

25 45. In addition, Li Qi and Universal Leader extended the \$15 million loan to  
26 Zetta Jet under economic duress asserted by Defendants, through the threat that  
27 without the additional loan the company would not repay the \$20 million in loans  
28

1 Universal Leader had already made, or the \$43 million in aircraft financing payments,  
2 plus interest, still owed to Li Qi's family entities.

3 46. As a direct and proximate result of Plaintiffs' reliance on the  
4 misrepresentations and concealments of Defendants, Universal Leader has been  
5 harmed by extending a \$15 million loan to an insolvent company with no reasonable  
6 possibility of repayment. Plaintiffs have suffered and will suffer damages in the  
7 amount of at least the \$15 million principal on the loan, plus prejudgment and post-  
8 judgment interest.

9 47. The foregoing conduct was committed by Defendants with oppression,  
10 fraud, and/or malice, and Plaintiffs are also entitled to exemplary damages according  
11 to proof.

12  
13 **SECOND CAUSE OF ACTION**

14 **(Negligent Misrepresentation)**

15 **(Against all Defendants)**

16 48. Plaintiffs incorporate by reference the allegations in paragraphs 1-35  
17 above as though set forth in full.

18 49. In order to induce Li Qi, through Universal Leader, to make a \$15  
19 million loan to Zetta Jet, Seagrim, Walter, and Cassidy represented to Li Qi in June  
20 2017 that (a) Zetta Jet was in a temporary cash crunch, and that his funds were  
21 urgently needed as a bridge loan to other financing; (b) that Zetta Jet was arranging  
22 financing with a financial institution, and upon completion of that financing Li Qi's  
23 loan would be repaid from those new funds with a priority over other creditors; and  
24 (c) that Zetta Jet was profitable, had a valuation of \$700 million or more, and would  
25 continue to prosper and grow if Li Qi would provide immediate bridge funding.

26 50. The Defendants' representations were false, misleading, and failed to  
27 disclose additional facts necessary to make the facts disclosed not misleading.  
28

1           51. Whether or not Defendants' believed these representations were true,  
2 they had no reasonable grounds for this belief, due to, among other things, the actual  
3 condition of the company and the posture of its creditors, its problems with cash flow  
4 management, ineffective management structure, inadequate finance staff, lack of  
5 adequate management processes and management internal controls, and an  
6 incomplete 15-month audit. As a result, Defendants had no reasonable grounds for  
7 believing Zetta Jet could obtain financing from a financial institution, repay Universal  
8 Leader's loan, or prosper and grow in the future.

9           52. Defendants intended for Li Qi, Truly Great Global, and Universal  
10 Leader to rely on the representations they made.

11           53. Li Qi, Truly Great Global, and Universal Leader reasonably relied on  
12 Defendants misrepresentations to extend the \$15 million loan to Zetta Jet on June 26,  
13 2017, and to accept the transfer from Defendants of additional shares of stock in Zetta  
14 Jet. Had Li Qi known the true facts, he would not have had Universal Leader make  
15 the loan to Zetta Jet.

16           54. As a direct and proximate result of Plaintiffs' reliance on the  
17 misrepresentations of Defendants, Universal Leader has been harmed by extending a  
18 \$15 million loan to an insolvent company with no reasonable possibility of  
19 repayment. Plaintiffs' reliance on Defendants' misrepresentations was a substantial  
20 factor in causing Plaintiffs' harm. Plaintiffs have suffered and will suffer damages in  
21 the amount of at least the \$15 million principal on the loan, plus prejudgment and  
22 post-judgment interest.

**THIRD CAUSE OF ACTION**

**(Breach of Contract)**

**(By Plaintiff Truly Great Global**

**Against Defendants Seagrim, Walter and Does 1-10)**

55. Plaintiff incorporates by reference the allegations in paragraphs 1-35 above as though set forth in full.

56. A Subscription and Shareholders' Agreement for Zetta Jet PTE was entered into between plaintiff Truly Great Global and Defendants Seagrim, Walter, and Cassidy (through his company known as Asia Aviation Holdings PTE, Ltd.)

57. Truly Great Global has performed all obligations it was required to perform under the Subscription and Shareholders' Agreement, except for such obligations as are excused by the breaches or nonperformance of Defendants.

58. The Subscription and Shareholders' Agreement provides, among other things, in paragraph 2.4(g) that the prior written approval of all the shareholders is required to pass any resolution the result of which would be the winding up, liquidation or receivership of the Company, or to make any composition or arrangement with creditors of the Company.

59. Defendants Seagrim and Walter breached the foregoing provision by authorizing officers of Zetta Jet PTE to take actions that resulted, or will result, in the liquidation of the company, without the prior written approval of all the shareholders. In particular, the resolution procured and utilized by Defendants was not approved by Cassidy, and was not knowingly approved by Li Qi, on behalf of Truly Great Global.

60. As a direct and proximate result of Defendant's breach of the Subscription and Shareholders Agreement, Plaintiff Truly Great Global has been reasonably and foreseeably harmed by, among other things, the devaluation of its investment in Zetta Jet PTE, the inability to obtain repayment of loans made to the company by Li Qi's family entities, and the lost opportunity to secure new financing

1 for the company and improve and continue operations, and other damages in an  
2 amount to be proven at trial.

3  
4 **FOURTH CAUSE OF ACTION**

5 **(Breach of Implied Covenant of**  
6 **Good Faith And Fair Dealing)**

7 **(By Plaintiff Truly Great Global**

8 **Against Defendants Seagrim, Walter, and Does 1-10)**

9 61. Plaintiff incorporates by reference the allegations in paragraphs 1-35  
10 above as though set forth in full.

11 62. In entering into the Subscription and Shareholders' Agreement for Zetta  
12 Jet PTE with plaintiff Truly Great Global, Defendants Seagrim and Walter impliedly  
13 promised to do nothing to interfere with the right of Truly Great Global to receive the  
14 benefits of the agreement.

15 63. Defendants Seagrim and Walter acknowledged, in paragraph ¶ 5.1 of the  
16 Subscription and Shareholders' Agreement, that the agreement would "be performed  
17 in a spirit of mutual co-operation, trust and confidence and that its intention is that the  
18 business, profitability and reputation of the Company shall be extended and  
19 maximised by all reasonable and proper means...."

20 64. Truly Great Global has performed all obligations it was required to  
21 perform under the Subscription and Shareholders' Agreement, except for such  
22 obligations as are excused by the breaches or nonperformance of Defendants.

23 65. Defendants Seagrim and Walter breached the implied covenant of good  
24 faith and fair dealing by improperly, unfairly and fraudulently interfering with Truly  
25 Great Global's right to receive benefits under the agreement, including, but not  
26 limited to, Truly Great Global's right of true unanimous consent of the shareholders  
27 before the company could be terminated, liquidated or wound up, and Truly Great  
28 Global's right to realize, preserve, and maximize its equity interest in the company,

1 obtained for valuable consideration. Defendants improperly authorized officers of  
2 Zetta Jet PTE to take actions that resulted, or will result, in the liquidation or  
3 winding-up of the company, and/or the company being subjected to an arrangement  
4 with creditors, without the unanimous approval of all the shareholders, and without  
5 the knowing approval of Li Qi, on behalf of Truly Great Global.

6 66. As a direct and proximate result of Defendant’s breach of the implied  
7 covenant of good faith and fair dealing, Plaintiff Truly Great Global has been  
8 reasonably and foreseeably harmed by, among other things, the devaluation of its  
9 investment in Zetta Jet PTE, the inability to obtain repayment of loans made to Li  
10 Qi’s family entities, and the lost opportunity to secure new financing for the company  
11 and improve and continue operations, and other damages in an amount to be proven  
12 at trial.

13  
14 **FIFTH CAUSE CAUSE OF ACTION**

15 **(Conversion)**

16 **(By Plaintiff Universal Leader**

17 **Against Defendants Seagrim, Walter and Does 1-10)**

18 67. Plaintiff incorporates by reference the allegations in paragraphs 1-35  
19 above as though set forth in full.

20 68. At all material times, Universal Leader was the owner of all funds in its  
21 possession or generated from its business and financing activities, was entitled to  
22 immediate and exclusive possession of those funds, and was entitled to control and  
23 direct the use of those funds.

24 69. Defendants Seagrim, Walter, and Does 1-10 intentionally took and  
25 obtained funds from Universal Leader on June 26, 2017 and converted at least  
26 \$693,000 of the funds to their own use on July 7, 2017. Defendant Seagrim took and  
27 obtained \$343,000 of the funds for his own use, and defendant Walter took and  
28 obtained \$350,000 of the funds for his own use.

1 70. Defendants obtained the funds from Universal Leader through fraud,  
2 duress, and other improper activities, including misrepresenting to and concealing  
3 from Plaintiffs the intended use of funds, and to reduce their own personal exposure  
4 to Zetta Jet's creditors.

5 71. Defendants' actions have interfered totally with Universal Leader's right  
6 and ability to own, possess, control and direct the funds. Universal Leader hereby  
7 demands that Defendants' return all such funds to it.

8 72. As a direct and proximate result of Defendants' conversion of funds,  
9 Universal Leader has been damaged in the amount of at least \$693,000, plus interest  
10 at the legal rate from June 26, 2017.

11 73. As a further direct and proximate result of Defendants' conversion of  
12 funds, Universal Leader has expended time and money to pursue the funds and is  
13 entitled to fair compensation for these expenses.

14 74. Defendants hold the funds, and all proceeds, investments, or earnings  
15 acquired by Defendants with the funds, as constructive trustees for the use and benefit  
16 of Universal Leader. Universal Leader is entitled to an order that such funds,  
17 proceeds, investments or earnings be accounted for and title transferred to Universal  
18 Leader.

19 75. The foregoing conduct was committed by Defendants with oppression,  
20 fraud, and/or malice, and Universal Leader is also entitled to exemplary damages  
21 according to proof.

22  
23 **SIXTH CAUSE OF ACTION**

24 **(Money Had and Received)**

25 **(By Plaintiff Universal Leader)**

26 **Against Defendants Seagrim, Walter and Does 1-10)**

27 76. Plaintiff incorporates by reference the allegations in paragraphs 1-32  
28 above as though set forth in full.

1 77. Within the past two years, Defendants Seagrim, Walter, and Does 1-10  
2 have taken and retained funds belonging to Universal Leader, in the amount of at  
3 least \$693,000, which funds were intended to be and were for the use and benefit of  
4 Zetta Jet PTE and Universal Leader's interest therein.

5 78. Defendants have appropriated the funds to their own use by means of  
6 conversion, misrepresentation, concealment and other wrongful conduct.

7 79. Defendants have been unjustly enriched by the taking and retention of  
8 these funds at the expense of Universal Leader.

9 80. Defendants are indebted to and obliged to repay the funds to Universal  
10 Leader, and have an obligation implied in fact and in law to do so, but have failed to  
11 repay the funds.

12 **REQUEST FOR JURY TRIAL**

13 81. Plaintiffs hereby give notice that they request a jury trial on all issues  
14 triable to a jury.

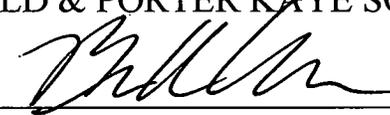
15 **PRAYER FOR RELIEF**

16 WHEREFORE, Plaintiffs pray for judgment as follows:

- 17 i. For actual damages according to proof at trial;
- 18 ii. For exemplary damages;
- 19 iii. For costs of suit;
- 20 iv. For appropriate equitable relief, including provisional remedies,
- 21 constructive trust, restitution, accounting, injunctive or declaratory relief;
- 22 v. For pre-judgment interest; and
- 23 vi. For such other and further relief as this Court may deem just and proper.

24 Dated: February 21, 2018

ARNOLD & PORTER KAYE SCHOLER LLP

25 By: 

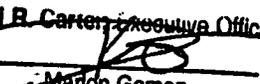
26 Brian K. Condon  
27 Attorneys for Plaintiffs Truly Global Great  
28 Ltd. and Universal Leader Investment Ltd.

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 TELEPHONE NO.: 213.243.4000 FAX NO.: 213.243.4199  
 ATTORNEY FOR (Name): Plaintiffs, Truly Great Global Ltd., et al.

FOR COURT USE ONLY

**FILED**  
 Superior Court of California  
 County of Los Angeles

**FEB 21 2018**

Sherril B. Carter, Executive Officer/Clerk  
 By  Deputy  
 Marion Gomez

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES  
 STREET ADDRESS: 111 North Hill Street  
 MAILING ADDRESS: Same  
 CITY AND ZIP CODE: Los Angeles 90012  
 BRANCH NAME: Central District

CASE NAME: Truly Great Global Ltd., et al. v. Seagrim, et al.

<p><b>CIVIL CASE COVER SHEET</b></p> <p><input checked="" type="checkbox"/> <b>Unlimited</b> (Amount demanded exceeds \$25,000)      <input type="checkbox"/> <b>Limited</b> (Amount demanded is \$25,000 or less)</p>	<p><b>Complex Case Designation</b></p> <p><input type="checkbox"/> <b>Counter</b>      <input type="checkbox"/> <b>Joinder</b></p> <p>Filed with first appearance by defendant (Cal. Rules of Court, rule 3.402)</p>	<p>CASE NUMBER: <b>BC694919</b></p> <p>JUDGE:</p> <p>DEPT:</p>
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*Items 1-6 below must be completed (see instructions on page 2).*

1. Check one box below for the case type that best describes this case:
- |   |  |   |
|---|--|---|
| <p><b>Auto Tort</b></p> <p><input type="checkbox"/> Auto (22)</p> <p><input type="checkbox"/> Uninsured motorist (46)</p> <p><b>Other PI/PD/WD (Personal Injury/Property Damage/Wrongful Death) Tort</b></p> <p><input type="checkbox"/> Asbestos (04)</p> <p><input type="checkbox"/> Product liability (24)</p> <p><input type="checkbox"/> Medical malpractice (45)</p> <p><input type="checkbox"/> Other PI/PD/WD (23)</p> <p><b>Non-PI/PD/WD (Other) Tort</b></p> <p><input type="checkbox"/> Business tort/unfair business practice (07)</p> <p><input type="checkbox"/> Civil rights (08)</p> <p><input type="checkbox"/> Defamation (13)</p> <p><input type="checkbox"/> Fraud (16)</p> <p><input type="checkbox"/> Intellectual property (19)</p> <p><input type="checkbox"/> Professional negligence (25)</p> <p><input type="checkbox"/> Other non-PI/PD/WD tort (35)</p> <p><b>Employment</b></p> <p><input type="checkbox"/> Wrongful termination (36)</p> <p><input type="checkbox"/> Other employment (15)</p> | <p><b>Contract</b></p> <p><input type="checkbox"/> Breach of contract/warranty (06)</p> <p><input type="checkbox"/> Rule 3.740 collections (09)</p> <p><input type="checkbox"/> Other collections (09)</p> <p><input type="checkbox"/> Insurance coverage (18)</p> <p><input checked="" type="checkbox"/> Other contract (37)</p> <p><b>Real Property</b></p> <p><input type="checkbox"/> Eminent domain/Inverse condemnation (14)</p> <p><input type="checkbox"/> Wrongful eviction (33)</p> <p><input type="checkbox"/> Other real property (26)</p> <p><b>Unlawful Detainer</b></p> <p><input type="checkbox"/> Commercial (31)</p> <p><input type="checkbox"/> Residential (32)</p> <p><input type="checkbox"/> Drugs (38)</p> <p><b>Judicial Review</b></p> <p><input type="checkbox"/> Asset forfeiture (05)</p> <p><input type="checkbox"/> Petition re: arbitration award (11)</p> <p><input type="checkbox"/> Writ of mandate (02)</p> <p><input type="checkbox"/> Other judicial review (39)</p> | <p><b>Provisionally Complex Civil Litigation</b><br/>(Cal. Rules of Court, rules 3.400-3.403)</p> <p><input type="checkbox"/> Antitrust/Trade regulation (03)</p> <p><input type="checkbox"/> Construction defect (10)</p> <p><input type="checkbox"/> Mass tort (40)</p> <p><input type="checkbox"/> Securities litigation (28)</p> <p><input type="checkbox"/> Environmental/Toxic tort (30)</p> <p><input type="checkbox"/> Insurance coverage claims arising from the above listed provisionally complex case types (41)</p> <p><b>Enforcement of Judgment</b></p> <p><input type="checkbox"/> Enforcement of judgment (20)</p> <p><b>Miscellaneous Civil Complaint</b></p> <p><input type="checkbox"/> RICO (27)</p> <p><input type="checkbox"/> Other complaint (not specified above) (42)</p> <p><b>Miscellaneous Civil Petition</b></p> <p><input type="checkbox"/> Partnership and corporate governance (21)</p> <p><input type="checkbox"/> Other petition (not specified above) (43)</p> |
|---|--|---|

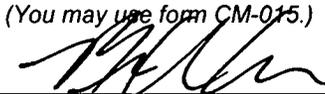
2. This case  is  is not complex under rule 3.400 of the California Rules of Court. If the case is complex, mark the factors requiring exceptional judicial management:
- |  |  |
|--|--|
| a. <input type="checkbox"/> Large number of separately represented parties   | d. <input type="checkbox"/> Large number of witnesses  |
| b. <input type="checkbox"/> Extensive motion practice raising difficult or novel issues that will be time-consuming to resolve | e. <input type="checkbox"/> Coordination with related actions pending in one or more courts in other counties, states, or countries, or in a federal court |
| c. <input type="checkbox"/> Substantial amount of documentary evidence   | f. <input type="checkbox"/> Substantial postjudgment judicial supervision  |

3. Remedies sought (check all that apply): a.  monetary b.  nonmonetary; declaratory or injunctive relief c.  punitive

4. Number of causes of action (specify): 6

5. This case  is  is not a class action suit.

6. If there are any known related cases, file and serve a notice of related case. (You may use form CM-015.)

Date: February 21, 2018  
 Brian K. Condon, Esq. 

(TYPE OR PRINT NAME) (SIGNATURE OF PARTY OR ATTORNEY FOR PARTY)

**NOTICE**

Plaintiff must file this cover sheet with the first paper filed in the action or proceeding (except small claims cases or cases filed under the Probate Code, Family Code, or Welfare and Institutions Code). (Cal. Rules of Court, rule 3.220.) Failure to file may result in sanctions.

- File this cover sheet in addition to any cover sheet required by local court rule.
- If this case is complex under rule 3.400 et seq. of the California Rules of Court, you must serve a copy of this cover sheet on all other parties to the action or proceeding.
- Unless this is a collections case under rule 3.740 or a complex case, this cover sheet will be used for statistical purposes only.

Page 1 of 2

Exhibit 4 to Roselius Declaration Page 24 of 28  
**INSTRUCTIONS ON HOW TO COMPLETE THE COVER SHEET**

**To Plaintiffs and Others Filing First Papers.** If you are filing a first paper (for example, a complaint) in a civil case, you must complete and file, along with your first paper, the *Civil Case Cover Sheet* contained on page 1. This information will be used to compile statistics about the types and numbers of cases filed. You must complete items 1 through 6 on the sheet. In item 1, you must check one box for the case type that best describes the case. If the case fits both a general and a more specific type of case listed in item 1, check the more specific one. If the case has multiple causes of action, check the box that best indicates the primary cause of action. To assist you in completing the sheet, examples of the cases that belong under each case type in item 1 are provided below. A cover sheet must be filed only with your initial paper. Failure to file a cover sheet with the first paper filed in a civil case may subject a party, its counsel, or both to sanctions under rules 2.30 and 3.220 of the California Rules of Court.

**To Parties in Rule 3.740 Collections Cases.** A "collections case" under rule 3.740 is defined as an action for recovery of money owed in a sum stated to be certain that is not more than \$25,000, exclusive of interest and attorney's fees, arising from a transaction in which property, services, or money was acquired on credit. A collections case does not include an action seeking the following: (1) tort damages, (2) punitive damages, (3) recovery of real property, (4) recovery of personal property, or (5) a prejudgment writ of attachment. The identification of a case as a rule 3.740 collections case on this form means that it will be exempt from the general time-for-service requirements and case management rules, unless a defendant files a responsive pleading. A rule 3.740 collections case will be subject to the requirements for service and obtaining a judgment in rule 3.740.

**To Parties in Complex Cases.** In complex cases only, parties must also use the *Civil Case Cover Sheet* to designate whether the case is complex. If a plaintiff believes the case is complex under rule 3.400 of the California Rules of Court, this must be indicated by completing the appropriate boxes in items 1 and 2. If a plaintiff designates a case as complex, the cover sheet must be served with the complaint on all parties to the action. A defendant may file and serve no later than the time of its first appearance a joinder in the plaintiff's designation, a counter-designation that the case is not complex, or, if the plaintiff has made no designation, a designation that the case is complex.

**CASE TYPES AND EXAMPLES**

<p><b>Auto Tort</b></p> <ul style="list-style-type: none"> <li>Auto (22)—Personal Injury/Property Damage/Wrongful Death</li> <li>Uninsured Motorist (46) <i>(if the case involves an uninsured motorist claim subject to arbitration, check this item instead of Auto)</i></li> </ul> <p><b>Other PI/PD/WD (Personal Injury/Property Damage/Wrongful Death) Tort</b></p> <ul style="list-style-type: none"> <li>Asbestos (04)                     <ul style="list-style-type: none"> <li>Asbestos Property Damage</li> <li>Asbestos Personal Injury/Wrongful Death</li> </ul> </li> <li>Product Liability <i>(not asbestos or toxic/environmental)</i> (24)</li> <li>Medical Malpractice (45)                     <ul style="list-style-type: none"> <li>Medical Malpractice—Physicians &amp; Surgeons</li> <li>Other Professional Health Care Malpractice</li> </ul> </li> <li>Other PI/PD/WD (23)                     <ul style="list-style-type: none"> <li>Premises Liability (e.g., slip and fall)</li> <li>Intentional Bodily Injury/PD/WD (e.g., assault, vandalism)</li> <li>Intentional Infliction of Emotional Distress</li> <li>Negligent Infliction of Emotional Distress</li> <li>Other PI/PD/WD</li> </ul> </li> </ul> <p><b>Non-PI/PD/WD (Other) Tort</b></p> <ul style="list-style-type: none"> <li>Business Tort/Unfair Business Practice (07)</li> <li>Civil Rights (e.g., discrimination, false arrest) <i>(not civil harassment)</i> (08)</li> <li>Defamation (e.g., slander, libel) (13)</li> <li>Fraud (16)</li> <li>Intellectual Property (19)</li> <li>Professional Negligence (25)                     <ul style="list-style-type: none"> <li>Legal Malpractice</li> <li>Other Professional Malpractice <i>(not medical or legal)</i></li> </ul> </li> <li>Other Non-PI/PD/WD Tort (35)</li> </ul> <p><b>Employment</b></p> <ul style="list-style-type: none"> <li>Wrongful Termination (36)</li> <li>Other Employment (15)</li> </ul>	<p><b>Contract</b></p> <ul style="list-style-type: none"> <li>Breach of Contract/Warranty (06)                     <ul style="list-style-type: none"> <li>Breach of Rental/Lease Contract <i>(not unlawful detainer or wrongful eviction)</i></li> </ul> </li> <li>Contract/Warranty Breach—Seller Plaintiff <i>(not fraud or negligence)</i></li> <li>Negligent Breach of Contract/Warranty</li> <li>Other Breach of Contract/Warranty</li> <li>Collections (e.g., money owed, open book accounts) (09)</li> <li>Collection Case—Seller Plaintiff</li> <li>Other Promissory Note/Collections Case</li> <li>Insurance Coverage <i>(not provisionally complex)</i> (18)                     <ul style="list-style-type: none"> <li>Auto Subrogation</li> <li>Other Coverage</li> </ul> </li> <li>Other Contract (37)                     <ul style="list-style-type: none"> <li>Contractual Fraud</li> <li>Other Contract Dispute</li> </ul> </li> </ul> <p><b>Real Property</b></p> <ul style="list-style-type: none"> <li>Eminent Domain/Inverse Condemnation (14)</li> <li>Wrongful Eviction (33)</li> <li>Other Real Property (e.g., quiet title) (26)                     <ul style="list-style-type: none"> <li>Writ of Possession of Real Property</li> <li>Mortgage Foreclosure</li> <li>Quiet Title</li> <li>Other Real Property <i>(not eminent domain, landlord/tenant, or foreclosure)</i></li> </ul> </li> </ul> <p><b>Unlawful Detainer</b></p> <ul style="list-style-type: none"> <li>Commercial (31)</li> <li>Residential (32)</li> <li>Drugs (38) <i>(if the case involves illegal drugs, check this item; otherwise, report as Commercial or Residential)</i></li> </ul> <p><b>Judicial Review</b></p> <ul style="list-style-type: none"> <li>Asset Forfeiture (05)</li> <li>Petition Re: Arbitration Award (11)</li> <li>Writ of Mandate (02)                     <ul style="list-style-type: none"> <li>Writ—Administrative Mandamus</li> <li>Writ—Mandamus on Limited Court Case Matter</li> </ul> </li> <li>Writ—Other Limited Court Case Review</li> <li>Other Judicial Review (39)                     <ul style="list-style-type: none"> <li>Review of Health Officer Order</li> <li>Notice of Appeal—Labor Commissioner Appeals</li> </ul> </li> </ul>	<p><b>Provisionally Complex Civil Litigation (Cal. Rules of Court Rules 3.400–3.403)</b></p> <ul style="list-style-type: none"> <li>Antitrust/Trade Regulation (03)</li> <li>Construction Defect (10)</li> <li>Claims Involving Mass Tort (40)</li> <li>Securities Litigation (28)</li> <li>Environmental/Toxic Tort (30)</li> <li>Insurance Coverage Claims <i>(arising from provisionally complex case type listed above)</i> (41)</li> </ul> <p><b>Enforcement of Judgment</b></p> <ul style="list-style-type: none"> <li>Enforcement of Judgment (20)                     <ul style="list-style-type: none"> <li>Abstract of Judgment (Out of County)</li> <li>Confession of Judgment <i>(non-domestic relations)</i></li> <li>Sister State Judgment</li> <li>Administrative Agency Award <i>(not unpaid taxes)</i></li> <li>Petition/Certification of Entry of Judgment on Unpaid Taxes</li> <li>Other Enforcement of Judgment Case</li> </ul> </li> </ul> <p><b>Miscellaneous Civil Complaint</b></p> <ul style="list-style-type: none"> <li>RICO (27)</li> <li>Other Complaint <i>(not specified above)</i> (42)</li> <li>Declaratory Relief Only</li> <li>Injunctive Relief Only <i>(non-harassment)</i></li> <li>Mechanics Lien</li> <li>Other Commercial Complaint Case <i>(non-tort/non-complex)</i></li> <li>Other Civil Complaint <i>(non-tort/non-complex)</i></li> </ul> <p><b>Miscellaneous Civil Petition</b></p> <ul style="list-style-type: none"> <li>Partnership and Corporate Governance (21)</li> <li>Other Petition <i>(not specified above)</i> (43)                     <ul style="list-style-type: none"> <li>Civil Harassment</li> <li>Workplace Violence</li> <li>Elder/Dependent Adult Abuse</li> <li>Election Contest</li> <li>Petition for Name Change</li> <li>Petition for Relief From Late Claim</li> </ul> </li> <li>Other Civil Petition</li> </ul>
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SHORT TITLE:

Truly Great Global Ltd., et al. v. Seagrini, et al.

CASE NO.

BC 694919

**CIVIL CASE COVER SHEET ADDENDUM AND  
STATEMENT OF LOCATION  
(CERTIFICATE OF GROUNDS FOR ASSIGNMENT TO COURTHOUSE LOCATION)**

This form is required pursuant to Local Rule 2.3 in all new civil case filings in the Los Angeles Superior Court.

**Step 1:** After completing the Civil Case Cover Sheet (Judicial Council form CM-010), find the exact case type in Column A that corresponds to the case type indicated in the Civil Case Cover Sheet.

**Step 2:** In Column B, check the box for the type of action that best describes the nature of the case.

**Step 3:** In Column C, circle the number which explains the reason for the court filing location you have chosen.

**Applicable Reasons for Choosing Court Filing Location (Column C)**

- |  |  |
|--|--|
| 1. Class actions must be filed in the Stanley Mosk Courthouse, Central District. | 7. Location where petitioner resides.  |
| 2. Permissive filing in central district.  | 8. Location wherein defendant/respondent functions wholly.   |
| 3. Location where cause of action arose.   | 9. Location where one or more of the parties reside.   |
| 4. Mandatory personal injury filing in North District.                           | 10. Location of Labor Commissioner Office.   |
| 5. Location where performance required or defendant resides.                     | 11. Mandatory filing location (Hub Cases – unlawful detainer, limited non-collection, limited collection, or personal injury). |
| 6. Location of property or permanently garaged vehicle.                          |  |

Auto  
Tort

Other Personal Injury/Property  
Damage/Wrongful Death Tort

<b>A</b> Civil Case Cover Sheet Category No.	<b>B</b> Type of Action (Check only one)	<b>C</b> Applicable Reasons – See Step 3 Above
Auto (22)	<input type="checkbox"/> A7100 Motor Vehicle - Personal Injury/Property Damage/Wrongful Death	1, 4, 11
Uninsured Motorist (46)	<input type="checkbox"/> A7110 Personal Injury/Property Damage/Wrongful Death - Uninsured Motorist	1, 4, 11
Asbestos (04)	<input type="checkbox"/> A6070 Asbestos Property Damage <input type="checkbox"/> A7221 Asbestos - Personal Injury/Wrongful Death	1, 11 1, 11
Product Liability (24)	<input type="checkbox"/> A7260 Product Liability (not asbestos or toxic/environmental)	1, 4, 11
Medical Malpractice (45)	<input type="checkbox"/> A7210 Medical Malpractice - Physicians & Surgeons <input type="checkbox"/> A7240 Other Professional Health Care Malpractice	1, 4, 11 1, 4, 11
Other Personal Injury Property Damage Wrongful Death (23)	<input type="checkbox"/> A7250 Premises Liability (e.g., slip and fall) <input type="checkbox"/> A7230 Intentional Bodily Injury/Property Damage/Wrongful Death (e.g., assault, vandalism, etc.) <input type="checkbox"/> A7270 Intentional Infliction of Emotional Distress <input type="checkbox"/> A7220 Other Personal Injury/Property Damage/Wrongful Death	1, 4, 11 1, 4, 11 1, 4, 11 1, 4, 11

SHORT TITLE:

Truly Great Global Ltd., et al. v. Seagrini, et al.

CASE NO

Non-Personal Injury/ Property  
Damage/Wrongful Death Tort

Employment

Contract

Real Property  
Unlawful Detainer

A Civil Case Cover Sheet Category No.	B Type of Action (Check only one)	C Applicable Reasons - See Step 3 Above
Business Tort (07)	<input type="checkbox"/> A6029 Other Commercial/Business Tort (not fraud/breach of contract)	1, 2, 3
Civil Rights (08)	<input type="checkbox"/> A6005 Civil Rights/Discrimination	1, 2, 3
Defamation (13)	<input type="checkbox"/> A6010 Defamation (slander/libel)	1, 2, 3
Fraud (16)	<input type="checkbox"/> A6013 Fraud (no contract)	1, 2, 3
Professional Negligence (25)	<input type="checkbox"/> A6017 Legal Malpractice <input type="checkbox"/> A6050 Other Professional Malpractice (not medical or legal)	1, 2, 3 1, 2, 3
Other (35)	<input type="checkbox"/> A6025 Other Non-Personal Injury/Property Damage tort	1, 2, 3
Wrongful Termination (36)	<input type="checkbox"/> A6037 Wrongful Termination	1, 2, 3
Other Employment (15)	<input type="checkbox"/> A6024 Other Employment Complaint Case <input type="checkbox"/> A6109 Labor Commissioner Appeals	1, 2, 3 10
Breach of Contract/ Warranty (06) (not insurance)	<input type="checkbox"/> A6004 Breach of Rental/Lease Contract (not unlawful detainer or wrongful eviction) <input type="checkbox"/> A6008 Contract/Warranty Breach -Seller Plaintiff (no fraud/negligence) <input type="checkbox"/> A6019 Negligent Breach of Contract/Warranty (no fraud) <input type="checkbox"/> A6028 Other Breach of Contract/Warranty (not fraud or negligence)	2, 5 2, 5 1, 2, 5 1, 2, 5
Collections (09)	<input type="checkbox"/> A6002 Collections Case-Seller Plaintiff <input type="checkbox"/> A6012 Other Promissory Note/Collections Case <input type="checkbox"/> A6034 Collections Case-Purchased Debt (Charged Off Consumer Debt Purchased on or after January 1, 2014)	5, 6, 11 5, 11 5, 6, 11
Insurance Coverage (18)	<input type="checkbox"/> A6015 Insurance Coverage (not complex)	1, 2, 5, 8
Other Contract (37)	<input checked="" type="checkbox"/> A6009 Contractual Fraud <input type="checkbox"/> A6031 Tortious Interference <input type="checkbox"/> A6027 Other Contract Dispute(not breach/insurance/fraud/negligence)	1, 2, 3, 5 1, 2, 3, 5 1, 2, 3, 8, 9
Eminent Domain/Inverse Condemnation (14)	<input type="checkbox"/> A7300 Eminent Domain/Condemnation Number of parcels _____	2, 6
Wrongful Eviction (33)	<input type="checkbox"/> A6023 Wrongful Eviction Case	2, 6
Other Real Property (26)	<input type="checkbox"/> A6018 Mortgage Foreclosure <input type="checkbox"/> A6032 Quiet Title <input type="checkbox"/> A6060 Other Real Property (not eminent domain, landlord/tenant, foreclosure)	2, 6 2, 6 2, 6
Unlawful Detainer-Commercial (31)	<input type="checkbox"/> A6021 Unlawful Detainer-Commercial (not drugs or wrongful eviction)	6, 11
Unlawful Detainer-Residential (32)	<input type="checkbox"/> A6020 Unlawful Detainer-Residential (not drugs or wrongful eviction)	6, 11
Unlawful Detainer- Post-Foreclosure (34)	<input type="checkbox"/> A6020F Unlawful Detainer-Post-Foreclosure	2, 6, 11
Unlawful Detainer-Drugs (38)	<input type="checkbox"/> A6022 Unlawful Detainer-Drugs	2, 6, 11

SHORT TITLE:

Truly Great Global Ltd., et al. v. Seagrill, et al.

CASE NO:

	<b>A</b> Civil Case Cover Sheet Category No.	<b>B</b> Type of Action (Check only one)	<b>C</b> Applicable Reasons - See Step 3 Above
<b>Judicial Review</b>	Asset Forfeiture (05)	<input type="checkbox"/> A6108 Asset Forfeiture Case	2, 3, 6
	Petition re Arbitration (11)	<input type="checkbox"/> A6115 Petition to Compel/Confirm/Vacate Arbitration	2, 5
	Writ of Mandate (02)	<input type="checkbox"/> A6151 Writ - Administrative Mandamus <input type="checkbox"/> A6152 Writ - Mandamus on Limited Court Case Matter <input type="checkbox"/> A6153 Writ - Other Limited Court Case Review	2, 8 2 2
	Other Judicial Review (39)	<input type="checkbox"/> A6150 Other Writ /Judicial Review	2, 8
<b>Provisionally Complex Litigation</b>	Antitrust/Trade Regulation (03)	<input type="checkbox"/> A6003 Antitrust/Trade Regulation	1, 2, 8
	Construction Defect (10)	<input type="checkbox"/> A6007 Construction Defect	1, 2, 3
	Claims Involving Mass Tort (40)	<input type="checkbox"/> A6006 Claims Involving Mass Tort	1, 2, 8
	Securities Litigation (28)	<input type="checkbox"/> A6035 Securities Litigation Case	1, 2, 8
	Toxic Tort Environmental (30)	<input type="checkbox"/> A6036 Toxic Tort/Environmental	1, 2, 3, 8
	Insurance Coverage Claims from Complex Case (41)	<input type="checkbox"/> A6014 Insurance Coverage/Subrogation (complex case only)	1, 2, 5, 8
<b>Enforcement of Judgment</b>	Enforcement of Judgment (20)	<input type="checkbox"/> A6141 Sister State Judgment	2, 5, 11
		<input type="checkbox"/> A6160 Abstract of Judgment	2, 6
		<input type="checkbox"/> A6107 Confession of Judgment (non-domestic relations)	2, 9
		<input type="checkbox"/> A6140 Administrative Agency Award (not unpaid taxes)	2, 8
		<input type="checkbox"/> A6114 Petition/Certificate for Entry of Judgment on Unpaid Tax	2, 8
		<input type="checkbox"/> A6112 Other Enforcement of Judgment Case	2, 8, 9
<b>Miscellaneous Civil Complaints</b>	RICO (27)	<input type="checkbox"/> A6033 Racketeering (RICO) Case	1, 2, 8
	Other Complaints (Not Specified Above) (42)	<input type="checkbox"/> A6030 Declaratory Relief Only	1, 2, 8
		<input type="checkbox"/> A6040 Injunctive Relief Only (not domestic/harassment)	2, 8
		<input type="checkbox"/> A6011 Other Commercial Complaint Case (non-tort/non-complex)	1, 2, 8
<input type="checkbox"/> A6000 Other Civil Complaint (non-tort/non-complex)		1, 2, 8	
<b>Miscellaneous Civil Petitions</b>	Partnership Corporation Governance (21)	<input type="checkbox"/> A6113 Partnership and Corporate Governance Case	2, 8
	Other Petitions (Not Specified Above) (43)	<input type="checkbox"/> A6121 Civil Harassment	2, 3, 9
		<input type="checkbox"/> A6123 Workplace Harassment	2, 3, 9
		<input type="checkbox"/> A6124 Elder/Dependent Adult Abuse Case	2, 3, 9
		<input type="checkbox"/> A6190 Election Contest	2
		<input type="checkbox"/> A6110 Petition for Change of Name/Change of Gender	2, 7
		<input type="checkbox"/> A6170 Petition for Relief from Late Claim Law	2, 3, 8
		<input type="checkbox"/> A6100 Other Civil Petition	2, 9

SHORT TITLE: Truly Great Global Ltd., et al. v. Seagrini, et al.	CASE NU
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**Step 4: Statement of Reason and Address:** Check the appropriate boxes for the numbers shown under Column C for the type of action that you have selected. Enter the address which is the basis for the filing location, including zip code. (No address required for class action cases).

<b>REASON:</b> <input type="checkbox"/> 1. <input checked="" type="checkbox"/> 2. <input type="checkbox"/> 3. <input type="checkbox"/> 4. <input type="checkbox"/> 5. <input type="checkbox"/> 6. <input type="checkbox"/> 7. <input type="checkbox"/> 8. <input type="checkbox"/> 9. <input type="checkbox"/> 10. <input type="checkbox"/> 11.		<b>ADDRESS:</b> Not applicable
<b>CITY:</b> 10676 SHERMAN WAY	<b>STATE:</b> CA	<b>ZIP CODE:</b> 91505

**Step 5: Certification of Assignment:** I certify that this case is properly filed in the Central District of the Superior Court of California, County of Los Angeles [Code Civ. Proc., §392 et seq., and Local Rule 2.3(a)(1)(E)].

Dated: February 21, 2018

  
 (SIGNATURE OF ATTORNEY/FILING PARTY)  
 Brian K. Condon, Esq.

**PLEASE HAVE THE FOLLOWING ITEMS COMPLETED AND READY TO BE FILED IN ORDER TO PROPERLY COMMENCE YOUR NEW COURT CASE:**

1. Original Complaint or Petition.
2. If filing a Complaint, a completed Summons form for issuance by the Clerk.
3. Civil Case Cover Sheet, Judicial Council form CM-010.
4. Civil Case Cover Sheet Addendum and Statement of Location form, LACIV 109, LASC Approved 03-04 (Rev. 02/16).
5. Payment in full of the filing fee, unless there is court order for waiver, partial or scheduled payments.
6. A signed order appointing the Guardian ad Litem, Judicial Council form CIV-010, if the plaintiff or petitioner is a minor under 18 years of age will be required by Court in order to issue a summons.
7. Additional copies of documents to be conformed by the Clerk. Copies of the cover sheet and this addendum must be served along with the summons and complaint, or other initiating pleading in the case.

C:  
 2:  
 3:  
 4:  
 5:  
 6:  
 7:  
 8:  
 9:  
 10:  
 11:

**EXHIBIT 5**

**(April 11, 2017 Email Correspondence)**

**From:** liqiqi@yahoo.com  
**Sent:** Tuesday, April 11, 2017, 15:15  
**To:** gcassidy@zettajet.com  
**Cc:** Cherry T Wong <cherry.t.wong@hsbc.com.sg>; hermannlee@hsbc.com.sg; keithchew@hsbc.com.sg  
**Subject:** 回复 : Re: 回复 : Fwd: Universal Leader\_USD780,671 / Case Ref: SG1170410-000277 / MID 174100608451HN00

if don't give out again ,I will sue HSBC sg your motherfucker.

From Android Yahoo !

2017 年 4 月 11 日星期二 15:48, Geoffery Cassidy Zetta Jet <gcassidy@zettajet.com> 写道 :

Hi Liqi

Yes I will deal with it.

Dear Hermann

I demand a formal explanation on this.

This is a Loan repayment to Universal Leader, we have been doing it so Long.

This is very crazy

Sent from my iPhone

On 11 Apr 2017, at 15:45, "[liqiqi@yahoo.com](mailto:liqiqi@yahoo.com)" <[liqiqi@yahoo.com](mailto:liqiqi@yahoo.com)> wrote:

it is only a personal loan ,zettajet repay to me for 1.5 years,what are you fucking need ?fuck you.fuck your whole family .fuck .rubbish HSBC sg .trash .

Geoff ,reply these motherfuckers.

From Android Yahoo !

2017 年 4 月 11 日星期二 15:22, Geoffery Cassidy Zetta Jet

<[gcassidy@zettajet.com](mailto:gcassidy@zettajet.com)> 写道 :

Liqi

More compliance questions!

See below!!! I'll let you tell my banks what you think! They are in copy

Sent from my iPhone

Begin forwarded message:

**From:** Hermann LEE <[hermannlee@hsbc.com.sg](mailto:hermannlee@hsbc.com.sg)>

**Date:** 11 April 2017 at 15:03:57 GMT+8

**To:** "[finance@asiaaviationcompany.com](mailto:finance@asiaaviationcompany.com)" <[finance@asiaaviationcompany.com](mailto:finance@asiaaviationcompany.com)>

**Cc:** Geoffery Cassidy Zetta Jet <[gcassidy@zettajet.com](mailto:gcassidy@zettajet.com)>, "Muhamad Hidayat Bin AMRAN"

Dear Eunise,

Would need you to reply on the queries below. Once replied, I can help to chase on the payment if not I cannot do anything on my side.

**Hermann LEE**

AVP, BUSINESS BANKING | The Hongkong and Shanghai Banking Corporation Limited  
21 Collyer Quay, #07-01 HSBC Building, Singapore 049320

---

**From:** Muhamad Hidayat Bin AMRAN

**Sent:** 11 April 2017 12:06

**To:** 'finance@zettajet.com' <finance@zettajet.com>

**Cc:** Hermann LEE <hermannlee@hsbc.com.sg>; Pei Sun LAM <peisunlam@hsbc.com.sg>; Pamela TOH <pamela.toh@hsbc.com.sg>

**Subject:** RE: Universal Leader\_USD780,671 / Case Ref: SG1170410-000277 / MID 174100608451HN00

Dear Eunise,

With regards to this payment, the team is requesting for the following details:

- 1) A DETAILED PURPOSE OF PAYMENT
- 2) AN ATTESTATION AS TO WHETHER THIS TRANSACTION INVOLVES DIRECTLY OR INDIRECTLY, DEBT OR EQUITY, SUCH AS, BUT NOT LIMITED TO, A LOAN, LETTER OF CREDIT, SECURITIES SETTLEMENT, EXTENSION OF CREDIT, DISCOUNT NOTES/BILLS, STOCKS, BONDS OR SHARE ISSUANCES
- 3) IF YES, PROVIDE DATE OF ISSUE AND DATE OF MATURITY

Please provide us with your response by 3pm 12 April 2017.

Thank you.

Best regards,

**Muhamad Hidayat Bin AMRAN**

Relationship Associate | HSBC Commercial Banking  
21 Collyer Quay HSBC Building Level 7 Singapore 049320

---

Phone. 65 6658 7466

Fax. 65 6538 2869

Email. [muhamad.hidayat.bin.amran@hsbc.com.sg](mailto:muhamad.hidayat.bin.amran@hsbc.com.sg)

Website: <http://www.hsbc.com.sg/business>

---

**From:** Muhamad Hidayat Bin AMRAN

**Sent:** 11 April 2017 09:45

**To:** 'finance@zettajet.com' <finance@zettajet.com>

Dear Eunise,

The payment is currently under compliance check at the moment. I'm trying to get them to expedite the checks. Once it is completed and funds has been sent out, I will inform you accordingly.

Thank you.

Best regards,

**Muhamad Hidayat Bin AMRAN**

Relationship Associate | HSBC Commercial Banking  
21 Collyer Quay HSBC Building Level 7 Singapore 049320

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Phone. 65 6658 7466  
Fax. 65 6538 2869  
Email. [muhamad.hidayat.bin.amran@hsbc.com.sg](mailto:muhamad.hidayat.bin.amran@hsbc.com.sg)  
Website: <http://www.hsbc.com.sg/business>

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**From:** [finance@zettajet.com](mailto:finance@zettajet.com) [<mailto:finance@zettajet.com>]

**Sent:** 11 April 2017 09:14

**To:** Muhamad Hidayat Bin AMRAN <[muhamad.hidayat.bin.amran@hsbc.com.sg](mailto:muhamad.hidayat.bin.amran@hsbc.com.sg)>

**Cc:** Hermann LEE <[hermannlee@hsbc.com.sg](mailto:hermannlee@hsbc.com.sg)>; Pei Sun LAM <[peisunlam@hsbc.com.sg](mailto:peisunlam@hsbc.com.sg)>

**Subject:** RE: Universal Leader\_USD780,671

Dear Hidayat

Kindly if you could assist with the below-mentioned.

Thank you.

Best regards,

<image001.jpg>

**EUNISE LEE** | Finance

OFFICE +65 6483 8870

WEB [zettajet.com](http://zettajet.com)

Zetta Jet Pte Ltd, 700 West Camp Road, #04-10 JTC Aviation One, Singapore 797649

[MYZETTAJET@ZETTAJET@MYZETTAJET@MYZETTAJET#ZETTAJET](mailto:MYZETTAJET@ZETTAJET@MYZETTAJET@MYZETTAJET#ZETTAJET)

FAR 135 AIR CHARTER CERTIFICATE # I1DA914J

**NOTE** This e-mail is intended only for the named recipient(s) above and may contain information that is privileged, confidential immediately.

<image002.jpg> Please consider the environment before printing this email.

---

**From:** [finance@zettajet.com](mailto:finance@zettajet.com) [<mailto:finance@zettajet.com>]

Dear Pei Sum

Kindly if you could check on the attached transaction done at 10/04/2017 14:08 but still not complete by bank.

Will wait to hear from you.

Thank you.

Best regards,

<image003.jpg>

**EUNISE LEE** | Finance

OFFICE +65 6483 8870

WEB [zettajet.com](http://zettajet.com)

Zetta Jet Pte Ltd, 700 West Camp Road, #04-10 JTC Aviation One, Singapore 797649

[MYZETTAJET@ZETTAJET@MYZETTAJET@MYZETTAJET#ZETTAJET](mailto:MYZETTAJET@ZETTAJET@MYZETTAJET@MYZETTAJET#ZETTAJET)

FAR 135 AIR CHARTER CERTIFICATE # I1DA914J

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**Internet communications cannot be guaranteed to be timely, secure, error or virus-free. The sender does not accept liability for any errors or omissions.**

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**"SAVE PAPER - THINK BEFORE YOU PRINT!"**

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<image002.jpg>

<image003.jpg>

<image004.jpg>

**EXHIBIT 6**

**(First Amended Complaint in *Truly Great Global Ltd. v. Seagrim*, No. BC694919 (Superior Court of California, County of Los Angeles))**

1 BRIAN K. CONDON (SBN 138776)  
2 JOHN C. ULIN (SBN 165524)  
3 TIFFANY M. IKEDA (SBN 280083)  
4 ARNOLD & PORTER KAYE SCHOLER LLP  
5 777 South Figueroa Street, Forty-Fourth Floor  
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12 Attorneys for Plaintiffs  
13 Truly Great Global Ltd. and Universal Leader  
14 Investment Ltd.

15 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
16 **COUNTY OF LOS ANGELES**

17 TRULY GREAT GLOBAL LTD. a  
18 British Virgin Islands Company; and  
19 UNIVERSAL LEADER  
20 INVESTMENT LTD., a British Virgin  
21 Islands Company,

22 Plaintiffs,

23 v.

24 JAMES NOEL HALSTEAD  
25 SEAGRIM, an individual; STEPHEN  
26 MATTHEW WALTER, an individual;  
27 GEOFFREY OWEN CASSIDY, an  
28 individual; and DOES 1 through 10,

Defendants.

Case No. BC694919

**FIRST AMENDED COMPLAINT  
FOR:**

1. Fraud
2. Negligent Misrepresentation
3. Breach of Contract

**DEMAND FOR JURY TRIAL**

1 Plaintiffs Truly Great Global Ltd. and Universal Leader Investment Ltd. hereby  
2 allege, upon and information and belief, as follows:

3 **PARTIES**

4 1. Plaintiff Truly Great Global Ltd. (“Truly Great Global”) is a company  
5 incorporated under the laws of the British Virgin Islands.

6 2. Plaintiff Universal Leader Investment Ltd. (“Universal Leader”) is a  
7 company incorporated under the laws of the British Virgin Islands.

8 3. Li Qi is a citizen of the People’s Republic of China, and resides in Hong  
9 Kong. His principal language is Mandarin Chinese. Li Qi is a Director of Truly  
10 Great Global and Universal Leader and was authorized to act and did act on their  
11 behalf in connection with the transactions at issue in this case.

12 4. Defendant James Noel Halstead Seagrim, also known as James N. H.  
13 Seagrim and James Seagrim (“Seagrim”) is a citizen of the United States, and resides  
14 in San Jose, California.

15 5. Defendant Stephen Matthew Walter, also known as S. Matthew Walter  
16 and Matthew Walter (“Walter”) is a citizen of the United States, and resides in Los  
17 Angeles, California.

18 6. Defendant Geoffrey Owen Cassidy, also known as Geoffrey O. Cassidy  
19 and Geoffrey Cassidy (“Cassidy”) is a citizen of Australia, and resides in Singapore.  
20 Cassidy has defaulted on the original Complaint, and Plaintiffs do not intend to open  
21 the default by filing a First Amended Complaint.

22 7. The true names and capacities, whether individual, corporate, or  
23 otherwise, of the defendants sued as Does 1 through 10 are presently unknown to  
24 Plaintiffs, who therefore sue these defendants by fictitious names. Plaintiffs will  
25 amend this First Amended Complaint to allege the true names and capacities of the  
26 defendants sued as Does 1 through 10 when they have been ascertained. In doing the  
27 acts and omissions alleged in this First Amended Complaint, Seagrim, Walter, and  
28 Cassidy, as well as Does 1 through 10, were acting as agents, partners, joint

1 venturers, and co-conspirators. Each of them committed such acts in the course and  
2 scope of such agency, partnership, joint venture, and conspiracy, and each of them  
3 agreed with, was aware of, intended to, and cooperated with the others to defraud and  
4 commit the other acts alleged herein against Plaintiffs.

5 **VENUE**

6 8. Venue is proper in this Court under Code of Civil Procedure § 395.

7 **FACTUAL BACKGROUND**

8 9. This action arises out of fraudulent actions by defendants Seagrim,  
9 Walter, and Cassidy to procure a \$15 million loan in June 2017 from plaintiff  
10 Universal Leader, acting through its Director, Li Qi, for the private air charter  
11 business then operating as “Zetta Jet,” by misrepresenting and concealing the true  
12 financial condition and imminent insolvency of Zetta Jet.

13 10. Zetta Jet PTE Ltd. (a Singapore company), and its U.S. operating  
14 subsidiary Zetta Jet USA (sometimes collectively “Zetta Jet”), were formed in July  
15 2015 and operated a private air charter business with its principal base of operations  
16 in Burbank, California. Zetta Jet was formed and initially owned by Seagrim, Walter,  
17 and Cassidy, who each owned equal one-third interests. The company was formed  
18 from a combination of existing operations, assets, and finances of prior companies  
19 (Advanced Air Management (“AAM”) and Asia Aviation Holdings PTE (“AAH”))  
20 that were owned and operated by Seagrim, Walter and/or Cassidy. Plaintiffs and Li  
21 Qi had no knowledge of or ownership interest in the operations or finances of those  
22 prior companies.

23 11. Seagrim, Walter and Cassidy had extensive experience in the aviation  
24 industry and were experienced operators in the private air charter business. In  
25 addition to their roles as shareholders and directors of Zetta Jet, the three defendants  
26 served as the executives and ran the day-to-day operations, financing, and sales for  
27 Zetta Jet, and directed its strategy.

1           12. Plaintiffs and Li Qi had no knowledge or prior experience in the  
2 operation or finances of a private air charter business. Li Qi’s background and prior  
3 business experience was in the computer services and e-commerce industry in China.

4           13. In December 2015 and August 2016, Zetta Jet acquired two Bombardier  
5 Global 6000 aircraft through lease and/or sale and purchase agreements from entities  
6 owned by Li Qi’s family and for which Li Qi acts as Director, Universal Leader and  
7 Glove Asset Management Ltd. (“Glove”). As a result of the aircraft sale transactions  
8 by Li Qi’s family companies, Li Qi developed a view of trust and respect for the  
9 experience and acumen of Seagram, Walter, and Cassidy in the private air charter  
10 business.

11           14. In February 2016, Li Qi decided to make an investment in Zetta Jet. His  
12 family’s company, Truly Great Global, invested \$19 million in exchange for 100,000  
13 shares (10%) of Zetta Jet PTE, pursuant to a Subscription Agreement. In addition, in  
14 February 2016, his family’s company, Universal Leader, made a loan of \$10 million  
15 to Zetta Jet PTE. The parties also entered into a Shareholders’ Agreement.

16           15. As a result of Truly Great Global’s acquisition of shares in Zetta Jet  
17 PTE, Li Qi was nominated as a Director of Zetta Jet PTE and he served in that role.  
18 Li Qi was not an officer of Zetta Jet PTE, and he was not an officer or director of  
19 Zetta Jet USA. Unlike Defendants, Li Qi was not involved in the day-to-day  
20 management of Zetta Jet, its operations, or its finances. Defendants and other  
21 management of Zetta Jet did not provide Li Qi with regular, complete or accurate  
22 financial or operational information about the company, so that he could not fully  
23 comprehend the company’s financial condition. Prior to the loan, board of directors’  
24 meetings were not held, and no board packets or information were circulated to Li Qi.  
25 Li Qi was rarely included on communications between the Defendants, or between  
26 one or more of the Defendants and the company’s staff. Instead, Defendants  
27 provided Li Qi with a positive impression of Zetta Jet’s business and future prospects.  
28

1           16. In July 2016, Universal Leader loaned an additional \$10 million to Zetta  
2 Jet PTE.

3           17. Unbeknownst to Li Qi, at the time of a September 2016 restructuring of  
4 the aircraft sale/lease agreements, Seagrim and Walter personally took cash  
5 distributions from Zetta Jet on September 23, 2016 in the amount of \$1 million each.  
6 The Board of Zetta Jet PTE did not authorize these distributions, Li Qi did not receive  
7 notice of or participate in any meeting or vote at which these distributions were  
8 authorized, and Truly Great Global did not receive a distribution.

9           18. Defendant Seagrim has discussed certain of his activities with regard to  
10 Zetta Jet in a sworn declaration and affidavit filed in other cases. There, Seagrim  
11 stated that he “first began to notice Company-related anomalies, inconsistencies and  
12 problems in November-December 2016, shortly after the merger of AAM into Zetta  
13 SG was finalized. These issues included: unpaid vendors, placement of liens on  
14 certain aircraft, commencement of litigation for non-payment of bills, and company  
15 credit cards being declined due to non-payment of outstanding balances. [¶] These  
16 issues did not make sense to me, as the Zetta Entities’ revenues were steadily  
17 increasing and there were no significant expenditures known to me which would  
18 not [sic] have caused these types of problems.”<sup>1</sup>

19           19. Seagrim further stated that “[i]t was around that same time that Cassidy  
20 and Tang took control of Zetta Jet PTE’s finances, books and records, including the  
21 financial records of Zetta Jet USA, and physically moved them to Singapore in  
22 January 2017. This made it difficult for me or any bookkeepers at Zetta Jet USA to  
23 monitor Zetta Jet PTE’s true financial position and the extent to which the  
24 Company’s financial condition had deteriorated due to Cassidy’s misappropriation of  
25 the Company’s funds.”<sup>2</sup> Seagrim further stated that “[e]ach time [Seagrim] inquired  
26

27  
28 <sup>1</sup> Declaration of James N.H. Seagrim, filed 02/26/2018 in Case No. 2:17-cv-06648-JAK-GJS (C.D.  
Cal.), Dkt #38-1 (“Seagrim 2-26-18 Declaration”), ¶ 43.

<sup>2</sup> *Id.*, ¶ 44.

1 about the financial strain on the Company, Cassidy would come up with a different  
2 explanation as to why Zetta Jet PTE was not profitable.”<sup>3</sup>

3 20. During the Spring of 2017, Zetta Jet was undergoing an audit by KPMG.  
4 In April 2017, as part of the audit, KPMG requested confirmation of accounts,  
5 payments and other matters from Zetta Jet’s bank. On June 3, 2017, Li Qi was  
6 informed by Cassidy that Zetta Jet was currently finishing an audit with KPMG. The  
7 audit was, in fact, never completed.

8 21. According to Seagrim, “[b]y June 2017, the Company [Zetta Jet] “was in  
9 dire need of funding to stabilize the business.”<sup>4</sup> It was at this time, according to  
10 Seagrim, that “Cassidy presented a ‘rescue plan’ that involved Mr. Li investing  
11 additional money into the Company at the expense of equally diluting” the other  
12 shareholders.<sup>5</sup> The dilution would occur because, as part of this rescue plan, Seagrim  
13 and Walter would transfer some of their Zetta Jet shares to Truly Great Global and  
14 Universal Leader would lend \$15 million to Zetta Jet PTE.

15 22. Seagrim participated in and consummated the rescue plan and transfer of  
16 some of his shares to Truly Great Global, without disclosing to Li Qi his knowledge  
17 of Zetta Jet’s “anomalies, inconsistencies, and problems” or Seagrim’s “inability to  
18 understand Zetta SG’s true financial positions,” of which Seagrim had knowledge for  
19 many months. Walter also participated in the loan and share transfer, referring in an  
20 email to Li Qi and others on June 20, 2017 to Zetta Jet’s “cash crunch crisis” and to  
21 Li Qi’s “bridge loan.”

22 23. At this time (June 2017), Seagrim, Walter, and Cassidy knew that Li  
23 Qi’s family entities were already substantially invested in Zetta Jet and therefore at  
24 great risk if the company were to founder and/or to refuse to repay what it owed to Li

25 \_\_\_\_\_  
26 <sup>3</sup> *Id.*, ¶ 45. Seagrim made the same or similar statements in another affidavit in an action in  
27 Australia (Affidavit of James Noel Halstead Seagrim dated January 25, 2018 filed in the Federal  
28 Court of Australia in Admiralty, in matter No. VIC1104 of 2017 *between Zetta Jet Pte. Ltd, First  
Plaintiff and Jonathan King, Chapter 7 Trustee, Second Plaintiff, and The Ship “Dragon Pearl,  
Defendant.”*)

<sup>4</sup> Seagrim 2-26-18 Affidavit, ¶ 46.

<sup>5</sup> *Id.*

1 Qi's family entities. They knew that, by this time, Li Qi's family entities had loaned  
2 \$20 million to Zetta Jet, invested \$19 million in equity, and sold/leased two aircraft to  
3 Zetta Jet through restructured aircraft sale/lease agreements, one of which had been  
4 paid off. Seagram, Walter and Cassidy knew that Zetta Jet's failure would cause  
5 significant losses to Li Qi and his family entities, and they exploited that knowledge  
6 to impose duress on Li Qi.

7 24. To do that, Defendants suggested or threatened that without the  
8 additional loan the company could not repay the \$20 million in loans Universal  
9 Leader had already made, or the approximately \$43 million in aircraft financing  
10 payments (plus interest) still owed to Li Qi's family entities.

11 25. In support of the scheme to induce the \$15 million loan, Defendants  
12 misrepresented and concealed facts from Li Qi to present a misleading picture of  
13 Zetta Jet in June 2017 that (a) Zetta Jet was only in a temporary "cash crunch", and  
14 that his funds were urgently needed as a "bridge loan" to other financing, when in  
15 fact the Company was in a downward spiral and was not likely to survive; (b) that  
16 Zetta Jet was seeking investment or financing from a financial institution, and upon  
17 completion of that investment or financing Universal Leader's loan would be repaid  
18 from the new funds with a priority over other creditors, when in fact, based on the  
19 knowledge Defendants had, there was no reasonable prospect of obtaining financing;  
20 (c) that Zetta Jet was profitable, had a valuation of \$700 million or more, and would  
21 continue to prosper and grow if Universal Leader would provide the immediate  
22 bridge loan, when in fact Defendants had no reasonable basis to believe this in light  
23 of the financial condition of the Company; and (d) that in consideration of the loan,  
24 Seagram and Walter would transfer to Truly Great Global portions of their Zetta Jet  
25 shares, when in fact Defendants knew or should have known the shares had little or  
26 no value.

27 26. At the same time, Seagram, Walter, and Cassidy pursued the \$15 million  
28 loan and share transfer transaction to Li Qi, they failed to disclose and concealed

1 from Li Qi material facts, of which they had special knowledge as a result of their  
2 roles as officers and day-to-day executives for the Company, including (a) the true,  
3 dire financial condition of Zetta Jet; (b) the anomalies, inconsistencies and problems  
4 Seagrim had become aware of many months earlier; (c) the removal to another  
5 country of Zetta Jet's books and records by Cassidy; (d) that the removal of the books  
6 and records made it difficult for Seagrim and the Company's bookkeepers to  
7 understand the true financial condition of the Company; (e) the inability of the  
8 Company to complete an audit; (f) the true extent and risk to the Company of unpaid  
9 creditor demands; and (g) the failure of Seagrim, Walter, and Cassidy, in their  
10 capacity as managers of Zetta Jet, to take action in response to the concerns that  
11 Seagrim had over the Company's finances and operations.

12 27. To induce the \$15 million loan from Universal Leader, in addition to  
13 failing to disclose the negative information they knew despite a duty to do so,  
14 Defendants undertook the following acts as part of the scheme to induce Li Qi to  
15 cause Universal Leader to fund the loan:

16 a. On May 31, 2017, Cassidy told Li Qi that the company would  
17 default on its contract with Bombardier and if that occurred there is no way the  
18 company could repay the \$20 million in loans that Li Qi's company, Universal  
19 Leader, had already made to Zetta Jet in 2016. In fact, this was intended to  
20 impose duress on Li Qi to obtain additional funds by undermining Zetta Jet's  
21 existing obligations to Universal Leader.

22 b. On or about May 31, 2017, Cassidy told Li Qi that BNP was  
23 interested in introducing Zetta Jet to its customers who potentially were interested  
24 in making an investment of \$100 million to \$200 million in Zetta Jet at a valuation  
25 of \$800 million to \$1 billion, and that the deal would be finished by early  
26 November. In fact, Zetta Jet's poor financial and operational status, known by  
27 Defendants, made it unlikely Zetta Jet could obtain such an investment, and the  
28

1 failure of Defendants to disclose this information made Cassidy’s statement  
2 misleading.

3 c. On June 5, 2017, Cassidy told Li Qi that Zetta Jet had a 2016  
4 valuation of \$700-850 million, and a 2017-2018 valuation of \$1.5 billion. In fact,  
5 there was no reasonable basis to support such valuations based on the financial  
6 condition of the Company known to Defendants.

7 d. On June 13, 2017, Cassidy told Li Qi that both Seagram and  
8 Walter signed letters agreeing to transfer shares to Li Qi in exchange for the \$15  
9 million loan.

10 e. On June 17, 2017, Seagram told Li Qi that “[f]or the sake of this  
11 company which is so close to great things we each go equal 3.3% so our investor  
12 liqi will keep us alive through to BNP.” In fact, Seagram had known for many  
13 months that Zetta Jet had anomalies, inconsistencies, and problems, and that  
14 Seagram and Zetta Jet’s bookkeepers could not understand the true financial  
15 condition of the Company. Seagram’s statement that the “company was so close  
16 to great things” was false and misleading in light of financial condition of the  
17 Company of which he had knowledge.

18 f. On June 17, 2017, Walter told Li Qi that an earlier proposal to  
19 offer Li Qi shares totaling 7% each was made “because it was the best thing to do  
20 for the company” and Walter had been led to believe it was the “only option to get  
21 the \$15m” from Li Qi. In fact, Walter had no reasonable basis to believe that the  
22 Company could survive or repay the loan.

23 g. On June 19, 2017, Li Qi was wavering on the loan and the  
24 proposed terms of the share transfer. To further induce Li Qi to proceed and place  
25 him under duress, Seagram told Li Qi that if the Company did not get the \$15  
26 million it would be insolvent and “we will have to shut the airline down tomorrow  
27 morning.”  
28

1 h. On that same date, Seagrim further threatened to report to the  
2 FAA that the Company was insolvent, causing its certificate to be cancelled and  
3 requiring immediate cessation of operations. But Seagrim did not do so.

4 i. On June 20, 2017, Cassidy heightened the sense of urgency when  
5 he sent an email to Seagrim and Walter noting loan payments of \$3.9 million “due  
6 today” and stating, “best you hurry and conclude the deal with Liqi.” Cassidy  
7 copied Li Qi on this email.

8 j. On June 20, 2017, Seagrim told Li Qi that he had spoken to  
9 Walter and that they would now agree to transfer more shares in the company,  
10 totaling 20%, to Truly Great Global in exchange for the \$15 million loan, and that  
11 the additional shares would come from Seagrim personally.

12 k. On June 21, 2017, Li Qi received (from Zetta Jet’s office in  
13 Burbank, California) two share transfer agreements: one purportedly signed by  
14 Seagrim transferring 150,000 shares (15%) of Zetta Jet PTE stock to Truly Great  
15 Global, and another signed by Walter, transferring 50,000 shares (5%) of Zetta Jet  
16 PTE stock to Truly Great Global. However, the share transfer agreement that was  
17 purportedly signed and delivered by Seagrim to induce Universal Leader to make  
18 the loan was not signed by Seagrim but appeared to have been forged because it  
19 did not resemble Seagrim’s prior signatures.

20 l. When Li Qi questioned whether Seagrim had actually signed the  
21 share transfer agreement, on June 22, 2017 Walter told Li Qi that Seagrim had  
22 signed the documents and put them on a Zetta Jet plane that flew from London to  
23 Los Angeles, and then someone in Los Angeles sent them by Fed Ex to Li Qi in  
24 Hong Kong.

25 m. However, on June 26, 2017, Walter told Cassidy that “Liqi notices  
26 James signature is different.” Li Qi told Seagrim, Walter, and Cassidy that  
27 Seagrim’s signature did not appear to be authentic, and that Universal Leader  
28 would not fund the loan without confirmation. Despite the evident forgery of

1 Seagrim’s signature , Seagrim emailed Li Qi stating, “this is to confirm this is my  
2 signature.”

3 n. A “Confirmatory Deed of Loan” was executed by Zetta Jet and  
4 Universal Leader which recited that “[t]he Company is currently seeking financing  
5 with a financial institution. Upon completion of such financing arrangement or  
6 any other financing arrangement, the Company has agreed to apply the money  
7 received from such financial arrangements to repay the Indebtedness” (excluding a  
8 loan to finance the purchase of aircraft). In fact, Zetta Jet had no reasonable  
9 prospect of obtaining such financing.

10 28. Li Qi, on behalf of Universal Leader, funded the \$15 million loan to  
11 Zetta Jet PTE on June 26, 2017, and a Confirmatory Deed of Loan was executed  
12 between Zetta Jet PTE and Universal Leader.

13 29. As of the date Universal Leader funded the loan, the following facts (in  
14 addition to those in paragraph 27 above) had been concealed from Plaintiffs, and  
15 were not disclosed by either Seagrim, Walter or Cassidy:

16 a. The Company’s true financial condition was not capable of being  
17 determined.

18 b. Zetta Jet’s financial problems, operating deficiencies, and long-  
19 term need for capital would not be solved with a temporary \$15 million bridge  
20 loan from Universal Leader.

21 c. The extent and risk of unpaid creditors’ demands against Zetta Jet  
22 far exceeded what was disclosed to Li Qi.

23 d. After Zetta Jet obtained the loan from Universal Leader, which  
24 was intended to meet the Company’s immediate “cash crunch”, Seagrim and  
25 Walter intended to and did take personal cash payments from those funds, which  
26 contradicted their representations that the purpose of the loan was to meet Zetta  
27 Jet’s “cash crunch” and “bridge” the Company to other financing or investment.  
28

1 e. Contrary to representations made to Li Qi in the Confirmatory  
2 Deed of Loan, Zetta Jet was not “arranging financing” with a financial institution  
3 and, based on information known to Defendants, had no reasonable prospect of  
4 obtaining such financing or investment.

5 30. At and before the time Universal Leader made the loan to Zetta Jet on  
6 June 26, 2017, Defendants knew that Zetta Jet did not have a “cash crunch” but rather  
7 had fundamental financial deficiencies, as well as operational and accounting  
8 problems. Defendants knew it was highly unlikely the loan would be repaid or that  
9 Zetta Jet would be able to complete an audit or obtain financing or investment from a  
10 financial institution, and had no reasonable grounds for believing Zetta Jet was  
11 profitable, or would prosper and grow in the future.

12 31. The misrepresentations, concealments, and inducements, in paragraphs  
13 24-27 and 29 above, were either false, misleading, failed to disclose additional facts  
14 necessary to make the facts disclosed not misleading, and/or intended to create duress  
15 to induce Li Qi, on behalf of Plaintiffs, to loan additional funds to and accept  
16 additional shares of Zetta Jet.

17 32. Defendants conspired and agreed amongst themselves to induce Li Qi to  
18 loan the additional funds to and accept additional shares of Zetta Jet, and committed  
19 the foregoing acts, among others, pursuant to that agreement, and each of the  
20 Defendants was aware of, intended to, and engaged in a common scheme to defraud  
21 and commit the other acts alleged herein against Plaintiffs.

22 33. On July 7, 2017, just 11 days after Universal Leader funded the loan,  
23 Seagrim and Walter each personally received cash payments from Zetta Jet in the  
24 amounts of \$343,000 and \$350,000, respectively. In other words, Seagrim and  
25 Walter used a portion of the additional \$15 million loan from Universal Leader in  
26 order to enrich themselves and/or to reduce their own personal exposure for Zetta  
27 Jet’s debts, without disclosing to Li Qi this use of the funds and contrary to their  
28

1 representation to Li Qi that the purpose of the loan was to meet Zetta Jet’s cash  
2 crunch and bridge the Company to other financing or investment.

3 34. On July 11, 2017, just 15 days after Universal Leader funded the loan,  
4 Seagrim told Cassidy that Zetta Jet was a “dead company,” that “Zetta will be open  
5 [sic] up like a can of beans,” and that it was already “too late” to resolve its creditor  
6 issues. Defendants knew or should have known of these problems before Universal  
7 Leader funded the loan and either disclosed them to Li Qi before the \$15 million loan  
8 was funded or refrained from inducing him to make the loan based on the false  
9 premise that the loan was a bridge to other financing and that the Company was so  
10 close to great things.

11 35. In a report dated August 17, 2017, company management noted that  
12 Zetta Jet had an ongoing problem with “cash flow management” caused by Company  
13 management’s use of an ineffective management structure, an inadequate finance  
14 staff, a lack of processes and internal controls, and Company management’s  
15 engagement in an incomplete audit process, all of which had led to Zetta Jet’s cash  
16 flow management problems. Plaintiffs are informed and believe, based on Seagrim’s  
17 knowledge and concerns as early as November 2016, that Defendants knew or  
18 suspected, or should have known or suspected, that such fundamental deficiencies  
19 with Zetta Jet’s financial operations existed before Universal Leader made the loan  
20 and should have disclosed these problems to Li Qi before the \$15 million loan was  
21 funded.

22 36. At a Zetta Jet PTE Board meeting on August 17, 2017, Walter proposed  
23 to terminate Cassidy based on accusations that Cassidy had misused and  
24 misappropriated assets of Zetta Jet. As a result, Li Qi was convinced by Seagrim and  
25 Walter to terminate Cassidy as Managing Director. Cassidy was terminated as  
26 Managing Director of Zetta Jet PTE, but remained a shareholder (through AAH).

27 37. On September 5, 2017, a Board meeting of Zetta Jet PTE was held in  
28 Hong Kong. The meeting proceeded in English, without translation. The Board

1 installed Michael Maher (“Maher”) as Zetta Jet’s new CEO. During the meeting,  
2 Maher requested authorization to hire counsel to research and provide advice  
3 regarding available bankruptcy protections in Singapore and the United States should  
4 that become necessary. There was no discussion or vote during the meeting of an  
5 authorization to put the company into bankruptcy. Under the terms of the  
6 Shareholder Agreement, any such authorization would require the affirmative consent  
7 of all shareholders -- Seagrim, Walter, Cassidy (AAH), and Truly Great Global.

8 38. On September 8, 2017, Seagrim sent a proposed Zetta Jet PTE Board  
9 resolution to Li Qi. The draft resolution was written in English. Seagrim and Maher  
10 knew that Li Qi’s primary language is Mandarin Chinese, and not English. Maher  
11 was aware of the communication concern, and provided some reports to Li Qi in  
12 English and Mandarin. Li Qi signed the resolution in reliance on Seagrim’s  
13 representation that it was “per our vote the other day” -- in other words, that it  
14 authorized only the retention by Zetta Jet PTE of legal counsel to provide advice  
15 about possible bankruptcy options in Singapore or the United States. Based on the  
16 discussion at the September 5, 2017, meeting, Li Qi did not believe the resolution  
17 authorized a bankruptcy filing but rather, merely consultation with counsel.

18 39. Li Qi did not know, and was not told by Seagrim, Walter, or Maher, that  
19 they intended to use the resolution as authorization to cause Zetta Jet PTE to file a  
20 bankruptcy petition and to take the same action for its US subsidiary, Zetta Jet USA.  
21 If Li Qi had known that Seagrim, Walter, and/or Maher would use the resolution as  
22 authority to cause the companies to file for bankruptcy relief, he would not have  
23 signed the resolution.

24 40. The resolution refers only to the board of directors of Zetta Jet PTE and  
25 makes no reference to and did not authorize commencement of a bankruptcy filing by  
26 Zetta Jet USA.

27 41. Even if the resolution as written had authorized the filing of a  
28 bankruptcy petition, rather than to engage counsel to advise about possible

1 bankruptcy options, and even if Defendants had not misled Li Qi into signing the  
2 resolution by misrepresenting how they intended to use the resolution, under the  
3 terms of the Shareholders Agreement, the resolution would not have been effective as  
4 an authorization to file bankruptcy, because, inter alia, it was not signed by  
5 shareholder Asia Aviation Company, through Cassidy. At the time the resolution was  
6 signed, Cassidy (through AAH) was a shareholder of Zetta Jet PTE and thus, under  
7 the terms of the Shareholder Agreement, his written consent was required for Zetta  
8 Jet PTE to file a bankruptcy petition.

9 42. Between September 13 and September 15, 2017, Li Qi told Seagrim and  
10 Walter that he had obtained commitments to raise between \$60 and 90 million in  
11 funding for Zetta Jet, from new investors, and at a Board meeting that had been  
12 noticed for September 16, 2017, Li Qi intended to (a) seek the termination of Maher  
13 as CEO, (b) move the parent company from Singapore to Hong Kong, and (c) seek  
14 authorization to negotiate the terms of the new investments. However, before the  
15 Board meeting could occur and without notice to Li Qi, on September 15, 2017  
16 Seagrim, Walter, and Maher caused Zetta Jet PTE and Zetta Jet USA to file for  
17 bankruptcy, and the company has now ceased operations.

18 43. On September 24, 2017, soon after the bankruptcy filing, KPMG  
19 reported in an email to Seagrim, Walter and others that its long-running audit of Zetta  
20 Jet was never completed, that KPMG had issued no opinions, that Zetta Jet had  
21 numerous deficiencies, that there were outstanding areas of inquiry that had  
22 prevented KPMG from completing the audit, and that completion of audit procedures  
23 in all material areas remained necessary -- sale and purchase agreements, loan  
24 confirmations, accounts payable, accounts receivable, revenue and expense  
25 transactions, alleged fraud impacts, and legal matters impacting the Company.

26 44. Walter had suspected problems with KPMG's audit of Zetta Jet much  
27 sooner. On September 25, 2017, Walter sent KPMG's email to Li Qi, and told Mr.  
28 Li, "[y]ou will recall that as early as July 2017 I had been requesting Geoff [Cassidy]

1 to come clean on the ‘scope of the audit.’” However, such concerns had not been  
2 reported to Li Qi before Universal Leader made the loan on June 26, 2017.

3 **FIRST CAUSE OF ACTION**

4 **(Fraud – Misrepresentation and Concealment)**

5 **(Against all Defendants)**

6 45. Plaintiffs incorporate by reference the allegations in paragraphs 1-44  
7 above as though set forth in full.

8 46. Defendants misrepresented and concealed facts from Plaintiffs and Li Qi  
9 to present a misleading picture of Zetta Jet in June 2017 that (a) Zetta Jet was only in  
10 a temporary “cash crunch”, and that his funds were urgently needed as a “bridge  
11 loan” to other financing, when in fact the Company was in a downward spiral and  
12 was not likely to survive; (b) that Zetta Jet was seeking investment or financing from  
13 a financial institution, and upon completion of that investment or financing Universal  
14 Leader’s loan would be repaid from the new funds with a priority over other  
15 creditors, when in fact, based on the knowledge Defendants had, there was no  
16 reasonable prospect of obtaining financing; (c) that Zetta Jet was profitable, had a  
17 valuation of \$700 million or more, and would continue to prosper and grow if  
18 Universal Leader would provide the immediate bridge loan, when in fact Defendants  
19 had no reasonable basis to believe this in light of the financial condition of the  
20 Company; and (d) that in consideration of the loan, Seagrim and Walter would  
21 transfer to Truly Great Global portions of their Zetta Jet shares, when in fact  
22 Defendants knew or should have known the shares had little or no value, as alleged  
23 more fully in paragraphs 25 and 27 above.

24 47. Defendants’ representations were, and Defendants had knowledge that  
25 they were, either false, misleading, or failed to disclose additional facts necessary to  
26 make the facts disclosed not misleading, as alleged more fully in paragraphs 17, 18,  
27 19, 20, 30, 34, 35, 43 and 44 above.

1           48. Defendants were the majority shareholders, officers, and/or operating  
2 executives of Zetta Jet, and were in possession of special facts and superior  
3 information regarding the Company that Li Qi and his family entities, including  
4 minority shareholder Truly Great Global, did not have. Defendants were also  
5 engaged in a transaction by which they sought a loan from, and transferred shares of  
6 stock to, Plaintiffs, and made representations to Plaintiffs in the course of doing so, as  
7 alleged more fully in paragraphs 10, 11, 13, 15, 17, 18 and 19 above. As such, in  
8 entering into the loan with Universal Leader and transfer of shares to Truly Great  
9 Global, Defendants owed to Plaintiffs a duty of full disclosure of material facts.

10           49. In participating in, advancing, and consummating the loan and stock  
11 transfer to Plaintiffs, and in making representations to Plaintiffs, Defendants failed to  
12 disclose material facts to Plaintiffs, and failed to fully disclose facts necessary to  
13 make the facts disclosed not misleading, as alleged more fully in paragraphs 26, 29  
14 and 33 above.

15           50. Defendants conspired and agreed amongst themselves to induce  
16 Universal Leader, through Li Qi, to loan additional funds to Zetta Jet, and committed  
17 the foregoing acts, among others, pursuant to that agreement. Each of the Defendants  
18 was aware of, intended to, and engaged in a common scheme to defraud and commit  
19 the other acts alleged herein against Plaintiffs, as more fully alleged in paragraphs 21,  
20 22 and 32 above.

21           51. Plaintiffs, and Li Qi acting on their behalf, did not know that the  
22 representations by Defendants were false and misleading, and was not aware or fully  
23 aware of the material facts that were concealed or not disclosed, as alleged more fully  
24 in paragraphs 3, 10, 11, 12, 13 and 15 above.

25           52. Defendants intended for Li Qi, Truly Great Global, and Universal  
26 Leader to rely on the representations they made, and Defendants intended to deceive  
27 them by concealing and failing to disclose the above facts.  
28

1           53. Plaintiffs, and Li Qi acting on their behalf, reasonably and justifiably  
2 relied on Defendants' misrepresentations and concealments to extend the loan to  
3 Zetta Jet on June 26, 2017, and to accept the transfer of Defendants' stock in Zetta  
4 Jet. Defendants were shareholders, directors, officers and day-to-day operating  
5 executives of Zetta Jet, had superior knowledge and expertise to Plaintiffs, and  
6 possessed special facts regarding the Company and the transaction, as more fully  
7 alleged in paragraphs 10, 11, 18, 19, 20, 30, 34, 35, 43 and 44. By contrast, Plaintiffs  
8 and Li Qi lacked knowledge or prior experience in the private air charter business,  
9 placed trust and respect in Defendants, Li Qi was not an officer of and had no day-to-  
10 day involvement in Zetta Jet, was not provided with regular financial information or  
11 communications, and board meetings were not conducted, as more fully alleged in  
12 paragraphs 3, 12, 13 and 15 above. Had Li Qi known the true or concealed facts, he  
13 would not have had Plaintiffs make the loan to Zetta Jet or accept the shares from  
14 Defendants.

15           54. Further, at the time of the loan, Li Qi believed that Zetta Jet could  
16 qualify for outside financing or investment, and he met with BNP Paribas in early  
17 June 2017 for that purpose. He had no knowledge of or reason to believe that the  
18 KPMG audit was floundering or could not be completed; that Seagrim (the most  
19 experienced and respected aviation businessman among the group) had already  
20 concluded that he could not understand Zetta Jet's true financial position and the  
21 extent to which Zetta Jet's financial condition had deteriorated; that Seagrim was  
22 aware of anomalies, inconsistencies and problems with the company's finances; or  
23 that Seagrim was unable to obtain any consistent explanations for the financial strain  
24 on the Company.

25           55. Because of the lack of board meetings, information sharing, or candid  
26 communications from Defendants, as alleged more fully in paragraph 15 above, the  
27 fact that Li Qi was a Director of Zetta Jet gave him no special knowledge or insight  
28 into the true financial condition of the company.



1           61. Defendants misrepresented and concealed facts from Plaintiffs and Li Qi  
2 to present a misleading picture of Zetta Jet in June 2017 that (a) Zetta Jet was only in  
3 a temporary “cash crunch”, and that his funds were urgently needed as a “bridge  
4 loan” to other financing, when in fact the Company was in a downward spiral and  
5 was not likely to survive; (b) that Zetta Jet was seeking investment or financing from  
6 a financial institution, and upon completion of that investment or financing Universal  
7 Leader’s loan would be repaid from the new funds with a priority over other  
8 creditors, when in fact, based on the knowledge Defendants had, there was no  
9 reasonable prospect of obtaining financing; (c) that Zetta Jet was profitable, had a  
10 valuation of \$700 million or more, and would continue to prosper and grow if  
11 Universal Leader would provide the immediate bridge loan, when in fact Defendants  
12 had no reasonable basis to believe this in light of the financial condition of the  
13 Company; and (d) that in consideration of the loan, Seagrim and Walter would  
14 transfer to Truly Great Global portions of their Zetta Jet shares, when in fact  
15 Defendants knew or should have known the shares had little or no value, as alleged  
16 more fully in paragraphs 25 and 27 above.

17           62. Defendants’ representations were either false, misleading, or failed to  
18 disclose additional facts necessary to make the facts disclosed not misleading, and  
19 Defendants had no reasonable grounds to believe they were true or complete, as  
20 alleged more fully in paragraphs 18, 19, 20, 30, 34, 35, 43 and 44 above.

21           63. Further, whether or not Defendants’ believed these representations and  
22 omissions were true or not misleading, Defendants had no reasonable grounds to  
23 believe Zetta Jet had only a temporary cash crunch which would be solved by a  
24 bridge loan, but rather fundamental financial deficiencies due to, among other things,  
25 the anomalies, problems, and inconsistencies of which Seagrim was aware, the  
26 removal of the company’s books and records out of the United States, the apparent  
27 inability of the Company to complete an audit, and the inability of Seagrim and the  
28 Company’s bookkeepers to understand the true financial condition of the Company,

1 as alleged more fully in paragraphs 18, 19, 20, 30, 34, 35, 43 and 44. As such,  
2 Defendants had no reasonable grounds to believe the loan would be repaid, that the  
3 Company could obtain financing or investment through a financial institution, or that  
4 Zetta Jet was profitable, or would continue in business, grow and prosper in the  
5 future.

6 64. Defendants intended for Li Qi, Truly Great Global, and Universal  
7 Leader to rely on the representations and omissions they made.

8 65. Defendants conspired and agreed amongst themselves to induce  
9 Universal Leader, through Li Qi, to loan additional funds to Zetta Jet, and committed  
10 the foregoing acts, among others, pursuant to that agreement, and each of the  
11 Defendants was aware of, intended to, and engaged in a common scheme to defraud  
12 and commit the other acts alleged herein against Plaintiffs, as more fully alleged in  
13 paragraphs 21, 22 and 32 above.

14 66. Plaintiffs, and Li Qi acting on their behalf, reasonably and justifiably  
15 relied on Defendants' misrepresentations and concealments to extend the loan to  
16 Zetta Jet on June 26, 2017, and to accept the transfer of Defendants' stock in Zetta  
17 Jet. Defendants were shareholders, directors, officers and day-to-day operating  
18 executives of Zetta Jet, had superior knowledge and expertise to Plaintiffs, and  
19 possessed special facts regarding the Company and the transaction, as more fully  
20 alleged in paragraphs 10, 11, 18, 19, 20, 30, 34, 35, 43 and 44. By contrast, Plaintiffs  
21 and Li Qi lacked knowledge or prior experience in the private air charter business,  
22 placed trust and respect in Defendants, Li Qi was not an officer of and had no day-to-  
23 day involvement in Zetta Jet, was not provided with regular financial information or  
24 communications, and board meetings were not conducted, as more fully alleged in  
25 paragraphs 3, 12, 13 and 15 above. Had Li Qi known the true or concealed facts, he  
26 would not have had Plaintiffs make the loan to Zetta Jet or accept the shares from  
27 Defendants.

1           67. Further, at the time of the loan, Li Qi believed that Zetta Jet could  
2 qualify for outside financing or investment, and he met with BNP Paribas in early  
3 June 2017 for that purpose. He had no knowledge of or reason to believe that the  
4 KPMG audit was floundering or could not be completed; that Seagrim (the most  
5 experienced and respected aviation businessman among the group) had already  
6 concluded that he could not understand Zetta Jet's true financial position and the  
7 extent to which Zetta Jet's financial condition had deteriorated; that Seagrim was  
8 aware of anomalies, inconsistencies and problems with the company's finances; or  
9 that Seagrim was unable to obtain any consistent explanations for the financial strain  
10 on the Company.

11           68. Because of the lack of board meetings, information sharing, or candid  
12 communications from Defendants, as alleged more fully in paragraph 15 above, the  
13 fact that Li Qi was a Director of Zetta Jet gave him no special knowledge or insight  
14 into the true financial condition of the Company.

15           69. In short, in June 2017, Li Qi, on behalf of Plaintiffs, relied on the belief,  
16 obtained from Defendants' misstatements and failures to disclose their true  
17 knowledge and information and all material facts, that Zetta Jet was in a temporary  
18 cash crunch, needed a bridge loan until other financing or investment could be  
19 obtained, and that the Company could continue in business, grow and prosper. If he  
20 did not believe this, he would not have had his family company lend an additional  
21 \$15 million to Zetta Jet for no valid economic purpose.

22           70. As a direct and proximate result of Plaintiffs' reliance on the  
23 misrepresentations of Defendants, Universal Leader has been harmed by extending a  
24 \$15 million loan to an insolvent company with no reasonable possibility of  
25 repayment. Plaintiffs' reliance on Defendants' misrepresentations was a substantial  
26 factor in causing Plaintiffs' harm. Plaintiffs have suffered and will suffer damages in  
27 the amount of at least the \$15 million principal on the loan, plus prejudgment and  
28 post-judgment interest.

1 **THIRD CAUSE OF ACTION**

2 **(Breach of Contract)**

3 **(By Plaintiff Truly Great Global**

4 **Against Defendants Seagrim, Walter and Does 1-10)**

5 71. Plaintiff incorporates by reference the allegations in paragraphs 1-44  
6 above as though set forth in full.

7 72. A Subscription and Shareholders' Agreement for Zetta Jet PTE was  
8 entered into between plaintiff Truly Great Global and Defendants Seagrim, Walter,  
9 and Cassidy (through his company known as Asia Aviation Holdings PTE, Ltd.)

10 73. Truly Great Global has performed all obligations it was required to  
11 perform under the Subscription and Shareholders' Agreement, except for such  
12 obligations as are excused by the breaches or nonperformance of Defendants.

13 74. The Shareholders' Agreement, which is Schedule 5 to the Subscription  
14 Agreement, provides, among other things, in paragraph 2.4(g) that "the Company  
15 shall not without the prior written approval of all the Shareholders ... (g) pass any  
16 resolution the result of which would be the winding up, liquidation, or receivership,  
17 or make any composition or arrangement with creditors of the Company." A true and  
18 correct copy of the Subscription and Shareholders' Agreement is attached hereto as  
19 Exhibit A.

20 75. Defendants Seagrim and Walter breached the foregoing provision of the  
21 Shareholders' Agreement by passing a resolution and authorizing officers of Zetta Jet  
22 PTE to take actions the result of which would be the winding up, liquidation or  
23 receivership, or make any composition or arrangement with creditors of the  
24 Company, without the prior written approval of all the shareholders. In particular,  
25 the resolution procured and utilized by Defendants, and their authorization of officers  
26 of Zetta Jet PTE to file a bankruptcy petition on behalf of Zetta Jet PTE and Zetta Jet  
27 USA, were actions (a) the result of which would be the winding up, liquidation or  
28 receivership of the Company, (b) seeking a composition or arrangement with

1 creditors of the Company, and that (c) were not approved by shareholder Asia  
2 Aviation Holdings (through Cassidy), not knowingly approved by Li Qi, on behalf of  
3 Truly Great Global, and did not authorize action on behalf of Zetta Jet USA, any or  
4 all of which breached the Shareholders' Agreement.

5 76. Seagrim and Walter's actions caused the winding up of Zetta Jet PTE  
6 and Zetta Jet USA and caused Zetta Jet PTE and Zetta Jet USA to seek a composition  
7 or arrangement with creditors, and breached the Shareholders' Agreement.

8 77. As a direct and proximate result of Defendants' breach of the  
9 Subscription and Shareholders Agreement, Plaintiff Truly Great Global has been  
10 reasonably and foreseeably harmed by, among other things, the devaluation of its  
11 investment in Zetta Jet PTE, the inability to obtain repayment of loans made to the  
12 company by Li Qi's family entities, and the lost opportunity to secure new financing  
13 for the company and improve and continue operations, and other damages in an  
14 amount to be proven at trial.

15 **REQUEST FOR JURY TRIAL**

16 78. Plaintiffs hereby give notice that they request a jury trial on all issues  
17 triable to a jury.

18 **PRAYER FOR RELIEF**

19 WHEREFORE, Plaintiffs pray for judgment as follows:

- 20 i. For actual damages according to proof at trial;  
21 ii. For exemplary damages;  
22 iii. For costs of suit;  
23 iv. For appropriate equitable relief, including provisional remedies,  
24 constructive trust, restitution, accounting, injunctive or declaratory relief;  
25 v. For pre-judgment interest; and  
26  
27  
28

1 vi. For such other and further relief as this Court may deem just and proper.

2  
3 Dated: January 25, 2019

ARNOLD & PORTER KAYE SCHOLER LLP

4  
5 By:  \_\_\_\_\_

Brian K. Condon  
Attorneys for Plaintiffs Truly Great Global  
Ltd. and Universal Leader Investment Ltd.

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# **EXHIBIT A**

**THIS AGREEMENT** is made the 26<sup>th</sup> day of February 2016

BETWEEN

- (1) TRULY GREAT GLOBAL LIMITED (誠佳環球有限公司) a company incorporated under the laws of the British Virgin Islands (BVI Company No.1904103) whose registered office is situate at P.O. Box 957, Offshore Incorporations Centre, Road Town, Tortola, British Virgin Islands (the "Purchaser");
- (2) ASIA AVIATION HOLDINGS PTE. LTD a company incorporated under the laws of Singapore (Registration No.201528963H) whose registered office is situate at 700 West Camp Road, 04-10, JTC Aviation One, Singapore, 797649 ("Asia Aviation");
- (3) JAMES NOEL HALSTEAD SEAGRIM (Holder of United Kingdom of Great Britain and Northern Ireland Passport No.099038139) of, 1240 W Hedding Street, San Jose, CA 95126-1710, United States of America ("JS");
- (4) STEPHEN MATTHEW WALTER (Holder of United States of America Passport No.442119396) of 6319 Melvin Avenue, Tarzana, CA 91335-6545, United States of America ("SW");
- (5) ZETTA JET PTE. LTD. a company incorporated under the Laws of Singapore (Registration No.201529010W) whose registered office is situate at 700 West Camp Road, 04-10, JTC Aviation One, Singapore, 797649 (the "Company").

**WHEREAS:-**

- (A) The Company is a company incorporated in Singapore whose particulars are set out in Schedule 2. As at the date of this Agreement, the Company has an issued share capital of 10,000 ordinary shares of par value of \$1.00 each which are issued and fully paid or credited as fully paid and are owned by the shareholders of the Company in the numbers shown opposite their respective names in Schedule 1 (the "Existing Member").
- (B) On or about 25 February 2016, the Company and the Existing Members have agreed to issue and allot 990,000 new shares of the Company at a par value of \$1.00 each, out of which the Purchaser has agreed to subscribe to 100,000 shares at par value of \$1.00 each for a total consideration of US\$19,000,000.00 ("**Purchaser Shares**") in reliance (inter alia), subject to the Disclosure Letter, upon the representations, warranties and undertakings in this Agreement, for the consideration and otherwise upon and subject to the terms and conditions of this Agreement. The Company and the Existing Members have agreed to issue and allot the remaining 890,000 new shares to the Existing Members at a par value of \$1.00 each pursuant to the proportion of their current shareholding as stated in Schedule 1.

- (C) The Purchaser, the Existing Members and the Company have agreed that, upon the issuance of the Purchaser Shares to the Purchaser, the Purchaser will hold 10% of the Entire Issued Share Capital.
- (D) Upon full issuance of the Purchaser Shares, the Purchaser and the Existing Members shall collectively hold 100% of the Entire Issued Share Capital. The Shareholders have agreed to enter into this Agreement to regulate both the management and control of the Company (and the Subsidiaries from time to time, if any) and the Shareholders' respective rights and obligations in the Company on the terms and conditions set out in Schedule 5 of this Agreement.

**WHEREBY IT IS AGREED** as follows:-.

1. Definitions and Interpretation

1.1 In this Agreement the following words and expressions have the meanings set opposite them:

**“Accounting Standards”**: the general accounting standards and practices adopted in Singapore;

**“Affiliate”**: in relation to anybody corporate, any holding company or subsidiary of such body corporate or any subsidiary of a holding company of such body corporate;

**“Agreement”**: this Agreement including its recitals and the schedules hereto;

**“Business”**: the business of the Company at the date hereof;

**“Business Day”**: a weekday (other than a Saturday) when banks are open for business in Singapore;

**“Claim”**: any claim by the Purchaser in connection with the Warranties;

**“Companies Act”**: the Companies Act Chapter 50 of the Laws of Singapore;

**“Competent Authority”**: any person or legal entity (including any government or government agency) having regulatory authority and/or any court of law or tribunal, or any local or national agency, authority, department, inspectorate, minister, ministry, official or public or statutory person (whether autonomous or not) of, or the government of, Singapore;

**“Completion”**: completion of the subscription and allotment of the Purchaser Shares herein;

**“Confidential Information”**: all information received or obtained as a result of entering into or performing, or supplied by or on behalf of a party in the negotiations leading to this Agreement and which relates to:-

- (i) the Company;
- (ii) the Business;

- (iii) the provisions of this Agreement;
- (iv) the negotiations relating to this Agreement;
- (v) the subject matter of this Agreement; or
- (vi) the Purchaser;

**“Date of Incorporation”** means 15 July 2015, the date of incorporation of the Company;

**“Directors”**: the directors of the Company named in Schedule 2;

**“Disclosure Letter”** the letter having the same date as this Agreement from the Seller’s Solicitors to the Buyer’s Solicitors;

**“Encumbrance”**: any interest or equity or any person (including any right to acquire, option or right of pre-emption) or any mortgage, charge, pledge, lien, assignment, hypothecation, security interest, title retention or any other security agreement or arrangement;

**“Entire Issued Share Capital”**: the aggregate of (i) all the issued shares of the Company as at the date of Completion which shall include the 990,000 new shares of the Company issued and allotted or to be issued or allotted as described in Recital (B) and (ii) all unissued shares of the Company which may now or in the future be required to be issued by the company upon the exercise of any right or option and/or upon the conversion of any convertible loan or securities;

**“Existing Members”**: the persons whose names and shareholdings as at the date of this Agreement are set out in the Schedule 1;

**“Financial Year”**: a financial year within the meaning ascribed to such expression by section 4 of the Companies Act;

**“Holding company”**: a holding company within the meaning ascribed to such expression by section 5 of the Companies Act;

**“Litigation”**: any actual or prospective proceedings, whether judicial, administrative, tribunal, arbitral, criminal or similar proceedings;

**“Losses”**: actions, proceedings, losses, damages, liabilities, claims, costs and expenses including fines, penalties, clean-up costs, legal and other professional fees;

**“Ordinary Shares”**: the ordinary shares in the capital of the Company;

**“Proceedings”**: any proceeding, suit or action arising out of or in connection with this Agreement;

**“Purchaser Shares”**: 100,000 Ordinary Shares to be issued to the Purchaser by the Company, which shares, when issued, shall rank *pari passu* in all respects with the existing issued Ordinary Shares and constitute 10% of the

Entire Issued Share Capital;

**“Service Document”**: a writ, summons, order, judgment or other process issued out of the courts of Singapore document relating to or in connection with any Proceedings;

**“Shareholder”**: a holder for the time being of Shares in the Company;

**“Shares”**: ordinary shares of the Company;

**“Singapore”** means the Republic of Singapore;

**“Subsidiary”**: a subsidiary within the meaning ascribed to such expression by section 5 of the Companies Act;

**“Taxation”**:

- (a) all forms of taxation including and without any limitation any charge, tax, duty, levy, impost, withholding or liability wherever chargeable imposed for support of national, state, federal, municipal or local government or any other person and whether of Singapore or any other jurisdiction; and
- (b) any penalty, fine, surcharge, interest charges or costs payable in connection with any taxation within (a) above;

**“US\$”**: United States of America dollars;

**“Voting Powers”**: all voting rights and powers of control available to a party to this Agreement or available to its representations, nominees or appointees;

**“Warranties”**: the warranties set out in Schedule 3; and

- 1.2 The table of contents and headings in this Agreement are inserted for convenience only and shall not affect its construction.
- 1.3 Unless the context otherwise requires words denoting the singular shall include the plural and vice versa, references to any gender shall include all other genders and references to persons shall include bodies corporate, unincorporated associations and partnerships in each case whether or not having a separate legal personality. References to the word “include” or “including” are to be construed without limitation.
- 1.4 References to recitals, schedules and clauses are to recitals, schedules and clauses of this Agreement, unless otherwise specified and references within a schedule to paragraphs are to paragraphs of that schedule unless otherwise specified.
- 1.5 References in this Agreement to any statute, statutory provision include a reference to that statute, statutory provision as amended, extended,

consolidated or replaced from time to time (whether before or after the date of this Agreement) and include any order, regulations, instrument or other subordinate legislation made under the relevant statute, statutory provision.

- 1.6 Any reference to “writing” or “written” includes faxes and any non-transitory form of visible reproduction of words.
- 1.7 Any agreement, covenant, representation, warranty, undertaking or liability arising under this Agreement on the part of two or more persons shall be deemed to be made or given by such persons jointly and severally.
- 1.8 In this Agreement:
  - 1.8.1 in the event that any person is required to give or is entitled to withhold its consent or approval to terms and conditions of this Agreement or to any other act, matter or thing under or referred to in this Agreement, such person shall act in good faith and be reasonable in giving or withholding such consent or approval or in imposing conditions to such consent or approval; and
  - 1.8.2 where any person is required to perform any act or give any consent or notification or do any other thing, it shall, in the absence of any specified time limit, perform, give or do or (as the case may be) notify its withholding of its consent or approval to the same as soon as is reasonably practicable in all the circumstances.

## **2. Subscription and allotment, Shareholders’ Agreement**

- 2.1 Subscription and allotment of the Purchaser Shares  
Subject to the terms of this Agreement, the Purchaser shall subscribe for and the Company shall allot and issue free from all Encumbrances and credited at fully paid to the Purchaser the Purchaser Shares together with all rights attaching thereto at the date of this Agreement.
- 2.2 Dividends and distributions  
The Purchaser shall be entitled to receive all dividends and distributions declared, paid or made by the Company on or after the date of this Agreement in respect of the Purchaser Shares.
- 2.3 Application for the Purchaser Shares  
This Agreement shall constitute an application from the Purchaser to subscribe for the Purchaser Shares in accordance with the Company’s memorandum and articles of association.
- 2.4 Shareholders’ Agreement  
The Shareholders agree to be bound by the Shareholders’ Agreement as specified in Schedule 5 and that the Company and the Shareholders shall procure any future shareholder of the Company to assume perform and comply with the obligations under the said Shareholders’ Agreement. For the avoidance of doubt, in the event there is any conflict between the memorandum and articles of the Company and the Shareholders’ Agreement, the Shareholders’ Agreement shall prevail.

### **3. Consideration**

- 3.1 The subscription price of the Purchaser Shares shall be United States Dollar Nineteen Million (US\$19,000,000.00) in total. The subscription price shall be paid by the Purchaser by deposit in cleared funds into the nominated account of the Company, the total subscription price at completion. Detail of the said nominated account as follows:-

Bank: Hongkong and Shanghai Bank (HSBC)  
Bank Address: 21 Collyer Quay, HSBC Building, Singapore 049320  
A/C Name: Zetta Jet Pte Ltd  
Bank Account: 260-805700-181  
Swift Code: HSBCSGSG

### **4. Completion**

#### **4.1 Time and method**

Completion shall take place by electronic transmission of all documents including signed copies of this Agreement in counterparts at or before 23:00 on 26<sup>th</sup> February, 2016 when all (but not part only) of the business referred to in this clause 4 shall be transacted except that any of such business may be waived by the party not in default of its obligations hereunder provided further that such waiver shall not prejudice any of the rights which the Company or the Purchaser (as the case may be) may have under this Agreement.

#### **4.2 Obligations of the Company**

At Completion:-

- 4.2.1 the Company shall procure that all necessary steps are taken properly to effect the matters listed in Part 1 of Schedule 4 at board meetings of the Company and shall deliver to the Purchaser duly signed minutes of all such board meetings; and
- 4.2.2 the Company shall procure that all necessary steps are taken properly to effect the matters listed in Part 2 of Schedule 4 at a general meeting of the Company and shall deliver to the Purchaser duly signed minutes of such general meeting.

#### **4.3 Obligations of the Purchaser**

Subject to clause 2.3, and subject to the Company complying with its obligations under clause 4.2, the Purchaser shall at Completion forthwith pay the total subscription price for the Purchaser Shares pursuant to clause 3.1.

### **5. Warranties**

#### **5.1 Extent of Warranties**

In consideration of the Purchaser agreeing to subscribe for the Purchaser Shares on the terms contained in this Agreement, the Company hereby, subject to the Disclosure Letter,-

- 5.1.1 warrants, represents and undertakes to the Purchaser and for any successor in title to the Purchaser Shares or to part or all of the

- Business in the terms set out in Schedule 3;
- 5.1.2 without restricting the rights of the Purchaser or any such successor or their ability to claim damages on any basis available to them in the event of any breach or non-fulfillment of any of the Warranties, undertake to the Purchaser that it will on demand pay to the Purchaser or such successors:-
- (a) the full amount of any shortfall or diminution in the value of any assets of the Company and an amount equal to any other loss suffered or incurred by the Purchaser or any such successor as a result of or in relation to any act, matter, thing or circumstances constituting a breach or non-fulfillment of any of the Warranties; and
  - (b) all costs, expenses, and disbursements suffered or incurred by the Purchaser or any such successor directly or indirectly as a result of or in relation to any breach or non-fulfillment of any of the Warranties.
- 5.1.3 warrants, represents and undertakes to the Purchaser that, subject as referred to in clause 5.1.1, the Warranties will be true and accurate in all respects and not misleading at and fulfilled down to Completion in all respects as if they had been made or given at Completion and on the basis that a reference to the actual time of Completion were substituted for any express or implied reference to the time of this Agreement;
- 5.1.4 undertakes that (save only as may be necessary to give effect to this Agreement) it shall not prior to Completion, do any act or thing or omit to do any act or thing the commission or omission of which would constitute a breach of any of the Warranties if they were given at Completion or which would make any of the Warranties untrue or inaccurate or misleading if they were so given on the basis mentioned in clause 5.1.3;
- 5.1.5 further undertakes to the Purchaser that upon becoming aware prior to of any matter event or circumstances (including any omission to act) which would or might reasonably be expected to cause or constitute a breach (or which would have caused or constituted a breach had such event occurred or been known to any of them prior to the date of this Agreement) of any of the Warranties or which would or might make any of the Warranties inaccurate or misleading it will promptly given written notice of such event to the Purchaser as well before as after Completion and if so requested by the Purchaser use its best endeavours promptly to prevent or remedy the same.
- 5.2 **Investigation by Purchaser**  
Subject to the Disclosure Letter, none of the Warranties shall be deemed in any way modified or discharged by reason of any investigation or inquiry made or to be made by or on behalf of the Purchaser, and no information relating to the Company of which the Purchaser has knowledge (actual or constructive) other than by reason of its being disclosed shall prejudice any claim which the Purchaser shall be entitled to bring or shall operate to reduce any amount recoverable by the Purchaser under this Agreement.
- 5.3 **Separate and independent warranties**

Each of the Warranties set out in the separate paragraphs of Schedule 3 shall be separate and independent and save as expressly otherwise provided shall not be limited by reference to any other such Warranties or by anything in this Agreement.

5.4 Release or indulgence by Purchaser

Any liability to the Purchaser or to any other person under this Agreement when executed may in whole or in part be released, compounded or compromised or time or indulgence may be given by the Purchaser or such other person in its absolute discretion as regards the Company under such liability without in any way prejudicing or affecting its rights against the Company under the same or like liability whether joint or several or otherwise.

5.5 Reliance on Warranties

The Purchaser has entered into this Agreement, subject to the Disclosure Letter, upon the basis of and in reliance upon the Warranties and the same together with any provision of this Agreement which shall not have been fully performed at Completion shall remain in force notwithstanding that Completion shall have taken place.

5.6 Notice of claims and limits

5.6.1 The Company shall notwithstanding anything to the contrary not be liable for any claim or series of claims in relation to a breach of any Warranty under this Agreement unless a notice of the claim or series of claim is given by the Purchaser to the Company within eighteen (18) months from the date following Completion.

5.6.2 Any such notice must give all available details within the knowledge of the person claiming of the circumstances giving rise or capable of giving rise to the claim in question.

5.6.3 The aggregate liability of the Company in respect any claim or series of claims in relation to a breach of any Warranty under this Agreement shall not exceed US\$19,000,000.

**6. Further assurance**

6.1 The Company shall, from time to time on being required to do so by the Purchaser, now or at any time in the future, do or procure the doing of all such acts and/or execute or procure the execution of all such documents in a form satisfactory to the Purchaser as the Purchaser may reasonably consider necessary for giving full effect to this Agreement and securing to the Purchaser the full benefit of the rights, powers and remedies conferred upon the Purchaser in this Agreement at the cost and expense of the Company.

**7. Assignment**

- 7.1 No party may assign the benefit of this Agreement whether absolutely or by way of security without the other party's consent except in the case of an assignment of all or part to an Affiliate of the Purchaser.
- 7.2 Subject to clause 7.1, this Agreement shall be binding upon and ensure for the benefit of the personal representatives and assigns and successors in title of each of the parties.

**8. Remedies cumulative**

- 8.1 The rights, powers and remedies provided in this Agreement or expressly referred to herein are cumulative and do not exclude any rights, powers or remedies provided by law.

**9. Waiver, variation and release**

- 9.1 No omission to exercise or delay in exercising on the part of any party to this Agreement any right, power or remedy provided by law or under this Agreement shall constitute a waiver of such right, power or remedy or any other right, power or remedy or impair such right, power or remedy. No single or partial exercise of any such right, power or remedy shall preclude or impair any other or further exercise thereof or the exercise of any other right, power or remedy provided by law or under this Agreement.
- 9.2 Any waiver of any right, power or remedy under this Agreement must be in writing and may be given subject to any conditions thought fit by the grantor. Unless otherwise expressly stated any waiver shall be effective only in the instance and only for the purpose for which it is given.
- 9.3 No variation to this Agreement shall be of any effect unless it is agreed in writing and signed by or on behalf of each party.

**10. Costs and expense**

- 10.1 Save as otherwise stated in this Agreement, the Purchaser, the Existing Members and the Company shall each bear his own costs and expenses in relation to the negotiation, preparation, execution and carrying into effect of this Agreement and other agreements forming part of the transaction provided that if the Purchaser shall exercise any right conferred by this Agreement to rescind this Agreement or if this Agreement becomes null and void in accordance with clause 4.4.3 the Company shall indemnify and keep the Purchaser indemnified against all Losses suffered or incurred by it in investigating the affairs of the Company and in the negotiation, preparation, execution and carrying into effect of this Agreement and the other agreements forming part of the transaction.
- 10.2 The Company shall bear any stamp duty payable in respect of the allotment and sale of the Purchaser Shares.

**11. Payments**

- 11.1 All payments to be made under this Agreement shall be made in full without any set-off or counterclaim and free from any deduction or withholding save as may be required by law in which event such deduction or withholding will not exceed the minimum amount which it is required by law to deduct or withhold and the payer will simultaneously pay to the payee such additional amounts as will result in the receipt by the payee of a net amount equal to the full amount which would otherwise have been receivable had no such deduction or withholding been required.

**12. Notices**

- 12.1 Any communication to be given in connection with the matters contemplated by this Agreement shall except where expressly provided otherwise be in writing and shall either be delivered by hand or sent by first class pre-paid post or facsimile transmission. Delivery by courier shall be regarded as delivery by hand.
- 12.2 Such communication shall be sent to the address of the relevant party referred to in this Agreement or the facsimile number set out below or to such other address or facsimile number as may previously have been communicated to the other party in accordance with this clause. Each communication shall be marked for the attention of the relevant person.

TRULY GREAT GLOBAL LIMITED (誠佳環球有限公司)

Address: #179, Lane 333, Jin Hui Road, Ming Hang District, Shanghai 201107,  
People's Republic of China  
Attention: Mr. Li Qi

James Noel Halstead Seagrim

Address: 1240 Hedding St, San Jose, CA 95126-1710, United States of  
America

Stephen Matthew Walter

Address: 6319 Melvin Ave, Tarzana, CA 91335-6545, United States of  
America

ASIA AVIATION HOLDINGS PTE. LTD

Address: 700 West Camp Road, 04-10, JTC Aviation One, Singapore, 797649  
Attention: Geoffrey Owen Cassidy

ZETTA JET PTE. LTD

Address: 700 West Camp Road, 04-10, JTC Aviation One, Singapore, 797649  
Attention: Geoffrey Owen Cassidy

- 12.3 A communication shall be deemed to have been served:-  
12.3.1 if delivered by hand at the address referred to in clause 12.2, at the  
time of delivery;

12.3.2 if sent by pre-paid post to the address referred to in clause 12.2, at the expiration of seven clear days after the time of posting; and

12.3.3 if sent by facsimile to the number referred to in clause 12.2, at the time of completion of transmission by the sender.

If a communication would otherwise be deemed to have been delivered outside of normal business hours (being 9:30 a.m. to 5:30 p.m. on a Business Day) under the preceding provisions of this clause, it shall be deemed to have been delivered at the opening of business on the next Business Day.

12.4 In proving service of the communication, it shall be sufficient to show that delivery by hand was made or that the envelope containing the communication was properly addressed and posted as pre-paid letter or that the facsimile was dispatched and a confirmatory transmission report was received.

12.5 A party may notify the other party to this Agreement of a change to its name, relevant person, address or facsimile number for the purposes of clause 12.2 PROVIDED THAT such notification shall only be effective on:-

12.5.1 the date specified in the notification as the date on which the change is to take place; or

12.5.2 if no date is specified or the date specified is less than three clear Business Days after the date on which notice is deemed to have been served, the date falling three clear Business Days after notice of any such change is deemed to have been given.

12.6 For the avoidance of doubt, the parties agree that the provisions of this clause shall not apply in relation to the service of Service Documents.

### **13. Time of the essence**

13.1 Time shall be of the essence of this Agreement.

### **14. Counterparts**

14.1 This Agreement may be executed in any number of counterparts and by the parties on different counterparts, but shall not be effective until each party has executed at least one counterpart.

14.2 Each counterpart shall constitute an original of this Agreement but all the counterparts shall together constitute one and the same Agreement.

### **15. Language**

15.1 Each notice, instrument, certificate or other communication to be given by one party to the other hereunder or in connection with this Agreement shall be in the English language.

### **16. Invalidity**

16.1 Each of the provisions of this Agreement is severable. If any such provision is or becomes illegal, invalid or unenforceable in any respect under the law of

any jurisdiction, the legality, validity or enforceability in that jurisdiction of the remaining provisions of this Agreement or, in any other jurisdiction, of that provision or any other provision of this Agreement, shall not in any way be affected or impaired thereby.

**17. Agreement to continue in full force and effect**

17.1 This Agreement shall, to the extent that it remains to be performed, continue in full force and effect notwithstanding Completion.

**18. Governing law and jurisdiction**

**18.1 Governing law**

This Agreement shall be governed by and construed in accordance with the laws of Singapore.

**18.2 Courts of Singapore**

The parties to this Agreement irrevocably agree that the courts of Singapore shall have non-exclusive jurisdiction to settle any dispute which may arise out of or in connection with this Agreement and that accordingly any Proceedings may be brought in such courts.

**AS WITNESS** the hands of the parties or their duly authorised representatives on the date first appearing at the head of this Agreement.

**Schedule 1**  
**Existing Members**

<u>Member</u>	<u>Shares</u>
JAMES NOEL HALSTEAD SEAGRIM	3,333
ASIA AVIATION HOLDINGS PTE. LTD.	3,334
STEPHEN MATTHEW WALTER	3,333

**Schedule 2**  
**Information about the Company**

- 1. Registered Office**  
700 West Camp Road, 04-10, JTC Aviation One, Singapore, 797649
- 2. Date of incorporation**  
15/07/2015
- 3. Registration number**  
1576797
- 4. Place of incorporation**  
The Republic of Singapore
- 5. Place of Business**  
700 West Camp Road, 04-10, JTC Aviation One, Singapore, 797649
- 6. Directors**  
James Noel Halstead Seagrim  
Stephen Matthew Walter  
Geoffery Owen Cassidy  
June Tang Kim Choo
- 8. Secretary**  
Lim Soh Sea
- 9. Issued Share Capital**  
10,000 shares
- 10. Paid-Up Capital**  
US\$10,000.00
- 11. Financial year end**  
**31st October**

**Schedule 3  
The Warranties**

**1. Share Capital**

- 1.1 The Purchaser Shares, when issued, will be credited as fully paid up. The Purchaser Shares shall constitute 10% of the Entire Issued Share Capital and there is no option, pre-emption rights or other rights to acquire, and no mortgage, charge, pledge, lien, third party right or other form of security or encumbrance on over or affecting such shares or any of them and there is no agreement or commitment to give or create any of the foregoing nor is there any agreement or other thing which does or might require the allotment or issue of any shares of the Company beyond the present issued share capital nor have any claims been made by any company or person entitled or claiming to be entitled to any of the foregoing.
- 1.2 No consent of any third party is required for the allotment of any of the Purchaser Shares.

**2. Accounts and business**

- 2.1 The Company  
Save in respect of the Business, the Company has not carried on any other business since its incorporation and has not entered into any transaction, undertaking, agreement or arrangement of whatsoever nature and whether legally binding or not nor assumed or incurred any liability or obligation whatsoever nor made any payment of any nature. No offer, tender or the like is outstanding which is capable of being converted into an obligation of the Company by an acceptance or other act of some other person.
- 2.2 Books and records  
All the accounts, books, ledgers, financial and other records, of whatsoever kind, of the Company:-
- (a) are in its possession;
  - (b) have been fully properly and accurately kept and completed;
  - (c) do not contain any material inaccuracies or discrepancies of any kind;
  - (d) reflect in accordance with good accounting principles all the financial transactions and give and reflect a true and fair view of its trading transactions, and its financial, contractual and trading position; and
  - (e) have been properly kept and maintained in accordance with all relevant laws applicable thereto.

**3. Corporate matters**

- 3.1 Directors  
The only directors of the Company are the persons whose names are listed in relation to in Schedule 2.
- 3.2 Interest in other companies

Subject to the Disclosure Letter, the Company is not the holder of, beneficial owner of or has agreed to acquire any share, interest or loan capital of any company (whether incorporated in Singapore or elsewhere).

- 3.3 **Options over the Company's capital**  
Save as pursuant to any transactions contemplated under this Agreement, there are no agreements or arrangements in force which provide for the present or future issue, allotment or transfer of or grant to any person the right (whether conditional or otherwise) to call for the issue, allotment or transfer of any share or loan capital of the Company (including any option or right of pre-emption or conversion).
- 3.4 **New issues of capital**  
Save as the Purchaser Shares, no share or loan capital has been issued or allotted, or agreed to be issued or allotted, by the Company since the Date of Incorporation.
- 3.5 **Commissions**  
No one is entitled to receive from the Company any fee, brokerage or other commission in connection with the allotment of the Purchaser Shares under this Agreement or of any share in the Company.
- 3.6 **Organisation**  
The Company is a company duly incorporated and validly existing under the laws of Singapore and has power to own, lease and operate all of its property and to carry on its business as it is now being conducted.
- 3.7 **Capitalisation**  
All issued shares in the Company are duly authorised, validly issued and fully paid and none of such shares has been issued in violation of the pre-emptive rights of any shareholders of the Company under the memorandum and articles of association of the Company or the terms of any agreement by which the Company or its shareholders were or are bound.
- 3.8 **Documents filed**
- (a) All returns, particulars, resolutions and documents required by the Companies Act or any applicable legislation to be filed with the Accounting and Corporate Regulatory Authority (ACRA) or with any other authority, in respect of the Company have been duly filed and were correct; all such returns, particulars, resolutions and documents were accurate in all respects and made on a proper basis and are not nor are likely to be the subject of any dispute with such entity or department and due compliance has been made with all the provisions of the Companies Act and other applicable legal requirements in connection with the formation of the Company, the allotment or issue of shares, debentures and other securities, the payment of dividends and the conduct of its business.
  - (b) All charges in favour of or created by the Company have (if appropriate) been registered in accordance with the provisions of the Companies Act or other relevant legislation.

- (c) Subject to the Disclosure Letter, the Company does not have any subsidiary, branch or representative office.

3.9 Possession of documents

All title deeds relating to the assets (other than such properties being subject to existing mortgages) of the Company, and an executed copy of all agreements to which the Company is a party, and the original copies of all other documents which are owned by or which ought to be in the possession of the Company are in its possession.

3.10 Investigation

There are not pending, or in existence, any investigations or enquiries by, or on behalf of, any governmental or other body in respect of the affairs of the Company.

3.11 Information disclosed to the Purchaser correct, subject to the Disclosure Letter,

- (a) All matters stated in this Agreement are true, accurate and complete and all information given by the Company to the Purchaser or its legal advisors or auditors, relating to the business, activities, affairs, or assets or liabilities of the Company was, when given, and is now true, accurate and comprehensive in all respects and is not misleading because of any omission or ambiguity or for any other reason.
- (b) There are no material facts or circumstances known to the directors of the Company, in relation to the assets, business or financial condition of the Company, which have not been fully, fairly and specifically disclosed in writing to the Purchaser or its legal advisors or auditors, and which, if disclosed, might reasonably have been expected to affect the decision of the Purchaser to enter into this Agreement.

**4. Taxation**

4.1 Accounts

The Accounts have made full provision or reserve for all Taxation (including deferred taxation) which is liable to be or could be assessed on the Company, or for which it may be accountable, in respect of the period ended on the Balance Sheet Date and such provision will be sufficient to cover all taxation assessed or liable to be assessed on the Company or for which it is, may be or may become accountable in respect of profits, income earnings, receipts, transfers, events and transactions up to and including the last day to which it relates.

4.2 Administration

- (a) All returns, computations and payments which should be or should have been made by the Company for any Taxation purpose have been made within the requisite periods and are up-to-date, correct and on a proper basis and none of them is or is likely to be the subject of any dispute with or penalty imposed by the Inland Revenue Authority of Singapore or any other Taxation authorities in Singapore or any other jurisdiction.

- (b) All particulars furnished to the Inland Revenue Authority of Singapore or other Taxation authorities, in connection with the application for any consent or clearance on behalf of the Company, or affecting the Company, fully and accurately disclosed all facts and circumstances material for the decision of those authorities; and consent or clearance is valid and effective; and any transaction, for which consent or clearance has previously been obtained, has been carried into effect (if at all ) only in accordance with the terms of the relative application and consent or clearance.
- (c) The Company has not taken or omitted to take any action which has had, or might have, the result of altering, prejudicing or in any way disturbing any arrangement or agreement which it has previously negotiated with the Inland Revenue Authority of Singapore, the Singapore Customs or any other Taxation authorities in Singapore or any other jurisdiction.
- (d) The Company has complied in all respects with all law, regulation, legislation, decree or order relating to taxation applicable to it and has kept and retained all record and documents appropriate or requisite for the purposes of any such law, regulation, legislation, decree or order.
- (e) No act or transaction has been effected in consequence whereof the Company may be or is being held liable for any taxation primarily chargeable against some other person.
- (f) If required by law, returns have been duly and promptly submitted on the tax liabilities under any law, regulation, legislation, decree or order applicable to it for each year of assessment and all accounts submitted to any taxation authorities in this connection have been agreed with the relevant taxation authorities.

#### 4.3 Distributions

The Company has not repaid, or agreed to repay or redeemed or agreed to redeem its share capital or capitalised or agreed to capitalise in the form of redeemable shares of debentures any profits or reserves of any class or description.

#### 4.4 Carry forward of losses

Nothing has been done, and no event or series of events has occurred, which might cause in relation to the Company the disallowance of the carry forward of losses or excess charges under any tax legislation.

#### 4.5 Capital allowances

- (a) All expenditure which the Company incurred on the provision of machinery or plant has qualified (if not deductible as a trading expense of a trade carried on by the Company) for allowances under the applicable legislation.
- (b) All capital allowances made or to be made to the Company in respect of capital expenditure incurred prior to the date of this Agreement or to be incurred under any subsisting commitment have been made in taxing its trade.

#### 4.6 Transactions not at arm's length

- (a) The Company does not own or has not agreed to acquire any asset, or has not received or agreed to receive any services or facilities (including without limitation the benefit of any licences or agreements), the consideration for the acquisition or provision of which was or will be in excess of its market value or determined otherwise than on an arm's length basis.
- (b) The Company has not engaged in any transaction in respect of which there may be substituted for any purpose of Taxation a different consideration for the actual consideration given or received by it.
- (c) The Company has not sold or agreed to sell any asset, nor has the Company received or agreed to receive any services or facilities (including without limitation the benefit of any licenses or agreements), the consideration for the sale or provision of which was or will be below its market value or determined otherwise than on an arm's length basis.

4.7 Stamp Duty

The Company has duly paid all stamp duty and interest, fines and penalties thereon payable in accordance with the provisions of the Stamp Duties Act of Singapore or any similar or corresponding legislation of any other jurisdiction whether or not the due date for payment has passed.

5. **Finance**

5.1 Capital commitments

There were no commitments on capital account outstanding at the Date of Incorporation and save in the ordinary course of business, the Company has not made or agreed to make any capital expenditure, or incurred or agreed to incur any capital commitments nor has it disposed of or realised any capital assets or any interest therein.

5.2 Dividends and distributions

All dividends or distributions declared, made or paid by the Company have been declared, made or paid in accordance with its articles of association or corresponding constitutional documents and the applicable provisions of the Companies Act or other applicable legislation.

5.3 Bank and other borrowings

- (a) The total amount borrowed by the Company (as determined in accordance with the provisions of the relevant instrument) does not exceed any limitation on its borrowing powers contained in its articles of association and/or any law, regulation, legislation, decree or order applicable to it, or in any debenture or other deed or document binding upon it.
- (b) Subject to the Disclosure Letter, the Company has no outstanding, nor has it agreed to create or issue, any loan capital; nor has it factored any of its debts, or engaged in financing of a type which were not shown or reflected in the Accounts, or borrowed any money which it has not repaid, save for borrowings shown in the Accounts.
- (c) The Company has not repaid or become liable to repay any loan or

indebtedness in advance of its stated maturity nor have any circumstances arisen whereby it could become so liable.

- (d) The Company has not received notice (whether formal or informal) from any lenders of money to it, requiring repayment or intimating the enforcement of any security the lender may hold over any of its assets; and there are no circumstances likely to give rise to any such notice.
- (e) The Company has not entered into any mortgage, charge, pledge, lien or other form of security, equity, encumbrance on, over or affecting the whole or any part of its undertaking, property or assets or any agreement, arrangement or commitment to give or create any of the foregoing except for the purpose of securing banking facilities used by the Company negotiated on an arm's length basis and on normal commercial terms.

#### 5.4 Liabilities

- (a) There are no liabilities (including contingent liabilities) which are outstanding on the part of the Company other than those liabilities incurred in the ordinary and proper course of business since the Date of Incorporation.
- (b) There has been no exercise, purported exercise or claim for any charge, lien, encumbrance or equity over any of the fixed assets of the Company; and there is no dispute directly or indirectly relating to any of its fixed assets.

#### 5.5 Continuation of facilities

- (a) In relation to all debentures, acceptance credits, overdrafts, loans or other financial facilities outstanding and owing by, or available to, the Company (referred to in this Clause as "facilities") :-
  - (i) there has been no contravention of or non-compliance with any provision of any of those documents;
  - (ii) no steps for the early repayment of any indebtedness have been taken or threatened;
  - (iii) there have not been nor are there any circumstances whereby the continuation of any of the facilities might be prejudiced, or which might give rise to any alteration in the terms and conditions of any of the facilities;
  - (iv) subject to the Disclosure Letter, none of the facilities is dependent on the guarantee or indemnity of any security provided by a third party of the Company; and
  - (v) the Company has no knowledge or information that, as a result of the allotment of the Purchaser Shares or any other thing contemplated in this Agreement, any of the facilities might be terminated or mature prior to its stated maturity.
- (b) The Company has not provided:
  - (i) any borrowing or indebtedness in the nature of borrowing or any other credit facility including any bank overdrafts and acceptance credits;
  - (ii) any mortgage, charge or debenture or any obligation (including a conditional obligation) to create a mortgage, charge or debenture;

- (iii) subject to the Disclosure Letter, any guarantee, letter of comfort, indemnity or suretyship in respect of the obligations or solvency of any other party; and
- (iv) any indebtedness other than those arising in the ordinary course of business.

**6. Trading**

**6.1 Conduct of businesses in accordance with the memorandum and articles of association or the corresponding constitutional documents**

- (a) The Company has at all times carried on business and conducted its affairs in all respects in accordance with its memorandum and articles of association or the corresponding constitutional documents in force for the time being and any other documents to which it is or has been a party and there is no violation of, or default with respect to any ordinance, statute, regulation, order, decree or judgment of any court or any governmental agency of Singapore or any foreign country.
- (b) The Company is empowered and duly qualified to carry on Business in all jurisdictions which it now carries on business.

**6.2 Litigation, disputes and winding up**

- (a) The Company is not engaged in any litigation or arbitration proceedings as plaintiff or defendant; there are no proceedings pending or threatened either by or against the Company; and there are no circumstances which are likely to give rise to any litigation or arbitration.
- (b) There is no dispute with any revenue or other official, department in Singapore or elsewhere, in relation to the affairs of the Company, and there are no facts which may give rise to any dispute.
- (c) There are no claims pending or threatened or capable of arising against the Company by an employee or workman or third party, in respect of any accident or injury, which are not fully covered by insurance.
- (d) No order has been made or petition presented or resolution passed for the winding up of the Company; nor has any distress, execution or other process been levied in respect of the Company which remains undischarged; nor is there any unfulfilled or unsatisfied judgment or court order outstanding against the Company.
- (e) No outstanding notices have been served, and the Company, having made due and careful enquiries, is not aware that any notices will be served on the Company in respect of any of its contracts or assets or in respect of any contravention or non-compliance with or alleged contravention or alleged non-compliance with any obligation statutory or otherwise.
- (f) The Company or any of its employees in the course of their employment has not committed any criminal act or material breach of contract or statutory duty or any tortious or other unlawful act which may materially affect the Company or its business.

**6.3 Compliance with statutes**

- (a) The Company and its officers, agents or employees (during the course of their duties in relation to it) has not committed or omitted to do any act or thing the commission or omission of which is or could be in contravention of any ordinance, act, order, regulation or the like (whether of Singapore or elsewhere) giving rise to any fine, penalty, default proceedings or other liability on its part.
  - (b) The Company has conducted and is conducting its business in all respects in accordance with all applicable laws and regulations whether of Singapore or elsewhere.
  
- 6.4 Documents stamped  
All documents which are in any way affect the right, title or interest of the Company in or to any of its property, undertaking or assets, or to which the Company is a party, and which attract stamp duty have been duly stamped within the requisite period for stamping.
  
- 6.5 Business names  
The Company does not use a name for any purpose other than its full corporate name. The Company has full right to use its name in all jurisdictions as necessary for the conduct of its business and each has not received any notice of conflict with respect to the rights of others regarding its name.
  
- 6.6 Powers of attorney and authority
  - (a) No power of attorney given by the Company is in force.
  - (b) There are not outstanding any authorities (express or implied) by which any person may enter into any contract or commitment to do anything on behalf of the Company or by which any person has been granted any other representative or agency rights or powers.
  
- 6.7 Subsisting contracts  
The Company is not a party to any contract, transaction, arrangement or liability which:-
  - (a) is of an unusual or abnormal nature or outside the ordinary and proper course of business.
  
- 6.8 Other party's defaults  
No party to any agreement with or under an obligation to the Company is in default under it, being a default which would be material in the context of its financial or trading position; and there are no circumstances likely to give rise to such a default.
  
- 6.9 Guarantees and indemnities  
Subject to the Disclosure Letter, there is not now other outstanding in respect of the Company any guarantee, or agreement for indemnity or for suretyship, given by it or for its accommodation.
  
- 6.10 All contracts at arm's length  
The Company is not a party to nor have its profit or financial position since incorporation been materially adversely affected by, any contract or

arrangement which is not of an entirely arm's length nature. The Company (after making due and careful enquiries) is not aware of any circumstances whereby the profit or financial position of the Company may be affected by any contract or arrangement which is not of an entirely arm's length nature.

**7. Authority**

- 7.1 The Company has full power to enter into and perform its obligations under this Agreement which, when executed, will constitute legal, valid and binding obligations of the Company in accordance with its terms and has complied with all statutory or other requirements relative thereto and has obtained or will before Completion obtain all necessary governmental or other consents authorisations or approvals requisite for the transactions herein contemplated.

**8. Solvency**

- 8.1 The Company has not stopped payment and is not insolvent nor unable to pay its debts. No order has been made or petition presented or resolution passed for the winding up of the Company and no distress, execution or other process has been levied on any of its assets. No administrative or other receiver has been appointed by any person over the business or assets of the Company or any part thereof, nor has any order been made or petition presented for the appointment of an administrator in respect of the Company.
- 8.2 No order has been made or petition presented or resolution passed for the winding up of the Company and no distress, execution or other process has been levied on any of its assets.

**9. Information**

- 9.1 All information given by the Company to the Purchaser relating to the business, activities, affairs or assets or liabilities of the Company was, when given, and is now true, complete, accurate and comprehensive in all respects.
- 9.2 There are no material facts or circumstances, in relation to the assets, business or financial condition of the Company, which have not been fully and fairly disclosed to the Purchaser and which, if so disclosed, might reasonably have been expected to affect the decision of the Purchaser to enter into this Agreement.
- 9.3 All the information given in this Agreement including the recitals and schedules is as at the date hereof true, accurate and complete in all material respects and is not misleading in any respect for any reason whatsoever.

**Schedule 4  
Completion  
Part 1**

On Completion, the Company shall cause a board meeting of the Company to be held at which the following matters shall be approved :

1. the allotment and issue of the Purchaser Shares, free from any Encumbrances and credited as fully paid up to, the Purchaser or its nominee(s); and
2. the registration of the Purchaser or its nominee(s) as registered holder(s) of the Purchaser Shares and the issuance of share certificate(s) to the Purchaser or its nominee(s) in respect of the Purchaser Shares according to the articles of association of the Company.

**Part 2**

On Completion, the Company shall cause a general meeting of the Company to be held at which:-

1. the allotment and issue of the Purchaser Shares, free from any Encumbrances and credited as fully paid up, to the Purchaser or its nominee(s) shall be approved;
2. the person nominated by the Purchaser to be appointed as a Director shall be approved; and
3. The appointment of the person nominated by the Purchaser to be appointed as a Director.

**Schedule 5**  
**Shareholders' Agreement**

1. **BUSINESS**

- 1.1 It is the intention of the Shareholders that at all times during the continuance of this Agreement, the Shareholders shall exercise all voting rights and other powers of control vested in them in relation to the Company so as to procure the Company to carry out the following business activities:

that the business of the Company shall comprise global private aircraft rental and charter.

2. **DIRECTORS AND MANAGEMENT**

2.1 The Board

- 2.1.1 The Business of the Company shall be managed by the Board. The composition of the Board immediately following execution of this Agreement shall be as follows:

<u>Directors</u>	<u>Nominated by</u>
Li Qi	the Purchaser
James Noel Halstead Seagrim	JS
Stephen Matthew Walter	SW
Geoffrey Owen Cassidy	Asia Aviation
June Tang Kim Choo	Asia Aviation

- 2.1.2 Subject to the approval of such nomination or removal by the Shareholders in a general meeting, the Purchaser shall be entitled to nominate up to 1 Director; Asia Aviation shall be entitled to nominate up to 2 Directors; JS shall be entitled to nominate up to 1 Director, SW shall be entitled to nominate up to 1 Director, and, in each case, to remove any directors so appointed by them.

- 2.1.3 The Shareholders shall be entitled at any time to remove any Director nominated by them respectively and to nominate any other person in his/her place. Each such nomination and removal shall be made by notice in writing served on the Company which shall take effect at the time it is received by the Company. Any Shareholder removing a Director shall be responsible for and shall indemnify the other Shareholders and the Company against any claim of whatever nature arising out of such removal.

- 2.1.4 The chairman of the Board shall be nominated by the Board of Directors.

- 2.1.5 The remuneration (if any) of the Directors shall be determined by the Board from time to time with the consent of the Shareholders.

2.2 Proceedings of Directors

2.2.1 Quorum

The quorum for Board meetings shall be two (2) Directors, of whom one (1) shall be a Director nominated by the Purchaser and one (1)

shall be a Director nominated by either JS, SW and Asia Aviation. A quorum must be present at the beginning of and throughout each meeting. If within ten minutes of the time appointed for a meeting a quorum is not present, the meeting shall stand adjourned until the same time and place on the same day in the following week and if at such adjourned meeting a quorum is not present, within ten minutes from the time appointed for such adjourned meeting two or more Directors present in person or by his/her alternate shall constitute a quorum.

2.2.2 Regulations of meetings

(1) Notice

Meetings of the Board shall be held from time to time as the Directors think fit. Save where urgent business arises where such period of notice is not practicable, a minimum of 7 days notice of meetings of the Board stating the time and place for such meeting and accompanied by an agenda of the business to be transacted (together with where practicable all papers to be circulated or presented to the same) shall be given to all the Directors and his/her alternate. Subject as aforesaid, the Directors may adjourn and otherwise regulate their meetings as they think fit.

(2) Alternate Director

Each Director shall be entitled to appoint any person to be his/her alternate and each alternate shall have one vote for every Director whom he/she represents.

(3) Conference Telephone

Directors may participate in a meeting of the Board by means of conference telephone or similar communications equipment whereby all persons participating in the meeting can hear each other and such participation shall constitute presence in person at a meeting.

(4) Votes of Directors

Questions arising in any meeting of the Board shall be decided by a simple majority of votes. The Chairman of the Board shall be entitled to a casting vote in the event of a deadlock.

(5) Signed resolutions

A resolution executed or approved in writing by all the Directors shall be as valid and effective for all purposes as a resolution passed at a meeting of the Board duly convened and held and may consist of several documents in the like form, each signed by one or more of the Directors. A resolution signed by an alternate Director need not also be signed by his/her appointor and, if it is signed by a Director who has appointed an alternate Director, it need not be signed by the alternate Director in that capacity.

2.3 Operation of bank accounts

Board of Directors shall have the right to nominate the signatory or signatories authorized to operate any or all of the bank account(s) of the Company.

2.4 Reserved Powers to Shareholders

The Shareholders shall exercise all voting rights and other powers of control available to them in relation to the Company to procure that the Company

shall not without the prior written approval of all the Shareholders, which approval may be given by the Shareholders themselves or a Director designated by it or his/her alternate (and, for this purpose, each Director designated by a Shareholder and his/her alternate shall be deemed to have authority to bind that Shareholder in relation to the provisions of this Clause unless that Shareholder shall have given prior written notice to the other Shareholders that the Director in question does not have such authority):

- (a) amend or change the rights, preferences, privileges or powers of, or the restrictions provided for the benefit of the shares in the registered capital of the Company;
- (b) take any action that authorizes, creates or issues shares of any class or equity interests or securities convertible into shares or other equity interests in the Company;
- (c) take any action that consolidates, subdivides or converts any share capital of the Company;
- (d) takes any action that reclassifies any outstanding securities, registered capital or other equity interests in the Company;
- (e) adopts or amends the Company's memorandum or articles of association or any of the charter or constitutional documents thereof save where such adoption and/or amendment are necessary to facilitate borrowings of the Company and/or a subsidiary, either or both of which to finance future purchases of aircraft either by the Company and/or a subsidiary (including a subsidiary to be formed in future) and for this purpose, includes the giving of security and/or guarantees to secure the future purchase of any aircraft by the Company and/or a subsidiary;
- (f) sell, or otherwise dispose of fixed assets of the Company in excess of US\$10,000,000 except for sale of aircraft;
- (g) pass any resolution the result of which would be the winding up, liquidation or receivership, or make any composition or arrangement with creditors of the Company;
- (h) purchase, whether or not in the ordinary course of the Business, with an amount exceeding US\$10,000,000 per transaction except for purchase of aircraft;
- (i) increase or decrease the authorized size of the board of directors of the Company;
- (j) make any material change(s) to the scope of the Business of the Company;

- (k) extend any loan to any party that is not incurred in the ordinary course of business;
- (l) adopt or amend any share option plan or scheme;
- (m) create any fixed or floating charge, lien (other than a lien arising by operation of law) or other encumbrance over the whole or any part of its business, undertaking, property or assets except for the purpose of securing its indebtedness or guarantying performance to its existing creditors for sums borrowed in the ordinary course of business;
- (n) make any loan or advance or give any credit except to the Company in the ordinary course of business;
- (o) factor or assign any of its book debts other than in the ordinary course of business; and
- (p) give any guarantee or indemnity for or otherwise secure the liabilities or obligations of any person except the Company in the ordinary course of business.

### 3. **GENERAL MEETINGS**

#### 3.1 Quorum

3.1.1 No business shall be transacted at any general meeting of the Shareholders unless a quorum is present. At least two persons being members or a proxy for members or a duly authorised representative of a corporation, holding not less than 50% of Shares in the entire issued share capital, of which one member must be the Purchaser or a proxy of the Purchaser, shall constitute a quorum. If within half an hour from the time appointed for the meeting of members a quorum is not present, then the meeting of members shall be adjourned to the same day and time of next week from the date thereof or, if such day is not a Business Day, the first Business Day after such day at the same place holding original meeting of members. It is not required to issue a notice convening the adjourned meeting of members. In the event that within half an hour of the time appointed for the holding of the adjourned meeting of members a quorum is still not present, any two or more members present shall be the quorum.

3.1.2 A written resolution signed by all the members shall be as valid and effective as a resolution passed at a meeting of members duly convened and held and such written resolutions may consists of several documents in the like form, each signed by one or more of the members.

#### 3.2 Votes of members

Subject to any special rights, privileges or restrictions attached to any Shares, at any general meeting of the Company, on a show of hands every member who (being an individual) is present in person or by proxy or (being a

corporation) is present by proxy or by a duly authorised representative shall have one vote, and on a poll every member present in person, by authorised representative or by proxy shall have one vote for every share of which he/she/it is the holder.

4. **ACCOUNTING MATTERS**

- 4.1 The Shareholders shall procure the Company to maintain accurate and complete accounting and other financial records in accordance with applicable law and generally accepted accounting principles.
- 4.2 Each Shareholder and its respective authorised representatives shall be allowed to access and examine the Company's books and records upon prior reasonable appointment with the Company.

5. **FURTHER OBLIGATIONS OF SHAREHOLDERS**

- 5.1 Each of the Shareholders acknowledges and confirms that this Agreement is entered into between them and will be performed in a spirit of mutual co-operation, trust and confidence and that its intention is that the business, profitability and reputation of the Company shall be extended and maximised by all reasonable and proper means and each Shareholder undertakes to use all reasonable commercial efforts to promote such business.
- 5.2 Each Shareholder agrees with the other to exercise its rights and powers to ensure that the business of the Company is conducted in accordance with sound international business principles.
- 5.3 All dealings between the Company and the Shareholders or their Affiliates shall be on a fair and equitable basis both as regards the interests of the Shareholders and the transaction and the balancing of the interests to the Shareholders and their Affiliates.
- 5.4 Each Shareholder shall promptly notify the other and the Company of all matters coming to its notice which may affect the title to or enjoyment of the Company's premises, assets or property, and of all significant notifications, orders, demands and other communications received from any government or other authority in relation to the Company's Business, assets or property.

6. **NEW ISSUE OF SHARES**

- 6.1 For the purposes of this Clause, the following expressions shall have the following meanings where used herein:

“New Issue”	means any issue of new Shares for subscription in cash;
“1 <sup>st</sup> New Issue Offer”	means the offer referred to in Clause 6.2;
“2 <sup>nd</sup> New Issue Offer”	means the offer referred to in Clause 6.3;

- “New Issue Shares” means the new Shares proposed to be issued under the New Issue;
- “1st New Issue Balance” means the balance of the New Issue Shares comprised in the New Issue Notices which have not been taken up by the Shareholders pursuant to Clause 6.2;
- “1<sup>st</sup> New Issue Ratio” means the ratio of (a) the total number of Shares held by a Shareholder, to (b) the total number of Shares at the time the New Issue Offer is made pursuant Clause 6.2;
- “2<sup>nd</sup> New Issue Ratio” means the ratio of (a) the total number of New Issue Shares proposed to be further subscribed by that Shareholder after accepting its respective 1<sup>st</sup> New Issue Offer, to (b) the 1st New Issue Balance;
- “1<sup>st</sup> New Issue Notice” means a notice in writing stating the following information regarding the New Issue:
- (1) name(s) of the proposed subscriber;
  - (2) number of New Issue Shares proposed to be subscribed by the proposed subscriber;
  - (3) number of New Issue Shares allocated to different Shareholders for subscription pursuant to Clause 6.2;
  - (4) the New Issue Price;
  - (5) the date of payment of the subscription money; and
  - (6) any other material terms;
- “2<sup>nd</sup> New Issue Notice” means a notice in writing stating the following information regarding the 1<sup>st</sup> New Issue Balance:
- (1) name(s) of the proposed subscriber;
  - (2) number of 1<sup>st</sup> New Issue Balance allocated to different Shareholders for subscription pursuant to Clause 6.3;
  - (3) the New Issue Price;
  - (4) the date of payment of the subscription money; and
  - (5) any other material terms.

- 6.2 Any proposal for any New Issue must be met with prior approval by simple majority in a general meeting of the Shareholders, and if such approval be so given, the Company shall first offer the New Issue Shares for subscription by the Shareholders at the New Issue Price in proportion to the 1<sup>st</sup> New Issue

Ratio (as nearly as may be without involving fraction or increasing the total number of New Issue Shares) by serving the 1st New Issue Notices.

- 6.3 In the event that the New Issue Shares or any part thereof are not subscribed by the Shareholders in accordance with Clause 6.2, the Company shall offer the 1st New Issue Balance for subscription by the Shareholders (other than those Shareholders who have not accepted the 1st New Issue Offer in whole or only in part) at the New Issue Price in proportion to the 2<sup>nd</sup> New Issue Ratio (as nearly as may be without involving fraction or increasing the total number of Shares stated in the 2<sup>nd</sup> New Issue Notice) by serving the 2nd New Issue Notices.
- 6.4 The offers referred to in Clauses 6.2 and 6.3 shall be open for acceptance within 14 days from the date of receipt of the New Issue Notices, failing which they shall lapse.
- 6.5 In the event that the 1<sup>st</sup> New Issue Balance or any part thereof are not subscribed by the Shareholders in accordance with Clause 6.3, the Company shall be at liberty to offer, the balance of the 1<sup>st</sup> New Issue Balance comprised in the 2<sup>nd</sup> New Issue Notices which have not been taken up by the Shareholders under the 2nd New Issue Offer, for subscription by the proposed subscriber at the New Issue Price.

7. **RESOLUTION OF DEADLOCK**

- 7.1 This clause applies in any case where:
- 7.1 a matter relating to the affairs of the Company or a Subsidiary has been considered by a meeting of the Board; and
- 7.2 no resolution has been carried at the meeting in relation to the matter by reason of an equality of votes for and against any proposal for dealing with it or by reason of any provision of the Shareholders Agreement providing for the unanimous approval of the Shareholders; and
- 7.3 the matter is not resolved within twenty-one (21) days from the date of the meeting as a result of any intervention by the Shareholders.

Any such case is referred to as a 'deadlock'.

- 7.2 In any case of deadlock each of the Shareholders shall, within 7 days of the deadlock arising, cause its appointees on the Board to prepare and circulate to the other Shareholders and other Directors a memorandum or other form of statement setting out

its position on the matter in dispute and its reasons for adopting that position. Each memorandum or statement shall be considered by the directors nominated by each of the Shareholders to which it is addressed who shall endeavour to resolve the deadlock. If the directors unanimously agree upon a resolution or disposition of the matter, they shall execute a statement setting out the agreed terms. The Shareholders shall exercise the voting rights and other powers available to them in relation to the Company to procure that the agreed terms are fully and promptly carried into effect.

7.3 If the deadlock is not resolved or disposed of in accordance with clause 7.2 within 30 days after expiry of the 7 day period, or such longer period as the Shareholders agree in writing, and if it prevents the Company or a Subsidiary from continuing to achieve its business purposes, any one Shareholder may by notice in writing to the other Shareholders require that the provisions of this clause be applied. Within 7 days of the notice in that behalf the Shareholders shall procure that their appointees on the Board:

- (a) convene an extraordinary general meeting of the Company to consider:
- (b) the matter from which the deadlock arose; and
- (c) the passing of a special or extraordinary resolution to place the Company in members' voluntary liquidation or in any other case in creditors' voluntary liquidation.

the meeting or meetings to be held within 5 weeks after the giving of the notice referred to above.

7.4 If, at the extraordinary general meeting referred to in clause 7.3 (a) no resolution is carried in relation to the matter from which the deadlock arose by reason of an equality of votes for and against any proposal for dealing with it, the Shareholders shall vote in favour of the resolution for winding up the Company.

7.5 In no circumstances shall any one Shareholder create an 'artificial deadlock' and then exercise its rights under clause 7.3 to require the winding up of the Company. For this purpose, an 'artificial deadlock' is a deadlock caused by any one Shareholder, or its appointees on the Board, voting against a proposal the approval of which is required to enable the Company to carry on the Business properly and efficiently in accordance with the Company's general trading principles.

8. **INFORMATION AND INSPECTION RIGHTS**

8.1 The Shareholders shall procure the Company to deliver to each of the Shareholders who continue to hold any Shares:

8.1.1 As soon as practicable, but in any event within NINETY (90) days after the end of each fiscal year of the Company, consolidated income statements and statements of cash flows for the Company for such fiscal year, consolidated and consolidating balance sheets for the Company as of the end of the fiscal year as compared to the audited balance sheets of the preceding fiscal year, all prepared in English, and prepared in accordance with Singapore Financial Reporting Standards or other international accounting standards to be decided by the Board of Directors, and audited and certified by the Auditors;

8.1.2 As soon as practicable, but in any event within sixty (60) days of the end of each fiscal half-year, unaudited income statements and statements of cash flows for such month for year-to-date period as of the end of such half-year period, balance sheets for the Company as of the end of such half-year period compared to the last audited balance sheets for the Company;

8.1.3 As soon as practicable, but in any event within seven (7) Business Days after providing such information to such other Shareholder, copies of all other documents or other information sent to any other Shareholder in such other person's capacity as a Shareholder;

8.1.4 As soon as practicable, but in any event within seven (7) Business Days after the filing of any reports or other documents by the Company with any relevant securities exchange or governmental authority, copies of any such reports or documents; and

8.1.5 Such other information as the Shareholders may reasonably request in writing.

8.2 The Company shall permit any Shareholder, at its own expense, to visit and inspect any of the properties and examine the books of account and records of the Company and for a reasonable period of time, discuss the affairs, finances and accounts of the Company with the directors, officers, employees, accountants and legal counsel of the Company, all at such reasonable times as may be requested in writing by such Shareholder.

9. **CONFIDENTIALITY**

9.1 Neither of the Shareholders shall disclose or divulge to any person or use for any purpose:-

9.1.1 any of the trade secrets or know-how or confidential information or any financial or trading information relating to the other Shareholder or the Company which it acquires as a result of entering into this Agreement whether directly or indirectly or through participation of the Business;

9.1.2 the existence and terms of this Agreement; and

9.1.3 any information which would be regarded as confidential by a reasonable business person relating to:

- (i) the business, affairs, customers, clients, suppliers, plans, intentions, or market opportunities of the other party or the Company;
- (ii) the operations, processes, product information, know-how, designs, trade secrets or software of the other party or the Company; and
- (iii) any information developed by the parties in the course of carrying out this Agreement.

9.2 Each of the Shareholders shall endeavour to prevent its employees, representatives or agents from doing anything which, if done by the Shareholder, would be a breach of this clause. This restriction shall continue to apply after the expiration or termination of this Agreement without limit in point of time but shall cease to apply to secret or information which comes into the public domain through no fault of the Shareholder concerned.

9.3 Clause 9.1 shall not apply where the disclosure or divulgence or use is:-

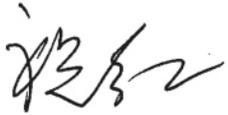
- 9.3.1 made to or for persons from whose provenance it is obtained;
- 9.3.2 with proper authority;
- 9.3.3 for the purpose of exercising or performing the parties' rights and obligations under this Agreement;
- 9.3.4 for promoting or furthering the operation of the Company or its business; and
- 9.3.5 required by law or any other regulatory body.

10. **SEVERABILITY**

10.1 If any of the provisions of this Agreement is found by a court of law or other competent authority to be void or unenforceable, it shall be deemed to be deleted from this Agreement and the remaining provisions shall continue to apply. The Shareholders shall negotiate in good faith in order to agree the terms of a mutually satisfactory provision to be substituted for the provision found to be void or unenforceable.

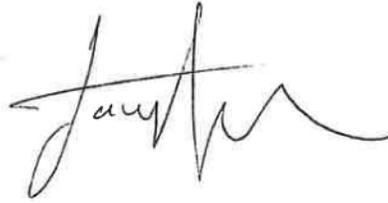
SIGNED by Li Qi, its Sole Director, for )  
and on behalf of Truly Great Global )  
Limited, in the presence of :- )

For and on behalf of  
**TRULY GREAT GLOBAL LIMITED**  
誠 佳 環 球 有 限 公 司  
.....  
Authorized Signature(s)



Zhu Hong

SIGNED by James Noel Halstead )  
Seagrim (who having first been identified )  
by production of his United Kingdom of )  
Great Britain and Northern Ireland )  
Passport No.099038139) in the presence

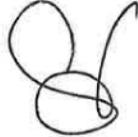
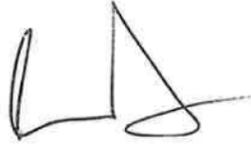


of :- KEVIN CHEEK  
*Kevin Cheek*

SIGNED by Stephen Matthew Walter )  
(who having first been identified by )  
production of his United States of America )  
Passport No.442119396) in the presence )  
of :- KEVIN CHEEK  
Kevin Cheek

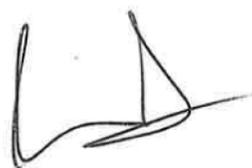


SIGNED by Geoffrey Owen Cassidy )  
its Director, for and on behalf of Asia )  
Aviation Holdings Pte. Ltd in the presence )  
of :- )



Sherry Ng

SIGNED by Geoffrey Owen Cassidy )  
its Director, for and on behalf of Zetta Jet )  
Pte. Ltd, in the presence of :- )



Sherry Ng

Dated the 26<sup>th</sup> day of February 2016

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TRULY GREAT GLOBAL LIMITED  
AND  
ASIA AVIATION HOLDINGS PTE. LTD  
AND  
JAMES NOEL HALSTEAD SEAGRIM  
AND  
STEPHEN MATTHEW WALTER  
AND  
ZETTA JET PTE. LTD.

---

SUBSCRIPTION AGREEMENT

incorporating

Shareholders' Agreement

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C. P. LIN & CO.,  
SOLICITORS,  
HONG KONG.

DL82168kic

**PROOF OF SERVICE**

I am over eighteen years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 777 South Figueroa Street, Forty-Fourth Floor, Los Angeles, California 90017-5844.

On January 25, 2019, I served the following document(s): **FIRST AMENDED COMPLAINT FOR 1. FRAUD 2. NEGLIGENT MISREPRESENTATION 3. BREACH OF CONTRACT** on the following person(s):

Will S. Skinner (Via E-Mail)  
Erik D. Slechta  
Sandra L. Weiherer  
SKINNER LAW GROUP  
21600 Oxnard Street, Suite 1760  
Woodland Hills, CA 91367  
Tel: (818) 710-7700 /Fax: (818) 710-7701  
skinner@skinnerlawgroup.com  
slechta@skinnerlawgroup.com  
weiherer@skinnerlawgroup.com

Mackenzie W. Smith (Via E-Mail)  
Laurie Alberts Salita  
Skinner Law Group  
101 Lindenwood Drive, Suite 225  
Malvern, PA 19355  
Tel: (484) 875-3160  
smith@skinnerlawgroup.com  
salita@skinnerlawgroup.com

Counsel for Defendants, James Noel Halstead  
Seagrim and Stephen Matthew Walter

Counsel for Defendants, James Noel  
Halstead Seagrim and Stephen Matthew  
Walter

Geoffrey Cassidy (Via U.S. Mail)  
64 Flora Road  
#04-08 the Gale Loyang  
Singapore 506911

Defendant

The documents were served by the following means:

**By U.S. mail.** I enclosed the document(s) in a sealed envelope or package addressed to the person(s) at the address(es) in Item 3 and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with this business' practice for collecting and processing correspondence for mailing. On the same day the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid. I am employed in the county where the mailing occurred. The envelope or package was placed in the mail at Los Angeles, California.

**By Overnight Delivery/Express Mail.** I enclosed the documents and an unsigned copy of this declaration in a sealed envelope or package designated by United Postal Service addressed to the persons at the address(es) listed in Item 3, with delivery fees prepaid or provided for. I placed the sealed envelope or package for collection and delivery, following our ordinary business practices. I am readily familiar with this business' practice for collecting and processing correspondence for express delivery. On the same day the correspondence is collected for delivery, it is delivered to a courier or driver authorized by United Postal Service to receive documents.

1  **By Electronic Service (E-mail)**. Based on a court order or an agreement of the parties to  
2 accept service by electronic transmission, I transmitted the document(s) and an unsigned copy of  
3 this declaration to the person(s) at the electronic notification address(es) listed in Item 3 on January  
4 25, 2019, before 5:00 p.m. PST. I did not receive, within a reasonable time after the transmission,  
5 any electronic message or other indication that the transmission was unsuccessful.

6  **STATE:** I declare under penalty of perjury under the laws of the State of California that the  
7 foregoing is true and correct.

8  
9  
10 Dated: January 25, 2019

Signature: *Vicky Apodaca*  
Vicky Apodaca

**EXHIBIT 7**

**(September 11, 2016 Email Correspondence)**

**From:** Janet Chung <janet.chung@cplin.com.hk> Filed 06/03/21 Entered 06/03/21 11:47:15 Desc  
**Sent:** Monday, September 12, 2016 12:36 PM Exhibit 1076: Rose Mus Declaration Page 2 of 23  
**To:** 'Salem Ibrahim' <salem@salemlaw.org.sg>; 'D Lin' <dlin@cplin.com.hk>  
**Cc:** 'Liqi' <liqiqi@yahoo.com>; 'Geoffery Cassidy' <gcassidy@zettajet.com>; 'Iman Ibrahim' <iman@salemlaw.org.sg>; 'Shing Yng' <sy@salemlaw.org.sg>  
**Subject:** RE: SPAs 9606.9688, Minsheng Refinance

Dear Salem.

We hereby resend the email below dated 12 September 2016 12:36pm. Please acknowledge receipt.

Kind regards,

Janet Chung  
By the Authority for and on behalf of  
David Lin

C P Lin & Co 練松柏律師行  
19B United Centre  
95 Queensway  
Admiralty  
Hong Kong  
T +852 2581 9959  
F +852 2581 2797

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**From:** Janet Chung [mailto:janet.chung@cplin.com.hk]  
**Sent:** Monday, September 12, 2016 12:36 PM  
**To:** 'Salem Ibrahim'; 'D Lin'  
**Cc:** 'Liqi'; 'Geoffery Cassidy'; 'Iman Ibrahim'; 'Shing Yng'  
**Subject:** RE: SPAs 9606.9688, Minsheng Refinance

Dear Salem,

1. As our amendments are all inserted and we have been informed that there is no additional insertion other than Minsheng's bank details, we are agreeable to waive your undertaking as stated in our email dated 9 September 2016 18:24 . Needless to say, the documents remain executed in escrow as stated.
2. As for the undertaking imposed on you today, now that you have finally informed us of the logistic of the exchange of the Agreements and the Deeds, may we suggest that, the undertaking be amended as follows:-  
"That you shall send us the scanned copies of the execution pages of all other parties to the Agreements and Deeds within 3 days of your receipt of the same, and shall send us 1 hard copy of the full executed original to us within 7 days after your receipt of the same;
3. Meanwhile, all other undertakings imposed today, namely:-
  - (a) That all the Agreements and Deeds are executed subject to the terms and conditions of (1) Sale and Purchase Agreement of Aircraft 9606 between Universal Leader (as Seller) and Zetta Jet Pte Ltd (as Buyer) dated 12 August 2016 and (2) Sale and Purchase Agreement of Aircraft 9688 between Glove Assets (as Seller) and Zetta Jet Pte Ltd (as Buyer) dated 12 August 2016 (the "SPAs");

to us;  
shall remain in force.

We shall await your instructions in relation to the disposal of the originals.

Kind regards,

Janet Chung  
By the Authority for and on behalf of  
David Lin

C P Lin & Co 練松柏律師行  
19B United Centre  
95 Queensway  
Admiralty  
Hong Kong  
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---

**From:** Salem Ibrahim [<mailto:salem@salemlaw.org.sg>]  
**Sent:** Monday, September 12, 2016 11:52 AM  
**To:** 'Janet Chung'; 'D Lin'  
**Cc:** 'Liqi'; 'Geoffery Cassidy'; 'Iman Ibrahim'; 'Shing Yng'  
**Subject:** RE: SPAs 9606.9688, Minsheng Refinance  
**Importance:** High

Dear David,

With the undertaking you want, you make it impossible for me to release scanned copies now to anyone else as Minsheng has not inserted their bank account details. The undertaking you want is, I quote:

- :
1. 9 September 2016 at 1823hrs: *All insertion and amendments in both SLB Purchase Agreements and the Deeds of Termination will need our prior approval before releasing the execution pages of the agreements (signed in escrow) to any party until all amendments are approved by our client, except for circulation for the purpose of showing execution in escrow.*
  2. Today: *"That you shall send us the scanned copies of the execution pages of all other parties to the Agreements and Deeds within 3 days, and shall send us 1 hard copy of the original to us within 7 days after the Agreements and Deeds are dated"*

You know as a fellow solicitor that I cannot undertake anything that is not within my control and that the Law Society has informed solicitors not to give undertakings on matters than are not within their control. I cannot guarantee signing by the other parties within 3 days or at all. 5 copies are required by lenders and unless you make an additional original, I cannot deliver the 6<sup>th</sup> original to you. To that extent, you have successfully blocked me for circulating scanned copies now. I leave this to Geoff and the other directors of Zetta to circulate it and leave you to deal with them.

I can inform you that to the best of my knowledge, there are no other amendments to the Deed of Termination and the SLB other than the insertion of Minsheng's bank account details. I can also confirm that nothing is engaged until closing at Escrow. You can participate at closing at escrow in place of Geoff if Li Qi and Geoff agree. At this stage, we are circulating copies so that escrow closing will be smooth and the scanned copies show each parties intention in good faith to proceed to closing.

Kind Regards,  
Salem

---

**From:** Janet Chung [<mailto:janet.chung@cplin.com.hk>]  
**Sent:** Monday, 12 September, 2016 11:05 AM  
**To:** 'Salem Ibrahim'; 'D Lin'  
**Cc:** 'Liqi'; 'Geoffery Cassidy'; 'Iman Ibrahim'; 'Shing Yng'  
**Subject:** RE: SPAs 9606.9688, Minsheng Refinance

Dear Sirs,

As requested, our client has attended our office and executed the 2 sets of SLB Purchase Agreements and Deeds of Terminations, all in escrow.

We send herewith the scanned copies of the following entire documents:-

1. Sale and Leaseback Purchase Agreement between Wells Fargo (as Seller), Universal Leader (as Beneficiary), Wells Fargo (as Buyer) and TVPX ARS Inc. (as Lessee) relating to Bombardier aircraft serial number 9606;
2. Deed of Termination between Wells Fargo (as Lessor), Universal Leader (as Beneficiary) and Zetta Jet (as Lessee) relating the leasing of Bombardier aircraft serial number 9606;
3. Sale and Leaseback Purchase Agreement between Wells Fargo (as Seller), Glove Assets (as Beneficiary), Wells Fargo (as Buyer) and TVPX ARS Inc. (as Lessee) relating to Bombardier aircraft serial number 9688; and
4. Deed of Termination between Wells Fargo (as Lessor), Glove Assets (as Beneficiary) and Zetta Jet (as Lessee) relating the leasing of Bombardier aircraft serial number 9688. (collectively "the Agreements and the Deeds")

Please note the above scanned copies of the Agreements and the Deeds are sent against your professional undertakings:-

4. That all the Agreements and Deeds are executed subject to the terms and conditions of (1) Sale and Purchase Agreement of Aircraft 9606 between Universal Leader (as Seller) and Zetta Jet Pte Ltd (as Buyer) dated 12 August 2016 and (2) Sale and Purchase Agreement of Aircraft 9688 between Glove Assets (as Seller) and Zetta Jet Pte Ltd (as Buyer) dated 12 August 2016 (the "SPAs"), and its release is subject to the same condition as mentioned in our email to you dated 9 September 2016 18:24;
5. Let us know the dates of the Agreements and Deeds as soon as practical;
6. That you shall send us the scanned copies of the execution pages of all other parties to the Agreements and Deeds within 3 days, and shall send us 1 hard copy of the original to us within 7 days after the Agreements and Deeds are dated;
7. The undertaking in our email on 15 August 2016 19:45 that you shall send us 1 copy of each of the SPAs to us.

We shall await your further instruction in relation to the disposal of the originals.

Kind regards,

Janet Chung  
By the Authority for and on behalf of  
David Lin

C P Lin & Co 練松柏律師行  
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95 Queensway  
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unauthorized copying, disclosure, distribution of the material or use of information contained in this e-mail is strictly prohibited.

---

**From:** Salem Ibrahim [<mailto:salem@salemlaw.org.sg>]  
**Sent:** Monday, September 12, 2016 10:52 AM  
**To:** 'D Lin'  
**Cc:** 'Janet Chung'; 'Liqi'; 'Geoffery Cassidy'; 'Iman Ibrahim'; 'Shing Yng'  
**Subject:** RE: SPAs 9606.9688, Minsheng Refinance  
**Importance:** High

Good Morning David,

Understand from Geoff that the documents have been signed.

We need a scanned copy immediately please. Its urgent.

I rang your office but was told you are at a meeting.

Kind Regards,  
Salem

---

**From:** Salem Ibrahim [<mailto:salem@salemlaw.org.sg>]  
**Sent:** Sunday, 11 September, 2016 10:29 PM  
**To:** 'D Lin'  
**Cc:** 'Janet Chung'; 'Liqi'; 'Geoffery Cassidy'; 'Iman Ibrahim'; 'Shing Yng'  
**Subject:** RE: SPAs 9606.9688, Minsheng Refinance  
**Importance:** High

Hi David,

Thank you for the effort. Attached is the SLB as approved by you. That complete SLB and Lease Termination Agreements for each of UK and Glove..

Please send urgently by email one copy of each executed whole document (i.e. the document and the execution page together) to us by email and persons copied hereto.

Each agreement should be signed in **5 originals**.

Please send by email one copy of each executed whole document (i.e. the document and the execution page together) by reply to us by email and persons copied hereto; and also send the originals by courier to the address and **in 5 originals**.

Will advise on disposal of originals tomorrow.

Kind Regards,  
Salem

---

**From:** D Lin [<mailto:dlin@cplin.com.hk>]  
**Sent:** Sunday, 11 September, 2016 6:19 PM  
**To:** [salem@salemlaw.org.sg](mailto:salem@salemlaw.org.sg)  
**Cc:** Janet Chung; Liqi; Geoffery Cassidy; Iman Ibrahim; Shing Yng

no further comments

David Lin 練紹良  
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On 11 Sep 2016, at 18:09, [salem@salemlaw.org.sg](mailto:salem@salemlaw.org.sg) wrote:

Yes will amend. Is there anything more so HFW can amend at one go. Will standby.

Kind Regards,  
Salem

On Sun, Sep 11, 2016 at 5:13 PM +0800, "D Lin" <[dlin@cplin.com.hk](mailto:dlin@cplin.com.hk)> wrote:

Dear all,

On first pour over of the docs, pls note:

1. SLP agt for 9688

Para 2(a) schedule 2 - the account no. Belongs to universal leader but payment is stated to be in favour of glove assets. In Hong along at least (and this is indeed a HK account) the payment process would be stopped. At any rate glove assets does not have any bank account. Please amend.

David Lin 練紹良  
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F +852 2581 2797

On 11 Sep 2016, at 13:00, Salem Ibrahim <[salem@salemlaw.org.sg](mailto:salem@salemlaw.org.sg)> wrote:

Appreciated.

Kind Regards,  
Salem

---

**From:** D Lin [<mailto:dlin@cplin.com.hk>]  
**Sent:** Sunday, 11 September, 2016 12:54 PM  
**To:** Salem Ibrahim  
**Cc:** Janet Chung; Liqi; Geoffery Cassidy; Iman Ibrahim; Shing Yng  
**Subject:** Re: SPAs 9606.9688, Minsheng Refinance

Thanks Shall take a look mid afternoon and revert.

David Lin 練紹良  
C P Lin & Co 練松柏律師行

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F +852 2581 2797

On 10 Sep 2016, at 21:22, Salem Ibrahim <[salem@salemlaw.org.sg](mailto:salem@salemlaw.org.sg)> wrote:

Dear David,

Just received the corrected version from HFW.

Please let me know if you are happy with these.

Kind Regards,  
<image001.jpg>  
Salem Ibrahim

### **SALEM IBRAHIM LLC**

**Advocates & Solicitors | Notaries Public | Commissioners for Oaths**

79 Robinson Road #16-06 CPF Building Singapore 068897 Tel: (65) 62261233 Fax: (65) 62260988

Website: [www.salemlaw.org.sg](http://www.salemlaw.org.sg)

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---

**From:** Salem Ibrahim [<mailto:salem@salemlaw.org.sg>]  
**Sent:** Saturday, 10 September, 2016 6:54 PM  
**To:** 'D Lin'  
**Cc:** 'Janet Chung'; 'Liqi'; 'Geoffery Cassidy'; 'Iman Ibrahim'; 'Shing Yng'  
**Subject:** RE: SPAs 9606.9688, Minsheng Refinance

Noted Squire.

Kind Regards,  
Salem

---

**From:** D Lin [<mailto:dlin@cplin.com.hk>]  
**Sent:** Saturday, 10 September, 2016 6:25 PM  
**To:** Salem Ibrahim  
**Cc:** Janet Chung; Liqi; Geoffery Cassidy; Iman Ibrahim; Shing Yng  
**Subject:** Re: SPAs 9606.9688, Minsheng Refinance

David Lin 練紹良  
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On 10 Sep 2016, at 18:01, Salem Ibrahim <[salem@salemlaw.org.sg](mailto:salem@salemlaw.org.sg)> wrote:

Hi David,

Are you able to provide me the fax number for UL/Glove for insertion into the Notices section or do you wish the fax numbers to be omitted?

Kind Regards,  
Salem

---

**From:** Janet Chung [<mailto:janet.chung@cclin.com.hk>]  
**Sent:** Friday, 9 September, 2016 6:24 PM  
**To:** 'Salem Ibrahim'  
**Cc:** 'Liqi'; 'Geoffery Cassidy'; 'Iman Ibrahim'; 'Shing Yng'; 'David Lin'  
**Subject:** RE: SPAs 9606.9688, Minsheng Refinance

Dear Salem,

We have just spoken to client and he is physically indisposed to attend the execution of the agreements (in escrow) until next Monday morning. In the meantime it is hoped that the final engrossment copies of all relevant agreements will be ready over the weekend.

In addition, we are not agreeable to send the hard copies of signed pages to HFW. We shall send the hard copies of the Deeds of Termination to your office by courier together with the hard copies of the Agreements, subject to below.

We would like you to confirm you are agreeable to professionally undertake that:-

1. All insertion and amendments in both SLB Purchase Agreements and the Deeds of Termination will need our prior approval before releasing the execution pages of the agreements (signed in escrow) to any party until all amendments are approved by our client, except for circulation for the purpose of showing execution in escrow.

Kind regards,

Janet Chung  
By the Authority for and on behalf of  
David Lin

C P Lin & Co 練松柏律師行  
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Hong Kong

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---

**From:** David Lin [<mailto:dlin@cplin.com.hk>]  
**Sent:** Friday, September 09, 2016 5:38 PM  
**To:** 'Salem Ibrahim'; 'Janet Chung'  
**Cc:** 'Liqi'; 'Geoffery Cassidy'; 'Iman Ibrahim'; 'Shing Yng'  
**Subject:** RE: SPAs 9606.9688, Minsheng Refinance

Thanks shall talk to client and revert.

David Lin 練紹良  
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---

**From:** Salem Ibrahim [<mailto:salem@salemlaw.org.sg>]  
**Sent:** Friday, September 09, 2016 5:36 PM  
**To:** 'David Lin' <[dlin@cplin.com.hk](mailto:dlin@cplin.com.hk)>; 'Janet Chung' <[janet.chung@cplin.com.hk](mailto:janet.chung@cplin.com.hk)>  
**Cc:** 'Liqi' <[liqiqi@yahoo.com](mailto:liqiqi@yahoo.com)>; 'Geoffery Cassidy' <[gccassidy@zettajet.com](mailto:gccassidy@zettajet.com)>; 'Iman Ibrahim' <[iman@salemlaw.org.sg](mailto:iman@salemlaw.org.sg)>; 'Shing Yng' <[sy@salemlaw.org.sg](mailto:sy@salemlaw.org.sg)>  
**Subject:** RE: SPAs 9606.9688, Minsheng Refinance

Dear David,

1. Yes, I need the signed scanned copies of the whole of both agreements and hard copies by courier to us;
2. They would be held by us pursuant to professional undertaking not to release at closing without you approving the amendments you have asked for and other

3. Other changes will be insertion of payment details of other parties, company numbers, addresses for notices and aircraft specification.

I would add that I just spoke to HFW (Hong Kong) and they would be prepared to receive the originals on their undertaking to hold to your order. Happy to put you in touch with them now. They are standing by.

Kind Regards,  
<image001.jpg>  
Salem Ibrahim

### **SALEM IBRAHIM LLC**

**Advocates & Solicitors | Notaries Public | Commissioners for Oaths**

79 Robinson Road #16-06 CPF Building Singapore 068897 Tel: (65) 62261233 Fax: (65) 62260988 Website: [www.salemlaw.org.sg](http://www.salemlaw.org.sg)

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---

**From:** David Lin [<mailto:dlin@cplin.com.hk>]  
**Sent:** Friday, 9 September, 2016 4:57 PM  
**To:** 'Salem Ibrahim'; 'Janet Chung'  
**Cc:** 'Liqi'; 'Geoffery Cassidy'; 'Iman Ibrahim'; 'Shing Yng'  
**Subject:** RE: SPAs 9606.9688, Minsheng Refinance

Dear Salem,

To clarify:

1. would you need the hard copies of signed pages;
2. Understand they would be held by you pursuant to professional undertaking not to release until closing, but they would be circulated to other parties?

I shall attempt to seek instructions upon your reply.

David Lin 練紹良  
C P Lin & Co 練松柏律師行  
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---

**From:** Salem Ibrahim [<mailto:salem@salemlaw.org.sg>]  
**Sent:** Friday, September 09, 2016 4:37 PM  
**To:** 'Janet Chung' <[janet.chung@cplin.com.hk](mailto:janet.chung@cplin.com.hk)>  
**Cc:** 'Liqi' <[liqiqi@yahoo.com](mailto:liqiqi@yahoo.com)>; 'Geoffery Cassidy' <[gassidy@zettajet.com](mailto:gassidy@zettajet.com)>; 'Iman Ibrahim' <[iman@salemlaw.org.sg](mailto:iman@salemlaw.org.sg)>; 'Shing Yng' <[sy@salemlaw.org.sg](mailto:sy@salemlaw.org.sg)>; 'D Lin' <[dlin@cplin.com.hk](mailto:dlin@cplin.com.hk)>  
**Subject:** RE: SPAs 9606.9688, Minsheng Refinance

Hello David,

I just received this email from HFW, Hongkong.

This suggestion is to facilitate the funding on time before the PRC Holidays mid next week.

The undertaking is not to release for closing but only for circulation purposes until the until the next round of execution of the agreement and deed incorporating your amendments.

Thank you.

Kind Regards,  
Salem

---

**From:** Salem Ibrahim [<mailto:salem@salemlaw.org.sg>]  
**Sent:** Friday, 9 September, 2016 4:23 PM  
**To:** 'Janet Chung'  
**Cc:** 'Liqi'; 'Geoffery Cassidy'; 'Iman Ibrahim'; 'Shing Yng'; 'D Lin'  
**Subject:** RE: SPAs 9606.9688, Minsheng Refinance

Hi David,

Not a problem. Just spoke to HFW and they are making the amendments. Will turn it around to you shortly.

---

**From:** Janet Chung [<mailto:janet.chung@cclin.com.hk>]  
**Sent:** Friday, 9 September, 2016 3:24 PM  
**To:** 'Salem Ibrahim'  
**Cc:** 'Liqi'; 'Geoffery Cassidy'; 'Iman Ibrahim'; 'Shing Yng'; 'D Lin'  
**Subject:** RE: SPAs 9606.9688, Minsheng Refinance

Dear Salem,

We are still in the process of reviewing the agreements, however, we note that the core content of our client's banking details were not inserted in Clause 2(a) of Schedule 2 of the SLB Purchase Agreement in place of [Financier] as recipient of \$27.5m from the Buyer (in either set of SLB Purchase Agreement), despite our client's bank details have been sent to you yesterday night pursuant to your urgent request.

We also note that our client's details are incomplete in the recitals (Company No. of Universal Leader being 1836404) and the Aircraft Specification to be provided by Zetta has not been inserted in Schedule 1. Since it is the execution version of the Agreements, we expect all relevant details to be finalized and properly inserted before execution.

The company no. of Universal Leader in the Deed of Termination is 1836404 instead of 1881019 (which is the company no. of Glove).

In any event, our client is not prepared to sign the agreements unless our client's details are properly inserted, in particular in Schedule 2. In the meantime, we are reviewing other parts of the agreements and shall revert soonest.

Kind regards,

Janet Chung  
By the Authority for and on behalf of  
David Lin

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**From:** Salem Ibrahim, <mailto:salem@salemlaw.org>  
**Subject:** Exhibit 7 to Rescind Declaration Page 13 of 23

**Sent:** Friday, September 09, 2016 2:13 PM

**To:** 'D Lin'

**Cc:** 'Janet Chung'; 'Liqi'; 'Geoffery Cassidy'; 'Iman Ibrahim'; 'Shing Yng'

**Subject:** RE: SPAs 9606.9688, Minsheng Refinance

Dear David,

Attached 1 pair of agreements for each of 9606,9688 in execution form.

Please arrange execution asap. For the Deed, it must be returned complete. For the SLB, we are happy for the signature page only to be returned.

After signing, please scan, email to us with originals to be sent to us immediately to Holman Fenwick Willan.

Here are the signing instructions and specific on originals and delivery as well as the role of Holman Fenwick Willan.

QUOTE:

Please arrange for execution of the documents [IN BLUE INK and on single sided paper](#) by the relevant authorised signatory **in accordance with our signing instructions below** (these are deeds so we must follow the protocol, ensure the signatures are witnessed and the signature blocks fully filled out, one whole signed, undated document to be sent in the pdf) (requisite number of originals set out next to the document).

Document	Parties	No. Originals Required	Dispatch of originals
Deed of Termination MSN 9606	<ol style="list-style-type: none"> <li>1. Wells Fargo (Lessor)</li> <li>2. Zetta Jet Pte. Ltd. (Lessee)</li> <li>3. Universal Leader Investment Limited (Beneficiary)</li> </ol>	4	All originals sent to HFW at address below
Deed of Termination MSN 9688	<ol style="list-style-type: none"> <li>1. Wells Fargo (Lessor)</li> <li>2. Zetta Jet Pte. Ltd. (Lessee)</li> <li>3. Glove Assets Investment Limited (Beneficiary)</li> </ol>	4	All originals sent to HFW at address below

**Execution instructions**

Please execute the documents in accordance with the following instructions:

- (a) Print the document in full (single sided) in the number specified above for the relevant company;
- (b) Arrange for each applicable execution clause to be signed by the relevant

authorised signatories and witnessed as applicable (where indicated) in all the printed copies of the document. Please **do not date** the document(s);  
(c) Send by email one copy of each executed whole document (i.e. the document and the signed execution page together) by reply to this email and persons copied hereto; and  
(e) Send the originals by courier to the address and in the number set out above as soon as practicable after execution and include tracking details for the courier. For documents to be sent to HFW:

FAO Luke Liberda  
Holman Fenwick Willan  
15<sup>th</sup> Floor, Tower One Lippo Centre  
89 Queensway  
Hong Kong

By returning copies of each signed document:

- You confirm that you printed and signed (or arranged for the signing of) each whole document in the form attached to this email;
- We will be authorised to hold the copies of each signed document to the order of the executing party pending closing when each document will be released by Holman Fenwick Willan to all other parties and it is agreed that upon closing the company on whose behalf the document was signed will be bound by the terms of each document and Holman Fenwick Willan are authorised to release the copies of each signed document to all other parties and to date each document accordingly;
- In the case of any document which is a deed, you confirm that its release and dating constitutes delivery of the deed by the person on whose behalf the deed was signed;
- You agree that you will send each whole original signed document to us as soon as practicable after it is signed;
- You agree that we will assemble the correct number of originals as specified above, using the counterparts returned to us; and
- You confirm that you have all requisite authorisations in order to give the confirmations and authorisations to sign each document on behalf of the relevant company and bind it to the terms contained therein.

UNQUOTE

Kind Regards,  
<image001.jpg>  
Salem Ibrahim

## **SALEM IBRAHIM LLC**

**Advocates & Solicitors | Notaries Public | Commissioners for Oaths**

79 Robinson Road #16-06 CPF Building Singapore 068897 Tel: (65) 62261233 Fax: (65) 62260988 Website: [www.salemlaw.org.sg](http://www.salemlaw.org.sg)

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Case 2:19-ap-01383-SK Doc 257-8 Filed 06/03/21 Entered 06/03/21 11:47:15 Desc  
Exhibit 7 to Rosefus Declaration Page 15 of 23  
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---

**From:** Salem Ibrahim [<mailto:salem@salemlaw.org.sg>]  
**Sent:** Thursday, 8 September, 2016 9:33 PM  
**To:** 'D Lin'  
**Cc:** 'Janet Chung'; 'Liqi'; 'Geoffery Cassidy'; 'Iman Ibrahim'; 'Shing Yng'  
**Subject:** RE: SPAs 9606.9688, Minsheng Refinance

David,

Parties to the Finance Lease labelled "Aircraft Lease Agreement" are,

- (1) Well Fargo, Lessor, as Owner Trustee for Minsheng Entity; and
- (2) TVPX, Lessee, as Lease Trustee for Zetta Entity

Your payment of \$55m will be remitted from International Aircraft Title Services Inc ("IATS").

Kind Regards,  
Salem

---

**From:** D Lin [<mailto:dlin@cplin.com.hk>]  
**Sent:** Thursday, 8 September, 2016 8:48 PM  
**To:** Salem Ibrahim  
**Cc:** Janet Chung; Liqi; Geoffery Cassidy; Iman Ibrahim; Shing Yng  
**Subject:** Re: SPAs 9606.9688, Minsheng Refinance

Thanks Salem, kindly let me know the name and parties of the document governing the lease finance as stated below.

We are instructed that the bank details to be inserted into para 2(b) of schedule 2 of the SLP agreement is as follows:

**Bank:** HSBC Bank, New York, USA  
**(Field 56a) SWIFT code:** [REDACTED]  
**Federal routing code:** [REDACTED]

**For credit to:** a/c no. [REDACTED]  
**(Field 57a) THE HONGKONG & SHANGHAI BANKING CORPORATION  
LIMITED, HONG KONG PRIVATE BANKING DIVISION  
BIC:** [REDACTED]

**In favour of:** UNIVERSAL LEADER INVESTMENT LIMITED  
**(Field 59) A/C** [REDACTED]

**With Message:** Please send SWIFT [REDACTED] to [REDACTED] with full payment details

(Field 70)  
David Lin 練紹良  
C P Lin & Co 練松柏律師行  
19B United Centre  
95 Queensway  
Admiralty  
Hong Kong  
T +852 2581 9959  
F +852 2581 2797

On 8 Sep 2016, at 19:36, Salem Ibrahim <[salem@salemlaw.org.sg](mailto:salem@salemlaw.org.sg)> wrote:

Dear David & Geoff,

It was a very helpful conference call and I think we can summarise it as follows:

- 1 In short, Minsheng is providing lease finance to Zetta and will refinance \$80m by purchase of 9606 and 9688.
- 2 Of this \$80m, \$55m will go to an account designated by UL/Glove.
- 3 Of the balance, US\$12,410,240 to Minsheng to satisfy the obligation to pay the fees for the 4 new Challenger 650;
- 4 Various fees and charges (escrow lender lawyers), and
- 5 The residual to Zetta.

Geoff has indicated he will instruct Wells Fargo on behalf of UL, Glove, on the payment of \$55m to an account designated by UL/Glove.

David, you will give me the details of the bank account for UL/Glove to be inserted for closing.

Kind Regards,  
Salem

---

**From:** Salem Ibrahim [<mailto:salem@salemlaw.org.sg>]  
**Sent:** Thursday, 8 September, 2016 5:34 PM  
**To:** 'Janet Chung'; 'Liqi'; 'Geoffery Cassidy'; 'David Lin'  
**Cc:** 'Iman Ibrahim'; 'Shing Yng'  
**Subject:** RE: SPAs 9606.9688, Minsheng Refinance

David,

Can you be on a conference call. I will give dial in numbers. Geoff will want to participate.

He is driving at the moment. What time is good for you?

Kind Regards,  
Salem

**From:** Salem Ibrahim [mailto:salem@salem.org.sg]  
**Sent:** Thursday, 8 September 2016 4:16 PM  
**To:** Janet Chung; 'Liqi'; 'Geoffery Cassidy'; 'David Lin'  
**Cc:** 'Iman Ibrahim'; 'Shing Yng'  
**Subject:** RE: SPAs 9606.9688, Minsheng Refinance  
**Importance:** High

SEE MY ANSWERS IN CAPS BELOW. PLEASE LET ME KNOW IF YOU NEED FURTHER CLARIFICATION OR NEED TO DISCUSS.

KIND REGARDS,  
SALEM

---

**From:** Janet Chung [mailto:janet.chung@cclin.com.hk]  
**Sent:** Thursday, 8 September, 2016 3:48 PM  
**To:** 'Salem Ibrahim'; 'Liqi'; 'Geoffery Cassidy'; 'David Lin'  
**Cc:** 'Iman Ibrahim'; 'Shing Yng'  
**Subject:** RE: SPAs 9606.9688, Minsheng Refinance

Dear Salem,

To allow us to understand the Sale and Leaseback Purchase Agreement (the "SLB Purchase Agreement"), please enlighten us on following:-

1. The purchase consideration is US\$ 40 million under the SLB Purchase Agreement and the purchase price of 9606 is US\$55million under the SPA between Universal Leaders and Zetta. Please explain the relationship between the said figures. **THE SLB ARISES THE PURCHASE AND FINANCE STRUCTURE FROM MINSHENG. THIS IS BETWEEN MINSHENG AND ZETTA. BETWEEN LI QI AND GEOFF/ZETTA, LI QI WANTS TO RECEIVE \$55M. THAT IS THE WAY GEOFF AND LI QI HAS AGREED BETWEEN THEMSELVES AND THAT'S THE WAY WE WROTE THE 2 SPAs. REMEMBER THAT THE SPA BETWEEN ZETTA AND GLOVE IS NOT DEAD AFTER UL RECEIVES \$55M. ZETTA CONTIUES TO PAY GLOVE UNDER THE SPA BUT AGREES TO PAY TITLE TO THE AIRCRAFT.**
2. Pursuant to the arrangement as stipulated in Schedule 2 of the SLB Purchase Agreement, the Escrow Agent, upon receipt of the Seller's instruction shall apply the purchase consideration received from the Buyer under the SLB Purchase Agreement to the following accounts:-
  - (a) The financier **WHICH IS LI QI - \$55M;**
  - (b) Minsheng; and
  - (c) Zetta Jet.

We note our client is not a (direct) recipient of any part of the purchase consideration from the Escrow Agent and Zetta Jet is only receiving around 16% of

the said purchase consideration. NOT CORRECT. YOU ARE ACTING THROUGH WELLS FARGO AT CLOSING AND YOU CAN GIVE A DIRECTION TO WELLS FARGO ON WHERE YOU WANT THE MONEY SENT. WELLS FARGO IS THE TRUSTEE AND YOUR CLIENT IS THE BENEFICIARY. Please let us know the exact source of fund and fund flow of payment of US\$55million under SPA to our client. SOURCE OF FUNDS IS MINSHENG FINANCIAL LEASING COMPANY LTD. THEY ARE A WELL KNOWN FINANCIAL INSITUATION IN THE PRC FOR AVIATION FINANCE.

3. An escrow agreement is entered between Wells Fargo (as Seller), Wells Fargo (as Buyer), Lessee and the Escrow Agent, where the Buyer, inter alia, agrees to remit the purchase consideration to the Escrow Agent. Our client is not a party of the Escrow Agreement. YOU ARE ACTING THROUGH WELLS FARGO. AS STATED IN MY EARLIER EMAIL, THERE WILL HAVE TO BE A DIRECTION FROM YOUR CLIENT TO WELLS FARGO AS TO WHERE TO PAY THE MONEY AND THE MONEY WILL GO FROM ESCROW AT CLOSING DIRECT TO YOUR CLIENTS' DESIGNATED BANK ACCOUNT. Assuming part of the consideration should flow to our client's account, we are wary that the Escrow Agent is under no obligation to take our client's interest into account. IATS AND WELLS FARGO AS ESCROW AGENTS HAVE BEEN DOING CLOSING, SALE, PURCHASE FOR ALL THE MAJOR LENDERS AND AIRCRAFT BUYER, SELLERS. THE BANKS ALSO PAY THE DRAWDOWN INTO ESCROW WITH IATS.
4. Pursuant to Clause 7(b), our client warrants the Buyer, inter alia, that the Aircraft is not subject to any encumbrances, has no damage history and the Manual and Technical Records are duly maintained. In view of the urgency of the matter, can Geoff and Zetta Jet give Universal Leader (and Gloves for 9688) warranties in relation to the above. YOU CAN PREPARE SOMETHING FOR ZETTA TO SIGN RE NO DAMAGE HISTORY AND THE MANUAL AND TECHNICAL RECORDS ARE DULY MAINTAINED (BUT SURPLUSAGE AS IT IS A PROVISION IN THE 2 LEASES). BUT ENCUMBRANCES CAN ONLY BE CREATED BY YOUR CLIENT. SO YOUR CLIENT CAN SPEAK TO THAT.

We look forward to receiving your feedback to the above soonest.

Kind regards,

Janet Chung  
By the Authority for and on behalf of  
David Lin

19B United Centre  
95 Queensway  
Admiralty  
Hong Kong  
T +852 2581 9959  
F +852 2581 2797

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---

**From:** Salem Ibrahim [<mailto:salem@salemlaw.org.sg>]  
**Sent:** Thursday, September 08, 2016 2:10 PM  
**To:** 'Liqi'; 'Geoffery Cassidy'; 'David Lin';  
[janet.chung@cplin.com.hk](mailto:janet.chung@cplin.com.hk)  
**Cc:** 'Iman Ibrahim'; 'Shing Yng'  
**Subject:** RE: SPAs 9606.9688, Minsheng Refinance

Hello Li Qi,

Just spoke to David and he is on it. I expect that we should progress this in the next 1 hour.

Kind Regards,  
Salem

---

**From:** Liqi [<mailto:liqiqi@yahoo.com>]  
**Sent:** Thursday, 8 September, 2016 1:40 PM  
**To:** Geoffery Cassidy; 'Salem Ibrahim'; 'David Lin';  
[janet.chung@cplin.com.hk](mailto:janet.chung@cplin.com.hk)  
**Cc:** 'Iman Ibrahim'; 'Shing Yng'  
**Subject:** Re: SPAs 9606.9688, Minsheng Refinance

yes, these things calling is best, maybe he is in meeting whole day.

**From:** Geoffery Cassidy  
**Sent:** Thursday, September 8, 2016 1:03 PM  
**To:** 'Salem Ibrahim' ; 'David Lin' ; [janet.chung@cplin.com.hk](mailto:janet.chung@cplin.com.hk)  
**Cc:** 'Iman Ibrahim' ; 'Shing Yng' ; 'Liqi'  
**Subject:** RE: SPAs 9606.9688, Minsheng Refinance

Hi Salem,  
Best to call David and hash it out quickly.

<image001.png>

**GEOFFERY CASSIDY** | Executive Director  
MOBILE +65 9625 5666  
DUTY MANAGER +65 9173 2611  
OFFICE +65 6483 8870  
SKYPE geoffery.cassidy  
WEB [zettajet.com](http://zettajet.com)

Zetta Jet Pte Ltd, 700 West Camp Road, #04-10 JTC Aviation One, Singapore 797649

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You'll need Skype CreditFree via Skype

---

**From:** Salem Ibrahim [<mailto:salem@salemlaw.org.sg>]  
**Sent:** Thursday, 8 September, 2016 12:54 PM  
**To:** 'David Lin' <[dlin@cplin.com.hk](mailto:dlin@cplin.com.hk)>; [janet.chung@cplin.com.hk](mailto:janet.chung@cplin.com.hk)  
**Cc:** 'Iman Ibrahim' <[iman@salemlaw.org.sg](mailto:iman@salemlaw.org.sg)>; [gcassidy@zettajet.com](mailto:gcassidy@zettajet.com); 'Shing Yng' <[sy@salemlaw.org.sg](mailto:sy@salemlaw.org.sg)>; Liqi <[liqiqi@yahoo.com](mailto:liqiqi@yahoo.com)>  
**Subject:** SPAs 9606.9688, Minsheng Refinance  
**Importance:** High

Dear David,

Greetings from Singapore.

1. Further to the SPAs signed for 9606, 9688, the Minsheng ("MS") workout is now near close and document finalisation for signing is scheduled for tomorrow.
2. Copies of the SPA were given to HFW who are acting for MS. To keep the documentation simple, they have prepared a Sale and Leaseback Purchase Agreement for each aircraft ("SLB") and a deed of termination ("DT").
3. Both drafts are attached and will mirror each other for both aircraft.
4. This will be an escrow closing with IATS. Wells Fargo will act for UL, Glove, against their written instructions for disposal of proceeds at closing. The instructions will be,

- (c) Payment of US\$12,410,240 (figure to be finally confirmed) to Minsheng;
- (d) Payment of balance of the monies to Zetta Jet
5. Under the scheme, all documents will be pre-signed and lodged with IATS in escrow pending closing. At close, UL, will receive their \$55m against the release of the Bills of Sale and other documents they have signed. UL therefore assured payment at escrow.
6. For the payout (a) in paragraph 4 above, you would need to designate the bank account for the USD55m. Please let me have the details.
7. I will be liaising with you and Geoff, copied to LiQi, on refinements to the fund flow and the form of direction that UL, Glove to Wells Fargo. The principal would always be that UL receives USD55m at closing.
8. Everyone is struggling with timing at the moment because MS has a 3-day holiday next week from 15-17 September for Mid-Autumn Festival. The drawdown process is expected to take place on Monday and I emphasise, document closing is tomorrow. As such, we would all sincerely appreciate having your confirmation to the attached agreements so that engrossed versions can be urgently put in place.
9. If we need to speak, I can give dial-in numbers.

Kind Regards,  
<image003.jpg>  
Salem Ibrahim

**SALEM IBRAHIM LLC**

Advocates & Solicitors | Notaries Public | Commissioners for Oaths

79 Robinson Road #16-06 CPF Building Singapore 068897 Tel: (65) 62261233 Fax: (65) 62260988 Website: [www.salemlaw.org.sg](http://www.salemlaw.org.sg)

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<MSFL\_Zetta - MSN 9606 - Deed of Termination - EXECUTION VERSION.PDF>

<MSFL\_Zetta - MSN 9606 - Sale and Leaseback Purchase Agreement -  
EXECUTION VERSION.PDF>

<MSFL\_Zetta - MSN 9688 - Deed of Termination - EXECUTION VERSION.PDF>

<MSFL\_Zetta - MSN 9688 - Sale and Leaseback Purchase Agreement -  
EXECUTION VERSION.PDF>



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**EXHIBIT 8**

**(BVI Company Search Report for Glove Assets Investment Limited)**



BVI Financial Services Commission, Registry of Corporate Affairs  
**Register of Companies Search Report**

**Date of Search :** 27/09/2019

This search is accurate as at the Search Date above.

**Company Name :** Glove Assets Investment Limited

**Company Number :** 1881019

**Company Type :** BC New Incorporation **Date of Incorporation / Registration :** 03/07/2015

**Current Status :**

Status Description: Active  
 Status Date: 03/07/2015  
 Current Registered Agent: Vistra (BVI) Limited  
 Vistra Corporate Services Centre  
 Wickhams Cay II  
 Road Town  
 Tortola  
 VG1110  
 VIRGIN ISLANDS, BRITISH  
 Current Registered Agent Address:  
 Current Registered Agent Phone Number: 284-494-8184  
 Current Registered Agent Fax Number: 284-494-5132

Current Registered Office :  
 Vistra Corporate Services Centre  
 Wickhams Cay II  
 Road Town  
 Tortola  
 VG1110  
 VIRGIN ISLANDS, BRITISH

Telephone:  
 Agent Fax:  
 Director Register Type : Private

**Share/Capital Information:**

Maximum Number of Shares the company is authorized to issue: 50,000  
 Ability to Issue Bearer Shares: No

**Previous Names History**

S.No	Previous Name	Foreign Character Name	Date Range or Cease Date	
			From	To
1	Glove Assets Investment Limited		03/07/2015	

**Transaction History**

S.No	Date	Transaction Number	Description	Status	Eforms/Attachments
1	23/06/2015	T150485436	Name Reservation (10 days)	Approved	Name Reservation (10 days)
2	03/07/2015	T150511836	Application for Incorporation (BC)	Approved	Application for Incorporation (BC) Memorandum and Articles of the Company
3	20/09/2016	T160703194	Application for Registration of Charge	Approved	Application For Registration Of Charge The attached particulars of the charge are an accurate description of it
4	12/10/2016	T160848698	Register of Members or Directors	Approved	Register of Directors
5	07/11/2016	T160958293	Annual Fee Submission (BC)	Approved	Annual Submission
6	13/02/2017	T170175154	Notice of Change of Registered Office Address	Approved	Notice Change Of Registered Office Address
7	10/11/2017	T171215234	Annual Fee Submission (BC)	Approved	Annual Submission
8	20/12/2017	T171409518	Request for Certifications (BC)	Approved	Request for Certifications
9	08/11/2018	T180864297	Annual Fee Submission (BC)	Approved	Annual Submission
10	11/09/2019	T190610957	Annual Fee Submission (BC)	Approved	Annual Submission

---

**Certificate History**

S.No	Transaction No.	Type of Certificate	Date of Filing
1	T150511836	Certificate of Incorporation (Original)	03/07/2015
2	T160703194	Certificate of Registration of Charge	20/09/2016

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**EXHIBIT 9**

**(BVI Company Search Report for Truly Great Global Limited)**



BVI Financial Services Commission, Registry of Corporate Affairs  
**Register of Companies Search Report**

**Date of Search :** 27/09/2019

This search is accurate as at the Search Date above.

**Company Name :** TRULY GREAT GLOBAL LIMITED

**Company Number :** 1904103

**Foreign Character Name :** 誠佳環球有限公司

**Company Type :** BC New Incorporation **Date of Incorporation / Registration :** 19/01/2016

**Current Status :**

Status Description: Active  
Status Date: 19/01/2016  
Current Registered Agent: Vistra (BVI) Limited  
Vistra Corporate Services Centre  
Wickhams Cay II  
Road Town  
Tortola  
VG1110  
VIRGIN ISLANDS, BRITISH  
Current Registered Agent Phone Number: 284-494-8184  
Current Registered Agent Fax Number: 284-494-5132

Current Registered Office : Vistra Corporate Services Centre  
Wickhams Cay II  
Road Town  
Tortola  
VG1110  
VIRGIN ISLANDS, BRITISH

Telephone:

Agent Fax:

Director Register Type : Private

**Share/Capital Information:**

Maximum Number of Shares the company is authorized to issue: 50,000

Ability to Issue Bearer Shares: No

**Previous Names History**

S.No	Previous Name	Foreign Character Name	Date Range or Cease Date
			From To
1	TRULY GREAT GLOBAL LIMITED	誠佳環球有限公司	19/01/2016

---

**Transaction History**

S.No	Date	Transaction Number	Description	Status	Eforms/Attachments
1	22/12/2015	T150946935	Name Reservation (10 days)	Approved	Name Reservation (10 days)
2	19/01/2016	T160031691	Application for Incorporation (BC)	Approved	Application for Incorporation (BC) Memorandum and Articles of the Company Translator Certificate
3	12/10/2016	T160848710	Register of Members or Directors	Approved	Register of Directors
4	13/02/2017	T170180075	Notice of Change of Registered Office Address	Approved	Notice Change Of Registered Office Address
5	24/05/2017	T170797885	Annual Fee Submission (BC)	Approved	Annual Submission
6	01/06/2017	T170874425	Request for Certifications (BC)	Approved	Request for Certifications
7	20/12/2017	T171409539	Request for Certifications (BC)	Approved	Request for Certifications
8	17/05/2018	T180389071	Annual Fee Submission (BC)	Approved	Annual Submission
9	06/05/2019	T190264310	Annual Fee Submission (BC)	Approved	Annual Submission

---

**Certificate History**

S.No	Transaction No.	Type of Certificate	Date of Filing
1	T160031691	Certificate of Incorporation (Original)	19/01/2016
2	T170874425	Certificate of Incorporation (Duplicate)	01/06/2017

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**EXHIBIT 10**

**(BVI Company Search Report for Universal Leader Investment Limited)**



BVI Financial Services Commission, Registry of Corporate Affairs  
**Register of Companies Search Report**

**Date of Search :** 27/09/2019

This search is accurate as at the Search Date above.

**Company Name :** Universal Leader Investment Limited

**Company Number :** 1836404

**Company Type :** BC New Incorporation **Date of Incorporation / Registration :** 08/08/2014

**Current Status :**

Status Description: Active  
 Status Date: 08/08/2014  
 Current Registered Agent: HSBC INTERNATIONAL TRUSTEE (BVI) LIMITED  
 Woodbourne Hall  
 P.O. BOX 916  
 Road Town  
 Tortola  
 VIRGIN ISLANDS, BRITISH  
 Current Registered Agent Phone Number: 284-494-5414  
 Current Registered Agent Fax Number: 284-494-5417

Current Registered Office : Woodbourne Hall  
 P.O. BOX 916  
 Road Town  
 Tortola  
 VIRGIN ISLANDS, BRITISH

Telephone:

Agent Fax:

Director Register Type : Private

**Share/Capital Information:**

Maximum Number of Shares the company is authorized to issue: 50,000

Ability to Issue Bearer Shares: No

**Previous Names History**

S.No	Previous Name	Foreign Character Name	Date Range or Cease Date	
			From	To
1	Universal Leader Investment Limited		08/08/2014	

**Transaction History**

S.No	Date	Transaction Number	Description	Status	Eforms/Attachments
1	29/07/2014	T140544456	Name Reservation (10 days)	Approved	Name Reservation (10 days)
2	08/08/2014	T140564776	Application for Incorporation (BC)	Approved	Application for Incorporation (BC) Memorandum and Articles of the Company
3	08/05/2015	T150278054	Application for Registration of Charge	Approved	Application For Registration Of Charge The attached particulars of the charge are an accurate description of it The attached particulars of the charge are an accurate description of it
4	12/10/2015	T150678864	Request for Certificate of Goodstanding	Approved	Request for Certificate of Good Standing
5	11/11/2015	T150773602	Application for Registration of Charge	Approved	Application For Registration Of Charge The attached particulars of the charge are an accurate description of it
6	20/11/2015	T150827597	Annual Fee Submission (BC)	Approved	Annual Submission
7	20/09/2016	T160703196	Application for Registration of Charge	Approved	Application For Registration Of Charge The attached particulars of the charge are an accurate description of it
8	28/09/2016	T160754450	Register of Members or Directors	Approved	Register of Directors
9	07/10/2016	T160805370	Register of Members or Directors	Approved	Register of Directors
10	16/11/2016	T161009178	Annual Fee Submission (BC)	Approved	Annual Submission
11	19/11/2017	T171256618	Annual Fee Submission (BC)	Approved	Annual Submission
12	22/12/2017	T171416326	Request for Certifications (BC)	Approved	Request for Certifications
13	16/07/2018	T180604987	Application for Registration of Charge	Approved	Application For Registration Of Charge The attached particulars of the charge are an accurate description of it
14	16/07/2018	T180604990	Application for Registration of Charge	Approved	Application For Registration Of Charge The attached particulars of the charge are an accurate description of it
15	16/11/2018	T180913526	Annual Fee Submission (BC)	Approved	Annual Submission

---

**Certificate History**

S.No	Transaction No.	Type of Certificate	Date of Filing
1	T140564776	Certificate of Incorporation (Original)	08/08/2014
2	T150278054	Certificate of Registration of Charge	08/05/2015
3	T150278054	Certificate of Registration of Charge	08/05/2015
4	T150678864	Certificate of Good Standing	12/10/2015
5	T150773602	Certificate of Registration of Charge	11/11/2015
6	T160703196	Certificate of Registration of Charge	20/09/2016

7	T180604987	Certificate of Registration of Charge	16/07/2018
8	T180604990	Certificate of Registration of Charge	16/07/2018

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**EXHIBIT 11**

**(September 18, 2017 Letter)**

This is the exhibit marked "GOC-20"

referred to in the Affidavit of

**GEOFFERY OWEN CASSIDY**

Sworn / Affirmed on this 18<sup>th</sup> day of September 2017

BEFORE ME,



**A COMMISSIONER FOR OATHS**

C. P. LIN & CO.

練松柏律師行

SOLICITORS & NOTARIES  
AGENTS FOR TRADEMARKS & PATENTS

UNIT B, 19TH FLOOR, UNITED CENTRE, 95 QUEENSWAY, ADMIRALTY, HONG KONG.

香港金鐘道95號統一中心19樓B室

TEL 電話: (852) 2581 9959

INTERCHANGE: DX-009087 Central

FAX 傳真: (852) 2581 2797

Partners:

AU MIU PO\*  
區妙寶律師\*

DAVID LIN\*#  
練紹良律師\*#

Our Ref 本行檔號:

DL821799

Your Ref 來函檔號:

18th September 2017

Associates:

AU YEONG CHI YUEN  
歐陽志遠律師

DAVID HUNG  
洪智耀律師

JANET CHUNG  
鍾嘉妍律師

Straits Law Practice LLC  
9 Raffles Place,  
#32-00 Republic Plaza,  
Singapore 048619

Consultants:

C. P. LIN#  
練松柏律師#

LUCILE AU  
區愷慈律師

Attn : Mr Sreenivasan SC

Dear Sirs,

Re: Bankruptcy application -  
Zetta Jet Pte Ltd & Zetta Jet USA Inc

\* Notary Public  
# 中國委托公証人

We refer to the call that you have had earlier yesterday with Mr Liqi. Mr Li is the beneficial owner of Truly Great Global Limited (“TGGL”). We act for both TGGL and Mr Li.

We refer to the filing of Chapter 11 Bankruptcy applications in relation to Zetta Jet Pte Ltd and Zetta Jet USA Inc in the United States of America. Our clients’ instructions to you are to take the necessary actions to stay the proceedings in the US and to have the proceedings withdrawn if possible.

We are instructed that Mr Geoffrey Cassidy will have briefed you of the full facts and that Mr Li has also done so. We summarise our understanding of the position as follows:

1. Mr Li, through TGGL is a 30% shareholder in Zetta Jet Pte Ltd (“Zetta Singapore”), a Singapore incorporated company. Mr Li is also a director. Zetta Singapore currently wholly owns Zetta Jet USA Inc (“Zetta USA”). In addition Zetta Singapore owes about US\$80 million to Mr Li and his companies.

2. The then existing shareholders and TGGL entered in a subscription agreement incorporating a shareholders' agreement, dated 26 February 2016. You have been given a copy.
3. Mr Li has just received papers showing that one Michael Maher, apparently the CEO of Zetta Singapore and Zetta USA has filed Chapter 11 bankruptcy proceedings in Los Angeles. In this regard, a directors meeting has been called for in Los Angeles, for 10 a.m. on 18 September 2017.
4. There have been issues in relation to allegations against Mr Geoffrey Cassidy. Mr Cassidy and his wife own 100% of Asia Aviation Holdings Pte Ltd ("AAH"), which in turn owns 34% of Zetta Singapore.
5. Mr Li had initially supported actions taken against Mr Cassidy by one James Seagrim and Mathew Walter, who are directors of Zetta Singapore and hold a combined 36% shareholding. Mr Li was briefed of various alleged breaches by Mr Cassidy by Mr Seagrim and Mr Walter, prior to a board of directors meeting held in Hong Kong on 17 August 2017. We are told that you have been given copies of the resolution, minutes and a recording of the meeting.
6. Subsequent to the meeting it has become apparent to Mr Li that the companies face financial difficulties and that Mr Seagrim and Mr Walter have no feasible plan to resolve the commercial future of the companies. They are good businesses but may have expanded too fast. Mr Li's interest is to safeguard the companies. In this context, he was told by Mr Seagrim and Mr Walter that lawyers had to be appointed to safeguard the company and protect it from bankruptcy. At no time was Mr Li told that the documents given to him to sign were to be used to actually file for bankruptcy. The present filings are the opposite of what Mr Li wanted. Mr Li reads and writes only simple English and the documents were given with a large number of other resolutions. The wording was to engage counsel, and not to file. Mr Li has forwarded to you the email of 8 September 2017 from Mr Seagrim to him.
7. Mr Li was aware that any application for bankruptcy would need consent of all shareholders, including AAH. Mr Cassidy met with Mr Li on 14 September 2017. It became quite clear that AAH would not consent to any bankruptcy. Mr Cassidy had explanations for the allegations against him. Mr Li also understands that Zetta's lawyers have refused to give proper particulars of the allegations. They discussed possible measures to save the companies, including Mr Li's friend buying out AAH and injecting new money and/or for a white knight. Mr Cassidy requested that any deal include a clean break with Zetta. Mr Walter subsequently acquiesced but Mr Seagrim did not.

**C. P. LIN & CO.**  
SOLICITORS & NOTARIES

8. Mr Li is extremely shocked that the bankruptcy filing was made without discussion and that a directors' meeting is being held after the filing. Mr Li feels that Mr Seagrim and/or Mr Maher have deliberately gone behind his back to file, without authority, and without mentioning his being a major creditor to Zetta Singapore.

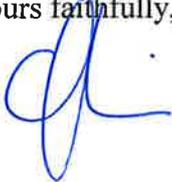
Mr Cassidy has informed Mr Li that AAH intends to take legal action to stay all bankruptcy proceedings in the US and to reverse them if possible, on various grounds, including the ground that the shareholder approval was not obtained. TGGL and Mr Li wish to join into the application. Mr Li is unable to give an affidavit as he is currently travelling but he has read and confirmed these instructions.

Mr Li also wants to make it clear that any board meeting without his attendance is invalid under the shareholders agreement. He wants to call for an EGM of shareholders to appoint new directors and understands that AAH wishes to exercise their rights to appoint two directors. He also wants to remove the CEO and have himself appointed as interim CEO. He is informed by Mr Cassidy that AAH will support these steps, which will then have the support of 64% of the shareholders.

Can you immediately take steps to stop all further steps in the bankruptcy and the appointment of special counsel and various other expensive actions. Please also get details of the creditors from Mr Cassidy as Mr Li does not believe that the filings are accurate.

Please contact the undersigned if you need any further instructions. You can show this letter to the court as Mr Li cannot file an affidavit in time, but there is no waiver of privilege except for that limited purpose.

Yours faithfully,



DL/vw

**From:** [N Sreenivasan](#)  
**To:** [Jason Lim](#); [Jerrie Tan Qiu Lin](#)  
**Subject:** FW: Bord Resolutions.  
**Date:** Monday, 18 September, 2017 9:31:11 AM  
**Attachments:** [mime-attachment.html](#)  
[2017.09.05 Zetta Jet Pte Ltd Board Resolution 1.pdf](#)  
[2017.09.05 Zetta Jet Pte Ltd Board Resolution 2.pdf](#)  
[mime-attachment.html](#)  
[2017.09.05 Zetta Jet Pte Ltd Board Resolution 3.pdf](#)  
[mime-attachment.html](#)  
[2017.09.05 Zetta Jet Pte Ltd Board Resolution 4.pdf](#)  
[mime-attachment.html](#)  
[image005.png](#)  
[image006.png](#)

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Yours faithfully,

N. Sreenivasan SC  
Managing Director

**Straits Law Practice LLC,**  
*Advocates & Solicitors*  
(UEN 200102265N)  
9 Raffles Place,  
#32-00 Republic Plaza  
Singapore 048619  
Tel: 6538 1300 / 6713 0200  
Fax: 6538 1311/ 6220 1602  
DID: +65 67130234  
Website :[www.straitslaw.com.sg](http://www.straitslaw.com.sg)

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**From:** Liqi [<mailto:liqiqi@yahoo.com>]  
**Sent:** Sunday, 17 September 2017 12:55 PM  
**To:** N Sreenivasan <[sreeni@straitslaw.com.sg](mailto:sreeni@straitslaw.com.sg)>; Muralli Rajaram <[muralli@straitslaw.com.sg](mailto:muralli@straitslaw.com.sg)>;  
[liqiqi@yahoo.com](mailto:liqiqi@yahoo.com)  
**Subject:** Fw: Bord Resolutions.

**From:** JNHS  
**Sent:** Friday, September 8, 2017 12:09 AM  
**To:** Liqi  
**Cc:** Matthew Walter ; [mmaher@zettajet.com](mailto:mmaher@zettajet.com) ; Samuel Krause ; Weai Hunt Yap  
**Subject:** Bord Resolutions.

Hi liqi,

Sitting in Bombardier right now waiting for Coleal and the general Counsel to finish some dialogue. We outlined everything we discussed in the meeting in HK.

In the meantime please see the board resolutions which myself and Matt have signed per our vote the other day. Please return your executed resolutions and we will have them filed.

I will be in touch post meeting with a conclusion.

Chat later James.

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Hi liqi,

Sitting in Bombardier right now waiting for Coleal and the general Counsel to finish some dialogue. We outlined everything we discussed in the meeting in HK.

In the meantime please see the board resolutions which myself and Matt have signed per our vote the other day. Please return your executed resolutions and we will have them filed.

I will be in touch post meeting with a conclusion.

Chat later James.

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BOARD RESOLUTION  
OF  
ZETTA JET Pte. Ltd

We, the undersigned, being the Directors of Zetta Jet Pte. Ltd, organized and existing under the laws of Singapore and having its principle place of business 700 West Camp Road 04-10, JTC Aviation One, Singapore, 797649 (the "Corporation") hereby certify that the following is a true and correct copy of a resolution duly adopted at a meeting of the Directors of the Corporation duly held and convened on September 5<sup>th</sup> 2017, at which a quorum of the Board of Directors was present and voting throughout, and that such resolution has not been modified, rescinded or revoked, and is at present in full force and effect.

Therefore, it is resolved.

Effective immediately, Chairman of the Board of Directors James Seagrim and Director Matthew Walter shall be given the authority to negotiate and execute an employment contract with Michael A. Maher, for employment as Chief Executive Officer and President of Zetta Jet, Pte. Ltd. and Zetta Jet, USA.

DIRECTORS

\_\_\_\_\_  
Li Qi  
Board of Director Zetta Jet, Pte. Ltd, Member

Date: \_\_\_\_\_

  
\_\_\_\_\_  
Mathew Walter  
Vice President and Director of Sales

Date: \_\_\_\_\_

  
\_\_\_\_\_  
James Seagrim  
Vice President and Director of Operations  
Chairman of the Board

Date: \_\_\_\_\_

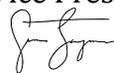
BOARD RESOLUTION  
OF  
ZETTA JET Pte. Ltd

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Therefore, it is resolved.

Effective immediately, Chief Executive Officer Michael A. Maher shall be given the authority to negotiate and execute an employment contracts for Zetta Jet, Pte. Ltd and Zetta Jet, USA, including company executives and senior managers, Weai Hunt Yap, Chief Financial Officer, General Council, Director of Sales, and Director of Operarions.

DIRECTORS

_____	Date: _____
Li Qi Board of Director Zetta Jet, Pte. Ltd, Member	
	
_____	Date: _____
Mathew Walter Vice President and Director of Sales	
	
_____	Date: _____
James Seagrim Vice President and Director of Operations Chairman of the Board	

BOARD RESOLUTION  
OF  
ZETTA JET Pte. Ltd

We, the undersigned, being the Directors of Zetta Jet Pte. Ltd, organized and existing under the laws of Singapore and having its principle place of business 700 West Camp Road 04-10, JTC Aviation One, Singapore, 797649 (the "Corporation") hereby certify that the following is a true and correct copy of a resolution duly adopted at a meeting of the Directors of the Corporation duly held and convened on September 5<sup>th</sup> 2017, at which a quorum of the Board of Directors was present and voting throughout, and that such resolution has not been modified, rescinded or revoked, and is at present in full force and effect.

Therefore, it is resolved.

Effective immediately, Chairman of the Board of Directors James Seagrim and Director Matthew Walter shall be given the authority to negotiate and execute the sale and transfer of the Asia Aviation Company Pte. Ltd (UEN No. 200920708R) Bentley Flying Spur V8 S vehicle bearing registration number SLJ5666B and with chassis number SCBEE53W8HC060271.

DIRECTORS

\_\_\_\_\_  
Li Qi  
Board of Director Zetta Jet, Pte. Ltd, Member

Date: \_\_\_\_\_

  
\_\_\_\_\_  
Mathew Walter  
Vice President and Director of Sales

Date: \_\_\_\_\_

  
\_\_\_\_\_  
James Seagrim  
Vice President and Director of Operations  
Chairman of the Board

Date: \_\_\_\_\_

BOARD RESOLUTION  
OF  
ZETTA JET Pte. Ltd

We, the undersigned, being the Directors of Zetta Jet Pte. Ltd, organized and existing under the laws of Singapore and having its principle place of business 700 West Camp Road 04-10, JTC Aviation One, Singapore, 797649 (the "Corporation") hereby certify that the following is a true and correct copy of a resolution duly adopted at a meeting of the Directors of the Corporation duly held and convened on September 5<sup>th</sup> 2017, at which a quorum of the Board of Directors was present and voting throughout, and that such resolution has not been modified, rescinded or revoked, and is at present in full force and effect.

Therefore, it is resolved.

Effective immediately, Chief Executive Officer Michael A. Maher shall be given the authority to seek out and engage legal counsel for bankruptcy protection and filing in Singapore and/or the USA.

DIRECTORS

\_\_\_\_\_  
Li Qi  
Board of Director Zetta Jet, Pte. Ltd, Member

Date: \_\_\_\_\_

  
\_\_\_\_\_  
Mathew Walter  
Vice President and Director of Sales

Date: \_\_\_\_\_

  
\_\_\_\_\_  
James Seagrim  
Vice President and Director of Operations  
Chairman of the Board

Date: \_\_\_\_\_

**EXHIBIT B**

**(Declaration of Nicholas Charles Burkill)**

**IN THE MATTER OF ZETTA JET USA INC AND ZETTA JET PTE LTD**

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**WITNESS STATEMENT OF**  
**NICHOLAS CHARLES BURKILL**

---

I, Nicholas Charles Burkill of Ritter House, Wickhams Cay II, PO Box 3170, Road Town, Tortola, British Virgin Islands **WILL SAY** as follows.

**A Introduction**

1. I am instructed by DLA Piper LLP to provide this expert evidence on British Virgin Islands ("BVI") law in response to the witness statement of Peter Ferrer dated 10 May 2021.

**B Qualifications**

2. I am a partner in Ogier and serve as its BVI office head of dispute resolution. Ogier is a leading offshore international law firm.
3. I graduated from Cambridge University in 1983 with a Bachelor of Arts (law) degree. I qualified as a solicitor of England and Wales in 1987 and as a solicitor advocate entitled to appear in the civil courts of England and Wales in 2001. I worked at Taylor Wessing LLP (and its previous constituent firms) from 1984 to 2005 where I became a partner in the firm and served as head of its commercial disputes group. From 2005 to 2016 I was a partner in Dorsey & Whitney (Europe) LLP where I served as head of the London trial group and as global co-chair of the firm's anti-corruption group. I have been a partner in Ogier since 2016 and was admitted to the BVI bar in 2016.
4. In 2002 I was appointed by the Lord Chancellor to the Civil Procedure Rule Committee of England and Wales and served on this committee until 2008. In 2019 I was appointed by the Chief Justice to serve on the Civil Procedure Rules Review Committee of the Eastern Caribbean Supreme Court and I continue to serve on that committee. I am a Fellow of the Chartered Institute of Arbitrators.

5. Through my career I have worked on fraud, asset tracing, shareholder and corporate disputes, applications for injunctions and third party discovery, jurisdictional disputes, international commercial litigation and arbitration. I regularly represent and advise clients in disputes before the BVI Commercial Court and Eastern Caribbean Court of Appeal.

**C Summary**

6. I do not consider in this witness statement whether or not BVI law is the relevant law to be applied by this Honourable Court. That is I believe a matter of California law and outside my expertise. Accordingly my analysis of BVI law is subject to the reservation that it is a matter for submissions on California law as to whether my analysis is relevant to the Court's determination.

7. I address the following matters under BVI law in this witness statement:

- (a) The liability of an individual for money paid to a company as agent for the individual;
- (b) The liability of an individual for money paid to a company as nominee for the individual;
- (c) The liability of an individual who is under an existing legal obligation or liability which he deliberately evades or whose enforcement he deliberately frustrates by interposing a company under his control.
- (d) The use of the phrase *alter ego* in BVI law.

8. I conclude that the facts pleaded in the Amended Adversary Complaint support personal liability of Mr Li under BVI law for sums claimed in these proceedings.

**D Facts**

9. I identify the following facts pleaded in the Amended Adversary Complaint in these proceedings, which I assume to be correct for the purposes of this witness statement. I use the definitions contained in the Amended Adversary Complaint.

10. Mr Li owns and controls three companies incorporated in the BVI: Universal Leader, Truly Great and Glove Assets. (Am. Compl. ¶¶ 36-42.) Mr Li used these three companies interchangeably and as a single entity and treats them as extensions of himself. (Am. Compl.

- ¶¶ 54-64.) None of the companies have any employees or bank accounts and all of their business is conducted through or at the direction of Mr Li. (Am. Compl. ¶¶ 34, 60.)
11. Zetta PTE was incorporated in Singapore on 15 July 2015. (Am. Compl. ¶ 83) Mr Li was a director of Zetta PTE between 26 February 2016 and 8 December 2017. (Am. Compl. ¶¶ 35, 133.)
  12. Mr Li described investments of about \$119m in Zetta PTE as being his investments, including the \$19 million First Investment funded by Universal Leader but for which Truly Great received an equity interest (Am. Compl. ¶¶ 61, 222-223,320); the 2015 acquisition of Plane 6 for \$50 million funded by Universal Leader although in the name of Glove Assets (Am. Compl. ¶¶ 180-183); and the 2015 acquisition of Plane 7 for \$50 million from Universal Leader (Am. Compl. ¶¶ 204-206). In addition, Mr Li through his entities invested the \$10 million First Loan funded by Universal Leader (Am. Compl. ¶ 224); the \$10 million Second Loan funded by Universal Leader ((Am. Compl. ¶¶ 246-248); the \$15 million Third Investment, funded by Universal Leader, but for which Truly Great received additional shares of Zetta PTE (Am. Compl. ¶¶ 318-323); and the transactions relating to the Minsheng Refinancing, out of the proceeds of which Universal Leader received \$55 million while Glove Assets received an unsecured obligation (Am. Compl. ¶¶ 232, 249-265). Mr Li referred to these investments as his personal investments, (Am. Compl. ¶¶ 56, 134-135, 236-237, 320). Although these investments were funded by transfers from Universal Leader, they were variously held in the name of Universal Leader, Glove Assets, and Truly Great. (Id.)
  13. Transfers were made by Zetta PTE to Universal Leader set out in Schedule A to the Amended Adversary Complaint totalling \$11,918,135.58 for obligations nominally incurred to both Universal Leader and Glove Assets. Transfers were made by Zetta PTE to Universal Leader for an obligation nominally incurred solely to Glove Assets set out in Schedule B to the Amended Adversary Complaint totalling \$10,148.723.00. A further \$55 million was paid by Zetta PTE out of proceeds of the Minsheng Refinancing to Universal Leader set out in Schedule D to the Amended Adversary Complaint.

## **E Laws of the British Virgin Islands**

14. I broadly agree with the description contained in section 6 of Mr Ferrer's report. BVI law is not the same as English law. I would also make clear that decisions of the Judicial Committee of the Privy Council are binding on the BVI Courts where such decisions are on appeal from the BVI; otherwise they are highly persuasive.

## F Overview of Relevant Legal Principles

### (1) Introduction

15. Each of the heads of liability I explain in this section are ones identified by the UK Supreme Court in Prest v Petrodel Resources Ltd and others [2013]UKSC 34 in the course of its analysis of the principle of piercing the corporate veil:

"There is a range of situations in which the law attributes the acts or property of a company to those who control it, without disregarding its separate legal personality. The controller may be personally liable, generally in addition to the company, for something that he has done as its agent or as a joint actor. Property legally vested in a company may belong beneficially to the controller, if the arrangements in relation to the property are such as to make the company its controller's nominee or trustee for that purpose."<sup>1</sup>

### (2) Liability under agency

16. *Bowstead & Reynolds on Agency* is a highly respected text book on the subject. It explains the nature of agency at [1-001] (22<sup>nd</sup> edition) in the following terms:

"(1) Agency is the fiduciary relationship which exists between two persons, one of whom expressly or impliedly manifests assent that the other should act on his behalf so as to affect his legal relations with third parties, and the other of whom similarly manifests assent so to act or so acts pursuant to the manifestation. The one on whose behalf the act or acts are to be done is called the principal. The one who is to act is called the agent. ...

"(2) In respect of the acts to which the principal so assents, the agent is said to have authority to act; and this authority constitutes a power to affect the principal's legal relations with third parties."

17. Accordingly where a Court concludes that an individual was the principal of a company and that the company was the individual's agent, the company's actions can result in personal liability of the individual to third parties.

### (3) Liability under nomineeeship

18. Nomineeeship is a form of trusteeeship. Lord Sumption recognised it in the passage referenced in the introduction to this section and used it interchangeably with trusteeeship. Lady Hale considered it in a similar way in *Prest* at [93]: "... *unless the company is a mere nominee holding the property on trust for the husband*".

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<sup>1</sup> Per Lord Sumption at [18]

19. Accordingly where a company receives money as nominee for an individual, BVI law does not permit the existence of that nominee arrangement to prevent the individual being liable for the receipt of the money by his nominee.

(4) Liability by piercing the corporate veil

20. Separately from each of the foregoing principles, BVI law will in specified circumstances impose liability on an individual as a result of 'piercing the corporate veil'. Broadly, an individual who is under an existing legal obligation or liability which he deliberately evades or whose enforcement he deliberately frustrates is liable even if he interposes a company.

(5) Alter ego

21. My understanding of the claims made in the Amended Adversary Complaint in these proceedings to the effect that Mr Li used his companies as alter egos of one another and of himself<sup>2</sup> is that these are claims made under California law, not BVI law. I understand the concept of alter ego as pleaded in the Amended Adversary Complaint to be summarised as follows<sup>3</sup>:

"Under the alter ego doctrine, when a corporation is used by an individual or individuals, or by another corporation, to perpetrate fraud, circumvent a statute, or to accomplish some other wrongful or inequitable purpose, the court may disregard the corporate entity and treat the corporation's acts as if they were done by the persons actually controlling the corporation."

22. The phrase alter ego as I understand it to be used in the Amended Adversary Complaint is therefore an expression of the principles applied by BVI courts to find individuals liable that I have outlined above. The phrase alter ego as used in England and the BVI is different from the concept used in the US.

23. The House of Lords (as it then was) considered the issue in Tesco Supermarkets Ltd v Nattras [1972] AC 153. Lord Reid made the position clear at p170E-G:

"I must start by considering the nature of the personality which by a fiction the law attributes to a corporation. A living person has a mind which can have knowledge or intention or be negligent and he has hands to carry out his intentions. A corporation has none of these: it must act through living persons, though not always one or the same person. Then the person who acts is not speaking or acting for the company. He is acting as the company and his mind which directs his acts is the mind of the company. ... He is an embodiment of the company or, one could say, he hears and

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<sup>2</sup> See for example paragraph 40 and section D of the Amended Adversary Complaint.

<sup>3</sup> Cal. Civ. Prac. Business Litigation §5.1 March 2021 update

speaks through the persona of the company, within his appropriate sphere, and his mind is the mind of the company. If it is a guilty mind then that guilt is the guilt of the company. It must be a question of law whether, once the facts have been ascertained, a person in doing particular things is to be regarded as the company or merely as the company's servant or agent. In that case any liability of the company can only be a statutory or vicarious liability."

24. In other words, as used in BVI law, the concept of alter ego is to fix a company with liability because of an individual who is the embodiment of the company. This is the opposite of the way in which I understand the phrase to be used in the Amended Adversary Complaint.
25. It was this concept of 'embodiment' that led Lord Reid to say that he considered the phrase to be confusing: someone who is the embodiment of a company is by definition not another.<sup>4</sup>
26. Rimer J used the phrase alter ego in Gencor ACP Limited and others v Glenn Bryan Dalby and others 2000 WL 1881279 (Ch): "*In my view this is the type of case in which the court ought to have no hesitation in regarding Burnstead [Limited] simply as the alter ego through which Mr Dalby enjoyed the profit which he earned in breach of his fiduciary duty to ACP*". On analysis, however, the basis of Burnstead and Mr Dalby being liable in this case was not that one was the alter ego of the other, but that there were ordinary equitable claims against both. I therefore consider Gencor below at paragraph 29ff.

## **G Analysis of legal principles in attributing company acts or property to individuals**

27. In this section I consider the concepts in BVI law of attributing acts or property to individuals in respect of acts in the name of a company or property held by a company. These concepts go beyond that of "*piercing the corporate veil*". It is not simply a question of considering whether or not the corporate veil should be pierced. Indeed, as Lord Neuberger remarked at [79], the doctrine "*appears never to have been invoked successfully and appropriately in its 80 years of supposed existence*". The better approach is to consider whether there are separate established principles available to undo wrongdoing, and then turn to the doctrine of piercing the corporate veil as considered by the Supreme Court in Prest and addressed in Mr Ferrer's report.
28. My attention has been drawn to the decision of the United States District Court, Southern District of New York in re Tyson 433 B.R. 68 (2010) and the analysis in that case of English

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<sup>4</sup> See p171H "*When dealing with a company the word alter is I think misleading. The person who speaks and acts as the company is not alter. He is identified with the company.*"

law on piercing the corporate veil. Since this pre-dates the UK Supreme Court's decision in Prest, I do not consider that it accurately sets out English and BVI law on the issue.

29. Gencor is a good example of a case where judgment was given against an individual who was the owner and controller of the company. As is apparent from the judgment at [19] the company, Burnstead Limited, was incorporated in the BVI but was owned and controlled by Mr Dalby. The claims against Mr Dalby and Burnstead Limited were "*based on the assertion that Mr Dalby diverted to Burnstead commissions and business opportunities which ought to have been paid and made available to [the claimant] ACP ... so that he and Burnstead are now liable to account for the profit so diverted*".

30. Counsel for Mr Dalby argued that he should not be liable to account for commission paid to Burnstead because he did not receive it: it went straight to Burnstead. Rimer J found at [26]:

"I do not accept that argument, which if correct, would provide the easiest possible escape from the rigours of equity's strict principles of accountability. All that would be required would be for the profiting director to ensure that he diverts the profit into his own creature company. The facts of this case are that Burnstead was an offshore company which was wholly owned and controlled by Mr Dalby and in which nobody else had any beneficial interest. Everything it did was done on his directions alone. ... Its only function was to make and receive payments. It was in substance little other than Mr Dalby's offshore bank account held in a nominee name."

31. Lord Sumption analysed Gencor in Prest at [31] and explained:

"The correct analysis of the situation was that the court refused to be deterred by the legal personality of the company from finding the true facts about its legal relationship with Mr Dalby. It held that the nature of their dealings gave rise to ordinary equitable claims against both. The result would have been exactly the same if Burnstead, instead of being a company, had been a natural person, say Mr Dalby's uncle, about whose separate existence there could be no doubt."

32. My conclusion therefore is that Gencor is an example of the court finding the individual who owned and controlled the company liable together with the company on an established principle, being the liability of both to account for profits resulting from the individual's breach of fiduciary duty and the attribution of the individual's knowledge to the company. Lord Neuberger identified in Prest at [83] the importance of agency and trusteeship where findings were made as to "*under his control*".

33. Lady Hale in her judgment in Prest (with whom Lord Wilson agreed) identified at [93] the importance of the concept of a nominee relationship:

"What we have in this case is a desire to disregard the separate legal personality of companies in order to impose upon the companies a liability which can only be that of the husband personally. ... The argument is that that is a power which can, because the husband owns and controls these companies, be exercised against the companies themselves. I find it difficult to understand how that can be done unless the company is a mere nominee holding the property on trust for the husband, as we have found to be the case with the properties in issue here. I would be surprised if that were not often the case."

34. Trustor AB v Smallbone (No 2) [2001] 1WLR 117 supports a similar analysis. In that case Mr Smallbone, the managing director of the claimant, controlled Introcom International Limited. He effected payments from an account in the name of the claimant to an account in the name of Introcom which were unauthorised and a breach of his duty to the claimant. Rimer J in earlier proceedings had found that "*Introcom was simply a vehicle Mr Smallbone used for receiving money from [the claimant]*".<sup>5</sup>
35. Lord Sumption found at [32] in Prest that the correct analysis of Trustor AB was one of agency or nominee:

"On that footing the company received the money on Mr Smallbone's behalf. This conclusion did not involve piercing the corporate veil, and did not depend on any finding of impropriety. It was simply an application of the principle summarised by the Vice-Chancellor at para 19 of his judgment, that receipt by a company will count as receipt by the shareholder if the company received it as his agent or nominee, but not if it received it in its own right. To decide that question, it was necessary to establish the facts which demonstrated the true legal relationship between Mr Smallbone and Introcom. Mr Smallbone's ownership and control of Introcom was only one of those facts, not in itself conclusive. Other factors included the circumstances and the source of the receipt, and the nature of the company's other transactions if any."

36. In addition to the specific legal principles of agency, trusteeship and nominee-ship there is a general principle of BVI law identified by Denning LJ (as he then was) in Lazarus Estates Ltd v Beasley [1956] 1 QB 702 cited by Lord Sumption in Prest at [18]:

"One of these principles is that the law defines the incidents of most legal relationships between persons (natural or artificial) on the fundamental assumption that their dealings are honest. The same legal incidents will not necessarily apply if they are not. The principle was stated in its most absolute form by Denning LJ in a famous dictum in [Lazarus]:

'No court in this land will allow a person to keep an advantage which he has obtained by fraud. No judgment of a court, no order of a Minister, can be allowed to stand if it has been obtained by fraud. Fraud unravels everything. The court is careful not to find fraud unless it is distinctly pleaded and proved; but once it is proved, it vitiates judgments, contracts and all transactions whatsoever ...'

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<sup>5</sup> At [24]

37. As Lord Sumption went on to identify at [18] "*The authorities show that there are limited circumstances in which the law treats the use of a company as a means of evading the law as dishonest for this purpose*". This then led to the Supreme Court's analysis in Prest of concealment and evasion principles considered in Mr Ferrer's report.

38. One application of the analysis in the BVI is UVW v XYZ BVIHC(COM) 2016/108 (27 October 2016) in which Wallbank J considered an application for *Norwich Pharmacal* relief (a common law third party discovery jurisdiction). Wallbank J held at [31], citing the English Court of Appeal in VTB Capital plc v Nutritek International Corp & ors [2012] EWCA Civ 808 at [78]:

"The point the Court of Appeal<sup>6</sup> was making was that if a corporate service provider involves itself in the life or affairs of a company that is, or becomes, used for wrongful purposes, he can expect to be required to give disclosure of information within its possession. This analysis is consistent with how the English courts treat with piercing the corporate veil. One of the requirements that must be established if the court is to pierce the corporate veil is that the company has been misused as a device or façade to conceal wrongdoing, and a company can be a façade for such purposes even though not incorporated with deceptive intent."

39. VTB Capital was also considered by the UK Supreme Court [2013] UKSC 5 and was also considered by Lord Sumption in Prest at [26]. He concluded that Lord Neuberger in VTB Capital adopted the view that "*any doctrine permitting the court to pierce the corporate veil must be limited to cases where there was a relevant impropriety*" and developed this at [27]:

"In my view, the principle that the court may be justified in piercing the corporate veil if a company's separate legal personality is being abused for the purpose of some relevant wrongdoing is well-established in the authorities. ... I think that the recognition of a limited power to pierce the corporate veil in carefully defined circumstances is necessary if the law is not to be disarmed in the face of abuse".

40. It was at this point in his analysis that Lord Sumption identified at [28] the principles of concealment and evasion. A good example of the application of these principles after Prest is Pennyfeathers Limited v Pennyfeathers Property Company Limited [2013] EWHC 3530.

41. In Pennyfeathers, two directors of the first claimant diverted a corporate opportunity of the first claimant to another company, the first defendant (Pennyfeathers Jersey). Rose J assumed at [117] that Pennyfeathers Jersey was not just an offshore bank account held in a nominee as

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<sup>6</sup> In JSC BTA Bank v Fidelity Corporate Services Limited et al HCVAP 2010/035, a decision of the Eastern Caribbean Court of Appeal in respect of *Norwich Pharmacal* relief.

in Gencor, but that it was sufficiently independent of the two directors to achieve the tax advantages of the Jersey regime. She then asked at [117]:

"Does this mean that the structure is also effective in distancing Mr Bowdery and Mr Attwell from the company's actions for the purpose of escaping their fiduciary duties? In my judgment it does not. There is no need to pierce the corporate veil here. It was a breach of Mr Bowdery and Mr Attwell's fiduciary duties to divert the opportunity to Pennyfeathers Jersey regardless of the links between them and that company. They were supposed to be pursuing those opportunities for the benefit of Pennyfeathers UK not for any other company. ... I am satisfied that the concealment principle means that Mr Bowdery and Mr Attwell cannot interpose Pennyfeathers Jersey to disguise the nature of their own conduct in diverting the opportunities that they should have pursued on behalf of Pennyfeathers UK to their own benefit instead."

42. Rose J then considered the evasion principle at [118]:

"I find that ... the benefit of the contracts entered into by Pennyfeathers Jersey in relation to the Farm development are impressed with the same trust as they would be if they had been entered into by Mr Bowdery and Mr Attwell personally. The interposition of Pennyfeathers Jersey and the Trimount Settlement should not be allowed to defeat Pennyfeathers UK's rights against Mr Bowdery and Mr Attwell or to frustrate the enforcement of those rights."

43. Rose J also helpfully emphasised at [119] "*My reading of Prest indicates that there was no need to establish in this case that Mr Bowdery and Mr Attwell were in control of Pennyfeathers Jersey. The references in Prest to the husband 'controlling' the companies was part of the factual matrix relied to support the conclusion that the company held its assets on trust for the husband sufficiently to entitle the court to regard those assets as available for distribution to the wife.*"

44. This then emphasises the importance of the factual matrix, which Lord Sumption identified at [52] in Prest:

"Whether assets legally vested in a company are beneficially owned by its controller is a highly fact-specific issue. It is not possible to give general guidance going beyond the ordinary principles and presumptions of equity ..."

## **H Application of principles**

45. As Lord Sumption pointed out in the passage in Prest quoted at paragraph 35 above it is for the court to establish the facts demonstrating the true legal relationship between Mr Li and the three companies used by him in his dealings with Zetta PTE. His ownership and control of the companies is one of the facts but is not conclusive of itself. The court applying BVI law would take into account the circumstances of the transfers to the companies, and the nature of the companies' other transactions if any.

46. The further circumstances that the Court would be entitled to take into account would be as follows, summarising the facts that I have identified from the Amended Adversary Complaint.
- (a) Mr Li used the three companies Universal Leader, Glove Assets and Truly Great interchangeably and as a single entity and treated them as extensions of himself.
  - (b) Mr Li owns and controls all of the three companies.
  - (c) None of the companies have any employees and all of their business is conducted through or at the direction of Mr Li.
  - (d) Mr Li described investments of about \$119m in Zetta PTE as being his investments, although these investments were made in the names of the three companies.
  - (e) Each of Mr Li's investments was funded by Universal Leader and neither Glove Assets or Truly Great had a bank account.
47. If none of the three companies effected any transactions other than those identified in the Amended Adversary Complaint this would be a further relevant consideration.
48. If the Court concludes that transfers to the companies were in truth made to them on behalf of Mr Li, whether as nominee for him or as his agent, then this is a basis under BVI law for recovery of those transfers from Mr Li. As Lord Sumption identified at [32] in Prest "*receipt by a company will count as receipt by the shareholder if the company received it as his agent or nominee*".
49. If it were required, an additional basis for liability of Mr Li would be under the principle of piercing the corporate veil if the Court were to conclude that Mr Li breached his fiduciary or other duties to Zetta PTE (a company incorporated in Singapore) under applicable Singapore law, which I understand from DLA Piper LLP (pursuant to Section 157 of the Singapore Companies Act (Chapter 50, Rev. Ed. 2006)) prohibits a director of a Singapore company from dishonestly causing that company to pay away money.
50. Lord Neuberger agreed with Lord Sumption at [81] in Prest that the doctrine "*should only be invoked where 'a person is under an existing legal obligation or liability or subject to an existing legal restriction which he deliberately evades or whose enforcement he deliberately frustrates by interposing a company under his control'*". There is no limitation in this doctrine that the "*existing legal obligation or liability*" or "*existing legal restriction*" must be under English (or BVI) law. In Pennyfeathers, the breach of existing fiduciary duty gave rise to the liability to account

and the Court concluded that the use of the company in that case was for the deliberate purpose of evading or frustration of enforcement. It is similarly open to this Honourable Court to conclude that the use of the three companies by Mr Li was for the deliberate purpose of evading or frustration of enforcement of a breach by Mr Li of an existing legal obligation or liability or existing legal restriction under Singapore law.

**I Conclusion**

51. The facts that I have identified pleaded in the Amended Adversary Complaint, if correct, support personal liability of Mr Li for payment of the sums paid by Zetta PTE to Universal Leader set out in Schedules A, B and D to the Amended Adversary Complaint as identified in this witness statement.

**J Statement of truth**

52. I declare under penalty of perjury under the laws of the United States, and the laws of the British Virgin Islands, that the foregoing is true and correct.

A handwritten signature in blue ink, appearing to read 'Nicholas Charles Burkill', written over a horizontal dotted line.

Nicholas Charles Burkill  
Ogier

3 June 2021

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**INDEX OF CASES CITED IN WITNESS STATEMENT OF  
NICHOLAS CHARLES BURKILL**

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<b>TAB</b>	<b>DOCUMENT</b>	<b>CITATION</b>	<b>PAGES</b>
1.	Prest v Petrodel Resources Limited	[2013]UKSC 34	1 - 95
2.	Bowstead & Reynolds on Agency	1-01 - (22nd edition)	96 - 97
3.	Tesco Supermarkets Ltd v Natras	[1972] AC 153	98 - 148
4.	Gencor ACP Limited and others v Glenn Bryan Dalby and others	2000 WL 1881279 (Ch)	149 - 174
5.	In re Tyson	433 B.R. 68 (2010)	175 - 200
6.	Trustor AB v Smallbone	(No 2) [2001] 1WLR 117	201 - 210
7.	Lazarus Estates Ltd v Beasley	[1956] 1 QB 702	211 - 231
8.	UWV v XYZ	2016/108 (27 October 2016)	232 - 251
9.	VTB Capital plc v Nutritek International Corp & Ors.	[2012] EWCA Civ 808	252 - 325
10.	JSC BTA Bank v Fidelity Corporate Services Limited	HCVAP 2010/035	326 - 341
11.	VTB Capital plc v Nutritek and others	[2013] UKSC 5	342 - 419
12.	Pennyfeathers Limited v Pennyfeathers Property Company Limited	[2013] EWHC 3530	420 - 463
13.	Singapore Companies Act	s.157 (Chapter 50, Rev. Ed. 2006)	464 - 465

[2013] 2 AC

415  
Prest v Prest (SC(E))

A Supreme Court

**Prest v Petrodel Resources Ltd and others**

[2012] EWCA Civ 1395

[2013] UKSC 34

B

[On appeal from *Prest v Prest*]

2012 July 2, 3;  
Oct 26

Thorpe, Rimer, Patten LJJ

2013 March 5, 6;  
June 12

Lord Neuberger of Abbotsbury PSC, Baroness Hale of  
Richmond, Lord Mance, Lord Clarke of Stone-cum-Ebony,  
Lord Wilson, Lord Sumption JJSC, Lord Walker of Gestingthorpe

C

*Husband and wife — Financial relief — Transfer of property — Properties held by companies controlled by husband — Wife alleging that properties belonging beneficially to husband — Husband and companies failing to comply with orders for disclosure — Husband ordered to transfer properties to wife or to cause them to be so transferred — Whether property to which husband “entitled” — Whether conditions for piercing companies’ corporate veils established — Whether court entitled to draw adverse inferences as to beneficial ownership of properties — Whether jurisdiction to order husband to transfer properties held by companies to wife — Matrimonial Causes Act 1973 (c 18), s 24(1)(a)*

D

E

The wife issued a claim for ancillary relief under section 23 of the Matrimonial Causes Act 1973<sup>1</sup> against her husband, who was the sole owner of a number of complexly structured offshore companies. The wife alleged that the husband had used the companies to hold legal title to properties which belonged beneficially to him. However, the husband failed to comply with orders for the full and frank disclosure of his financial position and the companies, which were joined as parties to the proceedings, failed to file a defence or to comply with orders for disclosure. The judge rejected the wife’s submission that the husband had been guilty of any impropriety in relation to the companies such as would ordinarily entitle the court to pierce the corporate veil, but held that, in matrimonial proceedings for ancillary relief, section 24(1)(a) of the 1973 Act conferred a wider jurisdiction to pierce the corporate veil. The judge concluded that, since the husband had the practical ability to procure the transfer of the properties, he was “entitled” to them within the meaning of section 24(1)(a), giving the court jurisdiction to make a transfer order in respect of them. Accordingly, he ordered the husband to transfer or cause to be transferred to the wife six properties and an interest in a seventh which were held in the name of two of the husband’s companies. The Court of Appeal by a majority allowed an appeal by the companies, holding that the Family Division’s practice of treating the assets of companies substantially owned by one party to the marriage as available for distribution under section 24(1)(a) was beyond the jurisdiction of the court unless the corporate personality of the company was being abused for a purpose which was in some relevant respect improper or, on the particular facts, it could be shown that an asset legally owned by the company was held in trust for the husband and that, since the judge had rejected both of those possibilities, he ought not to have made the order.

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H

On the wife’s appeal—

*Held*, (1) that the recognition of a limited power to pierce the corporate veil and to disregard the separate personality of a company in carefully defined circumstances

<sup>1</sup> Matrimonial Causes Act 1973, s 24(1): see post, Court of Appeal judgments, para 68.

was necessary if the law were not to be disarmed in the face of abuse and, provided that the limits were recognised and respected, it was consistent with the general approach of English law to the problems raised by the use of legal concepts to defeat mandatory rules of law; that, therefore, if a person were under an existing legal obligation or liability or subject to an existing legal restriction which he deliberately evaded or the enforcement of which he deliberately frustrated by interposing a company under his control, the court could pierce the corporate veil for the purpose, and only for the purpose, of depriving that company or its controller of the advantage which they would otherwise have obtained by the company's separate legal personality; but that the legal interest in the disputed properties was vested in the companies and, whatever the husband's reasons for organising matters in that way, there was no evidence that he was seeking to avoid any obligation which was relevant in the present proceedings; and that, accordingly, there was no justification as a matter of general legal principle for piercing the corporate veils of the companies (post, Supreme Court judgments, paras 27, 35–36, 57–58, 61, 80–82, 96, 97, 103, 104).

*Gilford Motor Co Ltd v Horne* [1933] Ch 935, CA, *Jones v Lipman* [1962] 1 WLR 832, *Gencor ACP Ltd v Dalby* [2000] 2 BCLC 734 and *Trustor AB v Smallbone (No 2)* [2001] 1 WLR 1177 considered.

(2) That, where there was no justification as a matter of general legal principle for piercing the corporate veil, no special and wider principle applied in matrimonial proceedings by virtue of section 24(1)(a) of the Matrimonial Causes Act 1973; that section 24(1)(a) invoked concepts of the law of property, with an established legal meaning and recognised legal incidents under the general law, which could not be suspended or mean something different in matrimonial proceedings; that there was nothing in the 1973 Act, or in its purpose or broader social context, to indicate that the legislature had intended to authorise the transfer by one party to the marriage to the other of property which was not his to transfer; that such a transfer would ordinarily be unnecessary for the purpose of achieving a fair distribution of the assets of the marriage since, if assets belonged to a company owned by one party to the marriage, the proper claims of the other could ordinarily be satisfied by directing the transfer of shares and, so far as a party deliberately attempted to frustrate the exercise of the court's ancillary powers by disposing of assets, section 37 of the Act provided for the setting aside of those dispositions in certain circumstances; that the recognition of a jurisdiction such as the judge had sought to exercise would cut across the statutory schemes of company and insolvency law, which were essential for the protection of those dealing with a company; and that, accordingly, section 24(1)(a) did not give the judge power to order the husband to transfer to the wife property to which he was not in law entitled (post, Supreme Court judgments, paras 37–41, 57–58, 86, 88–89, 96, 97, 103, 104).

But, (3) allowing the appeal, that the companies could be ordered to convey the seven disputed properties to the wife under section 24(1)(a) of the 1973 Act if the properties belonged beneficially to the husband by virtue of the particular circumstances in which they had come to be vested in the companies; that that issue required an examination of evidence which, almost entirely due to the husband's persistent obstruction and mendacity, was incomplete and in critical respects obscure; that in claims for ancillary relief in matrimonial proceedings, which had a substantial inquisitorial element, judges were entitled to draw on their experience and to take notice of the inherent probabilities when deciding what an uncommunicative spouse was likely to be concealing; that the wife had expressly alleged that the husband had used the companies to hold legal title to properties which belonged beneficially to him and the judge's findings about the ownership and control of the companies meant that the companies' refusal to co-operate with the proceedings was a course ultimately adopted on the direction of the husband; that it was a fair inference that the main, if not the only, reason for the companies' failure to co-operate was to protect the seven properties, which in turn suggested

A that proper disclosure of the facts would reveal them to have been held beneficially by the husband; and that, accordingly, the seven disputed properties were held by the companies on trust for the husband and, in those circumstances, the order of the judge requiring the properties to be transferred to the wife would be restored (post, Supreme Court judgments, paras 44-45, 55, 57-58, 84-85, 96, 97, 103, 104).

*Herrington v British Railways Board* [1972] AC 877, HL(E) and *R v Inland*

B *Revenue Comrs, Ex p TC Coombs & Co* [1991] 2 AC 283, HL(E) considered.

*Per* Lord Neuberger of Abbotsbury PSC, Lord Clarke of Stone-cum-Ebony and Lord Sumption JJS. If it is not necessary to pierce the corporate veil, it is not appropriate to do so, because on that footing there is no public policy imperative which justifies that course (post, Supreme Court judgments, paras 35, 62, 103).

Dictum of Munby J in *Ben Hashem v Al Shayif* [2009] 1 FLR 115, para 164 approved.

C Dictum in *VTB Capital plc v Nutritek International Corpn* [2012] 2 Lloyd's Rep 313, para 79, CA disapproved.

*Per* Lord Mance and Lord Clarke of Stone-cum-Ebony JJS. The court should not seek to foreclose all possible future situations which may arise. However, the situations in which piercing the corporate veil may be available as a fall-back are likely to be very rare and no one should be encouraged to think that any further exception, in addition to the evasion principle, will be easy to establish (post, Supreme Court judgments, paras 100, 102, 103).

D *Per* Lord Sumption JSC. Whether assets legally vested in a company are beneficially owned by its controller is a highly fact-specific issue. But, in the case of the matrimonial home, the facts are quite likely to justify the inference that the property was held on trust for a spouse who owned and controlled the company (post, Supreme Court judgments, para 52).

Decision of the Court of Appeal, post, p 421; [2012] EWCA Civ 1395; [2013] 2 WLR 557 reversed in part.

E

The following cases are referred to in the judgments of the Supreme Court:

*A v A* [2007] EWHC 99 (Fam); [2007] 2 FLR 467

*Adams v Cape Industries plc* [1990] Ch 433; [1990] 2 WLR 657; [1991] 1 All ER 929, CA

*Alliance Bank JSC v Aquanta Corpn* [2012] EWCA Civ 1588; [2013] 1 All ER (Comm) 819; [2013] 1 Lloyd's Rep 175, CA

F

*Allied Capital Corpn v GC-Sun Holdings LP* (2006) 910 A 2d 1020

*Atlas Maritime Co SA v Avalon Maritime Ltd (No 1)* [1991] 4 All ER 769, CA

*Attorney General v Equiticorp Industries Group Ltd* [1996] 1 NZLR 528

*Attorney General's Reference (No 2 of 1982)* [1984] QB 624; [1984] 2 WLR 447; [1984] 2 All ER 216, CA

G

*Bank of Tokyo Ltd v Karoon (Note)* [1987] AC 45; [1986] 3 WLR 414; [1986] 3 All ER 468, CA

*Barcelona Traction, Light and Power Co Ltd (Belgium v Spain) (Second Phase), Case concerning* [1970] ICJ Rep 3

*Belmont Finance Corpn Ltd v Williams Furniture Ltd* [1979] Ch 250; [1978] 3 WLR 712; [1979] 1 All ER 118, CA

*Ben Hashem v Al Shayif* [2008] EWHC 2380 (Fam); [2009] 1 FLR 115

*Berkey v Third Avenue Railway Co* (1926) 155 NE 58

H

*Briggs v James Hardie & Co Pty Ltd* (1989) 16 NSWLR 549

*Broderip v Salomon* [1895] 2 Ch 323, CA; sub nom *Salomon v A Salomon & Co Ltd* [1897] AC 22, HL(E)

*Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd* 1995 (4) SA 790

*Darby, In re; Ex p Brougham* [1911] 1 KB 95

*Gencor ACP Ltd v Dalby* [2000] 2 BCLC 734

418

Prest v Prest (SC(E))

[2013] 2 AC

- Gilford Motor Co Ltd v Horne* [1933] Ch 935, CA A  
*Green v Green* [1993] 1 FLR 326  
*Herrington v British Railways Board* [1972] AC 877; [1972] 2 WLR 537; [1972] 1 All ER 749, HL(E)  
*Jenkins v Livesey (formerly Jenkins)* [1985] AC 424; [1985] 2 WLR 47; [1985] 1 All ER 106, HL(E)  
*Jones v Lipman* [1962] 1 WLR 832; [1962] 1 All ER 442  
*Kingston's (Duchess of) Case* (1776) 2 Smith's LC (13th ed) 644; 1 Leach 146 B  
*Kosmopoulos v Constitution Insurance Co* [1987] 1 SCR 2  
*Kremen v Agrest (No 2)* [2010] EWHC 3091 (Fam); [2011] 2 FLR 490  
*La Générale des Carrières et des Mines Sarl v FG Hemisphere Associates LLC* [2012] UKPC 27; [2013] 1 All ER 409; [2012] 2 Lloyd's Rep 443, PC  
*Lazarus Estates Ltd v Beasley* [1956] 1 QB 702; [1956] 2 WLR 502; [1956] 1 All ER 341, CA  
*Lonrho Ltd v Shell Petroleum Co Ltd* [1980] 1 WLR 627, HL(E) C  
*Macaura v Northern Assurance Co Ltd* [1925] AC 619, HL(I)  
*McFarlane v McFarlane* [2006] UKHL 24; [2006] 2 AC 618; [2006] 2 WLR 1283; [2006] 3 All ER 1, HL(E)  
*Mubarak v Mubarak* [2001] 1 FLR 673  
*Multinational Gas and Petrochemical Co v Multinational Gas and Petrochemical Services Ltd* [1983] Ch 258; [1983] 3 WLR 492; [1983] 2 All ER 563, CA  
*Nicholas v Nicholas* [1984] FLR 285, CA  
*Nokes v Doncaster Amalgamated Collieries Ltd* [1940] AC 1014; [1940] 3 All ER 549, HL(E) D  
*R v Gomez* [1993] AC 442; [1992] 3 WLR 1067; [1993] 1 All ER 1, HL(E)  
*R v Inland Revenue Comrs, Ex p TC Coombs & Co* [1991] 2 AC 283; [1991] 2 WLR 682; [1991] 3 All ER 623, HL(E)  
*R v Secretary of State for the Home Department, Ex p Puttick* [1981] QB 767; [1981] 2 WLR 440; [1981] 1 All ER 776, DC  
*Secon Service System Inc v St Joseph Bank and Trust Co* (1988) 855 F 2d 406 E  
*Smith v Hancock* [1894] 2 Ch 377, CA  
*Stone & Rolls Ltd v Moore Stephens* [2009] UKHL 39; [2009] AC 1391; [2009] 3 WLR 455; [2009] Bus LR 1356; [2009] 4 All ER 431, HL(E)  
*Tjaskemolen (now Visvliet), The* [1997] 2 Lloyd's Rep 465  
*Trustor AB v Smallbone (No 2)* [2001] 1 WLR 1177; [2001] 3 All ER 987  
*VTB Capital plc v Nutritek International Corpn* [2012] EWCA Civ 808; [2012] 2 Lloyd's Rep 313, CA; [2013] UKSC 5; [2013] 2 AC 337; [2013] 2 WLR 398; [2013] 1 All ER 1296, SC(E) F  
*Wallersteiner v Moir* [1974] 1 WLR 991; [1974] 3 All ER 217, CA  
*Welwyn Hatfield Borough Council v Secretary of State for Communities and Local Government* [2011] UKSC 15; [2011] 2 AC 304; [2011] 2 WLR 905; [2011] PTSR 825; [2011] 4 All ER 851, SC(E)  
*Wisniewski v Central Manchester Health Authority* [1998] PIQR P324, CA  
*Woolfson v Strathclyde Regional Council* 1978 SC (HL) 90; 1978 SLT 159; 38 P & CR 521, HL(Sc) G  
*Wroth v Tyler* [1974] Ch 30; [1973] 2 WLR 405; [1973] 1 All ER 897
- The following additional cases were cited in argument before the Supreme Court:
- BJ v MJ (Financial Order: Overseas Trust)* [2011] EWHC 2708 (Fam); [2012] 1 FLR 667  
*Bank voor Handel en Scheepvaart NV v Slatford* [1953] 1 QB 248; [1952] 2 All ER 956, CA H  
*Bhullar v Bhullar* (unreported) 10 May 2002, Judge Behrens, Leeds  
*Blood v Blood* [1902] P 78  
*Bosworthick v Bosworthick* [1927] P 64, CA

[2013] 2 AC

Prest v Prest (SC(E))

- A *Brooks v Brooks* [1996] AC 375; [1995] 3 WLR 141; [1995] 3 All ER 257, HL(E)  
*Campbell (A Bankrupt), In re* [1997] Ch 14; [1996] 3 WLR 626; [1996] 2 All ER 537  
*Charman v Charman (No 4)* [2007] EWCA Civ 503; [2007] 1 FLR 1246, CA  
*Company, In re A* [1985] BCLC 333, CA  
*Crews-Orchard v Crews-Orchard* (1970) 114 SJ 150, CA  
*D v D* [2009] EWHC 3062 (Fam); [2011] 2 FLR 29
- B *Director of Public Prosecutions v Compton* [2002] EWCA Civ 1720; *The Times*, 11 December 2002, CA  
*E v E (Financial Provision)* [1990] 2 FLR 233  
*H (Restraint Order: Realisable Property), In re* [1996] 2 All ER 391, CA  
*Hawkes v Cuddy* [2007] EWHC 2999 (Ch); [2008] EWHC 210 (Ch); [2009] EWCA Civ 291; [2009] 2 BCLC 427, CA  
*Hope v Krejci* [2012] EWHC 1780 (Fam); [2013] 1 FLR 182
- C *Imerman v Tchenguiz* [2010] EWCA Civ 908; [2011] Fam 116; [2011] 2 WLR 592; [2011] 1 All ER 555, CA  
*Jones v Jones* [2011] EWCA Civ 41; [2012] Fam 1; [2011] 3 WLR 582, CA  
*Midland Bank Trust Co Ltd v Green* [1981] AC 513; [1981] 2 WLR 28; [1981] 1 All ER 153, HL(E)  
*Milne v Milne* (1871) LR 2 P & D 295  
*Prinsep v Prinsep* [1929] P 225  
*R v K* [2005] EWCA Crim 619; [2006] BCC 362, CA
- D *R (Prudential plc) v Special Comr of Income Tax (Institute of Chartered Accountants in England and Wales intervening)* [2013] UKSC 1; [2013] 2 AC 185; [2013] 2 WLR 325; [2013] 2 All ER 247, SC(E)  
*Rackind v Gross* [2004] EWCA Civ 815; [2005] 1 WLR 3505; [2005] 4 All ER 735, CA  
*Roberts Petroleum Ltd v Bernard Kenny Ltd* [1983] 2 AC 192; [1983] 2 WLR 305; [1983] 1 All ER 564, HL(E)
- E *Tobian Properties Ltd, In re; Maidment v Attwood* [2012] EWCA Civ 998, [2013] Bus LR 753, CA  
*W v H (Family Division: Without Notice Orders)* [2001] 1 All ER 300

The following cases are referred to in the judgments of the Court of Appeal:

- A v A [2007] EWHC 99 (Fam); [2007] 2 FLR 467
- F *Adams v Cape Industries plc* [1990] Ch 433; [1990] 2 WLR 657; [1991] 1 All ER 929, CA  
*Ben Hashem v Al Shayif* [2008] EWHC 2380 (Fam); [2009] 1 FLR 115  
*British American Tobacco Co Ltd v Inland Revenue Comrs* [1943] AC 335; [1943] 1 All ER 13, HL(E)  
*Company, In re A* [1985] BCLC 333, CA  
*Coroin Ltd, In re; Minwalla v Minwalla* [2004] EWHC 2823 (Fam); [2005] 1 FLR 771
- G *Crittenden v Crittenden* [1990] 2 FLR 361, CA  
*Gilford Motor Co Ltd v Horne* [1933] Ch 935, CA  
*Green v Green* [1993] 1 FLR 326  
*Hope v Krejci* [2012] EWHC 1780 (Fam); [2012] Fam Law 1327  
*Inn Spirit Ltd v Burns* [2002] EWHC 1731 (Ch); [2002] 2 BCLC 780  
*J v J* [1955] P 215; [1955] 3 WLR 72; [1955] 2 All ER 617, CA  
*Jones v Lipman* [1962] 1 WLR 832; [1962] 1 All ER 442
- H *Kremen v Agrest (No 2)* [2010] EWHC 3091 (Fam); [2011] 2 FLR 490  
*Littlewoods Mail Order Stores Ltd v McGregor* [1969] 1 WLR 1241; [1969] 3 All ER 855, CA  
*Macaura v Northern Assurance Co Ltd* [1925] AC 619, HL(I)  
*McKillen v Misland (Cyprus) Investments Ltd* [2012] EWCA Civ 179; [2012] 2 BCLC 611; [2012] BCC 575, CA

420

Prest v Prest (SC(E))

[2013] 2 AC

*Mubarak v Mubarak* [2001] 1 FLR 673 A  
*Munin Navigation Co Ltd v Petrodel Resources Ltd* [2012] EWCA Civ 136, CA  
*Nicholas v Nicholas* [1984] FLR 285, CA  
*Ord v Belhaven Pubs Ltd* [1998] 2 BCLC 447, CA  
*Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* [1982] Ch 204;  
[1982] 2 WLR 31; [1982] 1 All ER 354, CA  
*Salomon v A Salomon & Co Ltd* [1897] AC 22, HL(E)  
*Trustor AB v Smallbone (No 2)* [2001] 1 WLR 1177; [2001] 3 All ER 987 B  
*VTB Capital plc v Nutritek International Corpn* [2011] EWHC 3107 (Ch); [2012]  
EWCA Civ 808; [2012] 2 Lloyd's Rep 313, CA  
*W v H (Family Division: Without Notice Orders)* [2001] 1 All ER 300  
*Wallersteiner v Moir* [1974] 1 WLR 991; [1974] 3 All ER 217, CA  
*Wicks v Wicks* [1999] Fam 65; [1998] 3 WLR 277; [1998] 1 All ER 977, CA  
*Woolfson v Strathclyde Regional Council* 1978 SC (HL) 90; 1978 SLT 159;  
38 P & CR 521, HL(Sc) C

The following additional cases were cited in argument before the Court of Appeal:

*Antonio Gramsci Shipping Corpn v Stepanovs* [2011] EWHC 333 (Comm); [2011]  
Bus LR D117; [2012] 1 All ER (Comm) 293  
*Aveling Barford Ltd v Perion Ltd* [1989] BCLC 626  
*B (Appeal: Lack of Reasons), In re* [2003] EWCA Civ 881; [2003] 2 FLR 1035, D  
CA  
*Bank voor Handel en Scheepvaart NV v Slatford* [1953] 1 QB 248; [1952] 2 All ER  
956, CA  
*Brady v Brady* [1989] AC 755; [1988] 2 WLR 1308; [1988] 2 All ER 617, HL(E)  
*Buchler v Talbot* [2004] UKHL 9; [2004] 2 AC 298; [2004] 2 WLR 582; [2004] 1 All  
ER 1289, HL(E)  
*Gencor ACP Ltd v Dalby* [2000] 2 BCLC 734 E  
*H v H (Financial Relief: Conduct)* [1998] 1 FLR 971  
*Herrington v British Railways Board* [1972] AC 877; [1972] 2 WLR 537; [1972]  
1 All ER 749, HL(E)  
*Howard v Howard* [1945] P 1; [1945] 1 All ER 91, CA  
*Jenkins v Livesey (formerly Jenkins)* [1985] AC 424; [1985] 2 WLR 47; [1985] 1 All  
ER 106, HL(E)  
*Lee v Lee's Air Farming Ltd* [1961] AC 12; [1960] 3 WLR 758; [1960] 3 All ER 420, F  
PC  
*Lubbe v Cape plc* [2000] 1 WLR 1545; [2000] 4 All ER 268, HL(E)  
*Milne v Milne* (1871) LR 2 P & D 295  
*National Provincial Bank Ltd v Hastings Car Mart Ltd* [1965] AC 1175; [1965]  
3 WLR 1; [1965] 2 All ER 472, HL(E)  
*Nokes v Doncaster Amalgamated Collieries Ltd* [1940] AC 1014; [1940] 3 All ER  
549, HL(E) G  
*Partridge v Crittenden* [1968] 1 WLR 1204; [1968] 2 All ER 421, DC  
*Precision Dippings Ltd v Precision Dippings Marketing Ltd* [1986] Ch 447; [1985]  
3 WLR 812, CA  
*Print Factory (London) 1991 Ltd v Millam* [2007] EWCA Civ 322; [2007] ICR 1331,  
CA  
*Roberts Petroleum Ltd v Bernard Kenny Ltd* [1983] 2 AC 192; [1983] 2 WLR 305;  
[1983] 1 All ER 564, HL(E) H  
*Smith Stone & Knight Ltd v Birmingham Corpn* [1939] 4 All ER 116  
*Trebanog Working Men's Club and Institute Ltd v Macdonald* [1940] 1 KB 576;  
[1940] 1 All ER 454, DC  
*Wisniewski v Central Manchester Health Authority* [1998] PIQR P324, CA  
*X v X (Y and Z intervening)* [2002] 1 FLR 508

[2013] 2 AC

421  
Prest v Prest (CA)  
Thorpe LJ

- A The following additional cases, although not cited, were referred to in the skeleton arguments before the Court of Appeal:

*B v B (Financial Provision)* (1982) 3 FLR 298, CA

*Browne v Browne* [1989] 1 FLR 291, CA

*CMS Dolphin Ltd v Simonet* [2001] 2 BCLC 704

*Donaldson v Donaldson* [1958] 1 WLR 827; [1958] 2 All ER 660

- B *Duport Steel Ltd v Sirs* [1980] 1 WLR 142; [1980] ICR 161; [1980] 1 All ER 529, HL(E)

*George v George* [2003] EWCA Civ 202; [2004] 1 FLR 421, CA

*Grey v Pearson* (1857) 6 HL Cas 61, HL(E)

*O'D v O'D* [1976] Fam 83; [1975] 3 WLR 308; [1975] 2 All ER 993, CA

*Ranson v Ranson* [2001] EWCA Civ 1929; [2002] 1 FCR 261, CA

### APPEAL from Moylan J

- C By a petition dated 10 March 2008 the wife, Yasmin Aishatu Mohammed Prest, petitioned for a decree of divorce from her husband, Michael Jenseabla Prest. She applied in those proceedings for ancillary relief against the husband. On 27 February 2009 and 14 April 2011 Petrodel Resources Ltd (“PRL”), Petrodel Resources (Nigeria) Ltd, Petrodel Upstream Ltd (“Upstream”), Vermont Petroleum Ltd (“Vermont”), Elysium Diem Ltd, Petrodel Resources D (Nevis) Ltd and Elysium Diem (Nevis) Ltd, were joined as parties to the proceedings. By a judgment dated 4 October 2011 [2011] EWHC 2956 (Fam) and order dated 16 November 2011 Moylan J ordered, inter alia, that the husband transfer or cause to be transferred to the wife (i) four London properties and an interest in a fifth all held in the name of PRL and (ii) two London properties held in the name of Vermont.

- E By an appellant’s notice filed on 7 December 2011 and pursuant to permission granted by the Court of Appeal (Thorpe LJ) on 16 February 2012 PRL, Upstream and Vermont (together “the Petrodel companies”) appealed on the ground that the judge had misdirected himself in law in relation to the true construction of section 24(1)(a) of the Matrimonial Causes Act 1973 in that he had wrongly directed himself that as a matter of law assets of the Petrodel companies fell within the scope of section 24(1)(a) as being F “property to which [the husband] is entitled, either in possession or reversion”. The facts are stated in the judgment of Thorpe LJ.

*Tim Amos QC* and *Ben Shaw* (instructed by *Jeffrey Green Russell*) for the Petrodel companies.

*Richard Todd QC* and *Stephen Trowell* (instructed by *Farrer & Co LLP*) for the wife.

- G The husband did not appear and was not represented.

The court took time for consideration.

26 October 2012. The following judgments were handed down.

### THORPE LJ

- H *Introduction*

1 On 4 October 2011 Moylan J [2011] EWHC 2956 (Fam) delivered judgment in the financial provision case *Prest v Prest*, a truly extraordinary case even within the breadth and depth of family division bounds.

422

Prest v Prest (CA)  
Thorpe LJ

[2013] 2 AC

2 The husband and wife are both about 50 and both have dual Nigerian and British citizenship. The husband was born in Nigeria, the wife in England, both are highly educated. The husband was called to the Nigerian Bar. The wife graduated from Thames Polytechnic and subsequently obtained an MBA from Cranfield. A

3 They met in 1992 and married in 1993. They have four children who are teenagers. Throughout the marriage they lived principally in London but with properties in Nigeria and the Caribbean. They lived to a very high standard. Both came from affluent backgrounds. At all material times the husband has been prominent and successful in international oil development and trade. The final matrimonial home at Warwick Avenue is worth about £4m and there are a number of other properties that the husband has acquired in London, most in the name of three companies. B C

4 As well as the husband and the first respondent, there were seven corporate respondents. None of the corporate respondents took any part in the proceedings until the final hearing when the second, fourth and fifth appeared by leading counsel.

5 In para 3 of his judgment Moylan J thus recorded the principal issues in the case: D

“(a) The extent of the husband’s wealth including the nature and extent of his interest in the respondent companies; and (b) whether I can make orders directly against properties and shares held in the name of some of the respondent companies.”

6 Continuing with his introduction, the judge recorded the husband’s case that the net excess of his liabilities over assets equalled £48m. E

7 The wife’s case was that the husband’s assets net of liabilities equalled “tens if not hundreds of millions of pounds”.

8 Thus on issue (a) the gulf between the respective positions of the husband and wife could hardly have been wider.

9 As to issue (b) Mr Todd QC, for the wife, stressed the extent of the court’s power under section 24(1)(a) of the Matrimonial Causes Act 1973 which enabled orders to be made against alter ego companies. Mr Todd relied on *Nicholas v Nicholas* [1984] FLR 285. He distinguished *Ben Hashem v Al Shayif* [2009] 1 FLR 115. Alternatively if *Ben Hashem’s* case was not to be distinguished Mr Todd asserted impropriety in respect of the companies. Mr Todd further submitted that the companies held the shares and assets as bare trustee for the husband. F G

10 Mr Pointer QC for the husband and Mr Wagstaffe QC for the companies disputed the assertion that the properties and shares in the company were held on trust for the husband and they further submitted that the authority of *Ben Hashem’s* case prevented the judge from making orders against the properties or the shares.

11 As to outcome the wife sought an overall award of £30.4m. The husband proposed a package that amounted to a little over £2m. H

12 As is not uncommon in this specialist field of litigation the husband had repeatedly flouted his duty to give full frank and clear disclosure of his finances. He was in breach of many orders for disclosure; he had been repeatedly condemned in costs which he had not paid. At trial his evidence

[2013] 2 AC

423  
Prest v Prest (CA)  
Thorpe LJ

A was both deceitful and shambolic. In paras 12–13 of his judgment Moylan J stated:

“12. . . . I have sought to make sense of the husband’s factual case. Ultimately I have decided that this has been a vain task because the husband has failed so comprehensively to comply with his obligation to provide full and frank disclosure and to give clear evidence that his case  
B does not permit of such an exercise . . . the result of the way in which the case has developed is that a great deal of energy has been expended by the husband on seeking to establish what he is not worth rather than the more conventional focus being on seeking to demonstrate what he is worth . . .

“13. . . . his evidence consisted significantly of obfuscation and dissembling.”

C 13 This introduction to the case illustrates what a difficult and frustrating task the judge faced. Responsibility for that state of affairs rested squarely with the husband and his companies.

*The proceedings and the trial*

D 14 The proceedings have not run smoothly. In para 34 of the judgment below Moylan J recorded:

“The husband has not voluntarily paid any part of the maintenance pending suit order in respect of costs. This is not a minor breach of the order; it is a significant failure. It is made the more significant when contrasted with the fact that the husband has paid in excess of £760,000 towards his own costs.”

E 15 In a manoeuvre which I have not previously encountered the husband’s brother issued against the husband and one of his companies an application in the High Court in Nigeria which produced an order unopposed restraining the husband from: (i) disclosing any information concerning the accounts or affairs of the company; (ii) asserting or disclosing information that he is sole owner of the company.

F 16 As to this device the judge recorded at para 142 of his judgment:

“Notwithstanding the terms of the Nigerian order the husband has been able to produce documents which would appear to be covered by its terms. They have been produced at random and in a manner which has given me the clear impression that the husband does so when he considers it might help his case . . . Such attempts to manipulate the process  
G have been a recurrent feature of the husband’s conduct during the proceedings.”

H 17 In like manner when the senior master directed a letter of request to judicial authorities in the Isle of Man, a director of the Manx company avoided production, asserting concerns about claims that would be made against the board by shareholders or commercial partners for breach of confidence. Of that Moylan J aptly said, at para 47:

“Given the husband’s control over the corporate structure, it is hard to understand how these concerns could be genuine. It is not difficult, in my judgment, to see the hand of the husband behind this obstructive line

424

Prest v Prest (CA)  
Thorpe LJ

[2013] 2 AC

which is also reflected in letters written on behalf of the company by A  
Manx advocates.”

18 These sort of manoeuvrings in the interlocutory stages gravely  
impede the court and waste large sums of money. The trial judge faced a  
formidable task when he sat between 13 and 30 June 2011 to conduct the  
final hearing. He heard extensive oral evidence. As well as the husband and  
the wife there were two accountants whose evidence was of very limited B  
value since they at least agreed that neither had received the information and  
documents that would enable them to make any worthwhile assessment or  
valuation. However, there was a strong card in the wife’s hand given that  
she was able to call as a witness Mr Le Breton, a former business associate  
and fellow director of the husband.

19 The interval between 30 June and 4 October resulted from the  
judge’s struggle to make sense of the evidence and some 30 lever arch files of  
documents. C

20 Between paras 55 and 78 of his judgment the judge wrestled with the  
incomplete, inadequate, confused and conflicting evidence as to the  
husband’s activities through the corporate vehicles. The husband sought to  
rely on the evidence of a director of the companies, Mr Murphy.  
Mr Murphy chose not to appear. In para 69 the judge concluded that D  
Mr Murphy was unwilling rather than unable to attend.

21 In this section of his judgment the judge made two crucial findings.  
This is the first:

“I am satisfied that the directors of the group, including Mr Murphy,  
act in accordance with instructions given by or on behalf of the husband.  
The husband was unable in his oral evidence to provide details of any E  
specific occasion when the directors had not acted in accordance with his  
instructions.”

22 Here is the second: “I have no doubt at all that the husband does,  
indeed, just draw from PRL whatever he and his family need, as and when  
they need it.”

23 In the next section of his judgment the judge reviewed the London  
properties. Apart from the final matrimonial home there were 11. Apart  
from one they were all in the name of one or other company. BNP had a loan  
charged against the properties. As to that the judge said, at para 84: F

“However, as a result of the husband’s failure to give clear disclosure,  
the evidence is not sufficient for me to reach any firm conclusions as to  
what the true net position is in respect of the loan due to BNP.” G

24 The judge then reviewed the overseas properties and recorded the  
evidence that had been given by the husband and the wife. He also recorded  
the evidence of Mr Le Breton. In his evidence Mr Le Breton asserted that the  
husband was the ultimate owner of the companies. This is the judge’s  
record, at para 120, of his evidence:

“the husband was the effective owner of the Petrodel Group. He  
controlled every business decision. The directors acted merely on his  
instructions. Throughout the seven or eight years that he worked with the  
husband and Petrodel, the directors, according to Mr Le Breton,  
acted only on the husband’s instructions. There was also significant H

[2013] 2 AC

425  
Prest v Prest (CA)  
Thorpe LJ

A expenditure through Petrodel for the benefit of the husband, the wife and the children but Mr Le Breton was not aware of any significant sums being spent for other family members. There are also investments made through the company which were not business opportunities but were, he said, ‘private commitments that (the husband) chose to make’.”

B 25 Mr Le Breton also informed the judge that between 2001 and 2004 the husband stated that he was worth between \$40 to \$50m.

26 Of the wife’s evidence the judge said, at para 123: “I found the wife to be a careful and honest witness. She gave her evidence in a calm and dispassionate manner which was convincing.”

27 The judge continued, at para 124:

C “I also found Mr le Breton to be an honest witness . . . As I have said . . . I am satisfied that his evidence was reliable. For many years Mr Le Breton and the husband were very close work colleagues and were also friends. I am satisfied that Mr Le Breton is in a very good position to give me an accurate insight into the husband’s and Petrodel’s affairs.”

28 By contrast the judge said, at para 125:

D “I have found the husband to be a wholly unreliable witness. The husband is clearly an extremely intelligent, articulate and astute individual. I form the clear impression that he regards the proceedings as a game in which he has sought to manipulate the process to his advantage. Despite occasional suggestions, largely by prompting, that he was seeking to help the court, the husband was an extremely evasive witness. He was adroit but was deliberately evasive. He would frequently fail to answer a question although he clearly understood its meaning and would often digress on to a different subject or ask questions about the question. I do not consider that I can rely on any of the husband’s evidence unless corroborated by other reliable evidence.”

E

F 29 Having then condemned the husband for his breach of obligation to provide full frank and clear disclosure he said, at para 127:

“It would, as I have said, be a vain task to seek to make sense of his evidence because I am satisfied that much of it was opportunistic in that he would say whatever he felt at the moment best suited his case or at least provided him with an answer to the question.”

G 30 The husband had asserted that he held corporate assets in trust for his birth family because the initial capital, or seed money, had been supplied by his father subject to that trust. This manoeuvre was trenchantly dismissed. The judge said, in para 136: “I found the husband’s evidence on this issue particularly unconvincing and I am satisfied that it is a deliberate invention.” Then in the next paragraph two sentences must be cited:

H “I am satisfied the husband’s evidence as to the existence of any seed moneys is false. This has been invented for the purposes of seeking to defeat the wife’s claims . . . In so far as the husband has interests in the group or any of the companies within it or any of the assets held by the companies, such interests are held solely for the benefit of himself and his immediate family.”

426

Prest v Prest (CA)  
Thorpe LJ

[2013] 2 AC

31 When the judge turned to the section 25 exercise he considered the general position thus in para 143: A

“As a result of the husband’s failure to provide proper disclosure and honest evidence I do not have the information needed to enable me to determine the extent and value of the husband’s resources. I am satisfied that the husband’s failure has been deliberate. I have rejected his attempt to rely on the Nigerian proceedings and orders. I am satisfied that they are based on a false factual case and were contrived at the husband’s instigation in an attempt to provide him with an explanation for his failure to comply with his obligations in these proceedings.” B

32 In relation to Petrodel the judge said:

“Specifically as a result of the husband’s failure to comply with his disclosure obligations, the evidence which would be required to enable the value of Petrodel to be determined is almost completely lacking.” C

33 At least the judge was able to value the London properties at £11.3m gross and £9m net.

34 As to standard of living, the husband accepted that the running costs of the London home were about \$400,000 per annum. He put his annual income needs at £800,000. The wife put her annual needs for herself and the children at £730,000. D

35 Counsel’s submissions were predictable. Mr Todd relied upon *Nicholas v Nicholas* [1984] FLR 285 and *Mubarak v Mubarak* [2001] 1 FLR 673. Mr Pointer relied on *Ben Hashem v Al Shayif* [2009] 1 FLR 115. Mr Wagstaffe relied upon company rather than family authority, including *Salomon v A Salomon & Co Ltd* [1897] AC 22, *Adams v Cape Industries plc* [1990] Ch 433 and *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* [1982] Ch 204. E

36 The judge in his review of authorities considered *Nicholas v Nicholas*, *Crittenden v Crittenden* [1990] 2 FLR 361, *Mubarak v Mubarak*, *Minwalla v Minwalla* [2005] 1 FLR 771, *W v H (Family Division: Without Notice Orders)* [2001] All ER 300, *A v A* [2007] 2 FLR 467 and *Ben Hashem v Al Shayif* [2009] 1 FLR 115. F

37 From his review of these authorities he drew out the following principles. (a) Ownership and control were not in themselves sufficient to pierce the corporate veil. (b) Even where there was no unconnected third party interest the veil could not be pierced only because it is necessary in the interests of justice. (c) The veil can only be pierced if there is impropriety. (d) The impropriety must be linked to the use of the company structure to avoid or conceal liability. (e) In order to pierce the veil, both control by the wrongdoer and impropriety must be demonstrated. (f) A company may be a façade even though originally incorporated without deceptive intent. G

38 The judge then applied those principles to the facts before him. As to Petrodel he held that the whole structure was for the husband’s benefit alone and in his control, the husband “is able to change the structure and distribute the wealth within it to himself and/or his family as may be required or, I would add, as he wishes”. H

[2013] 2 AC

427  
Prest v Prest (CA)  
Thorpe LJ

A 39 The judge concluded this important section of his judgment in paras 208–210 which I must cite in full:

B “208. I spent some time during the hearing, and longer since trying to make sense of what appeared to be inconsistent themes in the husband’s evidence and seeking to identify how they might be reconciled. Ultimately I have decided that I have been seeking to impose an unduly legalistic framework onto a relatively simple factual situation, namely that the husband operates and controls the Petrodel group and its assets for the benefit of his immediate family. The wealth within the group is the family’s wealth to which the husband has unrestricted access. I am satisfied that the husband is both the effective owner and controller of the whole of Petrodel corporate structure. In coming to this conclusion I accept the evidence of Mr Le Breton that the husband told him that he is the ultimate beneficial owner and I also accept his apposite phrase that Petrodel is the husband and the husband is Petrodel. In my judgment, the information memorandum as found by the wife accurately describes the husband as the owner.

D “209. The extent to which the companies are the husband’s nominees is demonstrated by the term in the contract, which I repeat, that he: ‘shall be assumed to report to the board for issues pertaining to the management of the company, yet you shall have and employ full discretion with the way you manage all the affairs of the company in so far as your actions are for the benefit of the company and its shareholders.’ As the husband is the only effective shareholder, the husband is managing the affairs of the company solely for his benefit, hence the complete lack of any need for real board control. The husband has clearly used the companies to meet his and his family’s personal expenditure, as well as his legal costs in these proceedings, without any inhibition. The lack of any paper accounting also demonstrates the lack of any board control or supervision.

F “210. I am also satisfied that all the assets held within the companies are effectively the husband’s property. He is able to procure their disposal as he may direct based again on his being the controller of the companies and the only beneficial owner. There are no third party interests of any relevance because the other shareholders are merely nominal with no expectation of benefiting from their shareholdings.”

G 40 The judge then turned to the heart of his judgment, the wife’s award. He began by reminding himself of the dicta of Sachs J in *J v J* [1955] P 215 as to not only the duty of disclosure but also the consequences of breach, namely the drawing of adverse inferences. Being free to draw adverse inferences the judge concluded: “I consider that, conservatively, the husband must be worth at least \$60m, i.e. approximately £37.5m.”

H 41 From that conclusion the judge assessed the wife’s fair award at £17.5m. The judge then addressed the vital question of how the husband’s liability to the wife was to be discharged. Orders against foreign properties would be difficult to enforce. Orders against the husband’s shareholdings impossible, given that they were shrouded in the mist of concealment, subterfuge and lies. The judge felt unable to find impropriety within the meaning of the decided cases. The husband’s litigation misconduct was not so much impropriety as the giving of false evidence. The judge considered

428

Prest v Prest (CA)  
Thorpe LJ

[2013] 2 AC

that he had to choose between the *Nicholas* approach and the *Ben Hashem* approach. But the judge's essential ratio is to be found in para 220 when he posed the question: were the London houses "property" to which the husband was "entitled, either in possession or reversion" within the meaning of section 24(1)(a). There could be no doubt that the houses were property. Thus "the crucial words are, therefore, 'entitled either in possession or reversion,' words which have not been the subject of any particular analysis". The judge then concluded that that test was satisfied on the facts of this exceptional case. The directors were "stooges or ciphers". Payments were made for the benefit of the husband and his family without any apparent attempt to see whether the husband was entitled to such payments. The wealth within the structure was freely available to be distributed as the husband directed. Accordingly, at para 225:

"In this case the husband can without inhibition acquire the properties and shares which the wife seeks because, in effect, the companies are his nominees or agents. As a result, in my judgment, the husband is 'entitled' to the shares and properties held in the names of the corporate respondents because there is no impediment, including third party interests, to his enjoying the full benefit of those assets. They are held by the companies for the husband because the corporate structure is being used as a repository for the family wealth. Effectively the husband, in respect of the companies and their assets, is in the same position as he would be in if he was the beneficiary of a bare trust or the companies were his nominees. There exists no legal impediment to his procuring the transfer of the assets held by the companies into his name. In the language of the cases, they are his 'alter ego'."

42 In so holding and ordering the judge rested on the statutory power of section 24 which freed him from the constraints of company law as identified in *Salomon v A Salomon & Co Ltd* [1897] AC 22 and following cases.

43 Accordingly, in the order giving effect to judgment, the husband was ordered to transfer or cause to be transferred to the wife the London properties together with three properties in Nevis and the shares in a Nevis company. Following transfer the properties were to be sold and the net proceeds of sale applied in satisfaction of the lump sum.

44 I have followed the structure of the judgment in such detail and drawn out the judge's findings and conclusions in order to substantiate my opening observation that this was a truly exceptional case for the scale of the husband's litigation misconduct. There was almost no length to which he was not prepared to go in order to attempt to defeat or diminish the wife's claim. In such a case the judge's search for reality is never easy but it is vital that the court should not be prevented or emasculated by the devious and dishonest.

#### *Submissions on appeal*

45 It is in that context that I turn to the submissions on this appeal. The only appellants are the three companies who have had the advantage of representation by Mr Amos QC whose style of advocacy seems to clothe any client with respectability. They also had the advantage of a specialist company law junior in Mr Shaw.

[2013] 2 AC

429  
Prest v Prest (CA)  
Thorpe LJ

- A 46 Mr Amos first urged that the word “entitled” could not mean by custody or control but only by enforceable legal right.
- 47 Second, Mr Amos submitted that the corporate veil could only be pierced if impropriety of a particular character could be established. That proposition applied as much in Family as in Chancery proceedings. *Ben Hashem’s* case [2009] 1 FLR 115 had been specifically approved by the recent decision of this court in *VTB Capital plc v Nutritek International Corpn* [2012] 2 Lloyd’s Rep 313.
- B 48 Third, he submitted that that last word from this court implicitly overruled the dicta in *Nicholas v Nicholas* [1984] FLR 285 and in *In re A Company* [1985] BCLC 333.
- 49 Fourth, Mr Amos distinguished *Mubarak’s* case [2001] FLR 673. Bodey J was considering the court’s powers in the enforcement of an award arising from a contested hearing in which the husband had conceded that the company assets were to be treated as his.
- C 50 Finally Mr Amos submitted that the regulatory structure of company law militated strongly in favour of allowing the appeal. For what the order had achieved was to change the order of priority, not just preferring one creditor over another but advancing the husband as shareholder over any and all creditors.
- D 51 Mr Todd QC and Mr Trowell essentially relied on the legal analysis of Moylan J. However, Mr Todd submitted that *Ben Hashem’s* case and *Nicholas’s* case were not in conflict rather that they illustrated the operation of two separate principles. *Ben Hashem’s* case considered and applied to financial provision cases the classic rules of company law which tightly confined the circumstances in which a court might pierce the corporate veil.
- E However, *Nicholas v Nicholas* recognised an essential power in financial provision cases to make orders against assets which undoubtedly belonged to the husband, despite the fact that he might, for whatever reason, have chosen to hold them in a trust or company.

### Conclusions

- F 52 In weighing these rival submissions on the development of the case law I prefer the submissions of Mr Todd. Were there only one line of authority and were the Family Division judge bound to apply the company law as stated in the *VTB* case [2012] 2 Lloyd’s Rep 313, in many cases he or she would be unable to make orders fair to applicant wives.
- G 53 The powers of redistribution of assets on pronouncement of a decree came into force on 1 January 1971 and the development of the necessary case law was a gradual process. The decision in *Nicholas v Nicholas* [1984] FLR 285 can be seen as a relatively early pronouncement of the power necessary to enable the judge in financial provision cases to do justice.
- H 54 More recently, Munby J was ideally qualified to hold the balance between the family law and the company law authorities. Important is his decision in *W v H (Family Division: Without Notice Orders)* [2001] 1 All ER 300. Between pp 310E and 311D Munby J recognised the importance of the power of Family Division judge in financial provision cases as first stated in *Nicholas v Nicholas*. He struck the balance in financial provision

430  
Prest v Prest (CA)  
Thorpe LJ

[2013] 2 AC

proceedings precisely when he said in the final paragraph of the passage to which I have referred above: A

“Nothing that I say should be taken as intended to water down in any way the robustness with which the Family Division ought to deal in appropriate cases with husbands who seek to obfuscate or to hide or mask the reality behind shams, artificial devices and similar contrivances. Nor do I doubt for a moment the propriety and utility of treating as one and the same a husband and some corporate or trust structure which it is apparent is simply the alter ego or creature of the husband. On the other hand, and as the *Nicholas* case itself demonstrates, the court does not—in my judgment cannot properly—adopt this robust approach where, for example, property is held by a company in which, although the husband has a majority shareholding, the minority shareholders are what Cumming-Bruce LJ called ‘real interest’ held by individuals who as Dillon LJ put it, are not nominees but business associates of the husband.” B C

55 I would adopt that paragraph as a clear statement of the principle properly and necessarily applied in family provision proceedings.

56 When Munby J came to deliver his judgment in *Ben Hashem’s* case [2009] 1 FLR 115 the number of cases referred to in the judgment is impressive and includes his earlier decision in *W v H* (cited as *In re W (Ex parte Orders)* which is how it had been designated in the Family Law Reports). D

57 In *A v A* [2007] 2 FLR 467 Munby J had emphasised that his observations in *W v H* did not permit a court to ride rough shod over established principles especially if third party interests were involved. In *Ben Hashem’s* case [2009] 1 FLR 115, para 94 he made the same point, citing from his judgment in *A v A* those paragraphs in which he had set limit on his prior observations in *W v H*. Thus, although in *A v A* and *Ben Hashem’s* case I find Munby J cautioning against excess and emphasising that company law was uniform in all divisions, he does not disavow the propositions stated in *W v H*. E

58 I would not complicate the approach that a Family Division judge can legitimately adopt either by reference to company law authority on “lifting or piercing the corporate veil” or by questioning whether judges have used an alternative expression of the same principle when they have referred to ownership by an alter ego. The simple question is whether the individual is entitled to the property within the meaning of section 24(1)(a). The Family Division judges with particular expertise in this field (such as, Bodey, Coleridge and Mostyn JJ) have on many occasions stressed the need to get to the reality in determining the assets to which the husband is entitled. Indeed Mostyn J in an obiter passage in his judgment in *Hope v Krejci* [2012] EWHC 1780 (Fam), handed down on 29 June 2012, considered the impact of the decision in the *VTB* case. He concluded in para 22: F G

“I can easily see why these principles are critically necessary when the objective is that which was sought in the *VTB* case, namely to deem someone to be a party to a contract to which he plainly is not. But I have great difficulty in seeing why they must be satisfied for the form of piercing of the veil that is the telescoping order, which is almost invariably the situation confronted in financial remedy proceedings.” H

[2013] 2 AC

431  
Prest v Prest (CA)  
Thorpe LJ

A 59 Moylan J, whose expertise in this area is no less, adopted that approach and thereby achieved justice for the applicant.

60 Mr Amos's submissions in this court are essentially the submissions advanced by Mr Wagstaff below. They were rightly rejected by the judge. Vital are the judge's findings as to the complete absence of boundaries between the husband and his companies observed by not only him, who is not an appellant, but also the companies, who are. On the exceptional facts of this case I conclude that the judge was entitled to order the husband to transfer or cause to be transferred the assets which he did.

B 61 In the course of argument we were referred to a process which is known as telescoping which involves ordering the individual not to transfer the property but to transfer shares or to vote himself dividends or loans as a route to the property. That seems to me both cumbersome, expensive and uncertain to achieve the desired end. It is to import the discipline of company law in to a situation where at all material times the individual has not respected or utilised that discipline. However, that point hardly arises in the present case where none of the parties has ever advocated it.

C 62 As indicated above I would dismiss this appeal.

D 63 I have of course reviewed the judgment which I wrote in July in response to the receipt in October of the powerful judgment written by Rimer LJ. However, despite its cogency I emphasise that all judges who have endeavoured to achieve fairness in big money cases at first instance, including Munby J, have followed the pathway marked by Cumming-Bruce LJ, himself a former judge of the Division. I myself followed this path in the eight years that I sat in the Division and I have not questioned it in the more years that I have sat in this court. If this court now concludes that all these cases were wrongly decided they present an open road and a fast car to the money maker who disapproves of the principles developed by the House of Lords that now govern the exercise of the judicial discretion in big money cases.

E 64 In this case the reality is plain. So long as the marriage lasted, the husband's companies were milked to provide him and his family with an extravagant lifestyle. That was only possible because the companies were wholly owned and controlled by the husband and there were no third party interests. Of course in so operating them the husband ignored all company law requirements and checks.

F 65 Once the marriage broke down, the husband resorted to an array of strategies, of varying degrees of ingenuity and dishonesty, in order to deprive his wife of her accustomed affluence. Amongst them is his invocation of company law measures in an endeavour to achieve his irresponsible and selfish ends. If the law permits him so to do it defeats the Family Division judge's overriding duty to achieve a fair result.

RIMER LJ

*Introduction*

H 66 This appeal raises a question as to the court's jurisdiction in ancillary relief proceedings between spouses to order assets held by companies to be transferred to the applicant spouse in or towards satisfaction of her claim. The applicant (respondent to the appeal) was Yasmin Prest ("the wife"). Michael Prest ("the husband"), the main

432

Prest v Prest (CA)  
Rimer LJ

[2013] 2 AC

respondent to her application, was originally an appellant but his appeal was struck out for want of compliance with conditions of orders of the court. The remaining appellants, also respondents to her application, are three companies in his control: Petrodel Resources Ltd (“PRL”), Petrodel Upstream Ltd (“Upstream”) and Vermont Petroleum Ltd (“Vermont”). All three are incorporated in the Isle of Man. A

67 The main orders under challenge are those in para 5 of Moylan J’s order of 16 November 2011 by which he ordered the husband to “transfer or cause to be transferred” to the wife: (i) four London properties and an interest in a fifth all “held in the name of” PRL; and (ii) two London properties “held in the name of” Vermont. Para 5 did not also relate to properties held by Upstream, but Upstream appeals (as do PRL and Vermont) against other orders made by the judge, including his costs orders, although there is no need to refer further to them in this judgment. B C

68 In making the para 5 orders the judge was purporting to exercise the jurisdiction conferred upon the court by section 24(1)(a) of the Matrimonial Causes Act 1973, which provides so far as material:

“On granting a decree of divorce . . . the court may make any one or more of the following orders, that is to say— (a) an order that a party to the marriage shall transfer to the other party . . . such property as may be so specified, *being property to which the first-mentioned party is entitled, either in possession or reversion . . .*” (Emphasis supplied.) D

69 A question that exercised the judge, and this court on the appeal, was whether the properties the subject of his para 5 orders were “property” to which the husband was so entitled. Only if they were did the judge have jurisdiction to make the orders. Thorpe LJ has concluded that the judge was entitled to regard the properties as such “property” and so make the orders that he did. E

70 I respectfully disagree with Thorpe LJ’s reasoning and conclusion and would allow the appeals against the para 5 orders. I consider, with respect, that the judge fell into fundamental error. He made no primary findings justifying any conclusion other than that the properties were part of the assets of, and belonged beneficially to, the companies that respectively owned them. He held, however, that the husband’s sole control of the companies as their 100% owner enabled him to deal as he wished with the companies’ assets, and that it followed that the husband was therefore the beneficial owner of such assets and so “entitled” to them within the meaning of section 24(1)(a). F G

71 In so holding the judge was wrong. He should have held that section 24(1)(a) had no application to the para 5 properties and gave the court no jurisdiction to make the orders. That is because the shareholders of a company have no interest in, let alone entitlement to, the company’s assets and the same applies to a shareholder who is a 100% owner of the company. The distinction between the respective legal personalities, rights and liabilities of a company and those of its shareholders is as valid today as when the House of Lords decided *Salomon v A Salomon & Co Ltd* [1897] AC 22 and it applies as much in the disposition of ancillary relief proceedings as in other proceedings. The judge, however, simply equated the companies with the husband and regarded their assets as his. H

[2013] 2 AC

433  
Prest v Prest (CA)  
Rimer LJ

A *The judge's judgment*

72 The judge gave a very full judgment in which he explained that the husband's failure to co-operate in the disclosure process and to give clear evidence prevented him from giving a comprehensive account into which all the pieces of the jigsaw could be fitted. I do not question that such lack of co-operation made the judge's task more difficult than it should have been.

B The judge's findings of central importance are, however, as to the companies, their ownership and their assets and I must explain them.

73 The structure of the many companies in the Petrodel group is complicated but the relevant shareholdings are as follows. A Nevis company, Petrodel Resources (Nevis) Ltd ("the Nevis company"), holds 100% of Upstream. The Nevis company also holds 97.5% of a Nigerian company called Petrodel Resources (Nigeria) Ltd ("PRNL"), the other 2.5%

C being held as to half each by the wife and Helen Davies (the husband's sister). PRNL holds 99.99% of PRL, with the other 0.01% being held by Margaret Wilson, the wife's mother; and PRNL and PRL respectively hold 51% and 49% of Vermont. The husband's evidence was that the Nevis company (which owned 97.5% of PRNL) was itself wholly owned as to 100% by PRNL. The judge said (para 55(c)) that "this alleged circular ownership is but one of the puzzling features of this case".

D He also, however, referred to the different evidence of Mr Le Breton (who had worked in the Petrodel group until 2008), which was that the Nevis company was not owned by PRNL but that its shares were held for the husband's benefit through a trust; and at the hearing of the appeal, Mr Amos QC, for the appellants, told us that the Nevis company is now owned by a Nevis entity called the Family One Foundation, whose shares are held on trust for, amongst others, the husband. There are other companies in the group to which the judge referred in his judgment, but it is unnecessary to refer to them. The appeals are only about, or only directly about, PRL, Vermont and Upstream.

74 The judge said (para 55(b)) that PRNL was "effectively a holding company for [PRL]". Both companies were incorporated in 1993. PRL was the main trading company of the group, its accounts showing that it started trading in 2002. Its original shareholders were the husband and the wife and its first directors were relatives of the wife. By the trial, its shareholding was held as I have described and its directors were Ms Walters and Mr Murphy, the latter providing his services through a management company. The judge found that the husband began working full-time in the group in 2005, as chief executive officer of PRL. The judge said of PRL, at para 22, that:

G "[it] has been involved in the oil business in what are called downstream activities, namely trade and transportation, and more recently has been involved in upstream activities, namely oil exploration and production. Accounts for the years 2005, 2007 and 2008 . . . show turnover of between \$572m and \$1,400m and profits of between just under \$3m and approximately \$6m."

H 75 The judge referred, at para 77, to the husband's evidence that although PRL was still trading in gasoline, it had not undertaken a trade since one effected in early 2010 for which payment remained due. Documents produced during the trial showed, however, that "substantial trades have continued to be made by companies within the group being,

434

Prest v Prest (CA)  
Rimer LJ

[2013] 2 AC

probably, either [Vermont] and/or [the Nevis company]”. Both PRL and Vermont are, or were, trading companies. A

76 The former matrimonial home, 16, Warwick Avenue, London W2, was bought in PRL’s name in 2001. The judge said, at para 228, that if it were necessary so to decide, he would have held that Warwick Avenue was held by PRL on trust, or as a nominee, for the husband (he had earlier set out the evidence justifying such a finding) and (by para 3 of his order) he ordered its transfer to the wife. There is no appeal against that order, permission to appeal having been refused. As for the seven other London properties respectively held by PRL and Vermont which are the subject of the appeals, the judge made no like finding that any was held either on trust, or as nominee, for the husband although he had been pressed by the wife to do so. The judge explained that all the London properties were the subject of a charge by their respective corporate owners to BNP Paribas and that all save for Warwick Avenue were also charged to Ahli United Bank (UK) plc. The charged properties had a combined gross value of £11.3m, the indebtedness to Ahli being just under £1.9m. In paras 80–84 and 159–161, the judge explained the evidence as to the indebtedness to BNP Paribas but was unable to make a clear finding as to its amount. On one view, it may have been about \$7.6m. B C

77 The judge made an important finding as to the husband’s role in the governance of PRL. He referred to Mr Le Breton’s evidence that its directors acted pursuant to the husband’s instructions and to the terms of the husband’s employment contract as chief executive officer, which gave him full discretion as to the management of PRL’s affairs “in so far as [his] actions are for the benefit of the company and its shareholders”. He said, at para 70, that: D E

“I am satisfied that the directors of the group, including Mr Murphy, act in accordance with instructions given by or on behalf of the husband. The husband was unable in his oral evidence to provide details of any specific occasion when the directors had not acted in accordance with his instructions.” F

The judge thus found the husband to be a “shadow director” of PRL (compare section 251(1) of the Companies Act 2006), although he did not so describe him. G

78 The judge explained (at paras 71–74) the unsatisfactory evidence in relation to the directors’ current account shown in the PRL accounts, which showed liabilities to directors of just over \$10m for each of 2008 and 2009. This appeared to baffle the husband in his cross-examination, who at one point denied that he had a current or loan account with PRL as he was not a director. Despite this, the judge found it to be clear that “there is no person other than the husband to whom such sums could or would be due” and he referred to the husband’s acknowledgement elsewhere that he did have a director’s loan account. The judge then said, at paras 74–75: H

“74. The loan account has not been produced. Indeed, there is no direct evidence at all as to how the husband’s income and bonuses are dealt with in PRL’s accounts save possibly for references to directors’ remuneration which, given the amounts, are very unlikely to relate to actual directors. Further, the amounts given for directors’ emoluments

[2013] 2 AC

435  
Prest v Prest (CA)  
Rimer LJ

A are significantly less than the annual amounts spent by the husband on himself and his family and for which there appears to be no significant source other than PRL . . . The husband told me that he does not know how his income and bonus are dealt with in the accounts. When he was asked whether he receives any benefits from PRL other than his salary he replied that this is an accounting question. When asked in cross-examination to explain how some of the payments relating to the wife's mother were for the company's benefit, the husband replied that she was a shareholder. When Mr Todd asked whether a dividend had been declared, the husband said he was not sure how this benefit or these payments had been received.

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C "75. It was suggested to the husband in the course of his cross-examination that he just draws from PRL whatever he and his family need. He denied this but when then asked how he paid for school fees he said he would either pay it himself or he would take a director's loan. The only company of which the husband is a director is [PRNL]. There is no indication that this company has had sufficient resources to enable school fees to be paid. As the husband's employment contract permits him to set his own bonus, the whole exercise is artificial in any event as, if required, he could simply ascribe all payments made for his or his family's benefit as being part of his bonus. I have no doubt at all that the husband does, indeed, just draw from PRL whatever he and his family need, as and when they need it."

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E The judge referred, at para 92, to the fact that school fees, other educational costs, holidays in Italy and the cost of a chalet in Meribel had been paid by PRL out of its Royal Bank of Scotland account in the Isle of Man.

F 79 The judge made certain findings with regard to the husband's interest in the Petrodel group between paras 199 and 210. He concluded as follows, at paras 208–210:

G "208. I spent some time during the hearing, and longer since, trying to make sense of what appeared to be inconsistent themes in the husband's evidence and seeking to identify how they might be reconciled. Ultimately I have decided that I have been seeking to impose an unduly legalistic framework onto a relatively simple factual situation, namely that the husband operates and controls the Petrodel group and its assets for the benefit of his immediate family. The wealth within the group is the family's wealth to which the husband has unrestricted access. I am satisfied that the husband is both the effective owner and controller of the whole of the Petrodel corporate structure. In coming to this conclusion I accept the evidence of Mr Le Breton that the husband told him that he is the ultimate beneficial owner and I also accept his apposite phrase that Petrodel is the husband and the husband is Petrodel. In my judgment, the Information Memorandum as found by the wife accurately describes the husband as the owner.

H "209. The extent to which the companies are the husband's nominees is demonstrated by the term in his contract . . . that he 'shall be assumed to report to the board for issues pertaining to the management of the company, yet you shall have and employ full discretion with the way you manage all the affairs of the company in so far as your actions are for the benefit of the company and its shareholders'. As the husband is the only

436  
Prest v Prest (CA)  
Rimer LJ

[2013] 2 AC

effective shareholder, the husband is managing the affairs of the company solely for his benefit, hence the complete lack of any need for real board control. The husband has clearly used the companies to meet his and his family's personal expenditure, as well as his legal costs in these proceedings, without any inhibition. The lack of proper accounting also demonstrates the lack of any board control or supervision.

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"210. I am also satisfied that all the assets held within the companies are effectively the husband's property. He is able to procure their disposal as he may direct based again on his being the controller of the companies and the only beneficial owner. There are no third party interests of any relevance because the other shareholders are merely nominal with no expectation of benefiting from their shareholdings."

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80 Those paragraphs include a clear finding that the husband was the ultimate owner of the group and so in a position to control its affairs. The judge described him as the "effective owner" of the group and I read the "effective" as reflecting that, whilst the ultimate shareholding was not vested in the husband, he was nevertheless its sole controller. Given the evidence he heard, that finding was unsurprising and the appeals involved no challenge to it.

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81 The question in the appeal is not, however, as to the ownership of the ultimate shareholding that conferred control of the group companies, but as to the ownership of the properties the subject of the para 5 orders. There is no dispute that they were vested in and held by one or other of PRL and Vermont and so, prima facie, were *their* assets. They could not therefore be made the subject of the para 5 orders unless the true analysis was that, although held by the companies, they were properties to which the husband was "entitled, either in possession or reversion" within the meaning of section 24(1)(a). In para 210 the judge found that all the Petrodel group's assets were "effectively the husband's property". I interpret the "effectively" as reflecting the judge's reluctance, at any rate by that point in his judgment, to go so far as to say that they *were* his property.

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82 During the argument, Thorpe LJ suggested that the judge probably there meant that the assets belonged to the husband "in reality". With respect, that is to substitute for the judge's own imprecise wording a phrase of like imprecision. The question for the judge was in principle simple. Section 24(1)(a) obviously focuses only on property to which the respondent spouse is beneficially entitled, the location of the legal title being immaterial. The assets held by the companies (including therefore the properties) either belonged beneficially to the companies or to the husband. No third alternative was canvassed. Before the judge could make an order under section 24(1)(a) in relation to the various London properties, he had to be satisfied that they were the husband's beneficial property: and a finding that were "effectively" his property (whatever that may mean) was not good enough. The judge appears there to have been basing that finding on no more than his primary finding that the husband's sole control of the Petrodel group carried with it the authority to deal with all the group's assets. The critical question, however, is whether such control meant that the husband was in fact the beneficial owner of the companies' assets and, therefore, that the companies had no beneficial interest in them. The judge has not yet answered that question unambiguously, although these paragraphs were not

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H

[2013] 2 AC

437  
Prest v Prest (CA)  
Rimer LJ

A his last word on the topic. The ordinary principle is that the shareholders of a company (including a shareholder with 100% control) have no interest of any nature in the company's assets.

B 83 In paras 211–230, the judge explained the award that he proposed to make in favour of the wife. In assessing the husband's financial resources, which was the first issue upon which the judge embarked, he referred again to the husband's failure to give full and frank disclosure of his resources and held that he was entitled to draw adverse inferences against him. In making his assessment, the judge took into account the value of his interests in the Petrodel group and explained, in para 215, that he was satisfied that the husband had continued through Petrodel to trade successfully since 2004, the accounts of PRL suggesting that it had made a net profit for the four years 2005 to 2008 of \$19m. The judge concluded that the husband "must be worth at least \$60m, i.e. approximately £37.5m". That finding reflected that the husband's wealth included the value of his ultimate shareholding in the Petrodel group. The judge decided that a fair award to make to the wife was for her to receive resources totalling £17.5m.

D 84 The judge turned, at para 217, to consider how that award should be structured. Mr Todd QC, for the wife, had sought a lump sum order, with property transfer orders in respect of the London properties and the company shares in part satisfaction. Counsel for the husband and the companies had respectively submitted that no direct orders could be made in respect of the shares or properties held by the companies unless the judge was able to "find the requisite impropriety as set out in [*Ben Hashem v Al Shayif* [2009] 1 FLR 115, a decision of Munby JJ]". That was a decision to the effect that, without such a finding, it was not open to the court to pierce the Petrodel companies' veils of incorporation and so identify the companies with the husband; and that, without such piercing and identification, there was no basis for an order directly in respect of shares and/or properties held by the companies, because such assets were their assets, not the husband's. The judge added that there was "also the separate issue of whether the companies hold the shares and properties on trust for the husband or as his nominee". If the answer to that was yes, the route to the order sought by Mr Todd was straightforward: because if such shares and/or properties were so held, they were plainly "property to which [the husband was entitled], either in possession or reversion" within the meaning of section 24(1)(a). In the event, the judge declined to answer that latter question in the affirmative.

E F G 85 Importantly, the judge also expressly rejected the case that there was any relevant impropriety or, therefore (as might be thought to follow), any case for piercing the corporate veils of the Petrodel companies. His reasons were these, at paras 218–219:

H "218. Dealing first with the issue of impropriety, has the wife established that the company structure has been used to avoid or conceal liability? In my judgment the company structure in this case was set up and has been used for conventional reasons including wealth protection and the avoidance of tax. Mr Todd is right, for example, to point to the reference in the annex to the husband's Form E to his transferring his shares in [PRNL] to the Nevis company because he was involved in litigation. However, this does not result in the company structure being used to conceal or avoid liability. It is seeking to provide a degree of

438

Prest v Prest (CA)  
Rimer LJ

[2013] 2 AC

protection for the wealth, which may or may not be effective depending on the nature of the rights retained by the husband. He is also right to point to the company structure effectively being the husband's money box which he uses at will. This might be contrary to accounting or company law principles but any disregard of those principles does not, in my view, mean that the structure is being used to avoid or conceal liability. From the husband's perspective the wealth and the corporate structure is and remains his but at the same time he is able to take advantage of the tax and other benefits of holding it within a corporate structure. A  
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“219. I also do not accept Mr Todd's submission that the undoubted use by the husband of the corporate structure to seek to deny that the companies or their assets are his resources or are assets available to him amounts to impropriety as that word is used in the authorities. It is simply a husband giving false evidence. Accordingly, I do not consider that the wife has established impropriety in this case.” C

86 Having held that the conditions for piercing the corporate veil were not satisfied, the judge nevertheless went on to hold that the husband was “entitled” to the relevant properties within the meaning of section 24(1)(a) and, therefore, that he could and should make the para 5 orders for the transfer of the properties held by PRL and Vermont. That reasoning substantially repeated what the judge had found in paras 208–210 (quoted above) but he re-reasoned the issues and I must set out what he said, at paras 220–228. I should also first set out his interpretation, in para 193, of Bodey J's decision in *Mubarak v Mubarak* [2001] 1 FLR 673: D

“193. In essence, Bodey J decided, notwithstanding the comments in [*Crittenden v Crittenden* [1990] 2 FLR 361], that property is within the scope of section 24 if it is property to which a spouse is to be treated as being ‘entitled’ which can include property held by a company of which a spouse effectively has complete, or perhaps more accurately a sufficient degree of, control or ownership. Although the effect is to pierce the corporate veil it is, in my view, a question of statutory interpretation. Does the power given to the court by the Matrimonial Causes Act extend to property held through a corporate or other structure to which one spouse is (in effect) entitled through the use of rights and powers available to him and her? Bodey J decided that if a party has effective control of the legal or corporate structure and, because third party interests would not be prejudiced, is also the only person effectively entitled to the benefit of the property, then that property is within the scope of section 24 as being ‘property to which . . . (that) party is entitled in possession’.” E  
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“220. In my judgment, the question I must decide is whether the relevant shares and properties are ‘property’ to which the husband ‘is entitled, either in possession or reversion’. It is plain that the word ‘property’ is extremely broad and covers all forms of property. The crucial words are, therefore, ‘entitled either in possession or reversion’, words which have not been the subject of any particular analysis. I agree with Mr Wagstaffe that if a lay person was asked the question whether a husband who owns a company which owns a house is entitled to the house, they would reply in the affirmative but I also agree with him that I must decide from a legal perspective whether as a matter of statutory interpretation, as applied to the facts of this case, the answer is the same. H

[2013] 2 AC

439  
Prest v Prest (CA)  
Rimer LJ

A In undertaking this task, I am persuaded that I should apply [*Nicholas v Nicholas* [1984] FLR 285] and what appears to me to be Bodey J’s reasoning in *Mubarak v Mubarak* as set out in para 193 above.

B “221. As I have indicated, I am satisfied that the husband has complete control over the respondent companies both in terms of their operation and in terms of their management. He is the controlling force and the directors clearly act on his instructions. They are, to use the words of Munby J from *Ben Hashem’s* case, the husband’s ‘stooges’ or ‘ciphers’. I could also adopt the following passage from Lord Denning MR’s judgment in *Wallersteiner v Moir* [1974] 1 WLR 991, 1013: ‘He was in control of them as much as any “one-man company” is under the control of the one man who owns all the shares and is the chairman and managing director . . . He controlled their every movement. Each danced to his bidding. He pulled the strings.’

C “222. There is no evidence that any of the directors of any of the companies acted other than in accordance with the husband’s instructions. There is good evidence provided by Mr Le Breton that the corporate structure, the whole of it, was managed as the husband directed and I remind myself, again, of the terms of the husband’s contract of employment. Payments were made for the benefit of the husband and his family without any apparent attempt to see whether the husband was entitled to such payments. I have seen no reference to any determination being made of the husband’s bonus. The husband does not know how his income and bonus were accounted for in the accounts. There is reference to director’s remuneration but the amounts are substantially less than the amounts paid to the husband or for the benefit of the family. The husband himself accepts that the structure is such that he is able to effect whatever might be required to meet his obligations under Itsekiri customary law, be it transferring shares to his siblings or otherwise. How, I ask, would the husband be able to achieve this if he is not the effective owner of the whole group and of the companies?

D “223. The superficial nature of the company structure and the extent of the husband’s control can be seen from his contract of employment and the other matters to which I have referred. It is also clear to me that the husband looks at things from the perspective of obligations or need. The legal structure is of secondary importance save that clearly any such structure must be capable of being used to enable his obligations and/or his needs to be met. So, for example, if the husband’s customary law obligations require him to give his siblings shares in the company, then the structure must be such as to enable him to do so. I am confident that Mr Elusogbon did tell the husband not to worry because, indeed, the structure which holds the wealth and assets can be adjusted as required, or to put it another way the wealth held within the structure is freely available to be distributed as the husband directs. It is difficult to see how this could be achieved by him unless he controls, in English law terms, both the legal and the beneficial interest in the worth. Further, if the husband not only has complete control but also is the sole effective owner, which I have found that he is, in my judgment, again in English law terms, I would see this as equating to beneficial ownership.

H “224. In summary, therefore, in my judgment the answer to the question of whether an asset held in the legal name of a company is

440  
Prest v Prest (CA)  
Rimer LJ

[2013] 2 AC

property which falls within section 24(1)(a) depends on the facts of the case. It is right, of course, that as a matter of company law a shareholder only has a right of participation in accordance with the articles of association and has no right to any particular item of property. But, what if the shareholder is, in fact, able to procure the transfer to them of a particular item of company property, such as a matrimonial home, as a result of their control and ownership of the property and the absence of any third party interests. Am I to ignore the reality that the shareholder is able to procure the transfer to them of that property for the purposes of deciding whether it is property to which they are entitled?

“225. In my judgment, it would be contrary to the purpose and intention of the legislation if I were to do so. The legislation is intended to ensure that marital wealth can be distributed by the court between the parties in a fair and just manner. In this case the husband can without inhibition acquire the properties and shares which the wife seeks because, in effect, the companies are his nominees or agents. As a result, in my judgment, the husband is ‘entitled’ to the shares and properties held in the names of the corporate respondents because there is no impediment, including third party interests, to his enjoying the full benefit of these assets. They are held by the companies for the husband because the corporate structure is being used as a repository for the family wealth. Effectively the husband, in respect of the companies and their assets, is in the same position he would be in if he was the beneficiary of a bare trust or the companies were his nominees. There exists no legal impediment to his procuring the transfer of the assets held by the companies into his name. In the language of the cases, they are his ‘alter ego’.

“226. I do not consider that the company law principles, relied upon in particular by Mr Wagstaffe, determine the scope of the powers given to the court under the Matrimonial Causes Act. In my view, if a party is both the effective controller and the effective owner of a company it does not strain the language of the Matrimonial Causes Act to decide that he is ‘entitled . . . in possession’ to an asset held by that company such as the former matrimonial home. This interpretation accords with what was said in *Nicholas v Nicholas*. As identified in *Mubarak*, he is entitled to the asset in possession because he has the right and ability to procure its transfer to him for his own use. This is not to challenge the principles established by *Salomon* or *Adams v Cape Industries plc* or the other authorities referred to in *Ben Hashem’s* case. It is to recognise, as was said by Slade LJ in the *Cape* case [1990] Ch 433, 536G, with my emphasis: ‘save in cases which turn on the wording of particular statutes, the court is not free to disregard the principles of *Salomon* merely because it considers that justice so requires.’

“227. As a matter of general law the companies in the Petrodel group may be separate legal entities but, in my judgment, under the Matrimonial Causes Act their assets fall within the scope of section 24 as a result of the complete nature of the husband’s control and ownership. As Mr Wagstaffe submitted, the wife can have no stronger claim than the husband’s. In this case, as a result of control and ownership, the husband is able to procure the transfer of the properties and shares into his sole name or as he may direct. The case was argued on behalf of the husband and the companies on the basis of the husband’s rights as against the

[2013] 2 AC

441  
Prest v Prest (CA)  
Rimer LJ

A company. Apart from the alleged interests of the husband’s siblings, which I have rejected, it has not been asserted that any other rights or interests would or should inhibit me from making the orders sought by the wife.

B “228. I also propose to deal specifically with the position of Warwick Avenue. I am satisfied that the moneys used in the purchase and refurbishment of that property came from the husband. There is no evidence that he lent this money to the company, nor that he gifted it to the company. Accordingly, if it were necessary for me to decide the issue, I would decide specifically that the company holds that property on resulting trust for the husband.”

*The appeals*

C 87 I make first some observations about section 24(1)(a) of the Matrimonial Causes Act 1973. It is a clear and uncomplicated provision. The task that section 24(1)(a) sets the court is to identify “property to which [the respondent spouse] is entitled, either in possession or reversion”, and then to consider whether to make a property adjustment order in relation to any property so identified. The “property” to which the paragraph refers  
D means property to which the respondent spouse is beneficially entitled. The nature of the court’s inquiry as to the beneficial ownership of a particular asset will be the same as it would be in a case not arising under the section 24 jurisdiction: “property” for the purposes of section 24(1)(a) cannot and does not mean something different from “property” in other contexts. The inquiry will show that the asset in question either is, or is not, property of the respondent spouse. If it is, it is vulnerable to the exercise of the section 24  
E jurisdiction. If it is not, it is not.

F 88 This takes me back to para 218 of the judge’s judgment. The judge’s rejection there of the submission that the establishment of the Petrodel structure involved any impropriety such as to entitle the court to pierce the companies’ respective corporate veils was crucial to the disposition of the inquiry as to the beneficial ownership of the assets held by the appellants. The relevance of the “need for impropriety” submission was that it was *only* if relevant impropriety could be shown that the corporate veils could in consequence be pierced, following which it would then be open to the court, so far as it might think fit, to treat certain of the companies’ assets as the husband’s and make transfer orders in respect of them under section 24(1)(a).

G 89 The judge, however, rejected the submission that there had been any relevant impropriety and instead found that the company structure “was set up and has been used for conventional reasons including wealth protection and the avoidance of tax”. That can mean only that he was making a conventional finding that the “wealth” of the companies (which I presume means their assets) belonged beneficially to them. That is because, if he was instead finding that their “wealth” had always belonged, and continued to belong, not to the companies but exclusively to the husband, he could in  
H consequence only have found that the companies were mere nominees for him, which would undermine his finding as to the legitimacy of the establishment and use of the company structure. The judge underlined this by noting that the husband’s use of the companies “effectively [as his] money box . . . at will” might have been contrary to accounting or legal principles

442

Prest v Prest (CA)  
Rimer LJ

[2013] 2 AC

but that such use did not undermine the legitimacy of the establishment of their structure. He was implicitly saying that the companies were entities with assets of their own the use and disposal of which might be constrained by law, as a company's assets are; and that the husband, perhaps improperly, had helped himself to their assets did not alter that. A

90 The last sentence of at para 218 is more difficult. The judge there said that whilst "from the husband's perspective" the companies' "wealth and corporate structure is and remains his", at the same time "he is able to take advantage of the tax and other benefits of holding it within a corporate structure". I am not confident that I understand what the judge was saying there. If he was saying that the companies' "wealth" in fact belonged (and, presumably, had always belonged) beneficially to the husband, it would follow that the husband was not entitled to take advantage of the suggested benefits of holding them within a corporate structure: the assets (and liabilities) would, on that basis, have belonged to him alone, the companies would simply have held the assets as his nominees and the incorporation of the companies could have achieved no relevant change in his personal position. If, however, the judge was simply saying (as I regard more probable, since otherwise para 218 would overall make no sense) that the husband was, at least in substance, the sole beneficial owner of the shares in the ultimate holding company and so had complete control of all the group companies and *their* respective wealth, there is no problem. He would then simply have been describing the commonplace circumstance under which the one-man owner of a company, or a group of companies, enjoys total control of its or their affairs. B C D

91 I therefore arrive at the judge's para 220 on the basis that he has not only made no finding that the assets held by the Petrodel companies were other than assets that belonged to them beneficially (as a company's assets do) but has in fact found (in para 218) that they did so belong. In para 220 the judge focused on the question that section 24(1)(a) posed for him and indicated that he derived guidance from *Nicholas v Nicholas* [1984] FLR 285 and *Mubarak v Mubarak* [2001] 1 FLR 673 as to how he should answer it. E F

92 The judge then again explained, in paras 221–223, how the husband had sole control of the Petrodel companies and how he exercised that control by being their sole (shadow) director and how he was "the effective owner of the whole group" (meaning, as I have said, that he had sole control of the shares in the ultimate parent, the Nevis company). At the end of para 223, he concluded that the combined facts of the husband's complete control and the fact that he was "the sole effective owner" equated to "beneficial ownership": and he was apparently there saying that those combined circumstances made the husband the sole beneficial owner of the companies' assets. If he was not saying that, I do not know what he meant; if he was saying it, his statement cannot stand with para 218. G

93 In paras 224 and 225, the judge made clear his findings that the husband *was* "entitled" to all the companies' assets, and that finding necessarily carried with it a finding that the husband was the exclusive beneficial owner of such assets and that the companies had no beneficial interest in them. The companies which, in para 218, the judge had found to be legitimately established "for conventional reasons including wealth H

[2013] 2 AC

443  
Prest v Prest (CA)  
Rimer LJ

A protection and the avoidance of tax” have, therefore, by para 225 become the husband’s nominees or agents in respect of his own assets.

B 94 The judge’s conclusion to that effect was based on his holding that the husband’s sole control of the companies’ affairs gave him the beneficial ownership of all the assets held by the companies. His view was that such a sole shareholder’s power over the assets of the company he owns is equal to property. It was his view that if (as in every case he will) a sole ultimate shareholder of a group of companies is in a position to procure the transfer to himself of any asset held by any of the companies, then, in “the absence of any third party interests”, any such asset is property to which the sole shareholder is “entitled” within the meaning of section 24(1)(a). The corollary must be that it is not property to which the company is entitled or in which the company has any beneficial interest: the company is, in such a case, merely holding its assets as the nominee of its 100% controller.

C 95 The judge summarised his findings in para 226. His conclusion was that the controller of a company who has the “right and ability” to transfer its assets to himself for his own use is “entitled in possession” to the asset. That does, the judge recognised, amount to treating the company’s assets as the controller’s rather than the company’s. But he did not regard it as amounting to a departure from the principles of *Salomon v A Salomon & Co Ltd* [1897] AC 22 since section 24(1)(a) authorised such an inroad into the *Salomon* principles. That last observation is a difficult one. If, as the judge appears to have considered, section 24(1)(a) is to be interpreted as meaning that, in the case of a company in the sole ownership of a single individual, all the assets of the company are “property to which [that individual] is entitled”, that logically involves no inroad into the *Salomon* principles at all: it simply means that the effect of section 24(1)(a) is that such a company owns beneficially none of the assets it holds, which instead all belong beneficially to its 100% owner. Such an interpretation, however, involves a misunderstanding of section 24(1)(a) and is wrong.

D E 96 In particular, if the judge regarded anything in *Nicholas v Nicholas* [1984] FLR 285 and *Mubarak v Mubarak* [2001] 1 FLR 673 as supporting his conclusion, he misunderstood them. Those cases had nothing to say about the ordinary meaning of section 24(1)(a) and neither suggested that it means anything other than I have indicated it means. The relevant statements in the *Nicholas* and *Mubarak* cases were directed to a consideration of the circumstances in which it might be appropriate for the court to “pierce the corporate veil” of a company and then to *treat* its assets as those of the husband for the purposes of section 24(1)(a). In the present case, however, the judge appears to have regarded the guidance in *Ben Hashem v Al Shayif* [2009] 1 FLR 115 as to when the corporate veil might be pierced as the applicable guidance and held, in paras 218 and 219, that there was no basis for piercing the veil. Such guidance differs from that in *Nicholas v Nicholas* [1984] FLR 285 and *Mubarak v Mubarak* [2001] 1 FLR 673.

F G H 97 I respectfully disagree with the judge’s reasoning and conclusion. Once he had rejected the submission that he could pierce the corporate veils of the companies in the Petrodel group, he had no choice but to find that assets of PRL and Vermont, including the London properties the subject of the appeals, belonged beneficially to PRL and/or Vermont respectively, and that none of such assets belonged beneficially to the husband. The judge’s

444

Prest v Prest (CA)  
Rimer LJ

[2013] 2 AC

different conclusion that such properties were, or were “effectively”, the husband’s property was based on reasoning that was internally inconsistent, contrary to principle and wrong. I shall now explain why in fuller detail. A

*Basic principles*

98 First, the appeals concern companies all incorporated in jurisdictions other than England and Wales. There was, however, no expert evidence as to any foreign law governing the operations of any of the companies and the appeals were argued on the basis that English law applied to their operations. B

99 Second, *Salomon v A Salomon & Co Ltd* [1897] AC 22 provides the highest authority for the principle that a duly incorporated company is a legal entity wholly separate from those who incorporate it, with rights and liabilities of its own; and there was here no suggestion that any of the group companies was other than duly incorporated. The principle established by the *Salomon* case is too well known to require elaboration. I shall cite just two short passages. Lord Halsbury LC said, at p 31: C

“Either the limited company was a legal entity or it was not. If it was, the business belonged to it and not to Mr Salomon. If it was not, there was no person and no thing to be an agent at all; and it is impossible to say at the same time that there is a company and there is not.” D

Lord Macnaghten said, at p 53:

“It has become the fashion to call companies of this class ‘one-man companies’. That is a taking nickname, but it does not help one much in the way of argument. If it is intended to convey the meaning that a company which is under the absolute control of one person is not a company legally incorporated, although the requirements of the 1862 Act may have been complied with, it is inaccurate and misleading: if it merely means that there is a predominant partner possessing an overwhelming influence and entitled practically to the whole of the profits, there is nothing in that that I can see contrary to the true intention of the 1862 Act, or against public policy, or detrimental to the interests of creditors.” E F

100 Third, as appears from the latter quotation, it makes no difference to the fact of a company’s separate entity that a single individual controls all its shares. That is, and always has been, a commonplace circumstance. Companies can now be, and often are, incorporated with a single member. At the time of *Salomon’s* case, the minimum number was seven and the *Salomon* company was incorporated with seven members, but the House made plain that it makes no difference to the separate existence of the company that all the shares are held in trust for one person who has full control over it: (see again per Lord Macnaghten, and also per Lord Herschell, at p 45, and per Lord Davey, at p 54. G

101 Fourth, it follows from the fact of the company’s separate identity that its property belongs beneficially to the company itself and in no sense belongs, either at law or in equity, to its shareholders, who have no interest of any nature, whether proprietary or otherwise, in its assets. If they are working members and are remunerated by the companies for their efforts, the money so paid to them will cease to be the company’s money and become H

[2013] 2 AC

445  
Prest v Prest (CA)  
Rimer LJ

A theirs; likewise if a dividend is lawfully declared and paid to them; and likewise again if, upon liquidation, the surplus assets after paying the creditors are divided between them. Until, however, any of such events occurs, the money or property hitherto held by the company does not belong to the shareholders but to the company. If authoritative support is required for that, see *Maccaura v Northern Assurance Co Ltd* [1925] AC 619, 626  
B where Lord Buckmaster said: “Now, no shareholder has any right to any item of property owned by the company, for he has no legal or equitable interest therein.” He might equally have said “no shareholder is *entitled* to any item of property . . .” And Lord Wrenbury said, at p 633: “the corporator *even if he holds all the shares* is not the corporation, and . . . neither he nor any creditor of the company has any property legal or equitable in the assets of the corporation.” (Emphasis supplied.) The latter  
C quotation has a particular resonance for present purposes. That a shareholder of company A, which in turns wholly owns company B, owns none of the assets of either company was also recognised by the House of Lords in *British American Tobacco Co Ltd v Inland Revenue Comrs* [1943] AC 335: see p 339, per Viscount Simon LC. A company’s beneficial ownership of its assets was similarly recognised by both Lords Justices in  
D *Nicholas v Nicholas* [1984] FLR 285 (the relevant dicta in that case, to which I shall return, are as to when it may be appropriate to pierce a company’s veil and to *treat* the assets as instead belonging to its controller) and was again recognised by the same two judges in *Crittenden v Crittenden* [1990] 2 FLR 361. For a recent recognition of the same principle, see *In re Coroin Ltd; McKillen v Mislend (Cyprus) Investments Ltd* [2012] BCLC 611, paras 50, 52 in a judgment of mine with which Tomlinson and  
E Lloyd LJ agreed.

102 The judge noted in para 220 that “a lay person” might think that a husband “was entitled” to a house owned by a company that he owned. A lay person might so think but he would be wrong. If the same lay person carried on a business through a company of which he was the sole owner, and caused the company to incur liabilities that it could not meet, he would  
F have no hesitation in asserting that the liabilities must be met exclusively by the company (by recourse exclusively to *its* assets) and (provided his shares were fully paid) had nothing to do with him personally. That is what limited liability is about.

103 Fifth, whilst in the second sentence of para 224 the judge appears rightly to have recognised that a shareholder has no interest in his company’s assets, he went on to hold that this principle is trumped if the shareholder’s  
G total control of the group empowers him to procure the transfer to himself of a “particular item of property”. The judge found that the husband held such power, which meant, as the judge further held, that such item therefore belonged to him not to the company. It was not even necessary for the husband first to procure the *exercise* of the power: its mere existence meant that the property belonged beneficially not to the company, but to the husband.

H 104 With respect to the judge, his “power equals property” reasoning is wrong. It is heretical to suggest that the total control that a single individual is (and will *always* be) entitled to exercise over the affairs of his one-man company is a feature resulting in the company’s assets becoming assets to which he is “entitled” and, therefore, to which the company is not entitled.

446

Prest v Prest (CA)  
Rimer LJ

[2013] 2 AC

“Entitlement” within the meaning of section 24(1)(a) can, as I have said, only mean beneficially entitled (the paragraph cannot, for example, extend to property vested in a spouse on trust for a third party). The logic of the judge’s reasoning appears, therefore, to be that a one-man company can never own assets beneficially but can only ever hold its assets as the nominee of its sole controller. That is what Lord Wrenbury said is not the law. A

105 The flaw in the “power equals property” approach is that it ignores the fundamental principle that the only entity with the power to deal with assets held by it is the *company*. Those who control its affairs—even if the control is in a single individual—act merely as the company’s agents. Their agency will include the authority to procure an exercise by the company of its dispositive powers in respect of its property, but those powers are still exclusively the company’s own: they are not the agents’ powers. When and if the agents act as such, and procure a corporate disposition, the property which immediately before the disposition belonged to the company will become the property of the donee. Until then, it remains the property of the company and belongs beneficially to no one else. The judge’s point that the agent is automatically the owner of all the company’s assets by the mere fact of his authority to procure the company to dispose of them to himself is astonishing and does not begin to pass muster. And why should it? The proposition was simply the fruit of a judicial attempt to shoehorn into section 24(1)(a) assets which manifestly do not fit there. The judge’s finding that the husband’s mastery of the companies meant that they and their assets were his, and that they were the equivalent of mere nominees or agents for him (see, for example, his para 225) could have been lifted directly from the argument of counsel for the respondents that was rejected in *Salomon v A Salomon & Co Ltd* [1897] AC 22, 28, 29. B C D E

106 That is probably all that needs to be said about the judge’s “power equals property” theory. I shall, however, add a little more. A further reason why the theory does not work is that the judge overlooked that even the one-man in such a company does not have unlimited power to procure the company to deal as he would wish with the company’s assets. He may in practice be able to do so, by procuring the payment of its money and the execution of corporate dispositions right, left and centre, all perhaps for nothing in return. But he will not be able to do so lawfully. Even he will be constrained by the capital maintenance provisions which limit such wholesale disposals. He cannot, for example, lawfully procure the making of distributions by the company save out of its distributable profits and, if he does, the distribution will be unlawful and void. I discussed such problems in *Inn Spirit Ltd v Burns* [2002] 2 BCLC 780, which concerned a one-man corporate group, in which the one-man purported to pay himself a dividend. The one-man is not in a position lawfully to distribute to himself the entirety of his company’s assets at any time. To revert to the judge’s para 225, there is a “legal impediment” to wholesale transfers by a company in favour of its one-man controller. Only when the one-man lawfully procures the exercise of the corporate power of disposition in his own favour is it possible to identify which property has ceased to belong to the company and has become his. F G H

107 Further, the judge ignored that the companies he was dealing with (at any rate PRL and Vermont) were trading companies. They became the wealthy entities they did through commercial dealings with third parties,

[2013] 2 AC

447  
Prest v Prest (CA)  
Rimer LJ

A and were apparently financed by third party banks who took security for their loans over the group assets. In the course of creating their corporate wealth, the companies will have incurred liabilities to such third parties as creditors. Taking PRL as an example, if the judge's theory that "power equals property" is right, and all PRL's apparent assets in fact belonged beneficially to the husband, it would follow that during its trading operations PRL would logically have been meeting its liabilities with the husband's money; and, if it ceased to do so and was put into creditors' liquidation by a dissatisfied creditor, the husband would be entitled to assert that none of its apparent remaining assets belonged to it, that they all belonged to him and that there was therefore nothing available for the creditors in the liquidation. Such a potential outcome is another absurd consequence of the judge's approach. If the judge was right, third parties would be unlikely ever to be willing to trade with one-man companies, since such companies could never be more than mere nominees for the individual who controls them, whoever that might be. The third parties would, however, also face the problem that they would often not know whether any particular company was or was not a one-man company, since they might not know whether its control was enjoyed by a single individual.

D 108 How does the judge's approach square with these considerations? With whom did the judge consider the companies' trading counterparties were dealing? The companies? The husband? We were told at the hearing of the appeals that separate judgment creditors' petitions had been presented in the Isle of Man against PRL by Mr Le Breton and Munin Navigation Co Ltd: see *Munin Navigation Co Ltd v Petrodel Resources Ltd* [2012] EWCA Civ 136 for an account of Munin's claim. As matters stand, the judge has made a finding of fact, binding on PRL, to the effect that none of the assets apparently held by PRL belongs to it beneficially. To what assets did he consider its creditors would be entitled to look for repayment of their debts?

E 109 For these reasons, I conclude that the judge was wrong to hold that the properties the subject of the para 5 orders belonged beneficially other than to PRL and Vermont respectively. He should have held that the husband had no beneficial interest in them and that they were therefore not "property to which [he was] entitled" for the purposes of section 24(1)(a).

F 110 I turn to the family proceedings authorities. Some support for the judge's decision might be said to be found in certain of them, although the judge did not deploy such support in the way he might have done. In my judgment, however, properly analysed, they provide no legitimate support. Certain of them contain dicta that I would regard as incorrect and which should not in future be followed or applied.

#### *The family authorities*

H 111 Perhaps the best support for the judge's decision (but not his reasoning) is in certain dicta in the judgments of this court in *Nicholas v Nicholas* [1984] FLR 285 (Cumming-Bruce and Dillon LJ). The husband was the 71% shareholder in two companies, with the other 29% held by his business associates. The wife sought a property adjustment order. One of the companies owned a property, Elmwood, which had been used in part as the matrimonial home and in part for commercial purposes. The judge ordered the husband to undertake to procure the sale by the company of Elmwood to the wife for approximately £105,000 and to pay £105,000 to

448  
Prest v Prest (CA)  
Rimer LJ

[2013] 2 AC

the wife to enable her to buy it. The husband declined to give the undertaking and appealed against the order. A

112 In contrast to the orders made by the judge in this case, the *Nicholas v Nicholas* order did not, therefore, seek simply to divert a company's property to the wife for a nil return and so purport to confiscate its assets for her benefit. The judge instead fashioned an order whose substance was that the husband was to buy Elmwood from the company at full value for her benefit. The husband's point on his appeal was that the judge had no jurisdiction to make such an order. In giving the first judgment, Cumming-Bruce LJ accepted that there was no jurisdiction to order the husband to give the undertaking but said that deficiency in the order could be overcome by simply ordering the husband to use his controlling vote in the company to achieve the sale. I do not understand on what basis it was thought that the court could have so ordered (and it turned out that there was none) but Cumming-Bruce LJ also explained how there was anyway a further problem. He referred to section 24, the property adjustment order section, and cited section 24(1)(a). He continued, so far as material, at pp 287–288: B  
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“On the facts of the instant case, the property known as Elmwood . . . is vested in the company which owns it, and a question arises whether, having regard to the shareholdings in the two relevant companies . . . it is proper for the court to pierce the corporate veil with the effect that though the company is the legal owner of the realty the court would disregard [sic] the corporate ownership and make an order which, in effect, is an order against the husband, the individual shareholder. Of course it is quite clear, and there is abundant authority, that where the shareholding is such that the minority interests can for practical purposes be disregarded, the court does and will pierce the corporate veil and make an order which has the same effect as an order that would be made if the property was vested in the majority shareholder. But in the instant case it is not possible to take the view that the minority interests in either company can be thus disregarded. The shareholdings . . . are of such a character that the minority interests are real interests and it would not be an appropriate case in which the court should exercise its power to pierce the corporate veil. That being so, as . . . Elmwood is vested in the company and the company's ownership has to be respected, is it an appropriate use of the power to order a lump sum under section 23 to add to the order for a lump sum an obligation imposed upon the husband to procure the transfer by the company of the company's property to the wife by way of sale, the purchase money being the sum ordered by way of lump sum? D  
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“I am satisfied that, although I perfectly understand the reasons that led the judge to take the view that such an order, made as he thought by way of undertaking, should be made, having regard to the terms of section 24 when read with the terms of section 23(1)(c) [which empowers the court to order the payment of a lump sum], it is not open to the court to supplement the express powers specified in section 23(1)(c) and section 24(1) in such a way as to exercise an inherent power, the effect of which will be to force a third party, to wit the company, to sell property vested in the company by way of sale to the petitioner. The difficulty, H

[2013] 2 AC

449  
Prest v Prest (CA)  
Rimer LJ

- A I feel, is that Parliament has in section 24(1)(a) specifically limited the property that shall be the subject of a property adjustment order and has limited it to property which is property to which the first-mentioned party is entitled in possession or reversion. Clearly, no order could be made in respect of Elmwood, the company's property, pursuant to section 24. Section 23 is in terms drafted in such a way as to limit it simply to the obligation to pay a lump sum. I am unable to hold that I can collect from
- B section 23, when read with section 24, any power to order, as ancillary to an order for a lump sum, an order imposing an obligation upon a respondent to procure that a third party in whom the property is beneficially vested to divest itself of that property by way of sale to a petitioning wife, whether the machinery be by exercise of the majority shareholder's voting power or otherwise.
- C "For those reasons, though with reluctance, I take the view that there was no power to make the order that the judge made in respect of the transfer of Elmwood, whether by way of undertaking which, as I have already explained, was not an appropriate form of order, or by way of a direct order ordering the respondent to use his controlling vote in [the relevant company] to cause the sale of the company's property to the
- D petitioner. For those reasons I would hold that that very important feature of the judge's order should be varied."

113 Cumming-Bruce LJ then engaged in a discussion as to whether the court should vary the lump sum order of £105,000, none of which is material. Dillon LJ said, at pp 292–293, that he entirely agreed and, so far as material, continued:

- E "the case as presented in this court is presented on a significantly different basis from the case as understood by the judge. He plainly understood, as did counsel for the wife, that the husband was prepared to undertake, if the judge took the view that Elmwood should be transferred to the wife, that the husband would use his controlling interest in [the relevant company], to achieve such a transfer against payment by the wife
- F of the sum which the husband would provide by way of lump sum payment. On that understanding it is not surprising that he made the order he did. But it is now clear that there was no authority in counsel to offer any undertaking to the court and no undertaking has been given. Therefore, it is a question whether the court has power to order the husband to transfer the property to the wife against the payment of
- G £105,000, the property being vested in the company and not in the husband himself. If the company was a one-man company and the alter ego of the husband, I would have no difficulty in holding that there was power to order a transfer of the property, but that is not this case. The evidence shows that the husband only has a 71% interest in the company. The remaining 29% is held by individuals who . . . are not nominees but business associates of the husband . . . I find it quite impossible, therefore,
- H to ignore the corporate entity of [the company]. Therefore the order the judge made cannot stand."

114 Both judgments in *Nicholas v Nicholas* [1984] FLR 285 correctly recognised the existence of the separate legal personalities of the company that owned Elmwood and the husband and, therefore, that Elmwood was

450  
Prest v Prest (CA)  
Rimer LJ

[2013] 2 AC

not the latter’s property which could be the subject of an order under section 24(1)(a). For reasons that Cumming-Bruce LJ explained, with which Dillon LJ agreed, there was no jurisdiction in the court to make either the order the judge had made or a modified order to like effect requiring the husband to procure the sale of Elmwood to the wife. The present importance of the case lies, however, in the indication by both judges that: (i) (per Cumming-Bruce LJ, at p 287) in a case in which the husband is the majority shareholder in the company holding the relevant asset, and

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“the minority interests in the company can for practical purposes be disregarded, the court does and will pierce the corporate veil and make an order which has the same effect as an order that would be made if the property was vested in the majority shareholder”;

and (ii) (per Dillon LJ, at p 292):

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“If the company was a one-man company and the alter ego of the husband, I would have no difficulty in holding that there was power to order a transfer of the property, but that is not this case.”

Cumming-Bruce LJ asserted that there was “abundant authority” for his proposition. He did not, however, refer to any, the report recorded none as cited and during the overnight adjournment of the hearing of this appeal counsel identified no reported authority to which they considered he might have been referring.

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115 The judge took the view (at para 219) that the observations by Cumming-Bruce and Dillon LJ to which I have just referred were obiter and I agree with him. In *Hope v Krejci* [2012] EWHC 1780 (Fam) at [27], Mostyn J said he was not so sure, expressing the view that “the reasoning went to the very core of the decision not to pierce the corporate veil”. I recognise that the opening words of my quotation from Cumming-Bruce LJ’s judgment (“a question arises . . .”) might suggest that there was an issue in the appeal as to whether or not the veil could be pierced. I do not, however, understand that there was. The order under appeal was not a “veil piercing” order: it was not premised on any basis other than that Elmwood was an asset beneficially owned by the company. The order was directed at achieving its sale to the wife for full value and the issue on the appeal was whether there was jurisdiction to make such an order. There is no suggestion that it became part of the wife’s case in the Court of Appeal by a cross-appeal that the court could achieve a like result as that intended by the judge’s order by piercing the corporate veil and making a direct transfer order, and such a case would, on the facts, have been hopeless. The court’s decision was simply that there was no jurisdiction to make the type of order the judge had made and it had nothing to do with the circumstances in which the court can “pierce the veil”. In my view, the observations (per Cumming-Bruce LJ) as to “veil piercing” or (per Dillon LJ) as to the company being the husband’s alter ego were obiter.

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116 I interpret those observations as simply indicating the Lords Justices’ views that, in a case in which the husband is, either actually or in substance, the 100% owner of a company that owns an asset that might usefully be applied in or towards satisfaction of a wife’s ancillary relief claim, it will or may be open to the court to pierce the company’s corporate veil and then *treat* that asset as property of the husband so as to enable it to

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[2013] 2 AC

451  
Prest v Prest (CA)  
Rimer LJ

A be the subject of a section 24(1)(a) order. Mr Todd, for the wife, disagreed with that analysis and submitted that it was not what the Lords Justices were saying. Despite Cumming-Bruce LJ's express reference to "veil piercing" (which Mr Todd invited us to disregard), he said that both Lords Justices' respective observations were directed simply at applying a broad interpretation to the relevant language of section 24(1)(a), and that  
B submission perhaps reflected the judge's own understanding of them. They were, Mr Todd said, saying that property owned by a company of which the husband is, actually or in substance, the 100% owner is property to which the husband is "entitled" within the meaning of section 24(1)(a), whereas property owned by a company in which the husband has less than a 100% interest, and in which other shareholders have material shareholdings of their own, is not property to which the husband is so "entitled".

C 117 I respectfully reject that submission. There is no support for it in either judgment in *Nicholas v Nicholas* [1984] FLR 285, nor does it bear any sort of reasoned analysis. In essence, it amounts to an attribution to the Lords Justices in the *Nicholas* case of an adoption of Moylan J's approach that the 100% controller of a company is beneficially entitled to property held by it, whereas a company whose control is split between two or more  
D shareholders with independent interests will itself be the beneficial owner of such property. The suggestion that the beneficial entitlement to property held by a company will vary according to the number of controllers of its shares is absurd and neither Lord Justice in the *Nicholas* case was saying anything of the sort. All that they were saying—and Cumming-Bruce LJ used the very phrase—was that in a case in which a company is wholly owned by a husband, it will or may be open to the court to "pierce the  
E corporate veil"; and, having done so, by inference then to *treat* the property held by the company as belonging to him so as to enable it to be subjected to a section 24(1)(a) order. I say "by inference", because neither judge so spelt it out. But the inference must be right because the whole point of "veil piercing" is to identify the company with its controller. That is manifestly what Cumming-Bruce LJ was saying; and, although Dillon LJ did not also  
F expressly refer to "veil piercing", he did refer to the company as an alter ego of the husband, another traditional way of referring to the same concept.

118 I therefore reject Mr Todd's submission as to the sense of the dicta in *Nicholas v Nicholas*. Section 24(1)(a) cannot bite on a company's property, it can only bite on the husband's, and both Lords Justices recognised that. The critical question raised by the *Nicholas* case is, however, whether they were right in their respective dicta as to how recourse  
G to "veil piercing" might enable the circumnavigation of that obstacle in the path of a wife whose ancillary relief sights are set on an asset held by a company. That is a central question raised by these appeals and I shall shortly return to it.

119 We were also referred to *Crittenden v Crittenden* [1990] 2 FLR 361, also a decision of this court (by coincidence, also of Dillon LJ and Sir  
H Roualeyn Cumming-Bruce). It is necessary only to cite from Dillon LJ's judgment, with which Sir Roualeyn Cumming-Bruce agreed. Dillon LJ said, at p 364:

"The sections relied on by Mr Turner for the imposition of such a restriction are sections 24A and 37 of the Matrimonial Causes Act 1973.

452  
Prest v Prest (CA)  
Rimer LJ

[2013] 2 AC

Section 24A is concerned with the position where the court is considering ordering a sale of property. Subsection (1) provides: ‘Where the court makes under section 23 or 24 of this Act a secured periodical payments order, an order for the payment of a lump sum or a property adjustment order, then, on making that order or at any time thereafter, the court may make a further order for the sale of such property as may be specified in the order, being property in which or in the proceeds of sale of which either or both of the parties to the marriage has or have a beneficial interest, either in possession or reversion.’ That wording can relate to the shares in the company, Somerton Marine Ltd, which are owned in their own right by Mr or Mrs Crittenden, but it cannot relate to the assets of Somerton Marine Ltd.”

120 The point that Dillon LJ was making was that whilst the shares in the company owned respectively by Mr and Mrs Crittenden were “property” in which they had a beneficial interest, they had no such interest in the assets of the company and therefore no sale order in respect of such assets could be made. Dillon LJ was simply recognising the trite principle that a company’s assets belong beneficially to the company and not to its shareholders. It was suggested to us in argument that Dillon LJ was there departing from his obiter remarks in the *Nicholas* case and that, in agreeing with him, Sir Roualeyn Cumming-Bruce was departing from his own obiter remarks in the *Nicholas* case. I disagree. In the *Nicholas* case, Sir Roualeyn Cumming-Bruce made clear that the core principle is that a section 24(1)(a) order cannot be made in respect of a company’s property and Dillon LJ agreed. Both Lords Justices, albeit expressing themselves differently, also uttered the dicta to the effect that, in a one-man company case, recourse to “veil piercing” may enable a departure from the core principle that ordinarily applies. The court in the *Crittenden* case was not implicitly asserting that there was no scope for any “veil piercing” exception to the core principle. All it was doing was to refer to that principle without also referring to any exception to it. We are still left with the question of the correctness of the dicta in *Nicholas v Nicholas* [1984] FLR 285. I turn to that question.

121 The difficulty that the dicta pose is this. *Salomon’s* case [1897] AC 22 shows that a duly incorporated company (including a “one-man company”) is a legal entity separate from its members, with rights and liabilities of its own. Its assets belong beneficially to it, and it alone, and its members have no interest in them. This follows from the formal distinction between a company and its members, a distinction that applies equally to a one-man company and its controller. The first problem with the *Nicholas* dicta is that the court was saying that, in the case of a one-man company, its corporate identity can be ignored and its assets treated as belonging not to it but to the one man. That was apparently a heretical departure from the *Salomon* principle. On what basis could the *Nicholas* case endorse it?

122 As to that, it has also long been recognised that there may be circumstances in which it will be legitimate for the court to “pierce the corporate veil” of a company, as it has come to be called, thereby identify the company with those in control of it and, in its discretion, then to depart from the separate identity principle established in *Salomon’s* case. In such a case, the court may then be prepared to grant remedies against the company which, apart from any such veil piercing, might otherwise appear to be

[2013] 2 AC

453  
Prest v Prest (CA)  
Rimer LJ

A available only against those controlling it; or to grant remedies against the controllers which might otherwise appear to be available only against the company.

<sup>B</sup> <sup>123</sup> In my preceding sentence, I was substantially quoting from para 47 of the judgment of the court delivered by Lloyd LJ in the Court of Appeal's decision earlier this year in *VTB Capital plc v Nutritek International Corpn* [2012] 2 Lloyd's Rep 313 (the court also comprising Aikens LJ and myself). That case concerned a commercial dispute that raised several issues, one of which related to the court's jurisdiction to pierce the corporate veil and the effect and consequences of doing so. The issues were far removed from those of the present case but the importance of the judgment in the *VTB* case is that it recognised and affirmed the strict limitations identified in prior authority as to the only factual circumstances in which it will be open to the court to "pierce the veil". Thus it noted, at para 48, the unanimous (albeit obiter) view of the House of Lords in *Woolfson v Strathclyde Regional Council* 1978 SC (HL) 90, 96, that "it is appropriate to pierce the corporate veil only where special circumstances exist indicating that it is a mere façade concealing the true facts" (emphasis supplied). That limitation was expressly recognised by the judgment of this court in *Adams v Cape Industries plc* [1990] Ch 433, 539<sup>D-E</sup>, and the court had there also earlier said, at p 536<sup>G</sup>:

"save in cases which turn on the wording of particular statutes or contracts, the court is not free to disregard the principle of *Salomon v A Salomon & Co Ltd* [1897] AC 22 merely because it considers that justice so requires."

<sup>E</sup> <sup>124</sup> A decision not referred to in the *VTB* case, but to which we were and which it is convenient to notice, is that of this court in *Ord v Belhaven Pubs Ltd* [1998] 2 BCLC 447. That was a commercial case in which the issue was whether, in a case in which the defendant company was perceived as having insufficient assets to meet the claim, it was open to the court to substitute as defendants its parent company and another subsidiary which had taken over its trading operations. The judge had held that it was, relying in part on the view that it was open to her to lift the defendant's corporate veil and so enable the claim to be directed against the proposed new defendants. Hobhouse LJ, in a judgment with which Brooke LJ and Sir John Balcombe agreed, held that the judge was wrong. He said, at p 457, that she had approached the case on the basis that it was open to her to regard the companies as one economic unit and to disregard the distinction between them and then to say:

"since the company cannot pay, the shareholders who are the people financially interested should be made to pay instead. That of course is radically at odds with the whole concept of corporate personality and limited liability and the decision of the House of Lords in *Salomon v A Salomon & Co Ltd* [1897] AC 22."

<sup>H</sup> Hobhouse LJ then referred to *Woolfson's* case in the House of Lords and quoted, as I have, from Lord Keith (in [1998] 2 BCLC 447, the quotation is erroneously included as part of Hobhouse LJ's own words); and he referred to the Court of Appeal's decision in the *Adams* case as showing that "there must be some impropriety before the corporate veil can be pierced". He held

454

Prest v Prest (CA)  
Rimer LJ

[2013] 2 AC

that as the plaintiffs could not show the establishment of a façade concealing the true facts, or any other relevant impropriety, they could not satisfy the conditions for piercing the veil and the judge had been wrong to pierce it. That reasoning was, I consider, part of the ratio of the court’s decision as to why the judge had been wrong to make the decision she did. Sir John Balcombe, with his experience of both commercial and family law, did not qualify his agreement with Hobhouse LJ by indicating that different principles applied in family cases. A  
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125 Having digressed to *Ord*’s case, I return to the cases referred to in the *VTB* case as identifying the limitations upon the exercise of the veil piercing jurisdiction. *Trustor AB v Smallbone (No 2)* [2001] 1 WLR 1177 was a case in which, after referring to (amongst other cases) the *Woolfson* and *Adams* cases, Sir Andrew Morritt V-C said, at para 23, that

“the court is entitled to ‘pierce the corporate veil’ and recognise the receipt of the company as that of the individual(s) in control of it if the company was used as a device or façade to conceal the true facts thereby avoiding or concealing any liability of those individual(s).” C

I shall now set out the material parts of what the court in the *VTB* case [2012] 2 Lloyd’s Rep 313, paras 78–80 said about the next key authority, a decision in family proceedings: D

“78. *Ben Hashem v Shayif* [2009] 1 FLR 115 is a judgment of Munby J that includes between paras 144 and 221 a comprehensive discussion of the principles by reference to which the court may pierce the veil of incorporation. Between paras 159 and 164 Munby J restated the principles, which he summarised as follows. First, ownership and control of a company are not themselves sufficient to justify piercing the veil. Second, the court cannot pierce the veil, even when no unconnected third party is involved, merely because it is perceived that to do so is necessary in the interests of justice. Third, the corporate veil can only be pierced when there is some impropriety. Fourth, the company’s involvement in an impropriety will not by itself justify a piercing of its veil: the impropriety ‘must be linked to use of the company structure to avoid or conceal liability’ (a principle derived from *Trustor*). Fifth, it follows that if the court is to pierce the veil, it is necessary to show both control of the company by the wrongdoer *and* impropriety in the sense of a misuse of the company as a device or façade to conceal wrongdoing. Sixth, a company can be a façade for such purposes even though not incorporated with deceptive intent: ‘164 . . . The question is whether it is being used as a façade at the time of the relevant transaction(s). And the court will pierce the veil only so far as is necessary to provide a remedy for the particular wrong which those controlling the company have done. In other words, the fact that the court pierces the veil for one purpose does not mean that it will necessarily be pierced for all purposes.’ E  
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“79. Mr Snowden accepted that summary as a correct statement of the principles save that he questioned the correctness of the final principle, as to a requirement of necessity, as he also questioned the correctness of Warren J’s like point in [*Dadourian Group International Inc v Simms* [2009] 1 Lloyd’s Rep 601]. He said that it does not follow that a piercing of the veil will be available only if there is no other remedy available H

[2013] 2 AC

455  
Prest v Prest (CA)  
Rimer LJ

A against the wrongdoers for the wrong they have committed. In principle, we agree with Mr Snowden’s suggested qualification . . . With that qualification, we would, however, respectfully agree with Munby J’s summary of the principles.

B “80. Mr Snowden also submitted, in expansion of Munby J’s fourth principle (and reliance on what Munby J said at para 199) that it is not sufficient for veil piercing purposes merely to show that the company is involved in wrongdoing, for example that it is carrying out a fraud: there will be no question in such a case of the company being used as a façade. The relevant wrongdoing must be in the nature of an independent wrong that involves the fraudulent or dishonest misuse of the corporate personality of the company for the purpose of concealing the true facts. In principle, we agree with that too.”

C 126 The *VTB* case thus provided this court’s affirmation, drawing on earlier judgments of the House of Lords, the Court of Appeal (to which it could usefully have included a reference to *Ord’s* case), the Chancery Division and the Family Division, of the strict limits as to the exercise of the court’s jurisdiction to pierce a company’s corporate veil so as to enable it to disregard the separate corporate identity of a company and, instead, to identify it with its controllers. The decision showed that what is required is nothing less than proof of impropriety directed at the misuse of the corporate structure for the purpose of concealing wrongdoing. The judge in the present case did not have the advantage of the decision in the *VTB* case (either at first instance, per Arnold J [2011] EWHC 3107 (Ch), or in the Court of Appeal [2012] 2 Lloyd’s Rep 313). He did, however, have the benefit of Munby J’s decision in *Ben Hashem v Al Shayif* [2009] 1 FLR 115, which was in all material respects approved by this court in the *VTB* case, and, in para 217, he referred, as I have said, to the submissions made to him that he could not make orders against the shares or properties “unless I find the requisite impropriety as set out in *Ben Hashem’s* case [2009] 1 FLR 115”. He therefore directed himself correctly as to the conditions that must be satisfied before the court could pierce the veil of the Petrodel group companies and he rejected the submission that there had been any relevant impropriety. He found, therefore, that there was, for example, no question of the relevant properties having originally been beneficially owned by the husband and put into corporate names for the improper purpose of defeating the wife’s claims in her financial provision application. He found, by the application of criteria since affirmed in this court, that there was no factual basis upon which it was open to the court to pierce the corporate veil of any of the Petrodel companies.

H 127 With that discussion of the criteria for a judicial piercing of a corporate veil, I return to the dicta in *Nicholas v Nicholas* [1984] FLR 285. Both Lords Justices indicated their views that, if the respondent to an application for a property adjustment order is a husband with sole control of a one-man company, there is no difficulty in treating the company’s assets as *his* property for the purpose of meeting any such application. They were apparently saying that the total control of a company in the husband is *by itself* enough to entitle the court to pierce its veil and treat its assets as the husband’s.

456

Prest v Prest (CA)  
Rimer LJ

[2013] 2 AC

128 The legal basis for those assertions is unclear. There was an assumption in the argument before us that the “abundant authority” to which Cumming-Bruce LJ was referring was unreported authority in the Family Division, although he did not say so and unreported authority is anyway hardly authority. It is also improbable that Dillon LJ would have been so basing his own dicta: he had, by September 1983, been a Lord Justice for a year and before that his experience was made up of 31 years as a practitioner at the Chancery Bar and three years as a judge of the Chancery Division. A

129 Whilst neither side suggested it to us, I regard it as probable that Cumming-Bruce LJ, and also Dillon LJ, were basing themselves on (inter alia) dicta falling from Lord Denning MR in *Wallersteiner v Moir* [1974] 1 WLR 991. Cumming-Bruce LJ was later to refer to them in *In re A Company* [1985] BCLC 333, when delivering the judgment of this court (himself and Hollings J). He said, at pp 337–338: B

“In our view the cases before and after *Wallersteiner v Moir* [1974] 1 WLR 991 show that the court will use its powers to pierce the corporate veil if it is necessary to achieve justice irrespective of the legal efficacy of the corporate structure under consideration. As Lord Denning MR said [at p 1013], the companies identified were distinct legal entities and the principles of *Salomon v A Salomon & Co Ltd* [1897] AC 22 prima facie applied. But only prima facie. On the facts of the *Wallersteiner* case, the companies danced to Dr Wallersteiner’s bidding. Buckley LJ disagreed on the facts about the position of IFT, but Scarman LJ held that the evidence disclosed liability in Wallersteiner on the ground that he instigated the loan of £50,000.” C

130 The difficulty with that, however, is that Lord Denning MR’s dicta in relation to veil piercing (as similarly also advanced by him in *Littlewoods Mail Order Stores Ltd v McGregor* [1969] 1 WLR 1241, 1254) were the subject of consideration by this court in the later decision *Adams v Cape Industries plc* [1990] Ch 433, 543, where the court said that D

“in *Wallersteiner v Moir* [1974] 1 WLR 991 Buckley LJ, at p 1027, and Scarman LJ, at p 1032, expressly declined to tear away the corporate veil. In the *Littlewoods* case [1969] 1 WLR 1241, 1255, Sachs LJ expressly disassociated himself from the suggestion that the subsidiary was not a separate legal entity and Karminiski LJ refrained from associating himself with it. We therefore think that the plaintiffs can derive little support from those dicta of Lord Denning MR.” E

131 *In re A Company* [1985] BCLC 333 was not apparently referred to in the *Adams* case, but following the *Woolfson*, *Adams* and *VTB* cases, it is, I consider, clear, as Mr Amos submitted, that the opening sentence of the quoted statement in *In re A Company* cannot be regarded as the law. Nor does the mere fact that a company dances to its sole controller’s bidding entitle the court, without more, to equate the company with that controller (Moynan J also referred, at para 221, to Lord Denning MR’s dicta in *Wallersteiner v Moir* as if it provided a key to the case). Mr Todd advanced no argument in support of the approach adopted by the court in *In re A Company* and the tide of authority is now solidly against it. H

[2013] 2 AC

457  
Prest v Prest (CA)  
Rimer LJ

A 132 In my judgment, the dicta in *Nicholas v Nicholas* [1984] FLR 285 cannot stand with: (i) the prior House of Lords guidance in the *Wolfson* case 1978 SC (HL) 90 as to the *only* circumstance in which a judicial piercing of the corporate veil is appropriate, or (ii) with the subsequent adoption of that approach by the Court of Appeal in the *Adams* case [1990] Ch 433 and the *Ord* case [1998] 2 BCLC 447, or (iii) with the first three principles identified by Munby J in *Ben Hashem's* case [2009] 1 FLR 115, and accepted as correct by this court in the *VTB* case [2012] 2 Lloyd's Rep 313, as to the preconditions of a veil-piercing exercise. Whilst *Nicholas v Nicholas* was not cited in the *Adams* or *VTB* cases, there is no basis on which its dicta can be defended as establishing a separate, freestanding, legitimate principle of English law. They involve a head-on disregard of *Salomon v A Salomon & Co Ltd* [1897] AC 22. They were not advanced on the basis that they were directed at a special type of case justifying special treatment. In any particular case, an inability on the part of the court to make a property adjustment order in relation to property held by the husband's company rather than by the husband himself may be perceived as producing the potential for injustice; but the *Adams* case made clear that, by itself, such a consideration is no basis for assuming a jurisdiction to pierce the corporate veil: the court cannot disregard the *Salomon* case "merely because it considers that justice so requires". The husband and his company are separate legal persons and each owns his and its separate assets. Those differences must be respected and cannot be ignored merely because it is perceived as convenient to do so. A condition of the accepted basis for a piercing of the corporate veil is that the controller of the company has misused the fact of its separate corporate identity for the purpose of hiding facts or concealing wrongdoing. The rationale is that a wrongdoer cannot benefit from his dishonest misuse of a corporate structure for improper purposes. There was no suggestion in *Nicholas v Nicholas* [1984] FLR 285 that any such condition must be met before the veil could be pierced. The dicta were, in my judgment, wrong and should not be followed.

F 133 In fact, they have been followed. In *Green v Green* [1993] 1 FLR 326, Connell J considered (I do not understand why) that there was a conflict between the dicta in the *Nicholas* case and the decision in *Crittenden's* case but regarded the former as providing the key to his case and decided it on the basis that the husband was to be equated with the company of which he was the 100% owner so that an order for sale could be made of its land. Connell J's reasoning does not further the discussion. He just took the *Nicholas* dicta at face value and applied them. He did, however, note, at p 340, that the dicta reflected a practice that his own experience told him had been followed for some time (without, though, referring to any reported authority reflecting it).

H 134 In *Wicks v Wicks* [1999] Fam 65, this court overruled *Green v Green* on the basis that the court had no jurisdiction to make the order it did. The ratio of the decision did not, however, turn on Connell J's decision that, following the *Nicholas* case (to which the court did not refer), he could "pierce the corporate veil"; and only Peter Gibson LJ referred to that. He said, at p 89:

"I find it difficult to see how the application for ancillary relief in *Green v Green* [1993] 1 FLR 326 could have been said to relate to land when the

458

Prest v Prest (CA)  
Rimer LJ

[2013] 2 AC

husband merely owned shares in the two companies which owned land. A  
I can well understand Connell J's desire to find a solution so that the  
petitioner and her child could be provided with a home, but I do not think  
that the court had power in that case to order a sale of the land."

135 *W v H (Family Division: Without Notice Orders)* [2001] 1 All ER  
300 was a decision of Munby J. The wife obtained an ex parte injunction  
against B Co and X restraining the disposition of a property owned by B Co, B  
the shares of which were said to have been held on trust for the wife,  
husband and children. X claimed to have bought the shares from the  
husband but the wife asserted that the sale had been a sham. The report is  
about the inter partes hearing at which X and B Co sought the setting aside  
of the injunction. Munby J held that it should be continued. The  
importance of the decision lies in his observations at pp 310–311: C

"I ought to deal with a wider question canvassed by Mr Everall  
[counsel for the wife]. This relates to the approach to be adopted in the  
Family Division in cases where assets which a wife says belong in truth  
and reality to her husband are, or appear to be, vested in some other  
person, or in some corporate or trust entity.

"Mr Everall, referring me to *Nicholas v Nicholas* [1984] FLR 285, D  
*Green v Green* [1993] 1 FLR 326, *Purba v Purba* [2000] 1 FCR 652 and  
*Khreino v Khreino (No 2)* [2000] 1 FCR 80, submits that the court adopts  
a robust approach in such cases and does not allow itself to be, to use  
Thorpe LJ's words in *Khreino's* case (at p 85), emasculated by over-  
refined or technical arguments based on strict principles of property law.

"I readily accept that there is much force in Mr Everall's submission. E  
Thus, as can be seen from *Nicholas's* case (at pp 287, 292) and  
*Green's* case (at pp 337, 340), where property is vested in a one-man  
company which is the alter ego of the husband, the Family Division will  
pierce the corporate veil, disregard the corporate ownership and, without  
requiring the company to be joined as a party, make an order which has  
the same effect as the order that would be made if the property was vested  
in the husband. Indeed, the court can and will adopt this approach even F  
where there are minority interests involved if they are such that they can  
for practical purposes be disregarded.

"Moreover, as Thorpe LJ's forthright observations in *Purba's* case (at  
pp 654–655), and *Khreino's* case (at p 85), show, the court will not allow  
itself to be bamboozled by husbands who put their property in the names  
of close relations in circumstances where, taking a realistic and fair view,  
it is apparent that the recipient is a bare trustee and where the answer to  
the real question—Whose property is it?—is that it remains the husband's  
property. Again, in such cases there is no need for the third party to be  
joined. As *Purba's* case shows, where a transfer has been made post-  
separation to a close relative in order to defeat a wife's claims, the court  
can and will act without going through the formality of joining the third  
party or making setting aside orders under section 37. And as *Khreino's* H  
case shows, the court can and in appropriate cases will grant Mareva  
injunctions against both the husband and his offshore company and the  
relative who holds the bearer shares in the company without requiring  
either the company or the relative to be joined as parties.

[2013] 2 AC

459  
Prest v Prest (CA)  
Rimer LJ

A “Nothing that I say should be taken as intended to water down in any way the robustness with which the Family Division ought to deal in appropriate cases with husbands who seek to obfuscate or to hide or mask the reality behind shams, artificial devices and similar contrivances. Nor do I doubt for a moment the propriety and utility of treating as one and the same a husband and some corporate or trust structure which it is apparent is simply the alter ego or the creature of the husband. On the other hand, and as *Nicholas’s* case itself demonstrates, the court does not—in my judgment cannot properly—adopt this robust approach where, for example, property is held by a company in which, although the husband has a majority shareholding, the minority shareholdings are what Cumming-Bruce LJ [1984] FLR 285, 287 called ‘real interests’ held by individuals who, as Dillon LJ (at p 292) put it, are not nominees but business associates of the husband.”

C 136 I have no difficulty with much of that. If property held by a husband has been put into the name of someone who, on the evidence, is obviously a bare trustee for him, there will be no problem in holding that the beneficial ownership has not changed. As explained in the first sentence of the last quoted paragraph, the court will also not be bamboozled by the use by husbands to a like end of “shams, artificial devices and similar contrivances”. The more difficult part of the quotation is in its third paragraph and the remainder of the last paragraph, which reflect unqualified acceptance of the proposition, drawn from the *Nicholas* case, of the court’s jurisdiction—in the absence of any relevant impropriety—to equate a one-man company with the one-man and treat its assets as his. No reasoned justification for doing so was advanced, any more than in the *Nicholas* case. The only implicit justification is that family justice requires it. That, without more, is no justification. Why should family justice be regarded as different from any other sort of justice? No one would suggest that an unsatisfied creditor of the owner of a one-man company could look to the assets of the company to meet his debt, even though he might be able to look to the owner’s shares in the company (as a wife can on her ancillary relief application). Since I consider that the dicta in the *Nicholas* case were wrong, I also consider, with respect, that Munby J’s acceptance of them as correct was wrong. He was not, however, apparently referred to the authorities as to the limitations upon the court’s ability to pierce the corporate veil.

F 137 The next authority, decided shortly after *W v H*, is Bodey J’s decision in *Mubarak v Mubarak* [2001] 1 FLR 673. The question was whether the wife was entitled to enforce a lump sum payment order by recourse to assets held by one or other company in the ultimate control of the husband. The companies opposed the order. Bodey J said there were two strands of authority: those decided in the company/commercial sphere and those decided in the family sphere. The former strand, upon which the companies relied, was based on the recognition of a company as a separate legal entity, distinct from its shareholders, with assets belonging to it alone, a strand based on the *Salomon* case. Whilst it admitted of circumstances in which the veil could be pierced, the principle of most general application was that a company will be not allowed to be used as a device or sham to evade obligations and Bodey J referred to *Gilford Motor Co Ltd v Horne* [1933] Ch 935 and *Jones v Lipman* [1962] 1 WLR 832, which provide good

460

Prest v Prest (CA)  
Rimer LJ

[2013] 2 AC

examples of the sort of impropriety that is required. The companies' counsel submitted that there was no suggestion of any misuse of them in the instant case and that the *Adams* case showed that "no principle exists where, if reliance on the strict technicalities would produce injustice, then the veil of incorporation can, without more, be lifted". A

138 Turning to the family cases, Bodey J referred to the *Nicholas*, *Crittenden*, *Green* and *Wicks* cases. He then said [2001] 1 FLR 673, 681-682: B

"Drawing all these authorities together, the precise extent of the Family Division's power to go directly against the property of a company owned or controlled by one of the spouses appears less than clear. In both the Court of Appeal decisions disowning the power (*Crittenden v Crittenden* [1990] 2 FLR 361 and *Wicks v Wicks* [1999] Fam 65) no reference was seemingly made to *Nicholas v Nicholas* [1984] FLR 285, which contained strong Court of Appeal observations that the power exists when the circumstances there specified pertain. The one reported case to which I have been referred where the veil was actually lifted (*Green v Green* [1993] 1 FLR 326) has been disapproved by one of the judgments of the Court of Appeal in *Wicks v Wicks* [1999] Fam 65, but the disapproval was not the ratio of the decision: neither were *Crittenden v Crittenden* [1990] 2 FLR 361 nor *Nicholas v Nicholas* [1984] FLR 285 seemingly cited to the Court of Appeal in *Wicks*. C

"Further, it is quite certain that company law does not recognise any exception to the separate entity principle based simply on a spouse's having sole ownership and control. D

*"Rationalisation of approach"* E

"Ideally the Family Division and the Chancery Division should plainly apply a common approach. However, the fact remains that different considerations do frequently pertain: the company approach, on the one hand, being predominantly concerned with parties at arm's length in a contractual or similar relationship; the family approach, on the other hand, being concerned with the distributive powers of the court as between husband and wife applying discretionary considerations to what will often be a mainly, if not entirely, family situation. F

"I would echo the experience referred to by both Cumming-Bruce LJ and Connell J (above) as regards lifting the veil in the Family Division when it is just and necessary. In practice, especially in 'big money' cases, the husband (as I will assume) will often make a concession that company/trust assets can be treated as his, whereafter the case proceeds conveniently on that basis. It is pragmatic, saves expense and usually works. Problems such as have arisen in this case are rare and anyway can be avoided where there are other assets against which the lump sum order can be enforced. G

"The difficulty remains in defining those situations when lifting the veil is appropriate by way of enforcement following such a concession in ancillary relief proceedings. I would suggest that the Family Division can make orders directly or indirectly regarding a company's assets where (a) the husband (as I am assuming) is the owner or controller of the company concerned and (b) where there are no adverse third parties whose position or interests would be likely to be prejudiced by such an H

[2013] 2 AC

461  
Prest v Prest (CA)  
Rimer LJ

A order being made. I include as third parties those with real minority interests in the company and (where relevant on the facts) creditors and directors. The reason for my including the latter two categories will become apparent later in this judgment.

B “I adopt the rationalisation of this offered by Mr Hunter, that it would amount merely to a short-circuiting of the full company law route, namely the declaration of a dividend to the husband comprising the company asset concerned (eg the matrimonial home) enabling him and/or the court then to transfer it onwards to the wife. It would amount to his property for the purposes of section 24 in the same sense that the law may look on that as done as ought to be done; whilst the mechanics of the order would be along the lines adopted by Connell J in *Green v Green* [1993] 1 FLR 326, 341: ‘the respondent do sell, or cause G Ltd to sell, four plots of the blue land to . . .’

C “I would add that lifting the veil is most likely to be acceptable where the asset concerned (being the property of an effectively one-man company) is the parties’ former matrimonial home, or other such asset owned by the company other than for day-to-day trading purposes.”

D 139 After considering the evidence, Bodey J held that the case was not one in which he should lift the veil. His reasons were these, at pp 685–686:

E “both companies are bona fide trading companies incorporated well before the matrimonial difficulties of the husband and wife. DIL is incorporated outside the jurisdiction and the husband is not a director. It is not suggested that they are as such being used as a sham or device, albeit that their existence is very convenient to the husband. In my judgment, there do exist genuine third party rights and interests which ought to be respected, namely the interests of bona fide commercial creditors (one of them secured on the jewellery) and the position of directors who have fiduciary duties and who oppose the seizure of stock in trade. The facts of the case are far away from those of *Green v Green* [1993] 1 FLR 326 which Mr Pointer asks me to follow.

F “Applying the above proposed approach as regards lifting the corporate veil to the evidence now before me and having heard full legal argument, I come to the conclusion that this case does not fall within the necessarily circumscribed circumstances in which lifting the veil would be acceptable. However much the court may wish to assist a wife and children where a lump sum has not been paid, I am satisfied that doing so here, whensoever it may be permissible, would be a step too far in the all the circumstances. This is a conclusion strengthened by article 1 of the First Protocol [to the Convention for the Protection of Human Rights and Fundamental Freedoms] that every natural and legal person is to be entitled, subject to specified exceptions, to the peaceful possession of their possessions.”

H 140 I do not, with respect, find Bodey J’s “rationalisation of approach” convincing. Different considerations obviously arise in commercial and family cases but I cannot see why they can justify a difference of approach as regards lifting the veil. In all situations, the company is a separate legal entity. A commercial creditor of the present husband, if unable to obtain satisfaction from him, might well wish to attach assets of PRL and/or

462

Prest v Prest (CA)  
Rimer LJ

[2013] 2 AC

Vermont as an alternative means of satisfaction. Absent an ability to lift the corporate veil by first satisfying the *VTB* conditions, his claim would fail: the companies assumed and owed him no relevant obligations. I fail to understand the principle by which the wife’s ancillary relief claim is said to be enforceable against such companies without any need first to be able to satisfy the *VTB* conditions. Why should wives (or husbands) be entitled to a preferential exemption from what the *Salomon* case decided? A

141 Bodey J’s further discussion as to when it may be appropriate to lift the veil in order to satisfy a wife’s claim appears to have been premised on the basis that the husband has conceded that the company’s assets can be regarded as his, which is not this case. Thorpe LJ, in argument, observed that in his own experience such concessions are rare. I anyway cannot see that such a concession can take the matter very far. As Bodey J noted, it will still be necessary for the court to consider whether the veil should be lifted. His approach was that the lifting (or not) of the veil in family proceedings in relation to a company wholly or substantially owned by the husband is a discretionary exercise dependent on a consideration of whether to award the relevant asset to the wife would prejudice any minority interests in the company and/or the interests of its directors and creditors. He therefore favoured a balancing exercise directed to the consideration of whether the diversion of a company asset to the wife would prejudice interests other than those of the husband. If it would not, such diversion could be rationalised (and given legitimacy) on the basis that the husband could be regarded as under a duty to declare a dividend in his own favour of the asset, which would then be his property; and “the law may look on that as done which ought to be done”. C D

142 With respect, I neither follow nor agree with Bodey J’s reasoning. First, the husband is under no obligation to declare such a dividend even if it is lawfully open to him to do so. Second, the court has no jurisdiction of which I am aware to compel him to do so. Third, whether or not he ought to do so (is that a reference to his moral obligations?), the law does not look on as done that which ought to be done, even if equity sometimes does, although it ordinarily does so only in respect of unperformed legal obligations. Bodey J’s approach does not appear to me to have much to do with any true “lifting of the veil”. It proceeds instead on the basis that the relevant assets are the company’s, as they are, which has not come by them in circumstances involving any sort of relevant impropriety, but that the family courts have a paternalistic jurisdiction to distribute them to a claimant with no title to them provided that to do so will not prejudicially affect anyone with a real interest in their being preserved within the company. E F G

143 That approach is wrong. If, as it is, the question is whether or not assets held by the company are (i) assets to which the husband is “entitled” within the meaning of section 24(1)(a), or (ii) assets to which he is to be treated as so entitled, the answer to (i) is that he is not so entitled. As for (ii), the only circumstance in which it might, as a matter of discretion, be appropriate to treat him as so entitled is if there are legitimate grounds for lifting the corporate veil, for which purpose nothing less than compliance with the *VTB* conditions will do. Those conditions did not feature in Bodey J’s rationalisation, even though he had been referred to this court’s decision in the *Adams* case as identifying the limitations constraining an ability to lift H

[2013] 2 AC

463  
Prest v Prest (CA)  
Rimer LJ

A the veil. His suggestion that different principles apply—and, by inference, should continue to apply in two divisions of the High Court—is one with which I disagree. There is, as Mr Amos put it, but one law and but one High Court and all its divisions must apply the same law.

B 144 *A v A* [2007] 2 FLR 467 is a decision of Munby J. It did not turn on the piercing of any corporate veil, although in paras 18 and 19 he referred to, and affirmed, his own observations in *W v H*, on which I have earlier commented, in part negatively. He also made the point, at para 95, that:

C “only property owned by a party to the marriage can be the subject of a property adjustment or other order under the Matrimonial Causes Act 1973. Thus, to take a specific example, there is no power in the court . . . to order the transfer to the wife of the Antigua property, which is owned by HDC [a company in which the shares were held by the husband, the wife and a trust].”

As to that, I agree.

D 145 I come back to *Ben Hashem v Al Shayif* [2009] 1 FLR 115. Its importance is that it reflected Munby J’s exposition, approved by the Court of Appeal in the *VTB* case in all respects save one (immaterial for present purposes), as to the conditions that must be satisfied before it is open to the court to pierce the corporate veil and ignore the separate identities of the company and its corporators. What is essential is the proof of relevant impropriety. There are, however, perhaps two slightly odd features about Munby J’s reasoning.

E 146 First, he listed several reported authorities as the source of the conditions that he summarised, and his list (at para 158) includes *Nicholas v Nicholas* [1984] FLR 285. Neither the decision nor the dicta in the *Nicholas* case, however, support the existence of such conditions. The decision had nothing to do with veil piercing and the dicta are inconsistent with the principles that Munby J identified. Moreover, Munby J criticised Connell J’s decision to pierce the corporate veil in *Green v Green* [1993] 1 FLR 326, for which Connell J had relied simply on the fact of the husband’s ownership and control of the companies, having drawn his inspiration from the dicta in the *Nicholas* case. If *Green’s* case was in this respect wrong, it ought to have followed in Munby J’s view that the dicta in the *Nicholas* case were also wrong. Munby J also pointed out, at para 173, that Bodey J had been correct in *Mubarak v Mubarak* [2001] 1 FLR 673 to recognise that the fact that one spouse has sole ownership and control of a company is not enough to justify a piercing of the company’s corporate veil. All that Munby J actually said about the *Nicholas* case, at para 176, was that the veil piercing claim failed because the minority interests in the company could not be ignored. But (i) as I have said, I do not consider that there was a “veil piercing” claim in the *Nicholas* case, and (ii) the suggestion by both Lords Justices that, but for the minority interests, such a claim could without more have succeeded cannot stand with Munby J’s own explanation of the conditions that must be satisfied before such a claim can succeed. As for H Cumming-Bruce LJ’s reference to the “abundant authority” in the Family Division as to the court’s willingness and ability to pierce the veil in a “total control” case, Munby J noted at para 221 that counsel had been able to identify only one Family Division case to date in which the court had “pierced the veil” on that ground, namely *Green v Green*.

464

Prest v Prest (CA)  
Rimer LJ

[2013] 2 AC

147 The second odd feature is that, in *Ben Hashem v Al Shayif* [2009] 1 FLR 115, Munby J implicitly endorsed his own earlier agreement with the *Nicholas* dicta in *W v H*, from which he cited without critical comment at para 94. As his own summary of the basis upon which a company's veil may be pierced showed that the *Nicholas* dicta were wrong, so must it have followed that his earlier endorsement of the dicta was wrong. Munby J was not entitled to have it both ways. A

148 *Kremen v Agrest (No 2)* [2011] 2 FLR 490 is a decision of Mostyn J. The case concerned the wife's claim to unscramble successive transfers of a single share in a BVI company that owned an English property occupied by the husband. The judge set the transfers aside and declared that the company held the property beneficially for the husband. In making that declaration, the judge pierced the company's corporate veil. At para 43, he said that counsel had asked him to make explicit that, given the terms of Munby J's judgment in *Ben Hashem's* case, he had found actual impropriety on the part of the husband entitling him to pierce the veil. Mostyn J summarised *Ben Hashem's* case and said at para 44 that the decision had surprised practitioners in ancillary relief proceedings, whose understanding for years had been conditioned by the dicta in the *Nicholas* case. Nor did Mostyn J share Munby J's expressed difficulty with *Green v Green*. He then referred to Bodey J's judgment in *Mubarak's* case, saying, at para 46: B C D

“There is a strong practical reason why the cloak should be penetrable even absent a finding of wrongdoing. In *Mubarak v Mubarak* [2001] 1 FLR 673, Bodey J pointed out that the same end of putting the underlying asset into the hands of the claimant could be achieved by going down a pure company law route rather than violating the sanctity of the corporate veil.” E

Mostyn J then quoted the same passages from *Mubarak's* case that I have.

149 I do not understand what Mostyn J meant by “going down a pure company law route rather than violating the sanctity of the corporate veil”. I am not clear that Bodey J had in mind that the court could order the husband to declare an appropriate dividend and then release it to the wife. If so, it would amount to an order requiring the husband to take steps to achieve the holding by him of an asset he did not currently own and to which he had no present entitlement. I do not know what jurisdiction there is to make such an order. If, as I consider, Bodey J's dicta were directed at making an order *directly* regarding a company's assets, that does violate the sanctity to which Mostyn J referred. I add that if, contrary to Mostyn J's view, impropriety needed to be shown before the veil could be pierced, Mostyn J explained that there was abundant evidence of it in the case before him. But the thrust of *Kremen's* case was, however, that the *Nicholas* dicta should be preferred to the *Ben Hashem* principles. F G

150 I come finally to *Hope v Krejci* [2012] EWHC 1780 (Fam), another decision of Mostyn J, to which I have already referred. I shall not discuss the judgment in at any length. Mostyn J cited from, and discussed, various authorities to which I have referred, including his own judgment in *Kremen's* case. At para 27, he endorsed his view as to the supremacy and binding nature of the dicta in the *Nicholas* case and said that he did not regard the *VTB* case [2012] 2 Lloyd's Rep 313, in which the *Nicholas* case was not referred to, as requiring it to be altered. I read Mostyn J's discussion H

[2013] 2 AC

465  
Prest v Prest (CA)  
Rimer LJ

A of these matters in *Hope v Krejci* (although not his decision in *Kremen's* case) as obiter, but there is no doubt as to his view of the law that is or should be applied in family proceedings.

*The respondent's notice*

B 151 By a respondent's notice, and if wrong on her primary submissions in support of the judge's reasoning, the wife sought to overturn the judge's findings in para 217 that there was no relevant impropriety in relation to the establishment of the Petrodel group structure. The wife also challenged the finding in para 218 that the husband's conduct of the litigation did not amount to relevant impropriety sufficient to justify the court in piercing the companies' corporate veil.

C 152 This aspect of the wife's case was barely developed by Mr Todd in his oral submissions, who acknowledged that, given the judge's findings, it was a difficult argument. I consider that it was not only difficult but impossible. There is no factual basis upon which this court can conclude that these long-established companies were incorporated, or were used, as a cloak or mask to hide the PRL and Vermont properties from the court's gaze; or, more particularly, as part of an attempt to hoodwink the court into believing that assets that belonged beneficially to the husband were now the companies' assets and so escaped the wife's reach. The wife's case to such end was not improved by pointing, as she did—indeed it formed the main part of Mr Todd's submission—to the husband's unco-operative stance in the litigation. In my judgment, there is no substance to this part of the wife's case and I shall devote no more space to it.

E 153 The wife also contended that the judge was wrong not to find that the relevant PRL and Vermont properties were held by those companies as nominees or trustees for the husband. To that end, Mr Todd referred us to several paragraphs of the judge's judgment that he said supported such a finding. These were, in the main, paragraphs in which the judge discussed whether the assets of the Petrodel companies belonged to the husband rather than the companies and concluded that they did. I have explained why F I consider that the judge was wrong in that conclusion. If my criticism of his judgment in that respect is justified, there is, I consider, nothing in his judgment that could enable this court to find that he ought none the less to have found that the specific properties held by PRL and Vermont that are the subject of para 5 of his order belonged beneficially to the husband. I would also reject this argument advanced by the wife.

G *Conclusion*

H 154 I have made clear my views on the "veil piercing" issue, but shall summarise them. *Salomon v A Salomon & Co Ltd* [1897] AC 22 is House of Lords authority affirming the distinction between the separate legal personalities of a company and its incorporators. It makes no difference to such distinction that the company has a single incorporator with total control over its affairs. It is a feature of the principle that a company's assets belong beneficially to the company and that its incorporators have no interest in, or entitlement to, them. It is a further feature of it that such assets cannot be looked to in order to satisfy the personal obligations of the incorporators, any more than the latter's personal assets can be looked to in order to satisfy the

466

Prest v Prest (CA)  
Rimer LJ

[2013] 2 AC

obligations of the company. In special circumstances, in particular in the winding up of an insolvent company, there may be a statutory basis for requiring the corporators to contribute personally to the company's assets, for example if they have misapplied its assets or engaged in wrongful or fraudulent trading: see sections 212 to 214 of the Insolvency Act 1986. Exceptions of that nature are, however, irrelevant for present purposes.

155 Subject to exceptions such as those, and to cases in which it is legitimate to pierce the corporate veil, the separate corporate identity of a company is a fact of legal life that all courts are required to recognise and respect, whatever jurisdiction they are exercising. It is not open to a court, simply because it regards it as just and convenient, to disregard such separate identity and to appropriate the assets of a company in satisfaction either of the monetary claims of its corporator's creditors or of the monetary ancillary relief claims of its corporator's spouse. *Salomon's* case precludes any such approach; and the same was made clear by the House of Lords in *Woolfson v Strathclyde Regional Council* 1978 SC (HL) 90 and by the Court of Appeal in *Adams v Cape Industries plc* [1990] Ch 433, *Ord v Belhaven Pubs Ltd* [1998] 2 BCLC 447 and *VTB Capital plc v Nutritek International Corpn* [2012] 2 Lloyd's Rep 313. The obiter dicta in *Nicholas v Nicholas* [1984] FLR 285 to different effect are inconsistent with the *Salomon*, *Woolfson*, *Adams*, *Ord* and *VTB* cases and advance no reasoning why a different principle should apply in the family jurisdiction as compared with other jurisdictions. The *Salomon* principle must apply equally to all jurisdictions. A one-man company does not metamorphose into the one-man simply because the person with a wish to abstract its assets is his wife.

156 The *Woolfson*, *Adams*, *Ord*, *Ben Hashem* and *VTB* cases show that there may be factual circumstances in which it will be legitimate for the court to pierce a company's corporate veil and, to an appropriate extent, disregard the fact of its separate identity from that of its corporators. They all, however, affirm that that can only be done in limited circumstances, central to which is the demonstration of relevant impropriety in the corporators' use of the company. The rationale for such an exceptional jurisdiction is that the controllers of the company have so used the fact of its separate identity for improper purposes that it may be appropriate for the court to disregard its separate identity in order that its controllers may not derive the advantage from such abuse that they intended to achieve. It is perhaps a relative of the principle that a wrongdoer cannot ordinarily be allowed to profit from his own wrong. The jurisdiction, whilst of interest to legal theorists, is an exceptional one and there are few reported decisions where it has been applied (including, in particular, in family proceedings). Just as there is no rational ground for regarding the family courts as exempt from the *Salomon* case, so is there is no rational ground for regarding them as exempt from the need to be satisfied as to the conditions affirmed in the *VTB* case before piercing of a corporate veil. The dicta in the *Nicholas* case cannot stand with the principles explained in the *Woolfson*, *Adams*, *Ord*, *Ben Hashem* and *VTB* cases and they should no longer be regarded as of any authority. In so far as Mostyn J has, in *Kremen v Agrest (No 2)* [2011] 2 FLR 490 and *Hope v Krejci* [2012] EWHC 1780 (Fam), treated those principles as inapplicable in family cases and instead supported the *Nicholas* dicta, I would respectfully disagree with him.

[2013] 2 AC

467  
Prest v Prest (CA)  
Rimer LJ

- A 157 In this case, once the judge had rejected the impropriety assertion, he had no choice but to reject the claim that PRL and Vermont's London properties were or could be regarded as properties to which the husband had any entitlement. He had no jurisdiction under section 24(1)(a) to make the orders he did in relation to them. In so far as he was suggesting that section 24(1)(a) enabled the court to treat a company's property as
- B belonging to its 100% owner, he was wrong. Section 24(1)(a) confers no such jurisdiction. It does no more than confer a jurisdiction to make a transfer order in respect of property to which the respondent spouse is beneficially entitled. Whether such spouse is or is not so entitled to the particular item of property in issue will be a question of fact, to be answered in the same way as it would regardless of the making of any application under section 24(1)(a).
- C 158 I would allow the appeals by PRL and Vermont against the judge's para 5 orders.

**PATTEN LJ**

- D 159 I agree that the appeal should be allowed for the reasons contained in the judgment of Rimer LJ and I fully endorse his treatment of the issues of beneficial ownership and the limited circumstances in which it may be appropriate to pierce the veil of incorporation.
- E 160 What needs to be emphasised is that the provisions of section 24(1)(a) of the Matrimonial Causes Act 1973 do not give the court power to disapply the established principles of legal and beneficial ownership or of company law. On the contrary, those principles were plainly intended to define the limits of the court's jurisdiction under the statute and Moylan J was wrong to give the words "entitled, either in possession or reversion" any wider meaning. Married couples who choose to vest assets beneficially in a company for what the judge described as conventional reasons including wealth protection and the avoidance of tax cannot ignore the legal consequences of their actions in less happy times.
- F 161 I wish particularly to support Rimer LJ's criticism of the dicta in *Nicholas v Nicholas* [1984] FLR 285 and his view that these cannot be relied upon as a correct statement of the law following the decision of this court in *Adams v Cape Industries plc* [1990] Ch 433. They have led judges of the Family Division to adopt and develop an approach to company owned assets in ancillary relief applications which amounts almost to a separate system of legal rules unaffected by the relevant principles of English property and company law. That must now cease.

G *Appeal allowed.*

21 November 2012. The court granted an application by the wife for permission to appeal.

KEN MYDEEN, Barrister

H **APPEAL**

The wife appealed. The issues for the Supreme Court, as set out in the parties' statement of agreed facts and issues, were whether (1) the court had power in the context of the Matrimonial Causes Act 1973 to order the transfer of assets, as part of an ancillary relief award, which belonged to

468

Prest v Prest (SC(E))  
Argument

[2013] 2 AC

third party companies; (2) on a proper analysis, the companies held the properties on trust for the husband and as such the court was empowered to transfer those properties to the wife; (3) section 24(1)(c)(d) of the Act empowered the court to alter the settlement by which the husband was entitled to a beneficial interest in both the shares in the companies and their assets; and (4) the circumstances were such that the wife should be permitted to pierce the veil of incorporation either on the ground of impropriety or in the interests of justice. A  
B

The facts are stated in the judgment of Lord Sumption JSC.

*Richard Todd QC, Daniel Lightman and Stephen Trowell* (instructed by *Farrer & Co LLP*) for the wife.

Where an asset is held by a company which is effectively the alter ego of a spouse, and the legitimate priority interests of innocent third parties can be protected, section 24(1)(a) of the Matrimonial Causes Act 1973 operates as a statutory exception to the rule against piercing the corporate veil, enabling the court to look at the reality of the underlying ownership of the asset and to deal with the asset accordingly: see *Nicholas v Nicholas* [1984] FLR 285; *Green v Green* [1993] 1 FLR 326; *W v H (Family Division: Without Notice Orders)* [2001] 1 All ER 300; *A v A* [2007] 2 FLR 467; *Ben Hashem v Al Shayif* [2009] 1 FLR 115; *Mubarak v Mubarak* [2001] 1 FLR 673 and *Kremen v Agrest (No 2)* [2011] 2 FLR 490. C  
D

A person is entitled to the possession of an asset if he has the right and ability to procure its transfer to him for his own use, free of legitimate third party objection. The husband has all the rights of a 100% shareholder and controller in the respondent companies, including the right to a member's voluntary liquidation. Since the husband and the companies failed to disclose the net asset position of the companies and failed to provide the disclosure as to the acquisition costs of the properties which the husband and the companies had been ordered to produce, the judge was entitled to proceed on the basis that the secured creditors would be unaffected by the proceedings; further or alternatively that the wife's cross-appeal should succeed on its facts and that it be declared that the companies held the properties on resulting trust for the husband: for authority on the burden of proof and who should call which evidence, see *Herrington v British Railways Board* [1972] AC 877 and *Wisniewski v Central Manchester Health Authority* [1998] PIQR P324. E  
F

The husband could be ordered to put the companies into a members voluntary liquidation and the net proceeds then distributed to the wife; rather than employ this largely artificial exercise, the process could be "telescoped" into a transfer of the underlying assets (subject to the interests of secured and trade creditors) to the wife. G

The purpose of the Act is to do fairness as between spouses. The court had a wide discretion to achieve this including by variation of a settlement: see *Brooks v Brooks* [1996] AC 375. The Act requires the court to look not only at what a spouse has now but at resources to which a spouse is or might become entitled in the future: see sections 24(1) and 25 and *Crews-Orchard v Crews-Orchard* (1970) 114 SJ 150. H

The court may take notice of the fact that a spouse not only controls a company but, subject to third party interests, may dispose of it at will: see *W v H (Family Division: Without Notice Orders)* [2001] 1 All ER 300, 311;

A *Nicholas v Nicholas* [1984] FLR 285, 287, 292; *Green v Green* [1993] 1 FLR 326 and *Mubarak v Mubarak* [2001] 1 FLR 673, 679, 682. In the minority of cases where a spouse's legitimate claim can only be met by company assets the court should look to the powers vested in it by section 24(1) and have regard to the powers and control of the other spouse. If the interpretation of section 24(1)(a) favoured by the majority of the Court of Appeal is upheld, the corporate structure will (subject to the applicability of section 24(1)(c)) become a mechanism through which the aim of achieving fairness will be defeated. Whilst the court can order the shares to be transferred that would be frustrated in this case where the shares are held in a "La Ronde" arrangement whereby company A owns B, which owns C which in turn owns A and the companies are in three different jurisdictions. The jurisdiction to transfer assets held by a company under section 24(1) would only ever be exercised sparingly, and only in an "alter ego" case where the company and the spouse can be treated as one and the same person for the purposes of section 24(1): see *Ben Hashem v Al Shayif* [2009] 1 FLR 115 and *VTB Capital plc v Nutritek International Corpn* [2012] 2 Lloyd's Rep 313. The 1973 Act is not alone in representing a statutory departure from the sanctity of the corporate veil: see *Adams v Cape Industries plc* [1990] Ch 433; *Nokes v Doncaster Amalgamated Collieries Ltd* [1940] AC 1014; *In re H (Restraint Order: Realisable Property)* [1996] 2 All ER 391 and *Director of Public Prosecutions v Compton* The Times, 11 December 2002.

In circumstances where (1) the companies had failed to serve points of defence, (2) the husband had failed to provide the information sought and had given contradictory accounts of beneficial ownership, (3) a positive case had been advanced by the wife in her statement that the understanding was that the properties were beneficially owned by the husband and (4) the judge had recorded that some of the properties had been transferred for a nominal amount, the judge was entitled to find that the properties were held by the companies on trust for the husband.

Furthermore, the companies and/or the relevant underlying properties could be regarded as constituting "nuptial settlements" capable of variation under section 24(1)(c). A liberal and purposive approach must be taken to the interpretation of "nuptial settlement" in the context of the Act: see *Blood v Blood* [1902] P 78, 82; *Bosworthick v Bosworthick* [1927] P 64, 71, 72; *Prinsep v Prinsep* [1929] P 225, 232, 235; *Brooks v Brooks* [1996] AC 375, 391-392; *Ben Hashem v Al Shayif* [2009] 1 FLR 115, para 234; *E v E (Financial Provision)* [1990] 2 FLR 233; *D v D* [2011] 2 FLR 29; *BJ v MJ (Financial Order: Overseas Trust)* [2012] 1 FLR 667 and *Hope v Krejci* [2013] 1 FLR 182. The jurisdiction under section 24(1)(c) is not limited to cases concerning the matrimonial home, nor is there any reason why the powers in section 24(1)(c) should be limited to trust structures. The legislation should be read so as to enable the court to do justice between the parties. The findings of fact made by the judge are consistent with a determination that there is a nuptial settlement. [Reference was made to sections 994 and 996 of the Companies Act 2006; *Rackind v Gross* [2005] 1 WLR 3505; *In re Tobian Properties Ltd*; *Maidment v Attwood* [2013] Bus LR 753; *Bhullar v Bhullar* (unreported) 25 March 2002, Judge Behrens, Leeds and *Hawkes v Cuddy* [2007] EWHC 2999 (Ch); [2008] EWHC 210 (Ch); [2009] 2 BCLC 427, CA.]

470

Prest v Prest (SC(E))  
Argument

[2013] 2 AC

Alternatively, the wife should be entitled to pierce the corporate veil, either on the ground of impropriety or in the interests of justice, in order to obtain a fair outcome and the transfer of the properties which are in the names of the companies. The judge erred in holding that the companies cannot be held to have been improperly used, having been originally constituted properly, and Rimer LJ, ante, pp 441–442, paras 89, 90, was wrong in holding that because the judge had found that the companies were originally properly constituted it would be inconsistent to hold that the companies were shams or nominees. The husband was using the corporate structure to defeat both the court’s inquiry and the subsequent enforcement of an order. There was relevant impropriety: see *Ben Hashem v Al Shayif* [2009] 1 FLR 115, para 164. Historically, the courts have recognised the need to pierce the corporate veil in the interests of justice: see *In re A Company* [1985] BCLC 333. The suggestion in *Adams v Cape Industries plc* [1990] Ch 433 that the interests of justice is not a sufficient ground on which to pierce the corporate veil was made without the court’s attention being drawn to *In re A Company* and should not be followed: see *Trustor AB v Smallbone (No 2)* [2001] 1 WLR 1177, para 21. In the exceptional circumstances in which property has been held by a corporate structure that is wholly controlled by one party to the marriage, making that party’s shareholding the subject of an order under section 24(1) of the Act both impractical and unlikely to be enforceable in practice, and that property has overwhelmingly been used for the benefit of the parties to the marriage, the court should have the discretion to pierce the corporate veil to make that property the subject of an order under section 24(1) of the Act in the interests of justice. Such a narrow and precisely restricted exception would enable the court to respond to the demands of justice without unduly compromising certainty. The husband’s conduct in the present proceedings removes any doubt that the interests of justice are overwhelmingly in favour of the wife.

*Tim Amos QC, Oliver Wise, Ben Shaw and Amy Kissner* (instructed by *Jeffrey Green Russell Ltd*) for the Petrodel companies.

“Entitled” in section 24(1)(a) of the Matrimonial Causes Act 1973 must be given its ordinary narrow meaning. It entails an enforceable right. Thus the court can only order the transfer of assets in which a party holds a legal or beneficial interest. The companies’ assets are not the husband’s assets: see *Broderip v Salomon* [1895] 2 Ch 323; sub nom *Salomon v A Salomon & Co Ltd* [1897] AC 22. A controlling shareholder, even if he is the sole shareholder, has no interest in, or entitlement to, the company’s own property: see *Macaura v Northern Assurance Co Ltd* [1925] AC 619, 626–627. These principles form an integral part of English law and apply equally to ancillary relief proceedings since the law has to be applied in an homogeneous, structured and disciplined manner across all Divisions of the High Court: see *McFarlane v McFarlane* [2006] 2 AC 618; *Imerman v Tchenguiz* [2011] Fam 116; *Jones v Jones* [2012] Fam 1 and *A v A* [2007] 2 FLR 467.

Section 24(1)(a) does not operate as a statutory exception to these principles. There is no suggestion within its language, or its legislative history, to indicate that Parliament intended, by implication, to create a far-reaching exception which would allow a court in ancillary relief proceedings

[2013] 2 AC

471  
Prest v Prest (SC(E))  
Argument

- A to ignore the separate legal personality of a company and treat its property as the personal property of its controlling shareholder. [Reference was made to section 45 of the Matrimonial Causes Act 1857 (20 & 21 Vict c 85) and *Milne v Milne* (1871) LR 2 P & D 295, 299.] On the contrary, section 24(1)(a) on its face and as a matter of statutory construction is limited to property to which a party to a marriage has an enforceable right of ownership in possession or reversion. An ability in practical terms to extract an asset from a company does not equate to a rightful claim. Unvested prospective rights are also insufficient: see *Crews-Orchard v Crews-Orchard* (1970) 114 SJ 150. There is nothing within section 24(1)(a) to suggest that the court may simply disregard the English insolvency and capital-maintenance regimes and contractual rights of other shareholders and, instead, decide as a matter of judicial discretion which third party creditors and shareholders are sufficiently deserving of protection. Such an approach would create intolerable uncertainty for persons proposing to advance moneys to a company controlled by a party to a marriage. Clear and express wording would be required to achieve such a result: see *Bank voor Handel en Scheepvaart NV v Slatford* [1953] 1 QB 248, 278. That case also emphasises (at p 265) the international nature and acceptance of the concept of separate corporate personality, which in the present case has the added importance of the consideration of increasing respect and recognition by foreign courts for the decisions and workings of English courts and English family law.

- The decision of the majority of the Court of Appeal does not enable an unscrupulous party to a marriage to evade an ancillary relief award. First, if that party holds shares in a company, such shares themselves are property to which he is entitled and a court granting ancillary relief may order that they be transferred to the other party to the marriage. Further, if the unscrupulous party takes steps to place his assets in a corporate vehicle in order to avoid liability to pay ancillary relief, there are a variety of anti-avoidance measures which may be available to reverse such transfers: see section 37 of the 1973 Act and section 423 of the Insolvency Act 1986. Alternatively, if a party to a marriage takes steps to place assets in a company in order to evade an award of ancillary relief, the matrimonial court may be justified in piercing the corporate veil through the application of common law principles by virtue of the impropriety exception. The wife's reliance on statutes disregarding the separate legal personality of a company is misplaced: see *In re H (Restraint Order: Realisable Property)* [1996] 2 All ER 391, 400-401; *Director of Public Prosecutions v Compton* [2002] EWCA Civ 1720 at [44]; *R v K* [2006] BCC 362, para 25 and *R v Gomez* [1993] AC 442, 496-497. The unfortunate position of the wife is no reason for making an unprincipled order: see *Ben Hasbem v Al Shayif* [2009] 1 FLR 115, para 301. If reform is needed it is a matter for Parliament, not the courts: see *R (Prudential plc) v Special Comr of Income Tax (Institute of Chartered Accountants in England and Wales intervening)* [2013] 2 AC 185, para 49. [Reference was also made to *Charman v Charman (No 4)* [2007] 1 FLR 1246; *Belmont Finance Corpn Ltd v Williams Furniture Ltd* [1979] Ch 250; *Roberts Petroleum Ltd v Bernard Kenny Ltd* [1983] 2 AC 192; *In re Campbell (A Bankrupt)* [1997] Ch 14 and *Midland Bank Trust Co Ltd v Green* [1981] AC 513.]

472

Prest v Prest (SC(E))  
Argument

[2013] 2 AC

In *VTB Capital plc v Nutritek International Corpn* [2013] 2 AC 337 the Supreme Court assumed, without deciding, that English law permits the veil of incorporation to be pierced on appropriate facts. If it is necessary to decide whether there are, as a matter of principle, any grounds on which the corporate veil can be pierced at common law, it would be open to the court to conclude that there are no freestanding common law principles. Given that statute has given a company a separate legal existence, only statute can take that existence away. Moreover, the cases which are relied on by the wife to establish the courts' power to pierce the veil can be explained on other grounds or, in so far as they do suggest that such a jurisdiction exists, they should be rejected as inconsistent with the clear statements of principle contained in *Broderip v Salomon* [1895] 2 Ch 323; sub nom *Salomon v A Salomon & Co Ltd* [1897] AC 22; *Woolfson v Strathclyde Regional Council* 1978 SC (HL) 90; *Adams v Cape Industries plc* [1990] Ch 433; *Trustor AB v Smallbone (No 2)* [2001] 1 WLR 1177; *Ben Hashem v Al Shayif* [2009] 1 FLR 115 and *VTB Capital plc v Nutritek International Corpn* [2012] 2 Lloyd's Rep 313. The court should disapprove the obiter dicta of Cumming-Bruce and Dillon LJ in *Nicholas v Nicholas* [1984] FLR 285, 287E-F, 292F, of Cumming-Bruce LJ in *In re A Company* [1985] BCLC 333, 337I-338B and of Munby J in *W v H (Family Division: Without Notice Orders)* [2001] 1 All ER 300, 310H. Alternatively, if there are freestanding common law principles enabling the courts to pierce the corporate veil, the courts may in any event only do so if there is proof of relevant impropriety involving the misuse of a corporate structure to conceal or avoid a legal liability: see *Ben Hashem v Al Shayif* [2009] 1 FLR 115, paras 159-164; *VTB Capital plc v Nutritek International Corpn* [2012] 2 Lloyd's Rep 313; [2013] 2 AC 337, para 79. The courts cannot simply pierce the corporate veil whenever they perceive it to be in the interests of justice. The husband was not guilty of relevant impropriety which would justify piercing the corporate veil. Rather the corporate structure was set up and has been used for conventional reasons, including wealth protection and the avoidance of tax. The fact that the husband may have adopted an unco-operative stance in litigation against the wife does not turn this entirely legitimate use of a corporate structure into an improper use of such structure.

The judge did not find that the companies held all of their properties on trust for the husband. On the contrary, he concluded that the properties were "effectively" the property of the husband and that the companies were "in effect" nominees of the husband. These conclusions would have made no sense if the companies were in fact nominees for the husband. Accordingly, as the Court of Appeal correctly concluded, the judge's rejection of this aspect of the wife's case was clear. There is no new evidence or other material which would provide a basis for the Supreme Court to disturb the clear rejection of this aspect of the wife's case. Further, and in any event, the companies were not and are not nuptial settlements—neither settlements, nor nuptial.

[LORD NEUBERGER OF ABBOTSBURY PSC. It is not necessary to address the court on section 24(1)(c).]

The husband did not appear and was not represented.

*Todd QC* in reply.

It would be odious to the common law for a man who has complete control over these companies and through them, these properties, to be able

[2013] 2 AC

473  
Prest v Prest (SC(E))  
Argument

A to escape his responsibilities to his wife and children by deploying either (a) a corporate veil or (b) a cloak over the true beneficial ownership of the properties. Here the husband's and the companies' failures to provide proper disclosure raised the inference that the companies were beneficially owned by the husband. If so that beneficial interest could be transferred to the wife. Once the wife had asserted a positive case of beneficial ownership it fell to the husband to produce the evidence which should have been in his gift and which he and the companies were ordered to provide; their failure to do so should result in a finding that the companies hold the bare legal title on trusts of land for the husband as beneficial owner.

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C The word "entitled" in the Matrimonial Causes Act 1973 is a word in common use; it gives for an easy interpretation. If a reasonable person were asked "is Mr Prest entitled to these properties in circumstances where he could lawfully require their transfer or sale without any legitimate third party objection" then they would answer "yes". Any arcane interpretation which fails to achieve the underlying purpose of the Act is to be strongly discouraged. Whilst of very limited use, the doctrine of piercing the corporate veil survives and this would be an appropriate case for its deployment.

D The court took time for consideration.

12 June 2013. The following judgments were handed down.

## LORD SUMPTION JSC

### *Introduction*

E 1 This appeal arises out of proceedings for ancillary relief following a divorce. The principal parties before the judge, Moylan J, were Michael and Yasmin Prest. He was born in Nigeria and she in England. Both have dual Nigerian and British nationality. They were married in 1993, and during the marriage the matrimonial home was in England, although the husband was found by the judge to have been resident in Monaco from about 2001 to date. There was also a second home in Nevis. The wife petitioned for divorce in March 2008. A decree nisi was pronounced in December 2008, and a decree absolute in November 2011.

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G 2 The husband is not party to the appeal in point of form, although he is present in spirit. The appeal concerns only the position of a number of companies belonging to the group known as the Petrodel Group which the judge found to be wholly owned and controlled (directly or through intermediate entities) by the husband. There were originally seven companies involved, all of which were joined as additional respondents to the wife's application for ancillary relief. They were Petrodel Resources Ltd ("PRL"), Petrodel Resources (Nigeria) Ltd ("PRL Nigeria"), Petrodel Upstream Ltd ("Upstream"), Vermont Petroleum Ltd ("Vermont"), Elysium Diem Ltd, Petrodel Resources (Nevis) Ltd ("PRL Nevis") and Elysium Diem Ltd (Nevis). Three of these companies, PRL, Upstream and Vermont, all incorporated in the Isle of Man, are the respondents in this court. PRL was the legal owner of the matrimonial home, which was bought in the name of the company in 2001 but was found by the judge to be held for the husband beneficially. There is no longer any issue about that property, which is apparently in the process of being transferred to the wife. In addition, PRL

474

Prest v Prest (SC(E))  
Lord Sumption JSC

[2013] 2 AC

was the legal owner of five residential properties in the United Kingdom and A  
Vermont is the legal owner of two more. The question on this appeal is  
whether the court has power to order the transfer of these seven properties to  
the wife given that they legally belong not to him but to his companies.

3 Part II of the Matrimonial Causes Act 1973 confers wide powers on  
the court to order ancillary relief in matrimonial proceedings. Section 23  
provides for periodical and lump sum payments to a spouse or for the benefit B  
of children of the marriage. Under section 24(1)(a), the court may order that  
“a party to the marriage shall transfer to the other party . . . such property as  
may be so specified, being property to which the first-mentioned party is  
entitled, either in possession or reversion”. Section 25, as substituted by  
sections 3 and 48(2) of the Matrimonial and Family Proceedings Act 1984,  
provides for a number of matters to which the court must in particular have  
regard in making such orders, including, at section 25(2)(a), the “income, C  
earning capacity, property and other financial resources which each of the  
parties to the marriage has or is likely to have in the foreseeable future”.

4 The proper exercise of these powers calls for a considerable measure  
of candour by the parties in disclosing their financial affairs, and extensive  
procedural powers are available to the court to compel disclosure if  
necessary. In this case, the husband’s conduct of the proceedings has been D  
characterised by persistent obstruction, obfuscation and deceit, and a  
contumelious refusal to comply with rules of court and specific orders. The  
judge, Moylan J, recited in his judgment [2011] EWHC 2956 (Fam) the long  
history of successive orders of the court which were either ignored or  
evaded, the various attempts of the husband to conceal the extent of his  
assets in the course of his evidence, and the collusive proceedings in Nigeria  
by which he sought declarations that certain of the companies were held in E  
trust for his siblings. The only evidence on behalf of the respondent  
companies was an affidavit sworn by Mr Jack Murphy, a director of PRL  
and the corporate secretary of the three respondent companies, who failed to  
attend for cross-examination on it. The judge rejected his excuse that he was  
in bad health, and found that he was “unwilling rather than unable to attend  
court”: para 69. His conclusion was that

“as a result of the husband’s abject failure to comply with his F  
disclosure obligations and to comply with orders made by the court  
during the course of these proceedings, I do not have the evidence which  
would enable me to assemble a conventional schedule of assets”: para 13.

However, he found that the husband was the sole beneficial owner and the  
controller of the companies, and doing the best that he could on the material G  
available assessed his net assets at £37.5m.

5 By his order dated 16 November 2011, Moylan J ordered that the  
husband should procure the conveyance of the matrimonial home at  
16, Warwick Avenue, London W2 to the wife, free of incumbrances, and  
that he should make a lump sum payment to her of £17.5m and periodical  
payments at the rate of 2% of that sum while it remained outstanding,  
together with £24,000 per annum and the school fees for each of their four H  
children. In addition he awarded costs in favour of the wife, with a payment  
of £600,000 on account. The judge ordered the husband to procure the  
transfer of the seven UK properties legally owned by PRL and Vermont to  
the wife in partial satisfaction of the lump sum order. He directed those

[2013] 2 AC

475  
Prest v Prest (SC(E))  
Lord Sumption JSC

A companies to execute such documents as might be necessary to give effect to the transfer of the matrimonial home and the seven properties. Moreover, in awarding costs to the wife, the judge directed that PRL, Upstream and Vermont should be jointly and severally liable with the husband for 10% of those costs. Corresponding orders were made against certain of the other corporate respondents to the original proceedings, but they did not appeal, either to the Court of Appeal or to this court, and are no longer relevant, save in so far as the facts relating to them throw light on the position of the three respondents. No order was made (or sought) for the transfer of any assets of Upstream, but that company is interested in the present appeal by virtue of its liability under the judge's order for part of the wife's costs.

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6 The distinctive feature of the judge's approach was that he concluded that there was no general principle of law which entitled him to reach the companies' assets by piercing the corporate veil. This was because the authorities showed that the separate legal personality of the company could not be disregarded unless it was being abused for a purpose that was in some relevant respect improper. He held that there was no relevant impropriety. He nevertheless concluded that in applications for financial relief ancillary to a divorce, a wider jurisdiction to pierce the corporate veil was available under section 24 of the Matrimonial Causes Act 1973. The judge found that the matrimonial home was held by PRL on trust for the husband, but he made no corresponding finding about the seven other properties and refused to make a declaration that the husband was their beneficial owner. It is tolerably clear from his supplementary judgment of 16 November 2011 [2011] EWHC 3066 (Fam) (on the form of the order), that this was because having decided that he was specifically authorised to dispose of the companies' properties under section 24, it was unnecessary for him to do so and undesirable because of "the potential tax consequences": para 14. It is not clear what potential tax consequences he had in mind, but his observation suggests that without them he might well have made the declaration sought.

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7 In the Court of Appeal, the three respondent companies challenged the orders made against them on the ground that there was no jurisdiction to order their property to be conveyed to the wife in satisfaction of the husband's judgment debt. This contention, which has been repeated before us, raises a question of some importance. For some years it has been the practice of the Family Division to treat the assets of companies substantially owned by one party to the marriage as available for distribution under section 24 of the Matrimonial Causes Act, provided that the remaining assets of the company are sufficient to satisfy its creditors. In the Court of Appeal, the practice was supported by Thorpe LJ, but the majority disagreed: ante, pp 421–467. Rimer LJ, delivering the leading judgment for the majority, held that the practice developed by the Family Division was beyond the jurisdiction of the court unless (i) the corporate personality of the company was being abused for a purpose which was in some relevant respect improper, or (ii) on the particular facts of the case it could be shown that an asset legally owned by the company was held in trust for the husband. He considered that the judge had rejected both of these possibilities on the facts, and that he ought not therefore to have made the order. In a short concurring judgment, Patten LJ, ante, p 467, para 161, said that the Family Division had developed "an approach to company owned assets in ancillary

476

Prest v Prest (SC(E))  
Lord Sumption JSC

[2013] 2 AC

relief applications which amounts almost to a separate system of legal rules unaffected by the relevant principles of English property and company law.” The practice, he concluded, “must now cease”. This has significant practical implications. Unless the UK properties of the Petrodel Group are transferred to Mrs Prest, it is possible (she says likely) that the lump sum order in her favour will remain wholly unsatisfied. To date, the matrimonial home has been transferred to her but only subject to a pre-existing charge in favour of BNP Paribas to secure a debt of undisclosed amount. 10% of the money ordered to be paid on account of costs has been paid by the three respondents, but only in order to satisfy a condition imposed on them on their being granted leave to appeal to the Court of Appeal. Otherwise, apart from paying the children’s school fees, the husband has not complied with any part of Moylan J’s order and shows no intention of doing so if he can possibly avoid it.

### *The issues*

8 Subject to very limited exceptions, most of which are statutory, a company is a legal entity distinct from its shareholders. It has rights and liabilities of its own which are distinct from those of its shareholders. Its property is its own, and not that of its shareholders. In *Salomon v A Salomon & Co Ltd* [1897] AC 22, the House of Lords held that these principles applied as much to a company that was wholly owned and controlled by one man as to any other company. In *Macaurea v Northern Assurance Co Ltd* [1925] AC 619, the House of Lords held that the sole owner and controller of a company did not even have an insurable interest in property of the company, although economically he was liable to suffer by its destruction. Lord Buckmaster said, at pp 626–627:

“no shareholder has any right to any item of property owned by the company, for he has no legal or equitable interest therein. He is entitled to a share in the profits while the company continues to carry on business and a share in the distribution of the surplus assets when the company is wound up.”

In *Lonrho Ltd v Shell Petroleum Co Ltd* [1980] 1 WLR 627 the House of Lords held that documents of a subsidiary were not in the “power” of its parent company for the purposes of disclosure in litigation, simply by virtue of the latter’s ownership and control of the group. These principles are the starting point for the elaborate restrictions imposed by English law on a wide range of transactions which have the direct or indirect effect of distributing capital to shareholders. The separate personality and property of a company is sometimes described as a fiction, and in a sense it is. But the fiction is the whole foundation of English company and insolvency law. As Robert Goff LJ once observed, in this domain “we are concerned not with economics but with law. The distinction between the two is, in law, fundamental”: *Bank of Tokyo Ltd v Karoon (Note)* [1987] AC 45, 64. He could justly have added that it is not just legally but economically fundamental, since limited companies have been the principal unit of commercial life for more than a century. Their separate personality and property are the basis on which third parties are entitled to deal with them and commonly do deal with them.

[2013] 2 AC

477  
Prest v Prest (SC(E))  
Lord Sumption JSC

- A 9 Against this background, there are three possible legal bases on which the assets of the Petrodel companies might be available to satisfy the lump sum order against the husband: (1) It might be said that this is a case in which, exceptionally, a court is at liberty to disregard the corporate veil in order to give effective relief. (2) Section 24 of the Matrimonial Causes Act might be regarded as conferring a distinct power to disregard the corporate veil in matrimonial cases. (3) The companies might be regarded as holding the properties on trust for the husband, not by virtue of his status as their sole shareholder and controller, but in the particular circumstances of this case.

*The judge's findings: the companies*

- C 10 Most of the judge's findings of fact were directed to two questions which are no longer in dispute, namely whether the husband owned the Petrodel Group and what was the value of his assets. For present purposes, it is enough to summarise those which bear on the position of the three corporate respondents.

- D 11 At the time of the marriage, and throughout the 1990s, the husband was employed by a succession of major international oil trading companies as a trader, but in 2001 he left his last employer, Marc Rich, and began to run his own companies. Initially, there were two principal companies involved, Aurora and the Petrodel companies. In 2004 Aurora was wound up and thereafter he operated mainly through the Petrodel companies. The principal operating company of this group was PRL, a company incorporated in the Isle of Man. Its financial statements record that it was E incorporated on 4 May 1993, was dormant until 1996, and did not begin operations until 25 April 2002, i.e. after the husband had left Marc Rich and set up on his own. Between 1996 and 2002, it is described in its financial statements as a property investment company. Its sole function in that period appears to have been to hold title to the matrimonial home at F 16, Warwick Avenue in London and five residential investment properties in London, and to act as a channel for funding property purchases by other companies of the group. The husband's evidence was that the company had engaged in substantial agricultural and oil related business in the 1990s, in part in association with his then employer, Marc Rich. But this was inconsistent with the company's financial statements, and the judge rejected it. Mr Le Breton, a former business colleague of the husband, gave evidence at the hearing which the judge accepted as reliable. Mr Le Breton said that G from about 2001 PRL was engaged in a limited way in oil trading and shipping, and from 2006 moved into oil exploration and production in Nigeria and West Africa. The latest disclosed accounts of PRL are draft accounts for 2008 and 2009. The judge (para 147) declined to attach "any significant weight" to the financial data in the 2008 accounts, which he considered to have been manipulated. All the disclosed accounts are now very much out of date. For what they are worth, the accounts for both years H show a substantial turnover and large balances. The husband's evidence was that PRL ceased trading in 2010, when it lost its major exploration contract. Given his evident determination to frustrate his wife's claims on him, it cannot be assumed that the assets of the company recorded in the disclosed accounts are still there.

478

Prest v Prest (SC(E))  
Lord Sumption JSC

[2013] 2 AC

12 Management control of PRL has always been in the hands of the husband, ostensibly as chief executive under a contract of employment conferring on him complete discretion in the management of its business. The judge found that none of the companies had ever had any independent directors. The husband is a director of PRL Nigeria, but otherwise the directors are all nominal or professional directors, generally his relatives, who accept directions from him. The directors of PRL are Mr Murphy (the principal of its corporate secretary) and a lady in Nevis who appears to have been the couple's cleaner there.

13 The ownership of the respondent companies proved to be more difficult to establish. The husband did not admit to having any personal interest in the shares of any company of the group, and declined to say who the ultimate shareholders were. Substantially all of the issued shares of PRL are owned by PRL Nigeria. Almost all the shares of that company are owned by PRL Nevis, a company about which very little is known, but whose accounts show substantial balances, apparently derived from trading. The husband's evidence was that the shares of PRL Nevis were owned by its own subsidiary PRL Nigeria. The judge described this as "puzzling" (para 55) but made no finding as to whether it was true. More recently, it has been suggested that PRL Nevis is owned by a family trust about which, however, nothing has been disclosed. In the end, it did not matter, because the judge cut through the complexities of the corporate structure by accepting the evidence of the wife and Mr Le Breton that the husband was the true owner of the Petrodel Group, as he had always told them he was, even if the exact means by which he held it remained obscure. That accounted for PRL, PRL Nigeria and PRL Nevis.

14 It also accounted for Vermont, whose shares are held 49% by PRL and 51% by PRL Nigeria, and Upstream, which had a single issued share held by PRL Nevis. Vermont was and possibly still is a trading company. The husband's evidence was that it began to ship crude oil in 2010. The exact nature of Upstream's business (if any) is unclear. It does not appear to trade.

15 The husband declined to answer the question whether he received any benefits from PRL other than his salary, saying that this was an "accounting question". The judge, however, made extensive findings about this. He found that his personal expenditure substantially exceeded his salary and bonuses as chief executive, and that the difference was funded entirely by the company. There was no formality involved. The husband simply treated the companies' cash balances and property as his own and drew on them as he saw fit. The judge found that the husband had "unrestricted access" to the companies' assets, unconfined by any board control or by any scruples about the legality of his drawings: para 208. He used PRL's assets to fund his and his family's personal expenditure, including the substantial legal costs incurred in these proceedings. The group was "effectively . . . the husband's money box which he uses at will": para 218.

#### *Piercing the corporate veil*

16 I should first of all draw attention to the limited sense in which this issue arises at all. "Piercing the corporate veil" is an expression rather indiscriminately used to describe a number of different things. Properly

- A speaking, it means disregarding the separate personality of the company. There is a range of situations in which the law attributes the acts or property of a company to those who control it, without disregarding its separate legal personality. The controller may be personally liable, generally in addition to the company, for something that he has done as its agent or as a joint actor. Property legally vested in a company may belong beneficially to the controller, if the arrangements in relation to the property are such as to make the company its controller's nominee or trustee for that purpose. For specific statutory purposes, a company's legal responsibility may be engaged by the acts or business of an associated company. Examples are the provisions of the Companies Acts governing group accounts or the rules governing infringements of competition law by "firms", which may include groups of companies conducting the relevant business as an economic unit. Equitable remedies, such as an injunction or specific performance may be available to compel the controller whose personal legal responsibility is engaged to exercise his control in a particular way. But when we speak of piercing the corporate veil, we are not (or should not be) speaking of any of these situations, but only of those cases which are true exceptions to the rule in *Salomon v A Salomon & Co Ltd* [1897] AC 22, i.e. where a person who owns and controls a company is said in certain circumstances to be identified with it in law by virtue of that ownership and control.

- D 17 Most advanced legal systems recognise corporate legal personality while acknowledging some limits to its logical implications. In civil law jurisdictions, the juridical basis of the exceptions is generally the concept of abuse of rights, to which the International Court of Justice was referring in *Case concerning Barcelona Traction, Light and Power Co Ltd (Belgium v Spain) (Second Phase)* [1970] ICJ Rep 3 when it derived from municipal law a limited principle permitting the piercing of the corporate veil in cases of misuse, fraud, malfeasance or evasion of legal obligations. These examples illustrate the breadth, at least as a matter of legal theory, of the concept of abuse of rights, which extends not just to the illegal and improper invocation of a right but to its use for some purpose collateral to that for which it exists.

- E F 18 English law has no general doctrine of this kind. But it has a variety of specific principles which achieve the same result in some cases. One of these principles is that the law defines the incidents of most legal relationships between persons (natural or artificial) on the fundamental assumption that their dealings are honest. The same legal incidents will not necessarily apply if they are not. The principle was stated in its most absolute form by Denning LJ in a famous dictum in *Lazarus Estates Ltd v Beasley* [1956] 1 QB 702, 712:

- G H "No court in this land will allow a person to keep an advantage which he has obtained by fraud. No judgment of a court, no order of a Minister, can be allowed to stand if it has been obtained by fraud. Fraud unravels everything. The court is careful not to find fraud unless it is distinctly pleaded and proved; but once it is proved, it vitiates judgments, contracts and all transactions whatsoever . . ."

The principle is mainly familiar in the context of contracts and other consensual arrangements, in which the effect of fraud is to vitiate consent so that the transaction becomes voidable ab initio. But it has been applied altogether more generally, in cases which can be rationalised only on

480

Prest v Prest (SC(E))  
Lord Sumption JSC

[2013] 2 AC

grounds of public policy, for example to justify setting aside a public act such as a judgment, which is in no sense consensual, a jurisdiction which has existed since at least 1775: *Duchess of Kingston's Case* (1776) 2 Smith's LC (13th ed) 644, 646, 651. Or to abrogate a right derived from a legal status, such as marriage: *R v Secretary of State for the Home Department, Ex p Puttick* [1981] QB 767. Or to disapply a statutory time bar which on the face of the statute applies: *Welwyn Hatfield Borough Council v Secretary of State for Communities and Local Government* [2011] 2 AC 304. These decisions (and there are others) illustrate a broader principle governing cases in which the benefit of some apparently absolute legal principle has been obtained by dishonesty. The authorities show that there are limited circumstances in which the law treats the use of a company as a means of evading the law as dishonest for this purpose.

19 The question is heavily burdened by authority, much of it characterised by incautious dicta and inadequate reasoning. I propose, first, to examine those cases which seek to rationalise the case law in terms of general principle, and then to look at a number of cases in which the court has been thought, rightly or wrongly, to have pierced the corporate veil in order to identify the critical features of these cases which enabled them to do so.

20 Almost all the modern analyses of the general principle have taken as their starting point the brief and obiter but influential statement of Lord Keith of Kinkel in *Woolfson v Strathclyde Regional Council* 1978 SC (HL) 90. This was an appeal from Scotland in which the House of Lords declined to allow the principal shareholder of a company to recover compensation for the compulsory purchase of a property which the company occupied. The case was decided on its facts, but at p 96, Lord Keith, delivering the leading speech, observed that "it is appropriate to pierce the corporate veil only where special circumstances exist indicating that it is a mere facade concealing the true facts".

21 The first systematic analysis of the large and disparate body of English case law was undertaken by a strong Court of Appeal in *Adams v Cape Industries plc* [1990] Ch 433 (Slade, Mustill and Ralph Gibson LJJ). The question at issue in that case was whether the United Kingdom parent of an international mining group which was, at least arguably, managed as a "single economic unit" was present in the United States for the purpose of making a default judgment of a United States court enforceable against it in England. Among other arguments, it was suggested that it was present in the United States by virtue of the fact that a wholly owned subsidiary was incorporated and carried on business there. Slade LJ, delivering the judgment of the court, rejected this contention: pp 532–544. The court, adopting Lord Keith's dictum in *Woolfson v Strathclyde*, held that the corporate veil could be disregarded only in cases where it was being used for a deliberately dishonest purpose: pp 539, 540. Apart from that, and from cases turning on the wording of particular statutes, it held at p 536 that:

"the court is not free to disregard the principle of *Salomon v A Salomon & Co Ltd* [1897] AC 22 merely because it considers that justice so requires. Our law, for better or worse, recognises the creation of subsidiary companies, which though in one sense the creatures of their parent companies, will nevertheless under the general law fall to be

[2013] 2 AC

481  
Prest v Prest (SC(E))  
Lord Sumption JSC

A treated as separate legal entities with all the rights and liabilities which would normally attach to separate legal entities.”

22 In *Trustor AB v Smallbone (No 2)* [2001] 1 WLR 1177, Sir Andrew Morritt V-C reviewed many of the same authorities. Mr Smallbone, the former managing director of Trustor, had improperly procured large amounts of its money to be paid out of its account to a company called  
B Introcom Ltd, incorporated in Gibraltar. Introcom was owned and controlled by a Liechtenstein trust of which Mr Smallbone was a beneficiary. Its directors acted on his instructions. At an earlier stage of the litigation, Trustor had obtained summary judgment on some of its claims against Introcom, on the footing that the payments were unauthorised and a breach of Mr Smallbone’s duty as managing director, that the company was “simply  
C a vehicle Mr Smallbone used for receiving money from Trustor”, and that his knowledge could be imputed to the company. The Vice-Chancellor was dealing with a subsequent application by Trustor for summary judgment against Mr Smallbone himself. It was accepted that there was an arguable defence to the claims against him for damages or compensation for breach of his duties as a director of Trustor. Accordingly the sole basis of the application was that he was liable to account as a constructive trustee on the  
D footing of knowing receipt. This depended on the proposition that he was to be identified with Introcom and so treated as having received the money himself. It was submitted that the authorities justified piercing the corporate veil in three, possibly overlapping, cases: (i) where the company was a “facade or sham”; (ii) where the company was involved in some form of impropriety; and (iii) where it was necessary to do so in the interests of  
E justice. In each of these cases, the right of the court to pierce the corporate veil was said to be subject to there being no third party interests engaged, such as unconnected minority shareholders or creditors. Sir Andrew Morritt V-C concluded that the authorities supported the submission in case (i), and also in case (ii) provided that the impropriety was a relevant one, i.e. “linked to the use of the company structure to avoid or conceal liability for that impropriety”: para 22. He followed *Adams v Cape  
F Industries plc* in rejecting the submission as applied to case (iii). In summary, the court was “entitled to ‘pierce the corporate veil’ and recognise the receipt of the company as that of the individual(s) in control of it if the company was used as a device or facade to conceal the true facts, thereby avoiding or concealing any liability of those individual(s)”: see para 23.

23 For years after it was decided, *Adams v Cape Industries plc* was  
G regarded as having settled the general law on the subject. But for much of this period, the Family Division pursued an independent line, essentially for reasons of policy arising from its concern to make effective its statutory jurisdiction to distribute the property of the marriage on a divorce. In *Nicholas v Nicholas* [1984] FLR 285, the Court of Appeal (Cumming-Bruce and Dillon LJ) overturned the decision of the judge to order the husband to  
H procure the transfer to the wife of a property belonging to a company in which he held a 71% shareholding, the other 29% being held by his business associates. However, both members of the court suggested, obiter, that the result might have been different had it not been for the position of the minority shareholders. Cumming-Bruce LJ, at p 287, thought that, in that situation, “the court does and will pierce the corporate veil and make an

482

Prest v Prest (SC(E))  
Lord Sumption JSC

[2013] 2 AC

order which has the same effect as an order that would be made if the property was vested in the majority shareholder.” Dillon LJ said, at p 292, that “If the company was [a] one-man company and the alter ego of the husband, I would have no difficulty in holding that there was power to order a transfer of the property.” These dicta were subsequently applied by judges of the Family Division dealing with claims for ancillary financial relief, who regularly made orders awarding to parties to the marriage assets vested in companies of which one of them was the sole shareholder. Connell J made such an order in *Green v Green* [1993] 1 FLR 326. In *Mubarak v Mubarak* [2001] 1 FLR 673, 682c, Bodey J held that for the purpose of claims to ancillary financial relief the Family Division would lift the corporate veil not only where the company was a sham but “when it is just and necessary”, the very proposition that the Court of Appeal had rejected as a statement of the general law in *Adams v Cape Industries plc* [1990] Ch 433. And in *Kremen v Agrest (No 2)* [2011] 2 FLR 490, para 46, Mostyn J held that there was a “strong practical reason why the cloak should be penetrable even absent a finding of wrongdoing”.

24 There were of course dissenting voices, even in decisions on ancillary relief. Much the most significant of them for present purposes was that of Munby J. In *A v A* [2007] 2 FLR 467, paras 18–19, he drew attention to the robust approach which had always been adopted by judges of the Family Division in seeing through sham arrangements designed to hide the ownership of assets of the marriage by vesting them in relatives or companies which were in reality holding them as their nominees. But he warned against departing from fundamental legal principle. He observed, at para 21:

“In this sense, and to this limited extent, the typical case in the Family Division may differ from the typical case in (say) the Chancery Division. But what it is important to appreciate (and too often, I fear, is not appreciated at least in this division) is that the relevant legal principles which have to be applied are precisely the same in this division as in the other two divisions. There is not one law of ‘sham’ in the Chancery Division and another law of ‘sham’ in the Family Division. There is only one law of ‘sham’, to be applied equally in all three divisions of the High Court, just as there is but one set of principles, again equally applicable in all three divisions, determining whether or not it is appropriate to ‘pierce the corporate veil.’”

25 In *Ben Hashem v Al Shayif* [2009] 1 FLR 115, another decision of Munby J, the difference between the approach taken in the Family Division and in other divisions of the High Court arose in a particularly acute form, because he was hearing the claim for ancillary relief in conjunction with proceedings in the Chancery Division. In the Family Division, the wife was seeking an order transferring to her a property which she was occupying but which was owned by a company controlled by the husband, while in the Chancery proceedings the company was seeking a possession order in respect of the same property. After reminding himself of what he had said in *A v A* and conducting a careful review of both family and non-family cases, Munby J formulated six principles at paras 159–164 which he considered could be derived from them: (i) ownership and control of a company were not enough to justify piercing the corporate veil; (ii) the court cannot pierce

- A the corporate veil, even in the absence of third party interests in the company, merely because it is thought to be necessary in the interests of justice; (iii) the corporate veil can be pierced only if there is some impropriety; (iv) the impropriety in question must, as Sir Andrew Morritt V-C had said in the *Trustor* case [2001] 1 WLR 1177, be “linked to the use of the company structure to avoid or conceal liability”; (v) to justify
- B piercing the corporate veil, there must be “both control of the company by the wrongdoer(s) and impropriety, that is (mis)use of the company by them as a device or facade to conceal their wrongdoing”; and (vi) the company may be a “facade” even though it was not originally incorporated with any deceptive intent, provided that it is being used for the purpose of deception at the time of the relevant transactions. The court would, however, pierce the corporate veil only so far as it was necessary in order to provide a remedy
- C for the particular wrong which those controlling the company had done.

- 26 In *VTB Capital plc v Nutritek International Corpn* [2012] 2 Lloyd’s Rep 313, VTB Capital sought permission to serve proceedings out of the jurisdiction on the footing that the borrower under a facility agreement was to be identified with the persons who controlled it, so as to make the latter in law parties to the same agreement. The attempt failed in the Court of
- D Appeal because the court was not satisfied that that would be the consequence of piercing the corporate veil even if it were legitimate to do so: see paras 90–91. The decision is not, therefore, direct authority on the question whether the court was entitled to pierce the corporate veil. But the court considered all the principal authorities on that question and arrived at substantially the same conclusions as Sir Andrew Morritt V-C and Munby J.
- E Munby J’s statement of principle was adopted by the Court of Appeal subject to two qualifications. First, they said that it was not necessary in order to pierce the corporate veil that there should be no other remedy available against the wrongdoer, and so far as Munby J suggested that it was, he had set the bar too high. Secondly, they said that it was not enough to show that there had been wrongdoing.

- F “The relevant wrongdoing must be in the nature of an independent wrong that involves the fraudulent or dishonest misuse of the corporate personality of the company for the purpose of concealing the true facts”: see paras 79–80.

- On this point, the case took the same course in the Supreme Court [2013] 2 AC 337, which dismissed VTB Capital’s appeal. So far as piercing the corporate veil is concerned, the court’s reasons were given by Lord
- G Neuberger of Abbotsbury PSC. He noted the broad consensus among judges and textbook writers that there were circumstances in which separate legal personality of a company might be disregarded and the company identified with those who owned and controlled it. However, he declined to decide whether the consensus was right on an appeal from an interlocutory decision, given that, like the Court of Appeal, he considered that even if the
- H veil were pierced the result would not be to make a company’s controllers party to its contracts with third parties. But he adopted, as it seems to me, both the general reasoning of the Court of Appeal and the view of Munby J that any doctrine permitting the court to pierce the corporate veil must be limited to cases where there was a relevant impropriety: see paras 128, 145.

484

Prest v Prest (SC(E))  
Lord Sumption JSC

[2013] 2 AC

27 In my view, the principle that the court may be justified in piercing the corporate veil if a company's separate legal personality is being abused for the purpose of some relevant wrongdoing is well established in the authorities. It is true that most of the statements of principle in the authorities are obiter, because the corporate veil was not pierced. It is also true that most cases in which the corporate veil was pierced could have been decided on other grounds. But the consensus that there are circumstances in which the court may pierce the corporate veil is impressive. I would not for my part be willing to explain that consensus out of existence. This is because I think that the recognition of a limited power to pierce the corporate veil in carefully defined circumstances is necessary if the law is not to be disarmed in the face of abuse. I also think that provided the limits are recognised and respected, it is consistent with the general approach of English law to the problems raised by the use of legal concepts to defeat mandatory rules of law.

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28 The difficulty is to identify what is a relevant wrongdoing. References to a "facade" or "sham" beg too many questions to provide a satisfactory answer. It seems to me that two distinct principles lie behind these protean terms, and that much confusion has been caused by failing to distinguish between them. They can conveniently be called the concealment principle and the evasion principle. The concealment principle is legally banal and does not involve piercing the corporate veil at all. It is that the interposition of a company or perhaps several companies so as to conceal the identity of the real actors will not deter the courts from identifying them, assuming that their identity is legally relevant. In these cases the court is not disregarding the "facade", but only looking behind it to discover the facts which the corporate structure is concealing. The evasion principle is different. It is that the court may disregard the corporate veil if there is a legal right against the person in control of it which exists independently of the company's involvement, and a company is interposed so that the separate legal personality of the company will defeat the right or frustrate its enforcement. Many cases will fall into both categories, but in some circumstances the difference between them may be critical. This may be illustrated by reference to those cases in which the court has been thought, rightly or wrongly, to have pierced the corporate veil.

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29 The first and most famous of them is *Gilford Motor Co Ltd v Horne* [1933] Ch 935. Mr E B Horne had been the managing director of the Gilford Motor Co. His contract of employment precluded him being engaged in any competing business in a specified geographical area for five years after the end of his employment "either solely or jointly with or as agent for any other person, firm or company". He left Gilford and carried on a competing business in the specified area, initially in his own name. He then formed a company, JM Horne & Co Ltd, named after his wife, in which she and a business associate were shareholders. The trial judge, Farwell J, found that the company had been set up in this way to enable the business to be carried on under his own control but without incurring liability for breach of the covenant. However the reality, in his view, was that the company was being used as "the channel through which the defendant Horne was carrying on his business": p 943. In fact, he dismissed the claim on the ground that the restrictive covenant was void. But the Court of Appeal allowed the appeal on that point and granted an injunction against both Mr Horne and

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[2013] 2 AC

485  
Prest v Prest (SC(E))  
Lord Sumption JSC

A the company. As against Mr Horne, the injunction was granted on the concealment principle. Lord Hanworth MR said, at pp 961–962, that the company was a “mere cloak or sham” because the business was really being carried on by Mr Horne. Because the restrictive covenant prevented Mr Horne from competing with his former employers whether as principal or as agent for another, it did not matter whether the business belonged to him or to JM Horne & Co Ltd provided that he was carrying it on. The only relevance of the interposition of the company was to maintain the pretence that it was being carried on by others. Lord Hanworth MR did not explain why the injunction should issue against the company, but I think it is clear from the judgments of Lawrence and Romer LJ, at pp 962 and 966, that they were applying the evasion principle. Lawrence LJ, who gave the fullest consideration to the point, based his view entirely on Mr Horne’s evasive motive for forming the company. This showed that it was

“a mere channel used by the defendant Horne for the purpose of enabling him, for his own benefit, to obtain the advantage of the customers of the plaintiff company, and that therefore the defendant company ought to be restrained as well as the defendant Horne.”

D In other words, the company was restrained in order to ensure that Horne was deprived of the benefit which he might otherwise have derived from the separate legal personality of the company. I agree with the view expressed by the Court of Appeal in *VTB Capital v Nutritek* [2012] 2 Lloyd’s Rep 313, para 63, that this is properly to be regarded as a decision to pierce the corporate veil. It is fair to say that the point may have been conceded by counsel, although in rather guarded terms (“if the evidence admitted of the conclusion that what was being done was a mere cloak or sham”). It is also true that the court in *Gilford Motor Co Ltd v Horne* [1933] Ch 935 might have justified the injunction against the company on the ground that Mr Horne’s knowledge was to be imputed to the company so as to make the latter’s conduct unconscionable or tortious, thereby justifying the grant of an equitable remedy against it. But the case is authority for what it decided, not for what it might have decided, and in my view the principle which the Court of Appeal applied was correct. It does not follow that JM Horne & Co Ltd was to be identified with Mr Horne for any other purpose. Mr Horne’s personal creditors would not, for example, have been entitled simply by virtue of the facts found by Farwell J, to enforce their claims against the assets of the company.

G 30 *Jones v Lipman* [1962] 1 WLR 832 was a case of very much the same kind. The facts were that Mr Lipman sold a property to the plaintiffs for £5,250 and then, thinking better of the deal, sold it to a company called Alamed Ltd for £3,000, in order to make it impossible for the plaintiffs to get specific performance. The judge, Russell J, found that company was wholly owned and controlled by Mr Lipman, who had bought it off the shelf and had procured the property to be conveyed to it “solely for the purpose of defeating the plaintiffs’ rights to specific performance”. About half of the purchase price payable by Alamed was funded by borrowing from a bank, and the rest was left outstanding. The judge decreed specific performance against both Mr Lipman and Alamed Ltd. As against Mr Lipman this was done on the concealment principle. Because Mr Lipman owned and controlled Alamed Ltd, he was in a position specifically to perform his

486

Prest v Prest (SC(E))  
Lord Sumption JSC

[2013] 2 AC

obligation to the plaintiffs by exercising his powers over the company. This did not involve piercing the corporate veil, but only identifying Mr Lipman as the man in control of the company. The company, said Russell J portentously at p 836, was “a device and a sham, a mask which [Mr Lipman] holds before his face in an attempt to avoid recognition by the eye of equity”. On the other hand, as against Alamed Ltd itself, the decision was justified on the evasion principle, by reference to the Court of Appeal’s decision in *Gilford Motor Co Ltd v Horne*. The judge must have thought that in the circumstances the company should be treated as having the same obligation to convey the property to the plaintiff as Mr Lipman had, even though it was not party to the contract of sale. It should be noted that he decreed specific performance against the company notwithstanding that as a result of the transaction, the company’s main creditor, namely the bank, was prejudiced by its loss of what appears from the report to have been its sole asset apart from a possible personal claim against Mr Lipman which he may or may not have been in a position to meet. This may be thought hard on the bank, but it is no harder than a finding that the company was not the beneficial owner at all. The bank could have protected itself by taking a charge or registering the contract of sale.

31 In *Gencor ACP Ltd v Dalby* [2000] 2 BCLC 734, the plaintiff made a large number of claims against a former director, Mr Dalby, for misappropriating its funds. For present purposes the claim which matters is a claim for an account of a secret profit which Mr Dalby procured to be paid by a third party, Balfour Beatty, to a British Virgin Island company under his control called Burnstead. Rimer J held, at para 26, that Mr Dalby was accountable for the money received by Burnstead, on the ground that the latter was “in substance little other than Mr Dalby’s offshore bank account held in a nominee name”, and “simply . . . the alter ego through which Mr Dalby enjoyed the profit which he earned in breach of his fiduciary duty to ACP”. Rimer J ordered an account against both Mr Dalby and Burnstead. He considered that he was piercing the corporate veil. But I do not think that he was. His findings about Mr Dalby’s relationship with the company and his analysis of the legal consequences show that both Mr Dalby and Burnstead were independently liable to account to ACP, even on the footing that they were distinct legal persons. If, as the judge held, Burnstead was Mr Dalby’s nominee for the purpose of receiving and holding the secret profit, it followed that Burnstead had no right to the money as against Mr Dalby, who had in law received it through Burnstead and could properly be required to account for it to ACP. Burnstead itself was liable to account to ACP because, as the judge went on to point out, Mr Dalby’s knowledge of the prior equitable interest of ACP was to be imputed to it. As Rimer J observed, “The introduction into the story of such a creature company is . . . insufficient to prevent equity’s eye from identifying it with Mr Dalby”. This is in reality the concealment principle. The correct analysis of the situation was that the court refused to be deterred by the legal personality of the company from finding the true facts about its legal relationship with Mr Dalby. It held that the nature of their dealings gave rise to ordinary equitable claims against both. The result would have been exactly the same if Burnstead, instead of being a company, had been a natural person, say Mr Dalby’s uncle, about whose separate existence there could be no doubt.

[2013] 2 AC

487  
Prest v Prest (SC(E))  
Lord Sumption JSC

A 32 The same confusion of concepts is, with respect, apparent in Sir  
Andrew Morritt V-C's analysis in *Trustor AB v Smallbone (No 2)* [2001]  
1 WLR 1177, which I have already considered. The Vice-Chancellor's  
statement of principle at para 23 that the court was entitled to pierce the  
corporate veil if the company was used as a "device or facade to conceal the  
true facts thereby avoiding or concealing any liability of those individual(s)"  
B elides the quite different concepts of concealment and avoidance. As I read  
his reasons for giving judgment against Mr Smallbone, at paras 24–25, he  
did so on the concealment principle. It had been found at the earlier stage of  
the litigation that Introcom was "simply a vehicle Mr Smallbone used for  
receiving money from Trustor", and that the company was a "device or  
facade" for concealing that fact. On that footing, the company received the  
money on Mr Smallbone's behalf. This conclusion did not involve piercing  
C the corporate veil, and did not depend on any finding of impropriety. It was  
simply an application of the principle summarised by the Sir Andrew  
Morritt V-C at para 19 of his judgment, that receipt by a company will count  
as receipt by the shareholder if the company received it as his agent or  
nominee, but not if it received it in its own right. To decide that question, it  
was necessary to establish the facts which demonstrated the true legal  
D relationship between Mr Smallbone and Introcom. Mr Smallbone's  
ownership and control of Introcom was only one of those facts, not in itself  
conclusive. Other factors included the circumstances and the source of the  
receipt, and the nature of the company's other transactions if any.

E 33 In the *Trustor* case, as in the *Gencor* case, the analysis would have  
been the same if Introcom had been a natural person instead of a company.  
The evasion principle was not engaged, and indeed could not have been  
engaged on the facts of either case. This is because neither Mr Dalby nor  
Mr Smallbone had used the company's separate legal personality to evade a  
liability that they would otherwise have had. They were liable to account  
only if the true facts were that the company had received the money as their  
agent or nominee. That was proved in both cases. If it had not been, there  
would have been no receipt, knowing or otherwise, and therefore no claim  
to be evaded. The situation was not the same as it had been in *Gilford Motor*  
F *Co v Horne* [1933] Ch 935 and *Jones v Lipman* [1962] 1 WLR 832, for in  
these cases the real actors, Mr Horne and Mr Lipman, had a liability which  
arose independently of the involvement of the company.

G 34 These considerations reflect the broader principle that the corporate  
veil may be pierced only to prevent the abuse of corporate legal personality.  
It may be an abuse of the separate legal personality of a company to use it to  
evade the law or to frustrate its enforcement. It is not an abuse to cause a  
legal liability to be incurred by the company in the first place. It is not an  
abuse to rely on the fact (if it is a fact) that a liability is not the controller's  
because it is the company's. On the contrary, that is what incorporation is  
all about. Thus in a case like *VTB Capital v Nutritek* [2012] 2 Lloyd's Rep  
313; [2013] 2 AC 337, where the argument was that the corporate veil  
H should be pierced so as to make the controllers of a company jointly and  
severally liable on the company's contract, the fundamental objection to the  
argument was that the principle was being invoked so as to create a new  
liability that would not otherwise exist. The objection to that argument is  
obvious in the case of a consensual liability under a contract, where the  
ostensible contracting parties never intended that any one else should be

488

Prest v Prest (SC(E))  
Lord Sumption JSC

[2013] 2 AC

party to it. But the objection would have been just as strong if the liability in question had not been consensual. A

35 I conclude that there is a limited principle of English law which applies when a person is under an existing legal obligation or liability or subject to an existing legal restriction which he deliberately evades or whose enforcement he deliberately frustrates by interposing a company under his control. The court may then pierce the corporate veil for the purpose, and only for the purpose, of depriving the company or its controller of the advantage that they would otherwise have obtained by the company's separate legal personality. The principle is properly described as a limited one, because in almost every case where the test is satisfied, the facts will in practice disclose a legal relationship between the company and its controller which will make it unnecessary to pierce the corporate veil. Like Munby J in *Ben Hashem v Al Shayif* [2009] 1 FLR 115, I consider that if it is not necessary to pierce the corporate veil, it is not appropriate to do so, because on that footing there is no public policy imperative which justifies that course. I therefore disagree with the Court of Appeal in *VTB Capital v Nutritek* [2012] 2 Lloyd's Rep 313 who suggested otherwise at para 79. For all of these reasons, the principle has been recognised far more often than it has been applied. But the recognition of a small residual category of cases where the abuse of the corporate veil to evade or frustrate the law can be addressed only by disregarding the legal personality of the company is, I believe, consistent with authority and with long-standing principles of legal policy. B C D

36 In the present case, Moylan J held that he could not pierce the corporate veil under the general law without some relevant impropriety, and declined to find that there was any. In my view he was right about this. The husband has acted improperly in many ways. In the first place, he has misapplied the assets of his companies for his own benefit, but in doing that he was neither concealing nor evading any legal obligation owed to his wife. Nor, more generally, was he concealing or evading the law relating to the distribution of assets of a marriage on its dissolution. It cannot follow that the court should disregard the legal personality of the companies with the same insouciance as he did. Secondly, the husband has made use of the opacity of the Petrodel Group's corporate structure to deny being its owner. But that, as the judge pointed out, at para 219, "is simply [the] husband giving false evidence". It may engage what I have called the concealment principle, but that simply means that the court must ascertain the truth that he has concealed, as it has done. The problem in the present case is that the legal interest in the properties is vested in the companies and not in the husband. They were vested in the companies long before the marriage broke up. Whatever the husband's reasons for organising things in that way, there is no evidence that he was seeking to avoid any obligation which is relevant in these proceedings. The judge found that his purpose was "wealth protection and the avoidance of tax": para 218. It follows that the piercing of the corporate veil cannot be justified in this case by reference to any general principle of law. E F G

*Section 24(1)(a) of the Matrimonial Causes Act 1973* H

37 If there is no justification as a matter of general legal principle for piercing the corporate veil, I find it impossible to say that a special and wider principle applies in matrimonial proceedings by virtue of section 24(1)(a) of the Matrimonial Causes Act 1973. The language of this provision is clear. It

[2013] 2 AC

489  
Prest v Prest (SC(E))  
Lord Sumption JSC

A empowers the court to order one party to the marriage to transfer to the other “property to which the first-mentioned party is entitled, either in possession or reversion”. An “entitlement” is a legal right in respect of the property in question. The words “in possession or reversion” show that the right in question is a proprietary right, legal or equitable. This section is invoking concepts with an established legal meaning and recognised legal incidents under the general law. Courts exercising family jurisdiction do not occupy a desert island in which general legal concepts are suspended or mean something different. If a right of property exists, it exists in every division of the High Court and in every jurisdiction of the county courts. If it does not exist, it does not exist anywhere. It is right to add that even where courts exercising family jurisdiction have claimed a wider jurisdiction to pierce the corporate veil than would be recognised under the general law, they have not usually suggested that this can be founded on section 24 of the Matrimonial Causes Act 1973. On the contrary, in *Nicholas v Nicholas* [1984] FLR 285, 288, Cumming-Bruce LJ said that it could not.

C 38 This analysis is not affected by section 25(2)(a) of the Matrimonial Causes Act 1973. Section 25(2)(a) requires the court when exercising the powers under section 24, to have regard to the “income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future”. The breadth and inclusiveness of this definition of the relevant resources of the parties to the marriage means that the relevant spouse’s ownership and control of a company and practical ability to extract money or money’s worth from it are unquestionably relevant to the court’s assessment of what his resources really are. That may affect the amount of any lump sum or periodical payment orders, or the decision what transfers to order of other property which unquestionably belongs to the relevant spouse. But it does not follow from the fact that one spouse’s worth may be boosted by his access to the company’s assets that those assets are specifically transferrable to the other under section 24(1)(a).

D 39 Moylan J considered that it was enough to justify his order to transfer the properties that the husband should have the practical ability to procure their transfer, whether or not he was their beneficial owner. He found that this was established in the present case because of the power which the husband had over the companies by virtue of owning and controlling them. The judge did not make any finding about whether the properties of the corporate respondents were held in trust for the husband, except in the case of the matrimonial home in Warwick Avenue, which he found to be beneficially his. What he held was that the assets of the companies were “effectively” the husband’s property, because he treated them as such. He was “able to procure their disposal as he may direct, based again on his being the controller of the companies and the only beneficial owner”; para 210. The judge accepted that as a matter of company law, the husband as shareholder had no more than a right of participation in accordance with the company’s constitution, and that that did not confer any right to any particular property of the company. “But, what if the shareholder is, in fact, able to procure the transfer to them of a particular item of company property, such as a matrimonial home,” the judge asked, “as a result of their control and ownership of the company and the absence of any third party interests.” The judge’s answer to that question was that

490

Prest v Prest (SC(E))  
Lord Sumption JSC

[2013] 2 AC

the “purpose and intention” of the Matrimonial Causes Act 1973 was that the companies’ assets should be treated as part of the marital wealth. “Effectively”, he said, “the husband, in respect of the companies and their assets, is in the same position he would be in if he was *the beneficiary* of a bare trust or the companies were his nominees”: para 225. A

40 I do not accept this, any more than the Court of Appeal did. The judge was entitled to take account of the husband’s ownership and control of the companies and his unrestricted access to the companies’ assets in assessing what his resources were for the purpose of section 25(2)(a). But he was not entitled to order the companies’ assets to be transferred to the wife in satisfaction of the lump sum order simply by virtue of section 24(1)(a). I do not doubt that the construction of section 24(1)(a) of the Act is informed by its purpose and its social context, as well as by its language. Nor do I doubt that the object is to achieve a proper division of the assets of the marriage. But it does not follow that the courts will stop at nothing in their pursuit of that end, and there are a number of principled reasons for declining to give the section the effect that the judge gave it. In the first place, it is axiomatic that general words in a statute are not to be read in a way which “would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness”. The words are those of Lord Atkin in *Nokes v Doncaster Amalgamated Collieries Ltd* [1940] AC 1014, 1031–1032, but the principle is very familiar and has been restated by the courts in many contexts and at every level. There is nothing in the Matrimonial Causes Act 1973 and nothing in its purpose or broader social context to indicate that the legislature intended to authorise the transfer by one party to the marriage to the other of property which was not his to transfer. Secondly, a transfer of this kind will ordinarily be unnecessary for the purpose of achieving a fair distribution of the assets of the marriage. Where assets belong to a company owned by one party to the marriage, the proper claims of the other can ordinarily be satisfied by directing the transfer of the shares. It is true that this will not always be possible, particularly in cases like this one where the shareholder and the company are both resident abroad in places which may not give direct effect to the orders of the English court. In an age of internationally mobile spouses and assets this is a more significant problem than it once was, but such cases remain the exception rather than the rule. Section 24 cannot be construed as if it were directed to that problem. Third, so far as a party to matrimonial proceedings deliberately attempts to frustrate the exercise of the court’s ancillary powers by disposing of assets, section 37 provides for the setting aside of those dispositions in certain circumstances. Section 37 is a limited provision which is very far from being a complete answer to the problem, but it is as far as the legislature has been prepared to go. B C D E F G

41 The recognition of a jurisdiction such as the judge sought to exercise in this case would cut across the statutory schemes of company and insolvency law. These include elaborate provisions regulating the repayment of capital to shareholders and other forms of reduction of capital, and for the recovery in an insolvency of improper dispositions of the company’s assets. These schemes are essential for the protection of those dealing with a company, particularly where it is a trading company like PRL and Vermont. The effect of the judge’s order in this case was to make the wife a secured creditor. It is no answer to say, as occasionally has been said H

[2013] 2 AC

491  
Prest v Prest (SC(E))  
Lord Sumption JSC

A in cases about ancillary financial relief, that the court will allow for known creditors. The truth is that in the case of a trading company incurring and discharging large liabilities in the ordinary course of business, a court of family jurisdiction is not in a position to conduct the kind of notional liquidation attended by detailed internal investigation and wide publicity which would be necessary to establish what its liabilities are. In the present case, the difficulty is aggravated by the fact that the last financial statements, which are not obviously unreliable, are more than five years old. To some extent that is the fault of the husband and his companies, but that is unlikely to be much comfort to unsatisfied creditors with no knowledge of the state of the shareholder's marriage or the proceedings in the Family Division. It is clear from the judge's findings of fact that this particular husband made free with the company's assets as if they were his own. That was within his power, in the sense that there was no one to stop him. But, as the judge observed, he never stopped to think whether he had any right to act in this way, and in law, he had none. The sole shareholder or the whole body of shareholders may approve a foolish or negligent decision in the ordinary course of business, at least where the company is solvent: *Multinational Gas and Petrochemical Co v Multinational Gas and Petrochemical Services Ltd* [1983] Ch 258. But not even they can validly consent to their own appropriation of the company's assets for purposes which are not the company's: *Belmont Finance Corpn Ltd v Williams Furniture Ltd* [1979] Ch 250, 261 (Buckley LJ), *Attorney General's Reference (No 2 of 1982)* [1984] QB 624, *R v Gomez* [1993] AC 442, 496–497 (Lord Browne-Wilkinson). Mr Prest is of course not the first person to ignore the separate personality of his company and pillage its assets, and he will certainly not be the last. But for the court to deploy its authority to authorise the appropriation of the company's assets to satisfy a personal liability of its shareholder to his wife, in circumstances where the company has not only not consented to that course but vigorously opposed it, would, as it seems to me, be an even more remarkable break with principle.

42 It may be said, as the judge in effect did say, that the way in which the affairs of this company were conducted meant that the corporate veil had no reality. The problem about this is that if, as the judge thought, the property of a company is property to which its sole shareholder is "entitled, either in possession or reversion", then that will be so even in a case where the sole shareholder scrupulously respects the separate personality of the company and the requirements of the Companies Acts, and even in a case where none of the exceptional circumstances that may justify piercing the corporate veil applies. This is a proposition which can be justified only by asserting that the corporate veil does not matter where the husband is in sole control of the company. But that is plainly not the law.

#### *Beneficial ownership of the properties*

43 It follows from the above analysis that the only basis on which the companies can be ordered to convey the seven disputed properties to the wife is that they belong beneficially to the husband, by virtue of the particular circumstances in which the properties came to be vested in them. Only then will they constitute property to which the husband is "entitled, either in possession or reversion". This is the issue which the judge felt that he did not need to decide. But on the footing that he was wrong about the

492  
Prest v Prest (SC(E))  
Lord Sumption JSC

[2013] 2 AC

ambit of section 24(1)(a), it does need to be decided now. The issue requires an examination of evidence which is incomplete and in critical respects obscure. A good deal therefore depends on what presumptions may properly be made against the husband given that the defective character of the material is almost entirely due to his persistent obstruction and mendacity.

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44 In *Herrington v British Railways Board* [1972] AC 877, 930–931, Lord Diplock, dealing with the liability of a railway undertaking for injury suffered by trespassers on the line, said:

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“The appellants, who are a public corporation, elected to call no witnesses, thus depriving the court of any positive evidence as to whether the condition of the fence and the adjacent terrain had been noticed by any particular servant of theirs or as to what he or any other of their servants either thought or did about it. This is a legitimate tactical move under our adversarial system of litigation. But a defendant who adopts it cannot complain if the court draws from the facts which have been disclosed all reasonable inferences as to what are the facts which the defendant has chosen to withhold. A court may take judicial notice that railway lines are regularly patrolled by linesmen and Bangers. In the absence of evidence to the contrary, it is entitled to infer that one or more of them in the course of several weeks noticed what was plain for all to see. Anyone of common sense would realise the danger that the state of the fence so close to the live rail created for little children coming to the meadow to play. As the appellants elected to call none of the persons who patrolled the line there is nothing to rebut the inference that they did not lack the common sense to realise the danger. A court is accordingly entitled to infer from the inaction of the appellants that one or more of their employees decided to allow the risk to continue of some child crossing the boundary and being injured or killed by the live rail rather than to incur the trivial trouble and expense of repairing the gap in the fence.”

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The courts have tended to recoil from some of the fiercer parts of this statement, which appear to convert open-ended speculation into findings of fact. There must be a reasonable basis for some hypothesis in the evidence or the inherent probabilities, before a court can draw useful inferences from a party’s failure to rebut it. For my part I would adopt, with a modification which I shall come to, the more balanced view expressed by Lord Lowry with the support of the rest of the committee in *R v Inland Revenue Comrs, Ex p TC Coombs & Co* [1991] 2 AC 283, 300:

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“In our legal system generally, the silence of one party in face of the other party’s evidence may convert that evidence into proof in relation to matters which are, or are likely to be, within the knowledge of the silent party and about which that party could be expected to give evidence. Thus, depending on the circumstances, a prima facie case may become a strong or even an overwhelming case. But, if the silent party’s failure to give evidence (or to give the necessary evidence) can be credibly explained, even if not entirely justified, the effect of his silence in favour of the other party, may be either reduced or nullified.”

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Cf *Wisniewski v Central Manchester Health Authority* [1998] PIQR P324, P340.

[2013] 2 AC

493  
Prest v Prest (SC(E))  
Lord Sumption JSC

A 45 The modification to which I have referred concerns the drawing of  
adverse inferences in claims for ancillary financial relief in matrimonial  
proceedings, which have some important distinctive features. There is a  
public interest in the proper maintenance of the wife by her former husband,  
especially (but not only) where the interests of the children are engaged. Partly  
for that reason, the proceedings although in form adversarial have a  
B substantial inquisitorial element. The family finances will commonly have  
been the responsibility of the husband, so that although technically a claimant,  
the wife is in reality dependent on the disclosure and evidence of the husband  
to ascertain the extent of her proper claim. The concept of the burden of proof,  
which has always been one of the main factors inhibiting the drawing of  
adverse inferences from the absence of evidence or disclosure, cannot be  
C applied in the same way to proceedings of this kind as it is in ordinary civil  
litigation. These considerations are not a licence to engage in pure  
speculation. But judges exercising family jurisdiction are entitled to draw on  
their experience and to take notice of the inherent probabilities when deciding  
what an uncommunicative husband is likely to be concealing. I refer to the  
husband because the husband is usually the economically dominant party, but  
D of course the same applies to the economically dominant spouse whoever it is.

46 The facts, so far as the judge was able to make findings about them,  
are that the London properties were acquired as follows:

- December 1995 Flat 4, 27, Abbey Road was transferred to PRL by the  
husband for £1. It had been bought by him in 1991,  
before the marriage and before the incorporation of PRL.  
E There are two charges on the property, in favour of Ahli  
United Bank and BNP Paribas, apparently to secure loans  
made to PRL. Neither the husband nor PRL has  
complied with orders to disclose the loan agreement and  
related documents.
- F Flat 5, 27, Abbey Road was transferred to PRL on the  
same day, also for £1, by the husband's younger brother  
Michel. It had been bought in March of that year for  
£48,650 in Michel's name. The wife's evidence was that,  
at the time, Michel was a student in London with no  
substantial assets of his own who was being supported by  
her husband. She said that her husband had led her to  
believe that he had paid for it.
- G March 1996 Flat 2, 143, Ashmore Road, is a leasehold property  
transferred to PRL for £1 by the wife. It had originally been  
bought by the husband in November 1992 in the name of  
someone called Jimmy Lawrence. There is no information  
about Jimmy Lawrence or the reasons for his involvement.  
According to the husband's evidence, the purchase money  
came from PRL, but since PRL was not incorporated until  
H six months after that, this cannot be correct. At some stage,  
it is unclear when or how, the lease was transferred into the  
name of the wife, and she must have signed the transfer  
when it was conveyed to PRL, but she had no recollection  
of being involved or of ever having owned it.

494  
Prest v Prest (SC(E)) [2013] 2 AC  
Lord Sumption JSC

1998	The wife transferred her interest in the freehold of 143, Ashmore Street to PRL. The freehold had originally been bought in 1996 in the name of the wife and one Esta Blechman, who was the leasehold owner of another flat in the building. There is no information about the consideration paid either in 1996 or in 1998. The husband's evidence was the funds to buy the wife's interest in 1996 came from PRL.	A B
August 2000	Flat 6, 62–64, Beethoven Street was transferred to PRL by the husband for £85,000. He had originally bought it in 1988 (before the marriage) for £70,500. The property is charged to secure the loans made by Ahli United Bank and BNP Paribas.	
May 2001	The matrimonial home, 16, Warwick Avenue, was bought in the name of PRL for £1.4m and subsequently refurbished at a cost of about £1m. The judge rejected the husband's evidence that the purchase price and refurbishment costs were funded by PRL, because at that stage the company had not commenced trading operations. He found that they were funded from bonuses earned by the husband, presumably, at this stage, from his last employer before he set up on his own. The judge found that PRL had always held this property on trust for the husband and that conclusion is not challenged on this appeal. The property is charged to secure the loans made by Ahli United Bank and BNP Paribas. In accordance with the judge's order PRL has now conveyed it to the wife, but subject to the charges.	C D E
July 2001	Flat 310, Pavilion Apartments was bought in the name of Vermont for £635,000. The judge found that the money was derived from PRL.	
January 2004	11 South Lodge, Circus Road, was bought in the name of Vermont for £700,000. The judge found that the purchase price was also derived from PRL. The property is charged to secure the loans made to Ahli United Bank and BNP Paribas.	F

The judge recorded the wife's evidence that the husband had once advised her that if anything were to happen to him, she should sell all the properties, move to Nevis and use the proceeds of sale to meet her living expenses there. G

47 The starting point is that in her points of claim the wife expressly alleged, among other things, that the husband used the corporate defendants to hold legal title to properties that belonged beneficially to him. All seven of the properties in dispute on this appeal were identified in her pleading as having been held for him in this way. In her section 25 statement, she gives evidence of her belief that he was their beneficial owner, supported in some cases by admittedly inconclusive reasons for that belief. Neither the husband nor the companies have complied with orders for the production of the completion statements on the purchase of the properties and evidence of the source of the money used to pay the purchase price. The companies were H

[2013] 2 AC

495  
Prest v Prest (SC(E))  
Lord Sumption JSC

A joined to these proceedings only because they were alleged to be trustees for the husband of the shareholdings and the properties and because orders were being sought for their transfer to the wife. Yet the companies failed to file a defence, or to comply with orders for disclosure. One of the few things that is clear from Mr Murphy's affidavit was that the companies' refusal to co-operate was deliberate, notwithstanding that they were conscious that the London properties (unlike the other assets) were within the jurisdiction of the court, which was in a position directly to enforce any order that it might make in respect of them. The only explanation proffered for their contumacy was that the information was confidential to the companies' shareholders or "commercial partners". It is difficult to imagine that any commercial partners could enjoy rights of confidence over information concerning residential investment properties in London, and on the judge's findings the only shareholder was the husband himself. The only directly relevant evidence given by Mr Murphy in his affidavit is a bald assertion that the companies are the sole beneficial owners of the shareholdings and the properties, but he declined to appear for cross-examination on it. The judge rejected his explanation that his health was not up to it. The judge's findings about the ownership and control of the companies mean that the companies' refusal to co-operate with these proceedings is a course ultimately adopted on the direction of the husband. It is a fair inference from all these facts, taken cumulatively, that the main, if not the only, reason for the companies' failure to co-operate is to protect the London properties. That in turn suggests that proper disclosure of the facts would reveal them to have been held beneficially by the husband, as the wife has alleged.

48 Turning to what is known about the acquisition of the disputed properties, PRL acquired the legal interest in six London properties (including the matrimonial home) between 1995 and 2001. All of these properties were acquired by PRL before it began commercial operations and began to generate funds of its own. This was the main basis on which the judge found that the matrimonial home was held on trust for the husband from its acquisition in 2001. Since, as the judge found, no rent was paid to PRL for the family's occupation of the matrimonial home, this is a particularly clear case of the husband using PRL as a vehicle to hold legal title on trust for himself.

49 Of the other five properties owned by PRL, the first category comprises the three properties (Flats 4 and 5, 27, Abbey Road, and Flat 2, 143, Ashmore Road) acquired by the company in December 1995 and March 1996, in each case for a nominal consideration of £1. Since no explanation has been forthcoming for the gratuitous transfer of these properties to PRL, there is nothing to rebut the ordinary presumption of equity that PRL was not intended to acquire a beneficial interest in them. The only question is who did hold the beneficial interest. Flat 4, 27, Abbey Road was transferred by the husband, who had originally bought it in his own name in 1991, before PRL was incorporated. There is therefore an ordinary resulting trust back to the husband, which is held by him subject to the charges in favour of Ahli United Bank and BNP Paribas. Flat 5, 27, Abbey Road was transferred to PRL by the husband's younger brother Michel. He had acquired title shortly before at a time when he could not have paid for it himself. The wife's evidence was that the husband paid for it. Again, there is no evidence to rebut the ordinary inference that the

496

Prest v Prest (SC(E))  
Lord Sumption JSC

[2013] 2 AC

husband was the beneficial owner of the property at the time of the transfer to PRL, and that the company held it on a resulting trust for him. The leasehold interest in Flat 2, 143, Ashmore Road was transferred to PRL by the wife. The rather curious chain of title before that is summarised above. The circumstances suggest that the husband must have provided the purchase money and was the beneficial owner when the legal estate was held by Jimmy Lawrence and also at the time of its transfer from him to the wife. Either it then became the beneficial property of the wife (which is what equity would initially presume); or else it remained in the beneficial ownership of the husband, which is what I would on balance infer from the wife's evidence that the transfer was procured by the husband without her conscious involvement. In either case, the company as the legal owner can be required to transfer this property to the wife. I conclude that the husband was at all relevant times the beneficial owner of all three properties.

50 The freehold interest in 143, Ashmore Road and Flat 6, 62-64, Beethoven Street come into a different category. Flat 6, 62-64, Beethoven Street is known to have been acquired by PRL from the husband in August 1998 for substantial consideration. Since PRL had not begun operations at that stage, I infer that the purchase money must have come from the husband. Virtually nothing is known about the terms of acquisition of the wife's interest in the freehold of 143, Ashmore Road, except that the husband says that the money came from PRL. I infer for the same reason that PRL was funded by the husband. In itself, that is consistent with PRL being the beneficial owner if, for example, the husband provided the money to the company by way of loan or capital subscription. But there is no evidence to that effect, and I would not be willing to presume it in the absence of any. I conclude that the husband was the beneficial owner of these two properties.

51 That leaves the two London properties (Flat 310, Pavilion Apartments and 11 South Lodge, Circus Road) which were acquired in the name of Vermont for substantial consideration, in July 2001 and January 2004 respectively. Vermont is an oil trading company which according to the husband started lifting oil in 2010. In the company's financial statements for 2008, the two properties are listed as its only assets and there were no liabilities apart from the bank loans charged on Flat 310, Pavilion Apartments. Flat 310, Pavilion Apartments was acquired with funds derived from PRL at a time when the company had not begun trading operations. I infer that the funds were provided to PRL by the husband. The position is the same in the case of 11 South Lodge, except that this was bought with money provided by PRL at a time when it was an active trading company and could therefore have funded the purchase itself. However, it is right to note (i) that the ownership of residential investment property in London appears to have nothing to do with the oil trading business in which PRL was then engaged, and (ii) that at this stage of the history a consistent pattern can be discerned by which the husband causes properties to be acquired with funds provided by himself by companies under his control, nominally funded by PRL but in fact by himself. If 11 South Lodge was the exception, then it was a break with past practice. In the absence of any explanation of these transactions by the husband or his companies, I conclude that both of the properties acquired in the name of Vermont were beneficially owned by the husband.

[2013] 2 AC

497  
Prest v Prest (SC(E))  
Lord Sumption JSC

- A 52 Whether assets legally vested in a company are beneficially owned by its controller is a highly fact-specific issue. It is not possible to give general guidance going beyond the ordinary principles and presumptions of equity, especially those relating to gifts and resulting trusts. But I venture to suggest, however tentatively, that in the case of the matrimonial home, the facts are quite likely to justify the inference that the property was held on trust for a spouse who owned and controlled the company. In many, perhaps most cases, the occupation of the company's property as the matrimonial home of its controller will not be easily justified in the company's interest, especially if it is gratuitous. The intention will normally be that the spouse in control of the company intends to retain a degree of control over the matrimonial home which is not consistent with the company's beneficial ownership. Of course, structures can be devised which give a different impression, and some of them will be entirely genuine. But where, say, the terms of acquisition and occupation of the matrimonial home are arranged between the husband in his personal capacity and the husband in his capacity as the sole effective agent of the company (or someone else acting at his direction), judges exercising family jurisdiction are entitled to be sceptical about whether the terms of occupation are really what they are said to be, or are simply a sham to conceal the reality of the husband's beneficial ownership.
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*Nuptial settlement*

- 53 The wife sought special leave to argue that the companies constituted a nuptial settlement within the meaning of section 24(1)(c) of the Act. The court ruled in the course of the hearing that leave would be refused. The point was not argued below and does not appear to be seriously arguable here.
- E

*Terms for permission to appeal*

- 54 Before parting with this case, I will only record my surprise that the companies were given permission to appeal on such undemanding terms. They were required to make a payment on account of costs, but they were not required to purge their contempt in failing to disclose documents or information, nor were they put on terms as to dealings with the properties. There may have been good reasons for not imposing such terms, but on the face of it the possibility was not even considered.
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*Conclusion*

- 55 I would accordingly declare that the seven disputed properties vested in PRL and Vermont are held on trust for the husband, and I would restore para 6 of the order of Moylan J so far as it required those companies to transfer them to the wife.
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- 56 Subject to any contrary submissions as to costs, I would also restore para 14 of the judge's order so far as it dealt with the costs payable by PRL and Vermont, and would order them to pay the costs of the appeal to the Court of Appeal and to this court. As at present advised, I would not require Upstream, against whom no relief has ever been sought, to pay any costs, but in the rather unusual circumstances of this case, I would not make any costs order in their favour either.
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498

Prest v Prest (SC(E))  
Lord Neuberger of Abbotsbury PSC

[2013] 2 AC

LORD NEUBERGER OF ABBOTSBURY PSC

57 I agree that Mrs Prest’s appeal succeeds. More particularly, I agree that her appeal should be (i) allowed on the basis that the properties were acquired and held by the respondent companies on trust for the husband, but (ii) dismissed in so far as it relies on piercing the veil of incorporation, or on section 24(1)(a) or (c) of the Matrimonial Causes Act 1973.

58 I agree with all that Lord Sumption JSC says on (i) the construction of section 24(1)(a) of the 1973 Act, in paras 37–42, (ii) the trust issue, in his masterly analysis of the facts and inferences to be drawn from them, in paras 43–52, (iii) the point sought to be raised under section 24(1)(c), in para 53, and (iv) his conclusions in paras 55 and 56, and there is nothing I wish to add on those issues.

59 I wish, however, to add a little to what Lord Sumption JSC says on the question of whether, and if so, in what circumstances, the court has power to pierce the corporate veil in the absence of specific statutory authority to do so.

60 I agree that there are two types of case where judges have described their decisions as being based on piercing the veil, namely those concerned with concealment and those concerned with evasion. It seems to me that Staughton LJ had a similar classification in mind in *Atlas Maritime Co SA v Avalon Maritime Ltd (No 1)* [1991] 4 All ER 769, 779G (quoted in *VTB Capital plc v Nutritek International Corpn* [2013] 2 AC 337, para 118), where he sought to distinguish between “lifting” and “piercing” the corporate veil.

61 I also agree that cases concerned with concealment do not involve piercing the corporate veil at all. They simply involve the application of conventional legal principles to an arrangement which happens to include a company being interposed to disguise the true nature of that arrangement. Accordingly, if piercing the corporate veil has any role to play, it is in connection with evasion.

62 Furthermore, I agree that, if the court has power to pierce the corporate veil, Munby J was correct in *Ben Hashem v Al Shayif* [2009] 1 FLR 115 to suggest that it could only do so in favour of a party when all other, more conventional, remedies have proved to be of no assistance (and therefore I disagree with the Court of Appeal in *VTB Capital v Nutritek* [2012] 2 Lloyd’s Rep 313, para 79, who suggested otherwise).

63 However, as in the recent decision of this court in *VTB v Nutritek*, it is not necessary to decide whether there is a principle that it is open to a court, without statutory authority (or, possibly, in the absence of the intention of contracting parties), to pierce the veil of incorporation (“the doctrine”), and, if it is, the scope, or boundaries, of the doctrine.

64 However, I can see considerable force in the view that it is appropriate for us to address those matters now. This is the second case in the space of a few months when the doctrine has been invoked before this court on what are, on any view, inappropriate grounds. It is also clear from the cases and academic articles that the law relating to the doctrine is unsatisfactory and confused. Those cases and articles appear to me to suggest that (i) there is not a single instance in this jurisdiction where the doctrine has been invoked properly and successfully, (ii) there is doubt as to whether the doctrine should exist, and (iii) it is impossible to discern any

[2013] 2 AC

499  
Prest v Prest (SC(E))  
Lord Neuberger of Abbotsbury PSC

A coherent approach, applicable principles, or defined limitations to the doctrine.

65 In these circumstances, there is obvious value in seeking to decide whether the doctrine exists, and if so, to identify some coherent, practical and principled basis for it, if we can do so in this case.

B 66 Any discussion about the doctrine must begin with the decision in *Salomon v A Salomon & Co Ltd* [1897] AC 22, in which a unanimous House of Lords reached a clear and principled decision, which has stood unimpeached for over a century. The effect of the decision is encapsulated at pp 30–31, where Lord Halsbury LC said that a “legally incorporated” company “must be treated like any other independent person with its rights and liabilities appropriate to itself . . . , whatever may have been the ideas or schemes of those who brought it into existence”. Whether that is characterised as a common law rule or a consequence of the companies legislation (or an amalgam of both), it is a very well established principle of long standing and high authority. Writing extrajudicially, Lord Templeman referred to the principle in the *Salomon* case as the “unyielding rock” on which company law is constructed, and on which “complicated arguments” might ultimately become “shipwrecked”: *Forty Years On* (1990) 11 Co Law 10.

D 67 The decision in the *Salomon* case plainly represents a substantial obstacle in the way of an argument that the veil of incorporation can be pierced. Further, the importance of maintaining clarity and simplicity in this area of law means that, if the doctrine is to exist, the circumstances in which it can apply must be limited and as clear as possible.

E 68 Since the decision in the *Salomon* case, there have been a number of cases where the courts have considered “piercing” or “lifting” the corporate veil. The most important of those cases are discussed by Lord Sumption JSC in paras 20–35 above. That discussion demonstrates, as I see it, the following: (i) the decision of the International Court of Justice in *Case concerning Barcelona Traction, Light and Power Co Ltd (Belgium v Spain) (Second Phase)* [1970] ICJ Rep 3 recognises the doctrine; however, that is in the context of a civil law system which includes the principle of abuse of rights, and begs the question whether, in a common law system, the doctrine should be applicable by the courts in the absence of specific legislative sanction; (ii) there are judgments in family cases based on obiter dicta in *Nicholas v Nicholas* [1984] FLR 285 (eg the judgments of Thorpe LJ in this case and of Mostyn J in *Kremen v Agrest (No 2)* [2011] 2 FLR 490), where the doctrine has been treated as valid and applicable; but the application of

F the doctrine, even if it exists, in these cases is unsound, as Munby J effectively (in both senses of the word) indicated in *A v A* [2007] 2 FLR 467 and *Ben Hashem v Al Shayif* [2009] 1 FLR 115; (iii) there are two cases outside the family law context which laid the ground for the establishment of the doctrine, namely the decisions of the Court of Appeal in *Gilford Motor Co Ltd v Horne* [1933] Ch 935, and of Russell J in *Jones v Lipman* [1962] 1 WLR 832; (iv) there are two subsequent decisions, one of the House of Lords, *Wolfson v Strathclyde Regional Council* 1978 SC (HL) 90, the other of the Court of Appeal, *Adams v Cape Industries plc* [1990] Ch 433, in which it was assumed or accepted that the doctrine existed, but they cannot amount to more than obiter observations, as in neither of them did the doctrine apply; (v) in subsequent cases in the Court of Appeal and High

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500

Prest v Prest (SC(E))  
Lord Neuberger of Abbotsbury PSC

[2013] 2 AC

Court, it has been (unsurprisingly) assumed that the doctrine does apply, two recent examples being the Court of Appeal decisions in *VTB v Nutritek* [2012] 2 Lloyd's Rep 313 and *Alliance Bank JSC v Aquanta Corpn* [2013] 1 All ER (Comm) 819; (vi) however, in only two of those subsequent cases (the first instance decisions in *Gencor ACP Ltd v Dalby* [2000] 2 BCLC 734 and *Trustor AB v Smallbone (No 2)* [2001] 1 WLR 1177) has the doctrine actually been relied on, and they each could have been decided the same way without recourse to the doctrine, and therefore involved illegitimate applications of the doctrine on any view: see para 62 above.

69 On closer analysis of cases mentioned in subpara (iii) above, it does not appear to me that the facts and outcomes in the *Gilford Motor* and *Jones* cases provide much direct support for the doctrine. However, the decisions can fairly be said to have rested on the doctrine if one takes the language of the judgments at face value. Further, they indicate that, where a court is of the view (albeit that I think that it was mistaken in those cases) that there is no other method of achieving justice, the doctrine provides a valuable means of doing so.

70 In the *Gilford Motor* case [1933] Ch 935, the legal argument at first instance and on appeal seems to have concentrated on the validity of the restrictive covenant: see pp 936–937, 950–952. It is also clear from the judgment of Lord Hanworth MR, at p 961, that counsel for the company conceded that if, contrary to his contention, the company was a “mere cloak or sham” and that the business was actually being carried on by Horne in breach of the restrictive covenant, then the company should also be restrained. Further, in my view, as that passage indicates, the case was one of concealment, and therefore did not really involve the doctrine at all.

71 In any event, it seems to me that the decision in the *Gilford Motor* case that an injunction should be granted against the company was amply justified on the basis that the company was Horne’s agent for the purpose of carrying on the business (just as his wife would have been, if he had used her as the “cloak”); therefore, if an injunction was justified against Horne, it was justified against the company. There is nothing in the judgments in the *Gilford Motor* case to suggest that any member of the Court of Appeal thought that he was making new law, let alone cutting into the well established and simple principle laid down in *Salomon v A Salomon & Co Ltd* [1897] AC 22.

72 It is by no means inconceivable that the three members of the Court of Appeal in the *Gilford Motor* case were using the expression “cloak or sham” to suggest, as a matter of legal analysis, a principal and agent relationship. Lord Hanworth MR relied on a passage in a judgment of Lindley LJ in *Smith v Hancock* [1894] 2 Ch 377, 385 (where the expression “cloak or sham” appears to have originated), and in that passage, it seems to me that the cloak or sham is treated as amounting to the business being “carried on for the defendant”. This view is supported by something Lord Denning MR said in *Wallersteiner v Moir* [1974] 1 WLR 991, 1013, namely it was “quite clear” that the companies in that case:

“were just the puppets of Dr Wallersteiner . . . Transformed into legal language, they were his agents to do as he commanded. He was the principal behind them . . . At any rate, it was up to him to show that any one else had a say in their affairs and he never did so: cf *Gilford*.”

[2013] 2 AC

501  
Prest v Prest (SC(E))  
Lord Neuberger of Abbotsbury PSC

A 73 As for *Jones v Lipman* [1962] 1 WLR 832, I am unconvinced that it was necessary for Russell J to invoke the doctrine in order to justify an effective order for specific performance, as sought by the plaintiffs in that case. An order for specific performance would have required Lipman not merely to convey the property in question to the plaintiffs, but to do everything which was reasonably within his power to ensure that the property was so conveyed: see e.g. *Wroth v Tyler* [1974] Ch 30, 47–51.

B Lipman and an employee of his solicitors were the sole shareholders and directors of the company, and its sole liability appears to have been a loan of £1,500 to a bank (borrowed to meet half the £3,000 which it paid for the property). In those circumstances, it seems clear that Lipman could have compelled the company to convey the property to the plaintiffs (on the basis that he would have to account to the company for the purchase price, which would have ensured that the bank was in no way prejudiced). Indeed, I consider that the company could fairly have been described and treated as being Lipman’s “creature”, without in any way cutting into the principle established in *Salomon v A Salomon & Co Ltd* [1897] AC 22.

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D 74 The history of the doctrine over 80 years of its putative life (taking the *Gilford Motor* case [1933] Ch 935 as the starting point) is, therefore, at least as I see it, a series of decisions, each of which can be put into one of three categories, namely: (i) decisions in which it was assumed that the doctrine existed, but it was rightly concluded that it did not apply on the facts; (ii) decisions in which it was assumed that the doctrine existed, and it was wrongly concluded that it applied on the facts; and (iii) decisions in which it was assumed that the doctrine existed and it was applied to the facts, but where the result could have been arrived at on some other, conventional, legal basis, and therefore it was wrongly concluded that it applied: see para 62 above. (The doctrine has been invoked in cases not considered by Lord Sumption JSC, but they take matters no further: see the decisions mentioned and briefly considered in *VTB v Nutritek* [2013] 2 AC 337, paras 125, 127.)

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F 75 The lack of any coherent principle in the application of the doctrine has been commented on judicially in many of the major common law jurisdictions. In this country, Clarke J in *The Tjaskemolen (now Visvliet)* [1997] 2 Lloyd’s Rep 465, 471 said that “The cases have not worked out what is meant by ‘piercing the corporate veil’”. In Australia, in *Briggs v James Hardie & Co Pty Ltd* (1989) 16 NSWLR 549, 567, Rogers AJA in the New South Wales Court of Appeal observed that “there is no common, unifying principle, which underlies the occasional decision of courts to pierce the corporate veil”, and that “there is no principled approach to be derived from the authorities”. In *Kosmopoulos v Constitution Insurance Co* [1987] 1 SCR 2, para 12, Wilson J in the Supreme Court of Canada said that “The law on when a court may . . . [lift] the corporate veil’ . . . follows no consistent principle”. The New Zealand Court of Appeal in *Attorney General v Equiticorp Industries Group Ltd* [1996] 1 NZLR 528, 541, said that “‘to lift the corporate veil’ . . . is not a principle. It describes the process, but provides no guidance as to when it can be used”. In the South African Supreme Court decision, *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd* 1995 (4) SA 790, 802–803, Smalberger JA observed that “The law is far from settled with regard to the circumstances in which it would be permissible to pierce the corporate veil.”

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502

Prest v Prest (SC(E))  
Lord Neuberger of Abbotsbury PSC

[2013] 2 AC

76 Judges in the United States have also been critical, even though the doctrine has been invoked and developed to a much greater extent than in this jurisdiction. In *Secon Service System Inc v St Joseph Bank and Trust Co* (1988) 855 F 2d 406, 414, Judge Easterbrook in the US Court of Appeals described the doctrine as “quite difficult to apply, because it avoids formulating a real rule of decision. This keeps people in the dark about the legal consequences of their acts”. And in *Allied Capital Corpn v GC-Sun Holdings LP* (2006) A 2d 1020, 1042–1043, the Delaware Court of Chancery said that the doctrine has been “rightfully criticized for its ambiguity and randomness”, and that its application “yield[s] few predictable results”.

77 The doctrine has fared no better with academics. Easterbrook and Fischel, “Limited Liability and the Corporation” (1985) 52 Univ Chicago L Rev 89, pithily observe that “‘Piercing’ seems to happen freakishly. Like lightning, it is rare, severe, and unprincipled.” The jurisprudence on the doctrine has been described as “incoherent and unprincipled” by Farrar, “Fraud, Fairness and Piercing the Corporate Veil” (1990) 16 Can Bus LJ 474, 478. C Mitchell, in “Lifting the Corporate Veil in the English Courts: An Empirical Study” (1999) 3 Co Fin & Ins LR 15, 16 observes that “courts have often used conclusory terms to express their decisions on the point, which for all their vividness tell us nothing about the reasoning which underpins these decisions”. Neyers in “Canadian Corporate Law, Veil-Piercing, and the Private Law Model Corporation” (2000) 50 Univ Toronto LJ 173, 180, asks rhetorically: “How can the ‘legal person doctrine’ that is so central to corporate law in one sentence be disregarded so casually in the next?” D Michael in “To Know a Veil” (2000) 26 J Corp Law 41, 55, refers to the doctrine as “a non-existent and false doctrine”. Ramsay and Noakes, “Piercing the Corporate Veil in Australia” (2001) 19 C & SLJ 250, 251, note that the doctrine “is far from clear in the case law”. Oh, “Veil-Piercing” (2010) 89 Texas Law Review 81, 84 says that “The inherent imprecision in metaphors has resulted in a doctrinal mess”.

78 This last view has some resonance with my remarks in *VTB v Nutritek* [2013] 2 AC 337, para 124, about the use of pejorative expressions to mask the absence of rational analysis. It also chimes with Cardozo J’s reference to the “mists of metaphor” in company law, which, “starting as devices to liberate thought, . . . end often by enslaving it”, in *Berkey v Third Avenue Railway Co* (1926) 155 NE 58, 61.

79 In these circumstances, I was initially strongly attracted by the argument that we should decide that a supposed doctrine, which is controversial and uncertain, and which, on analysis, appears never to have been invoked successfully and appropriately in its 80 years of supposed existence, should be given its quietus. Such a decision would render the law much clearer than it is now, and in a number of cases it would reduce complications and costs: whenever the doctrine is really needed, it never seems to apply.

80 However, I have reached the conclusion that it would be wrong to discard a doctrine which, while it has been criticised by judges and academics, has been generally assumed to exist in all common law jurisdictions, and represents a potentially valuable judicial tool to undo wrongdoing in some cases, where no other principle is available. Accordingly, provided that it is possible to discern or identify an approach to

[2013] 2 AC

Prest v Prest (SC(E))

Lord Neuberger of Abbotsbury PSC

A piercing the corporate veil, which accords with normal legal principles, reflects previous judicial reasoning (so far as it can be discerned and reconciled), and represents a practical solution (which hopefully will avoid the problems summarised in para 75 above), I believe that it would be right to adopt it as a definition of the doctrine.

B 81 Having read what Lord Sumption JSC says in his judgment, especially in paras 17, 18, 27, 28, 34 and 35, I am persuaded by his formulation in para 35, namely that the doctrine should only be invoked where “a person is under an existing legal obligation or liability or subject to an existing legal restriction which he deliberately evades or whose enforcement he deliberately frustrates by interposing a company under his control”.

C 82 It appears to me that such a clear and limited doctrine would not fall foul of at least most of the strictures which have been made of the doctrine. In particular, (i) it should be of value in the few cases where it can be properly invoked; (ii) it is, I believe and hope, sufficiently clear as to render it unlikely to be raised in inappropriate cases; and (iii) it does not cut across the rule in *Salomon v A Salomon & Co Ltd* [1897] AC 22 because it is consistent with conventional legal principles.

D 83 It is only right to acknowledge that this limited doctrine may not, on analysis, be limited to piercing the corporate veil. However, there are three points to be made about that formulation. In so far as it is based on “fraud unravels everything”, as discussed by Lord Sumption JSC in para 18, the formulation simply involves the invocation of a well established principle, which exists independently of the doctrine. In any event, the formulation is not, on analysis, a statement about piercing the corporate veil at all. Thus, it

E would presumably apply equally to a person who transfers assets to a spouse or civil partner, rather than to a company. Further, at least in some cases where it may be relied on, it could probably be analysed as being based on agency or trusteeship especially in the light of the words “under his control”. However, if either or both those points were correct, it would not undermine Lord Sumption JSC’s characterisation of the doctrine: it would, if anything, serve to confirm the existence of the doctrine, albeit as an aspect of a more

F conventional principle. And if the formulation is intended to go wider than the application of “fraud unravels everything”, it seems to me questionable whether it would be right for the court to take the course of arrogating to itself the right to step in and undo transactions, save where there is a well established and principled ground for doing so. Such a course is, I would have thought, at least normally, a matter for the legislature. Indeed

G **BARONESS HALE OF RICHMOND JSC** (with whom **LORD WILSON JSC** agreed)

H 84 I agree that this appeal should succeed, on the basis that the properties in question were held by the respondent companies on trust for the husband. As he is beneficially entitled to them, they fall within the scope of the court’s power to make transfer of property orders under section 24(1)(a) of the Matrimonial Causes Act 1973. It also means that the

504

Prest v Prest (SC(E))  
Baroness Hale of Richmond JSC

[2013] 2 AC

court has power to order that the companies, as bare trustees, transfer these properties to the wife. A

85 The reasons for holding that these properties were beneficially owned by the husband have been amply explained by Lord Sumption JSC. I would only emphasise the special nature of proceedings for financial relief and property adjustment under the Matrimonial Causes Act 1973, which he explains in para 45. There is a public interest in spouses making proper provision for one another, both during and after their marriage, in particular when there are children to be cared for and educated, but also for all the other reasons explored in cases such as *McFarlane v McFarlane* [2006] 2 AC 618. This means that the court's role is an inquisitorial one. It also means that the parties have a duty, not only to one another but also to the court, to make full and frank disclosure of all the material facts which are relevant to the exercise of the court's powers, including of course their resources: see *Livesey (formerly Jenkins) v Jenkins* [1985] AC 424. If they do not do so, the court is entitled to draw such inferences as can properly be drawn from all the available material, including what has been disclosed, judicial experience of what is likely to be being concealed and the inherent probabilities, in deciding what the facts are. B C

86 I also agree, for the reasons given by Lord Sumption JSC, that section 24(1)(a) does not give the court power to order a spouse to transfer property to which he is not in law entitled. The words "entitled, either in possession or reversion" refer to a right recognised by the law of property. This is clear, not only from the statutory language, but also from the statutory history. D

87 The words "entitled to any property either in possession or reversion" first appeared in the Matrimonial Causes Act 1857 (20 & 21 Vict c 85), which introduced judicial divorce to the law of England and Wales. Section 45 gave the court power, when granting a decree of divorce on the ground of the wife's adultery, to settle such property for the benefit of the husband and/or the children of the marriage. The same words were used in section 3 of the Matrimonial Causes Act 1884 (47 & 48 Vict c 68), when extending the same power to a husband's application for restitution of conjugal rights. They were carried through, respectively, into section 191(1)(2) of the Supreme Court of Judicature (Consolidation) Act 1925, then into section 24(1)(2) of the Matrimonial Causes Act 1950, then into sections 17(2) and 21(3) of the Matrimonial Causes Act 1965. The decree of restitution of conjugal rights was abolished in the comprehensive package of matrimonial law reforms which came into force on 1 January 1971. That package included, in section 4(a) of the Matrimonial Proceedings and Property Act 1970, the power to order either spouse to transfer to the other "property to which the first-mentioned party is entitled, either in possession or reversion". This was an expansion, for the benefit of either spouse and to outright transfer as well as settlement, of the earlier power to settle the wife's property. Section 4(a) later became section 24(1)(a) of the Matrimonial Causes Act 1973. E F G

88 There is nothing in the language, the history, or indeed the report of the Law Commission which led to the 1970 Act, *Report on Financial Provision in Matrimonial Proceedings* (1969) (Law Com No 25), to suggest that those words should be read to include "property over which the first-mentioned party has such control that he could cause himself to become entitled, either in possession or reversion". But of course such property can H

[2013] 2 AC

505  
Prest v Prest (SC(E))  
Baroness Hale of Richmond JSC

A be taken into account when computing that party’s resources for the purpose of section 25(2) of the 1973 Act, which lays down a non-exhaustive list of factors to be taken into account by the court when deciding how to exercise its various powers to make financial and property adjustment orders.

B 89 Nor is there anything in the language of section 24(1)(a) to suggest that it was Parliament’s intention to grant the divorce courts an express power to “pierce the corporate veil” in such a way as to treat property belonging to a limited company as property belonging to the spouse who owns and/or controls the company. The question nevertheless arises as to whether, in a case such as this, the courts have power to prevent the statutes under which limited liability companies may be established as separate legal persons, whether in this or some other jurisdiction, being used as an engine of fraud. I agree with Lord Sumption JSC that “piercing the corporate veil”  
C is an example of that general principle, with which family lawyers are familiar from *R v Secretary of State for the Home Department, Ex p Puttick* [1981] QB 767.

D 90 Lord Sumption JSC refers to the process compendiously as “disregarding the separate personality of the company” at para 16. When considering its scope, however, it may be helpful to consider what the purpose of doing this is. In *Salomon v A Salomon & Co Ltd* [1897] AC 22 the purpose was to go behind the separate legal personality of the company in order to sue Aron Salomon personally for a liability that was legally that of the company which he had set up (with himself and members of his family as shareholders) to conduct his leather and boot-making business. This succeeded at first instance and in the Court of Appeal (sub nom *Broderip v Salomon*), Lindley LJ going so far as to say [1895] 2 Ch 323, 339 that  
E “Mr Aron Salomon’s scheme is a device to defraud creditors”. They did not think that Parliament had legislated for the setting up of limited liability companies in order that sole traders should be able to conduct their businesses on limited liability terms. But the House of Lords disagreed: the company was a separate person from Mr Salomon and he could not be made liable for the company’s debts. They did not think that there was any fraud  
F involved simply in using a limited liability company as a vehicle for conducting a legitimate business. Thus was the legal structure of modern business born.

G 91 But there are a few cases where the courts have apparently been prepared to disregard the separate personality of a company in order to grant a remedy, not only against the company, but also against the individual who owns and/or controls it. Both *Gilford Motor Co Ltd v Horne* [1933] Ch 935 and *Jones v Lipman* [1962] 1 WLR 832 are examples of this. In both those cases, it so happened that the controller had a pre-existing legal obligation which he was attempting to evade by setting up a company, in the one case a contractual obligation not to compete with his former employers, in the other case a contractual obligation to sell some land to the claimant.  
H In *In re Darby; Ex p Brougham* [1911] 1 KB 95, on the other hand, the liquidator of a creditor company was permitted to go behind the separate personality of a debtor company registered in Guernsey in order to obtain a remedy personally against its promoters who had fraudulently creamed off the profit from the sale by the Guernsey company to the creditor company of a worthless licence to run a slate quarry in Wales.

506  
Prest v Prest (SC(E))  
Baroness Hale of Richmond JSC

[2013] 2 AC

92 I am not sure whether it is possible to classify all of the cases in which the courts have been or should be prepared to disregard the separate legal personality of a company neatly into cases of either concealment or evasion. They may simply be examples of the principle that the individuals who operate limited companies should not be allowed to take unconscionable advantage of the people with whom they do business. But what the cases do have in common is that the separate legal personality is being disregarded in order to obtain a remedy against someone other than the company in respect of a liability which would otherwise be that of the company alone (if it existed at all). In the converse case, where it is sought to convert the personal liability of the owner or controller into a liability of the company, it is usually more appropriate to rely on the concepts of agency and of the “directing mind”.

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93 What we have in this case is a desire to disregard the separate legal personality of the companies in order to impose on the companies a liability which can only be that of the husband personally. This is not a liability under the general law, for example for breach of contract. It is a very specific statutory power to order one spouse to transfer property to which he is legally entitled to the other spouse. The argument is that that is a power which can, because the husband owns and controls these companies, be exercised against the companies themselves. I find it difficult to understand how that can be done unless the company is a mere nominee holding the property on trust for the husband, as we have found to be the case with the properties in issue here. I would be surprised if that were not often the case.

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94 There is a statutory power to set aside certain dispositions made with the intention of defeating a claim for financial provision or property adjustment in section 37 of the Matrimonial Causes Act 1973. It is not suggested in this case that the expenditure involved in buying these properties, all of which were bought long before the marriage broke down, was made with that intention. If it had been, there might have been an argument that the exception for bona fide purchasers for value contained in section 37(4) did not apply to a company where the controlling mind was acting with that intention. But that is not this case.

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95 *Stone & Rolls Ltd v Moore Stephens* [2009] AC 1391 is an example of going behind the separate legal personality of the company in order to “get at” the person who owned and controlled it, not for the purpose of suing him, but in order to attribute his knowledge to the company so that its auditors could raise a defence of *ex turpi causa* to the company’s allegation that they had negligently failed to detect the fraudulent nature of its business.

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96 For all those reasons, in addition to those given by Lord Sumption JSC, I would dismiss this appeal on all but the issue of whether either party had a beneficial interest in the properties in question but allow it on that ground. I fervently hope that the wife will gain some benefit from the outcome of all this litigation, although in the light of the mortgages which apparently encumber the properties I am not optimistic that she will.

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LORD MANCE JSC

97 I agree that the appeal should be allowed for the reasons given by Lord Sumption JSC, supplemented in their essence by Lord Neuberger of Abbotsbury PSC.

[2013] 2 AC

507  
Prest v Prest (SC(E))  
Lord Mance JSC

A 98 I agree with Lord Sumption JSC's analysis of the domestic case law to date in which the metaphor of "piercing the veil" has been deployed as part of the reasoning for a decision representing an exception to the basic principle in *Salomon v A Salomon & Co Ltd* [1897] AC 22.

B 99 In the upshot, the only cases which Lord Sumption JSC identifies in which a principle of "piercing the veil" can be said to have been critical to the reasoning can be rationalised as falling within what he describes as the evasion principle. In other cases, the corporate entity was simply being used to conceal the real actor, or some other analysis or relationship existed (such as principal and agent, nominee or trustee-beneficiary) to explain the decision.

C 100 It is however often dangerous to seek to foreclose all possible future situations which may arise and I would not wish to do so. What can be said with confidence is that the strength of the principle in *Salomon's* case and the number of other tools which the law has available mean that, if there are other situations in which piercing the veil may be relevant as a final fall-back, they are likely to be novel and very rare.

D 101 In this connection, I have however in mind that, in giving the recent Privy Council judgment in *La Générale des Carrières et des Mines Sarl v Hemisphere Associates LLC (Jersey)* [2012] 2 Lloyd's Rep 443, para 77, I said (in a context where Gécamines was a state corporation, not susceptible of being wound up):

E "The alternative way in which Hemisphere puts its case is to submit that, if Gécamines is otherwise accepted as a separate juridical entity, the facts found justify the lifting of the corporate veil to enable Hemisphere to pursue Gécamines as well as the state. In the Board's view, this involves a misapplication of any principles on which the corporate veil may be lifted under domestic and international law. Assuming for the sake of argument that the 'unceremonious' subjecting of Gécamines to the controlling will of the state involved a breach by the state of its duty to respect Gécamines as a separate entity, that might conceivably justify an affected third party, possibly even an aggrieved general creditor of Gécamines, in suggesting that the corporate veil should be lifted to make the state, which had deprived Gécamines of assets, liable for Gécamines' debts. The Board need express no further view on that possibility. It represents the inverse of the present situation. There is no basis for treating the state's taking or Gécamines' use of Gécamines' assets for state purposes, at which Hemisphere directs vigorous criticism, as a justification for imposing on Gécamines yet further and far larger burdens in the form of responsibility for the whole of the debts of the Democratic Republic of the Congo. In international law as in domestic law, lifting the corporate veil must be a tailored remedy, fitted to the circumstances giving rise [to] it."

H 102 It may be that the possibility on which I touched in para 77 would evaporate as a possible further exception to the principle in *Salomon's* case [1897] AC 22. It is certainly a different situation to those which Lord Sumption JSC discusses. But one would wish to hear further argument on this or any other suggested exception, in a case where it was directly relevant, before deciding this. No one should, however, be encouraged to think that any further exception, in addition to the evasion principle, will be

508

Prest v Prest (SC(E))  
Lord Mance JSC

[2013] 2 AC

easy to establish, if any exists at all. The evident absence, under the close scrutiny to which Lord Sumption JSC has subjected the case law, of authority for any further exception speaks for itself. A

#### LORD CLARKE OF STONE-CUM-EBONY JSC

103 I agree with the other members of the court that the appeal should be allowed for the reasons given by Lord Sumption JSC. I only wish to add a word on piercing the corporate veil. I agree that there is such a doctrine and that its limits are not clear. I also agree that Munby J was correct in *Ben Hashem v Al Shayif* [2009] 1 FLR 115 to suggest that the court only has power to pierce the corporate veil when all other more conventional remedies have proved to be of no assistance. It is thus likely to be deployed in a very rare case. Lord Sumption JSC may be right to say that it will only be done in a case of evasion, as opposed to concealment, where it is not necessary. However, this was not a distinction that was discussed in the course of the argument and, to my mind, should not be definitively adopted unless and until the court has heard detailed submissions on it. I agree with Lord Mance JSC that it is often dangerous to seek to foreclose all possible future situations which may arise and, like him, I would not wish to do so. I expressed a similar view in *VTB Capital plc v Nutritek International Corpn* [2013] 2 AC 337 and adhere to it now. However, I also agree with Lord Mance JSC and others that the situations in which piercing the corporate veil may be available as a fall-back are likely to be very rare and that no one should be encouraged to think that any further exception, in addition to the evasion principle, will be easy to establish. It will not. B  
C  
D

#### LORD WALKER OF GESTINGTHORPE

104 Lord Sumption JSC has comprehensively analysed the rather confused evidence relating to beneficial ownership of the London properties. His conclusion that they are all in the beneficial ownership of Mr Prest is in my view irresistible, based as it is on positive evidence of the sources from which the purchases were funded, as well as on inferences drawn from the failure of Mr Murphy, a director of PRL, to attend court for cross-examination. I also agree with all Lord Sumption JSC's observations as to the construction and effect of the Matrimonial Causes Act 1973, to which Baroness Hale of Richmond JSC has added a full account of its legislative history. The appeal should be allowed in the terms proposed by Lord Sumption JSC. E

105 In these circumstances it is not strictly necessary for this court to add further general comments on the vexed question of piercing the corporate veil. But for my part I think it would be a lost opportunity—even perhaps a minor dereliction of duty—if we were to abstain from any further comment. I do therefore welcome the full discussion in the judgments of Lord Neuberger of Abbotsbury PSC, Baroness Hale, Lord Mance and Lord Sumption JSC. F  
G

106 I am reluctant to add to the discussion but for my part I consider that “piercing the corporate veil” is not a doctrine at all, in the sense of a coherent principle or rule of law. It is simply a label—often, as Lord Sumption JSC observes, used indiscriminately—to describe the disparate occasions on which some rule of law produces apparent exceptions to the principle of the separate juristic personality of a body corporate reaffirmed H

[2013] 2 AC

509  
Prest v Prest (SC(E))  
Lord Walker of Gestingthorpe

A by the House of Lords in *Salomon v A Salomon & Co Ltd* [1897] AC 22. These may result from a statutory provision, or from joint liability in tort, or from the law of unjust enrichment, or from principles of equity and the law of trusts (but without any “false invocation of equity” in the phrase used by C Mitchell in the article mentioned by Lord Neuberger PSC, at para 77). They may result simply from the potency of an injunction or other court order in binding third parties who are aware of its terms. If there is a small residual category in which the metaphor operates independently no clear example has yet been identified, but *Stone & Rolls Ltd v Moore Stephens* [2009] AC 1391, mentioned in Baroness Hale JSC’s judgment, is arguably an example.

*Appeal allowed.*

C

JILL SUTHERLAND, Barrister

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D

END OF VOLUME AND OF APPEAL CASES SERIES FOR 2013

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F

G

H

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# **BOWSTEAD AND REYNOLDS**

ON

**AGENCY**

TWENTY-SECOND EDITION

BY

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SWEET & MAXWELL



THOMSON REUTERS

CHAPTER 1

NATURE OF THE SUBJECT

Article 1

AGENCY AND AUTHORITY

- (1) Agency is the fiduciary relationship which exists between two persons, one of whom expressly or impliedly manifests assent that the other should act on his behalf so as to affect his legal relations with third parties, and the other of whom similarly manifests assent so to act or so acts pursuant to the manifestation. The one on whose behalf the act or acts are to be done is called the principal. The one who is to act is called the agent. Any person other than the principal and the agent may be referred to as a third party.<sup>1</sup> **1-001**
- (2) In respect of the acts to which the principal so assents, the agent is said to have authority to act; and this authority constitutes a power to affect the principal's legal relations with third parties.<sup>2</sup>
- (3) Where such authority results from a manifestation of assent that the agent should represent or act for the principal expressly or impliedly made by the principal to the agent personally, the authority is called actual authority, express or implied. But the agent may also have authority resulting from such a manifestation made by the principal to a third party; such authority is called apparent authority.<sup>3</sup>
- (4) A person may have the same fiduciary relationship with a principal where that person acts on behalf of that principal but has no authority to affect the principal's relations with third parties. Because of the fiduciary relationship such a person may also be called an agent.<sup>4</sup>

*Comment*

**1. Theoretical basis of agency in the common law**

**Purpose of definition** It is customary to begin a systematic treatise with some sort of definition of its subject-matter. The definition given here is partly based on that in the American *Restatement*, and it is hoped that it may provide a useful starting point to an area of law where concepts have been “peculiarly troublesome”.<sup>5</sup> **1-002**

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<sup>1</sup> *Restatement, Third*, § 1.01. See too *London Borough of Haringey v Ahmed* [2017] EWCA Civ 1861 at [27].

<sup>2</sup> *Restatement, Third*, §§ 2.01, 2.03 and Comment c to § 1.01.

<sup>3</sup> *Restatement, Third*, § 2.01 and 2.03. And see in general Conant, “Proposed Code of Agency Contracts” (1971) 13 *Mal. L.R.* 98.

<sup>4</sup> See below, para.1-020.

<sup>5</sup> W. Müller-Freienfels, “The Law of Agency” in A. Yiannopoulos (ed.), *Civil Law in the Modern World* (1965), p.79. See also F.M.B. Reynolds and Tan Cheng Han, “Agency Reasoning—a Formula

A.C. Greenberg v. I.R.C. (H.L.(E.))

Lord Simon of Glaisdale

A Lord Morris of Borth-y-Gest and I agree with all that he says about this transaction.

I would dismiss both appeals.

*Appeals dismissed with costs.*

Solicitors: *Slaughter & May; Solicitor of Inland Revenue.*

B M. G.

C [HOUSE OF LORDS]

TESCO SUPERMARKETS LTD. . . . . APPELLANTS  
AND  
NATTRASS . . . . . RESPONDENT

D 1971 Feb. 3, 4, 8, 9; Lord Reid, Lord Morris of Borth-y-Gest,  
March 31 Viscount Dilhorne, Lord Pearson and  
Lord Diplock

*Trade Description—" Act or default of another person"—Manager of supermarket—Offence at store due to manager's failure to supervise properly—System of supervision set up—Manager instructed on operation of system—Ladder of responsibility to ensure carrying out of system—Whether store manager "another person"—Whether "all reasonable precautions and . . . due diligence" exercised by company—Trade Descriptions Act 1968 (c. 29), ss. 20 (1), 24 (1) (a) (b)*

E *Company—Psyche—Intention—" Brains of company"—Responsible officer test—Criteria for determining responsibility of company for act or default of its servants*

F The defendants, a body corporate owning supermarket stores, were charged with an offence under the Trade Descriptions Act 1968.<sup>1</sup> They sought to raise a defence under section 24 (1) on the grounds that the commission of the offence was due to the act or default of another person, namely, the manager of the store at which it was committed, and that they had taken all reasonable precautions and exercised all due diligence to avoid the commission of such an offence.  
G The manager was not a person within section 20 carrying out functions as a director, manager, secretary or other similar

<sup>1</sup> Trade Descriptions Act 1968, s. 20 (1): "Where an offence under this Act which has been committed by a body corporate is proved to have been committed with the consent and connivance of, . . . any director, manager, secretary or other similar officer of the body corporate, . . . he as well as the body corporate shall be guilty of that offence . . ."

H S. 24 (1): "In any proceedings for an offence under this Act it shall, . . . be a defence for the person charged to prove—(a) that the commission of the offence was due to . . . the act or default of another person, . . . and (b) that he took all reasonable precautions and exercised all due diligence to avoid the commission of such an offence. . . ."

officer of the defendants, and they had properly instructed him in the operation at the store of a system for the avoidance of offences under the Act and had provided adequate and proper supervision to see that the system was followed and their instructions observed. The justices found that the defendants had set up a proper system so that they had complied with section 24 (1) (b), and that the manager had failed properly to carry out his part in the operation of the system, the commission of the offence being due to his act or default in failing in his duty of supervision. However, the justices were of the opinion that the defence failed because the manager could not be "another person" within section 24 (1) (a), and they convicted the defendants.

On appeal, the Divisional Court dismissed the appeal on the grounds that although the manager was "another person" within section 24 (1) (a) the defendants had not complied in the circumstances with the requirements of section 24 (1) (b).

The defendants appealed:—

*Held*, (1) that the manager was "another person" within section 24 (1) (a) since any person could come within that description in paragraph (a) provided that, where the defendant was an individual, the other person was someone apart from the defendant, and, where the defendant was a body corporate, he was not a person within section 20 carrying out functions as such a person.

(2) That the taking of precautions and exercise of due diligence by the defendants under section 24 (1) (b) involved the duty of setting up an efficient system for the avoidance of offences under the Act, and a proper operation of the system; that the defendants had adequately performed that duty and had not delegated to their store managers the functions of ensuring that the system was carried out, and that accordingly the defendants in the circumstances had satisfied the requirements of section 24 (1) (b) and the appeal would be allowed.

Observations of Viscount Haldane L.C. in *Lennard's Carrying Co. Ltd. v. Asiatic Petroleum Co. Ltd.* [1915] A.C. 705, 713, 714, H.L.(E.) and of Denning L.J. in *H. L. Bolton (Engineering) Co. Ltd. v. T. J. Graham & Sons Ltd.* [1957] 1 Q.B. 159, 172, C.A. considered.

*R. C. Hammett Ltd. v. London County Council* (1933) 49 T.L.R. 209; 97 J.P. 105, D.C. and *Series v. Poole* [1969] 1 Q.B. 676, D.C. overruled.

Decision of the Divisional Court [1971] 1 Q.B. 133; [1970] 3 W.L.R. 572; [1970] 3 All E.R. 357 reversed.

The following cases are referred to in their Lordships' opinions:

*Beckett v. Kingston Bros. (Butchers) Ltd.* [1970] 1 Q.B. 606; [1970] 2 W.L.R. 558; [1970] 1 All E.R. 715, D.C.

*Bolton (H. L.) (Engineering) Co. Ltd. v. T. J. Graham & Sons Ltd.* [1957] 1 Q.B. 159; [1956] 3 W.L.R. 804; [1956] 3 All E.R. 624, C.A.

*Coppen v. Moore (No. 2)* [1898] 2 Q.B. 306, D.C.

*Director of Public Prosecutions v. Kent and Sussex Contractors Ltd.* [1944] K.B. 146; [1944] 1 All E.R. 119, D.C.

*Dumfries and Maxwelltown Co-operative Society v. Williamson*, 1950 S.C.(J.) 76.

*Hammett (R. C.) Ltd. v. Crabb* (1931) 47 T.L.R. 623; 95 J.P. 180, D.C.

*Hammett (R. C.) Ltd. v. London County Council* (1933) 49 T.L.R. 209; 97 J.P. 105, D.C.

## A.C. Tesco Ltd. v. Nattrass (H.L.(E.))

- A *Henshall (John) (Quarries) Ltd. v. Harvey* [1965] 2 Q.B. 233; [1965] 2 W.L.R. 758; [1965] 1 All E.R. 725, D.C.  
*Lady Gwendolen, The* [1965] P. 294; [1965] 3 W.L.R. 91; [1965] 2 All E.R. 283, C.A.  
*Lennard's Carrying Co. Ltd. v. Asiatic Petroleum Co. Ltd.* [1915] A.C. 705, H.L.(E.).  
*Lim Chin Aik v. The Queen* [1963] A.C. 160; [1963] 2 W.L.R. 42; [1963] 1 All E.R. 223, P.C.
- B *Magna Plant v. Mitchell* (unreported), April 27, 1966, D.C.  
*Melias Ltd. v. Preston* [1957] 2 Q.B. 380; [1957] 3 W.L.R. 42; [1957] 2 All E.R. 449, D.C.  
*Mousell Brothers Ltd. v. London and North-Western Railway Co.* [1917] 2 K.B. 836, D.C.  
*Rex v. I. C. R. Haulage Ltd.* [1944] K.B. 551; [1944] 1 All E.R. 691, C.C.A.  
*Series v. Poole* [1969] 1 Q.B. 676; [1968] 2 W.L.R. 261; [1967] 3 All E.R. 849, D.C.
- C *Sweet v. Parsley* [1970] A.C. 132; [1969] 2 W.L.R. 470; [1969] 1 All E.R. 347, H.L.(E.).  
*Vane v. Yiannopoulos* [1965] A.C. 486; [1964] 3 W.L.R. 1218; [1964] 3 All E.R. 820, H.L.(E.).  
*Walkling (A.) Ltd. v. Robinson* (1929) 46 T.L.R. 151; (1930) 99 L.J.K.B. 171, D.C.
- D

The following additional cases were cited in argument:

- Birkenhead and District Co-operative Society Ltd. v. Roberts* [1970] 1 W.L.R. 1497; [1970] 3 All E.R. 391, D.C.  
*British Fermentation Products Ltd. v. British Italian Trading Co. Ltd.* [1942] 2 K.B. 145; [1942] 2 All E.R. 256, D.C.
- E *Dobell (G. E.) & Co. v. Steamship Rossmore Co. Ltd.* [1895] 2 Q.B. 408, C.A.  
*Freeman v. C. T. Warne Pty. Ltd.* [1947] V.L.R. 279 (Australia).  
*Moore v. Bresler (I.) Ltd.* [1944] 2 All E.R. 515, D.C.  
*Reg. v. Stanley Haulage Ltd.* (1963) 114 L.J. 25.  
*Sherras v. De Rutzen* [1895] 1 Q.B. 918, D.C.
- F APPEAL from the Divisional Court of the Queen's Bench Division (Lord Parker C.J., Cooke and Fisher JJ).

On November 5, 1969, the prosecutor, William Kenneth Nattrass, preferred an information against the defendants, Tesco Supermarkets Ltd., for that they, on September 26, 1969, at Northwich in the county of Chester, in offering to supply goods, namely, a packet of Radiant washing powder, gave an indication by means of a notice bearing the statement "Radiant 1s. off Giant Size 2s. 11d." that the goods were offered at a price less than that at which they were in fact being offered, namely, 3s. 11d., contrary to section 11 (2) of the Trade Descriptions Act 1968.

- G On January 23, 1970, the defendants gave notice pursuant to section 24 (2) of the Act of 1968 to both the prosecutor and one John Reginald Clement ("the manager") of Tesco Supermarkets Ltd., 42 Witton Street,  
 H Northwich, that at the hearing of the summons against them they intended to rely on the contention that the contravention in question was due to the act or default of the manager and that they had used all due diligence to secure compliance with the provisions in question.

156

Tesco Ltd. v. Natrass (H.L.(E.))

[1972]

The justices heard the information on February 3, 1970, and found the following facts. At about 10.00 a.m. on September 26, 1969, and for a number of days prior thereto the defendants were displaying affixed to the window of their store in Witton Street, Northwich, a large poster divided by a horizontal line into two. The upper part bore the legend "Radiant 1s. off Giant Size 2s. 11d." The lower part bore another legend referable to another product. The defendants had caused an advertisement to the same effect to be included in local and national newspapers. Prior to that time on that date at that store, and for a number of days prior thereto, the defendants displayed for sale on a separate fixture a number of giant size packets of Radiant each bearing on it the legend in prominent lettering "1s. off recommended price." Such packets were known in the trade as flash packs, and one was produced in evidence. The recommended retail price of giant size packets of Radiant during the week in question was 3s. 11d. At that time on that date at that store the defendants had no flash packs of Radiant on display. At that time on that date at that store the defendants were displaying for sale a number of giant size packets of Radiant washing powder each bearing on it a single price marking of 3s. 11d. but no other marking referable to its price, and each standing on a shelf which itself bore a price marking of 3s. 11d. The defendants intended the relevant part of the poster to apply only to the flash packs of giant size Radiant. At that time on that date at that store Thomas Coane, an old age pensioner, searched the store for a giant size packet of Radiant priced at 2s. 11d. expecting to find a packet at a reduced price such as the flash pack produced in evidence, but was able to find only the packets marked with the price of 3s. 11d. He selected one of those and, on inquiring the price of the cashier, was informed that there were no giant size packets of Radiant in stock for sale at the price of 2s. 11d. He was accordingly charged the price of 3s. 11d. Mr. Coane immediately complained to David John Sprake Hughes, inspector of weights and measures and an officer authorised by the weights and measures authority under the Trade Descriptions Act 1968. The inspector visited the store at 10.20 a.m. on that date and interviewed the manager and Miss Winifred Rogers, an assistant in the store ("the assistant"), whose duty it was to replenish the soap powder fixtures. The manager explained to the inspector that all packs marked with the normal price were removed from display during the period of a special offer and that his assistants were required to inform him if any special offer stock were sold out so that he could remove any display notices. The assistant told the inspector that, on the evening prior to that date, she had discovered that no flash packs of Radiant remained on display and she had thereupon filled the soap fixture with giant size packets of Radiant, each marked with a price of 3s. 11d. but had not reported the dearth of flash packs or her action to the manager. The manager also informed the inspector that although at that time on that date there was no flash pack of Radiant on display, he was expecting a further 50 cases from the manufacturer during that day. He added that if Mr. Coane had questioned him about the display notice, he would have allowed him to purchase a giant size packet of Radiant marked at 3s. 11d. for 2s. 11d. The store was managed by the manager who was responsible for the manner and extent of the display of the

**A.C. Tesco Ltd. v. Natrass (H.L.(E.))**

- A** poster and the manner and extent of the display of items including packets of Radiant within the store and for the marking of prices on goods and display equipment therein. The defendants were a nationally known public company who owned many hundred stores including at least 250 in the North, each of which was under the control of a separate manager. The system of selection of managers was careful and reasonable. The manager had long experience in the food trade. The selection of him as manager
- B** of the store was reasonable. The defendants provided adequate staff and equipment for the running of the store.

- The manager received instruction from the defendants in the running of the store: (a) by attending a comprehensive six-day management course three and a half years previously on his appointment as manager and a further half-day course devoted to the Trade Descriptions Act 1968, provided by the defendants for managers; (b) orally from a branch inspector employed by the defendants who attended at the store every week for the purposes of ensuring that it was properly managed; (c) orally from an area controller employed by the defendants who attended at the store regularly, although less frequently than the branch inspector; (d) from a regional director employed by the defendants who attended at the store occasionally; (e) from up-to-date and regular price lists and amendments thereto issued by the defendants specifying the price at which each item for sale was to be sold; copies of the relevant price lists for giant size Radiant obtaining for the whole of the week including September 26, 1969, were produced in evidence; (f) from literature relevant to particular promotions including the promotion of the flash packs of giant size Radiant, a copy of the literature relevant to which promotion was produced in evidence; (g) from sundry notices issued by the defendants including four notices under the heading "Trade Descriptions Act" which notices, issued respectively March, April, July and August 1969, were produced in evidence; (h) from a manual entitled *Store Operating Manual* delivered to the manager at least a week before September 26, 1969, which included a section entitled "Bulletin 20" containing detailed provisions particularly relevant to securing compliance with the provisions of the Act of 1968; a copy of that manual was produced in evidence; (i) orally from the defendants' highly qualified hygiene executive on the subject of hygienic requirements and steps necessary to secure compliance with all relevant statutory requirements. The executive last attended at the store on July 29, 1969.

- The defendants exercised supervision over the manager and proper running of the store: (a) by the regular attendance of the branch inspector who was responsible only for some six to eight stores and whose duties were solely those of supervision; (b) by the regular attendance of the area controller who was responsible for some three or four branch inspectors and some 24 stores and whose duties were those of supervising the branch inspectors as well as the managers and the operation of those stores; (c) by the appointment of a regional director responsible for a number of stores and the supervision of the area controllers, branch inspectors and managers of them; (d) by visits from the hygiene executive; (e) by requiring the manager himself to carry out regular checks on certain aspects of the operation of the store including the display of special offers and to record

such checks in a book entitled "Weights and Measures Book" which was inspected by the branch inspector and the area controller, and which book was produced in evidence; the entry therein for September 26, 1969, "All special offers O.K." was made before 10.00 a.m. on that day; the entries to the same effect in respect of earlier days that week were made after 10.00 a.m. on September 26, 1969, after complaint had been made by the weights and measures inspector. A

The store on that date was displaying for sale many thousands of different lines including many containing flash offers. The manager over-estimated his stock of flash packs of giant size Radiant in that he thought four empty cases were, in fact, full. The flash packs of giant size Radiant had sold at a rate much higher than the defendants had, or could reasonably have, foreseen. The manager did not realise that the store had sold out of flash packs of giant size Radiant; had he so realised he would either have cut the poster in half and removed that portion relevant to Radiant or have reduced the price of the standard packets of giant size Radiant to 2s. 11d. The manager had not checked the soap powder fixture on that date notwithstanding the entry in his "Weights and Measures Book" for that morning, "All special offers O.K." The manager had under him an assistant manager, various section heads and other staff totalling in all some 60 persons. The ladder of responsibility from the manager upwards was: the manager—the branch inspector—the area controller—the regional director—the board of directors. It was the practice in the grocery trade for all stores whether large or small to be under the immediate direction of a shop manager. C D

In order to assist the parties the justices indicated that, subject to argument, it appeared to them that the defendants had established that the commission of the offence was due to the act of the manager and that they had satisfied the provisions of section 24 (1) (b), but that the justices were not satisfied that the manager was "another person" within the meaning of section 24 (1) (a). E

It was contended on behalf of the prosecutor, that the poster displayed in the window of the store was, in the words of section 11 (2), likely to be taken as an indication that all giant size packets of Radiant were being offered for supply at a price of 2s. 11d. each. Mr. Coane had interpreted the poster in that way. Members of the public could not reasonably be expected to assume that the poster referred only to the flash packs of Radiant. The facts disclosed that the offence was due primarily to the act or default of the assistant in stocking her soap powder fixture with non-flash packs of Radiant and failing to inform the manager that the special offer was exhausted. While the manager might have been at fault in not checking the soap powder fixture on that morning, it was unreasonable of the defendants to expect him to have time himself to comply with all the instructions issued to him, and check all the shelves of goods and flash offers each morning. The principle underlying *Beckett v. Kingston Bros. (Butchers) Ltd.* [1970] 1 Q.B. 606 was distinguishable from the present case. In *Beckett's* case a special instruction had been given to a shop manager in relation to one commodity. The defendant company in that case clearly contemplated that the action specified in the instruction would be carried out by the manager personally. Bridge J. distinguished the F G H

## A.C. Tesco Ltd. v. Nattrass (H.L.(E.))

A facts of *Beckett's* case from those in *R. C. Hammett Ltd. v. London County Council* (1933) 97 J.P. 105 in that in *Beckett's* case the act or default was that of the manager himself, whereas in *Hammett's* case it was that of a junior employee whom the manager had failed to supervise. In the present case, the manager had failed to supervise the action of the assistant and, following *Hammett's* case, the failure to exercise due diligence by the manager was the responsibility of the defendants; in short the manager

B was the alter ego of the company in relation to the act of default of junior employees. The decision in *Beckett's* case took no account of the principle laid down in *A. Walkling Ltd. v. Robinson* (1930) 99 L.J.K.B. 171 which did not appear to have been cited in argument in *Beckett's* case. Although the wording of section 24 (1) of the Act of 1968 differed somewhat from section 12 of the Sale of Food (Weights and Measures) Act 1926, and section 26 (1) of the Weights and Measures Act 1963, *Walkling's* case laid

C it down that the statutory defence that the offence was due to the default of a person under the defendant's control had no application where that person was in the defendant's employment. Section 24 (1) of the Act of 1968 might have been intended to compress into one subsection the two defences afforded by section 12 (2) and (5) of the Act of 1926 and sections 26 (1) and 27 (1) of the Act of 1963, but the reference to the default

D of a defendant's employee in the judgment of Lord Hewart C.J. in *Walkling's* case (1930) 99 L.J.K.B. 171, 177 suggested that the decision in that case would have been the same if the two defences in the Act of 1926 had been included in one subsection, and, referring to section 12 (2), he stated "those words seem to me to have no relation to the case where it is a defect of the machinery or a default of the persons under the defendant's control which is responsible for the mischief."

E The decision in *Hall v. Farmer* [1970] 1 W.L.R. 366 in following *Walkling's* case indicated that the principle of that case still applied to the statutory defence in section 26 (1) of the Weights and Measures Act 1963, and, by implication, section 24 (1) of the Act of 1968, notwithstanding the different wording. The reference in section 24 (1) to "or to the act or default of another person, an accident or some other cause beyond his

F control" suggested that each of those alternatives was to be interpreted ejusdem generis and related to a situation beyond the defendant's control. Offences under section 11 (2) of the Act of 1968 were absolute as had been conceded by the defendants. Traders had an implied absolute duty under section 11 (2) to ensure that indications as to the prices of goods were not in contravention of the subsection, and on the authority of *Series v. Poole* [1969] 1 Q.B. 676 if a trader delegated the fulfilment of his absolute duty to

G an employee he remained liable for his employee's failure to fulfil that duty if it were due to the employee's own failure to exercise due diligence.

It was contended on behalf of the defendants that the poster displayed was intended to and would only be taken as an indication that there were certain identifiable packets, namely, the flash packs of giant size Radiant offered for sale at 2s. 11d. The poster was not likely to be taken as an

H indication that standard packets, i.e., non-flash packs of giant size Radiant were being offered for sale at 2s. 11d. So long as some identifiable packets of giant size Radiant, i.e., flash packs, were offered for sale at 2s. 11d. it did not constitute an offence if different packets, even if containing the

identical commodity and so described, were offered for sale at a higher price than the poster indicated so long as that higher price was clearly marked on those other packets. If the foregoing contention was correct no offence would be committed simply because the defendants had sold out of stock of the packets selling at 2s. 11d. but continued to sell packets at 3s. 11d. if such selling out had occurred sooner than they could reasonably have foreseen. In the premises no offence under section 11 had been proved. If an offence under section 11 had been proved, then the defendants had proved that the commission of the offence had been due to the act of default of the manager: in miscalculating the quantity of flash packs of giant size Radiant available in the store on that morning; in allowing, contrary to the defendants' instructions, flash packs and standard packets of the same article to be on sale at the same time; in failing to remove that part of the poster relevant to Radiant when the stock of flash packs was sold out; in failing to exercise proper supervision. They had taken all reasonable precautions and exercised all due diligence: in providing a properly equipped store; by properly selecting the manager to manage it; by providing a proper detailed and adequate system and instruction as to how such system and the store were to be operated; by providing adequate and proper supervision to see that the defendants' system was followed and their instructions observed. The manager was "another person" within the meaning of section 24 (1) (a). *Beckett v. Kingston Bros. (Butchers) Ltd.* [1970] 1 Q.B. 606 was authority for the proposition that in general an employee and in particular a manager could be another person within the meaning of section 2 (1) (a). *R. C. Hammett Ltd. v. London County Council* (1933) 97 J.P. 105 could be reconciled with *Beckett's* case in that the result in *Hammett's* case might have been different if the manager and not a more junior employee had been blamed. Even if the immediate act or default was that of one or more junior employees, a more senior employee only could be blamed under section 24 (1) (a) and the defence yet succeed if the act or default of that senior employee was either co-extensive with that of the junior employee or was comprised in the failure to correct that of the junior employee. Where the defendant was a limited company any employee who was not the alter ego of the company could be another person within section 24 (1) (a). Generally only the directors and perhaps the secretary could be the alter ego of a company although particular facts in a particular case might show another person so to be. The manager in this case could in no circumstances be said to be the alter ego of the defendants. The defendants adopted in argument the whole of the comment to *Beckett's* case in [1970] Crim.L.R. 119, 120. *Hall v. Farmer* [1970] 1 W.L.R. 366 on its proper meaning supported the contention that an employee could be another person within the meaning of the Weights and Measures Act 1963. *Series v. Poole* [1969] 1 Q.B. 676 had no relevance as it turned on the question whether a person, upon whom there lay a statutory duty to do an act, could show that he exercised due diligence to secure that the duty was performed simply by reasonably delegating its fulfilment to a third person; *A. Walkling Ltd. v. Robinson* (1930) 99 L.J.K.B. 171 could be distinguished in that it was not there considered whether an employee could be "another person" as the defence was

A.C. Tesco Ltd. v. Nattrass (H.L.(E.))

A based on different grounds. In the premises the defendants had proved that the manager was another person within the meaning of section 24 (1) (a).

The justices were of the opinion that the poster was likely to be taken as an indication that the standard packets of giant size Radiant were being offered for sale at 2s. 11d., being a price less than they were in fact being offered for sale, namely, 3s. 11d. and that, in consequence, an offence under section 11 (2) had been made out; that the commission of the offence was due to the act or default of the manager by his failure to see that the defendants' policy was correctly carried out and/or to correct the errors of the staff under him; that the defendants had exercised all due diligence in devising a proper system for the operation of the store and by securing so far as was reasonably practicable that it was fully implemented and thus had fulfilled the requirements of section 24 (1) (b); and that the defendants could not rely upon the act or default of the manager as he was not "another person" within the meaning of section 24 (1) (a), for the following reasons: *Beckett v. Kingston Bros. (Butchers) Ltd.* [1970] 1 Q.B. 606 was distinguished on the ground that there a single definite instruction was given to each shop manager calling upon him to take specific action on a specific occasion whereas the defendants were relying on general instructions; that there only the act or default of the manager was proved, whereas in this case the justices were satisfied that the assistant and the manager were both at fault. As compared with *Beckett's* case the manager had a larger staff working under him whereas in *Beckett's* case it was otherwise and indeed suggested that the manager might have had no staff at all. In the result the justices reached the conclusion that the original act or default was that of the assistant and that the act or default of the manager was in his failure to instruct or supervise her. The manager represented the defendants in his supervisory capacity, and for his lack of due diligence the defendants were responsible on the principle laid down in *Hammett's* case. Accordingly the manager was not "another person" for the purposes of section 24 (1) (a). The defendants had failed to establish the defence provided by section 24 and, accordingly, the justices convicted them and fined them £25, and ordered them to pay an advocate's fee of 15 guineas.

F The defendants appealed and the questions for the opinion of the High Court were whether the justices came to a correct determination in point of law in concluding that (a) an offence under section 11 (2) had been made out; and (b) the manager was not another person within the meaning of section 24 (1) (a).

G The Divisional Court dismissed the appeal, holding that albeit the justices were wrong in concluding that the defence failed on the ground that the manager could not be another person within section 24 (1) (a), nevertheless the defendants had failed in the circumstances to satisfy the requirements of section 24 (1) (b).

The defendants appealed.

H *Andrew Rankin Q.C.* and *Patrick Phillips* for the defendants. The effect of the decision of the Divisional Court is that a retail company could never rely on section 24 of the Trade Descriptions Act 1968 if there was an offence committed by one of its shop managers under the Act. The

legal position is precisely the same between an individual owner and a company, save where that "other person" is within the brain area of the company. Thus, given an owner who has set up a reasonable system for supervising his retail activities and has delegated the duties responsibly and has not been negligent, then the owner has a defence under section 24 if one of his employees at shop level has committed an offence under the Act. A

Section 20 of the Act of 1968 defines and limits the brain area of the company to officers of the company. The so-called alter ego principle is not applicable in the present case. There is a presumption, in the absence of express statutory provision, that where a company or its officers have not been negligent that Parliament does not intend such classes of person to be guilty of an offence. It is a defence to section 11 that what was done was outside the scope of the servant's employment by virtue of section 24. Section 11 imposes a strict liability. If no diligence can prevent an offence being committed, then if an activity is carried on which leads to an offence being committed, there is no defence under section 24. The scope and limit of the defence are more restricted than under the Food and Drugs Act 1955 and the Weights and Measures Act 1963. B

If necessary, it will be contended that *Series v. Poole* [1969] 1 Q.B. 676 was wrongly decided. Alternatively, it is plainly distinguishable. On the facts in that case there was plainly no due diligence. Further, if *Beckett v. Kingston Bros. (Butchers) Ltd.* [1970] 1 Q.B. 606 was correctly decided, the present case was wrongly decided. *Beckett's* case was correct in law. C

*Hammett (R. C.) Ltd. v. Crabb* (1931) 95 J.P. 180 is frequently cited as authority for the proposition that employers are liable for the acts or defaults of their shop managers, but on analysis it is seen that it is not authority for any such proposition. On the facts found by the Divisional Court, it was held there that the employers had shown due diligence and that therefore the justices should not have imposed any penalty on them. *Hammett (R. C.) Ltd. v. London County Council* (1933) 97 J.P. 105 was wrongly decided for it holds that the act of the servant is the act of the master. D

As to what is to be imputed to a company, see *Magna Plant v. Mitchell* (unreported), April 27, 1966, D.C.; *Reg. v. Stanley Haulage Ltd.* (1963) 114 L.J. 25; *Lennard's Carrying Co. Ltd. v. Asiatic Petroleum Co. Ltd.* [1915] A.C. 705, 713, and *Bolton (H. L.) (Engineering) Co. Ltd. v. T. J. Graham & Sons Ltd.* [1957] 1 Q.B. 159. E

A corporation is liable just as a natural person, if the corporation has delegated its authority. Further, a corporation can be liable at common law where the act of the servant is to be imputed. Further cases which exemplify the "identification" principle are *Director of Public Prosecutions v. Kent & Sussex Contractors Ltd.* [1944] K.B. 146 and *Rex v. I. C. R. Haulage Ltd.* [1944] K.B. 551. The authorities show that there is a line above which the servant's acts are the acts of the company and below which they are not. F

To bring section 24 into operation, it is necessary to identify "another person." So far as a natural person is concerned, he can identify any other person be he servant or third party. Why should it be different for a corporation? It can identify any of its servants as "another person" G

## A.C. Tesco Ltd. v. Nattrass (H.L.(E.))

A provided such person is not an "officer" or delegate of the company. "Another person" in section 24 is any person apart from delegates and those specified in section 20. *Moore v. Bresler (I.) Ltd.* [1944] 2 All E.R. 515 is the high-water mark of those cases which identify servants as an alter ego of the company.

B *The Lady Gwendolen* [1965] P. 294 is useful as showing how far down the chain of responsibility it is possible to go in relation to imputing the fault of the servant as the fault of the company. Willmer and Winn L.J.J. applied the alter ego principle. See also *Henshall (John) (Quarries) Ltd. v. Harvey* [1965] 2 Q.B. 233.

C The alter ego principle is said to be a means whereby one can identify those persons in a company who can in law be identified as the company. On the facts here, a shop manager of a supermarket being merely a cog in a vast machine is not the alter ego of the company and, therefore, he is "another person" within the meaning of section 24 (1) (a).

In considering the application of the Act of 1968, is there any test whereby one can determine if a person is the alter ego? In the three consumer protection statutes there is a provision which covers this question—in this Act it is section 20. Alternatively, there is no such touchstone but the facts of each particular case have to be examined.

D It emerges from the cases that there are three types of person who have been held to be the alter ego of the company. These are, the managing director, assistant managing director and a road traffic manager. In the case of a natural person, every person is "another person" for the purposes of section 24 (1) (a). In the case of a company, every person is "another person" save those persons who are the officers or delegates of the company.

E The decision of the Divisional Court is wrong for it is based on the proposition that the defendants delegated their duty of taking reasonable precautions to the shop manager. But in the defendants' organisation, there is no such delegation. Employees of Tesco were entrusted with their duties but there was no delegation so as to impute criminal responsibility to the company. *Series v. Poole* [1969] 1 Q.B. 676 was wrongly decided.

F The defence afforded by section 20 of the Road Traffic Act 1962 was not in the Road Traffic Act 1960. Therefore, Parliament must have added the provision in 1962 to alleviate cases of hardship. But by the decision of the Divisional Court this defence was rendered nugatory. Reliance is placed on the observations of Lord Justice-General Cooper in *Dumfries and Maxwelltown Co-operative Society v. Williamson*, 1950 S.C.(J.) 76, 80, that "the underlying idea manifestly is that there should not be vicarious responsibility for an infringement of the Act committed without the consent or connivance of an employer." [Reference was also made to *Freeman v. C. T. Warne Pty. Ltd.* [1947] V.L.R. 279.]

G *Phillips* following. Strict liability is an animal on its own. It is a creature of statute. It is not a principle of the law of master and servant or of that of principal and agent. What makes a master liable for the act of his servant or the principal for that of his agent in those circumstances where strict liability arises? The criterion for answering this question is whether the act is within the scope of the servant or agent's authority. There are two anomalies in this branch of the criminal law: the abolition

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of the need for mens rea—a guilty mind; and the fact that a man is liable albeit he has expressly forbidden an act by his servant if that act is within the scope of the servant's ostensible authority. A

As to the expression “another person” in section 24, the purpose of this Act is that the guilty person should be convicted. Parliament only contemplated two categories of persons who would be prosecuted: those referred to in sections 20 and 23. To extend the scope of the persons who are the company is to go contrary to the intention of the Act for it means that there are persons who can be prosecuted who do not fall within those specified in sections 20 and 23. B

As to *Hammett (R. C.) Ltd. v. London County Council*, 97 J.P. 105, the argument appears to be based on causation.

*Edgar Fay Q.C., Richard Yorke and Caroline Alton* for the respondent prosecutor. This case is almost entirely concerned with the proper construction of section 24 (1) (a) of the Act of 1968. The expression “the commission of the offence” in contrast to the alleged commission of the offence points to the offence being an offence of strict liability. Paragraph (b) of section 24 (1) requires proof that all reasonable precautions and all due diligence have been taken. In interpreting subsection (1) the question is, where the person charged is the employer: is it confined to his personal precautions and personal diligence, or does it embrace his servants where they are entrusted with control? “He” in paragraph (b) embraces those servants who are in a supervisory capacity. The section draws a distinction between the act or default which causes the offence and the defence of having taken all reasonable precautions and exercised all due diligence which should have prevented the offence. First it is necessary to discover the actual offender and then ascertain whether the employer has exercised all reasonable precautions and exercised all due diligence. C  
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In section 24 (1) (b) “another person” cannot include here Miss Rogers, for so to do is to make the provision meaningless. Even if Clement had directed the cashier to take 2s. 11d. for these goods, there would still have been an offence committed under the Act. It is nihil ad rem that in the circumstances it is unlikely that there would have been an information laid. The distinction drawn in paragraphs (a) and (b) is between the act and default of the actual servant and the servant whose duty it is to exercise all due diligence. The majority of the authorities support the above contention: see *Series v. Poole* [1969] 1 Q.B. 676, 683. F

The respondent draws a distinction between the doing of the act and those persons who are responsible for taking supervisory acts. Diligence and precautions relate to the acts of a master to enforce discipline in his organisation; see *per* Lord Parker C.J. in *Series v. Poole*. G

*Beckett v. Kingston Bros. (Butchers) Ltd.* [1970] 1 Q.B. 606 turned on the question whether it was the manager's hand which committed the offence. In *Hammett v. London County Council*, 97 J.P. 105, 109, the question was put succinctly in argument which must be asked in the present case, namely, was the manager's failure to use due diligence the failure of the employer or principal—the appellant company? That question was answered there as the respondent answers it here. The argument for the respondents in that case is also that of the respondent here. The Act distinguishes between the actual offender on the one hand and the employer H

A.C.

Tesco Ltd. v. Natrass (H.L.(E.))

A or principal on the other. It says nothing of intermediate stages, and the employer is responsible for the acts or omissions of all persons above the actual offender. The onus is on the employer to show that due diligence has been used; and the chain of diligence must be complete until it is broken by the actual offender brought before the court. If the defendants are to succeed, *Hammett v. London County Council* must be overruled. It is to be observed that *Hammett* has been followed ever since it was decided in 1933 and was cited in *Series v. Poole* [1969] 1 Q.B. 676. The defendants' argument entails overruling the decisions in *Hammett* and *Series v. Poole* and disapproving the reasoning in *Beckett v. Kingston Bros. (Butchers) Ltd.* [1970] 1 Q.B. 606. This line of authority has hitherto always been considered as applying to the range of consumer protection legislation, it being analogous legislation.

C Reliance is placed on the dictum of Wright J. in *Sherras v. De Rutzen* [1895] 1 Q.B. 918, 922: "there must be guilty knowledge on the part of the defendant or of someone who has been put in his place to act for him." This dictum applies a fortiori in the present case.

The fact that section 24 affords a defence does not deprive the offence of which the defendants are being charged of being an offence of strict liability.

D As to the distinction between the commission of an offence and the act in default, the cases repeatedly emphasise the distinction between the company and its employees; see *Melias Ltd. v. Preston* [1957] 2 Q.B. 380, which emphasises the distinction between the supervising servant and the last servant in the chain. For an illustration of strict liability in this type of case, see *Birkenhead and District Co-operative Society Ltd. v. Roberts* [1970] 1 W.L.R. 1497 where the structure of section 24 was examined.

E The question is: is the act of the servant the act of the master? What is aimed at in the case of employers in section 24 (1) (b) is supervision—supervision not in theory, but in execution. The offence is one of strict liability. This is important in considering the nature of the defence afforded. *British Fermentation Products Ltd. v. British Italian Trading Co. Ltd.* [1942] 2 K.B. 145 is distinguishable for that was a case of vendor and purchaser and not a case of control of a servant in the exercise of due diligence.

G Reliance is placed on *Lim Chin Aik v. The Queen* [1963] A.C. 160 for the test to be applied in determining whether the liability imposed by the statute is strict. In that case the Privy Council attached importance to the public utility of the provision in question. If strict liability is attached to the offence, then strict canons of construction should be applied to the defence. In section 24 (1) (b) the words relate to actions and not to a mental state. If a company is to be made liable despite having produced a proper system of supervision, then the company upon being convicted would in future take care to overhaul its system.

H In passing this type of legislation, Parliament is, in effect, taking the view that although the offences if committed give the individual consumer a civil cause of action, such a right is quite artificial in the circumstances and, therefore, a public right is given to remedy these injustices. The intention of Parliament must be ascertained from the field in which the

statute is to operate. Here, it is (i) in respect of retail business and (ii) it is for the purposes of consumer protection. A

If it be said that when the section refers to taking all reasonable precautions that means it is only necessary to devise a reasonable system, the answer is that the system must be *seen* to be carried out.

Another reason for construing section 24 strictly is that these are offences in relation to sale of goods and the contracting party is the employer and it follows that if any person is benefited by a contravention of the provisions of the Act, it is not the servant in default, but the person who owns the company. B

Use of due diligence and the taking of all reasonable precautions are not limited to employers, but to all members of the organisation who are concerned with supervisory activities. The devising of a system is not confined to the board room, but will often be in the hands of a servant in a supervisory capacity. The present case concerns a corporation and the manager was within the brain area of the company. This was a very large store. The object of supermarkets is to do away with counterhands. Clement had under him a staff of no less than 60 persons. C

In *Director of Public Prosecutions v. Kent & Sussex Contractors Ltd.* [1944] K.B. 146, 158, Hallett J. draws an analogy between a natural person and a corporate person. This comparison is accepted, provided that it is remembered that the mind of a company is diffused amongst many persons. The brain of a company is spread over many persons. But the comparison here in respect of Clement and an individual owner is not between an owner who has several shops, but with a small company or individual who has only one shop. Clement is part of the brain of Tesco for there devolved upon him part of the company's managerial functions. A portion of the company's brain had devolved upon him and therefore negligence on his part is the company's negligence. E

Suppose there are three supermarkets, each with 60 employees in contiguous towns, one managed by the individual owner, the second owned by a company, whose managing director manages the shop, and the third owned by Tesco. On the defendants' argument, the first two defendants would be liable for a breach of the provisions of the Act like those alleged here and Tesco would escape. It cannot be the law that the large organisation should escape. It would mean that there was one law for the rich and another for the poor. It is pertinent to consider the facts found by the justices here in their conclusion. It will be seen that Clement failed to give proper instructions or to exercise proper supervision. F

*Yorke* following. The Act of 1968 is dealing with civil transactions almost exclusively. If it is dealing with civil transactions, then the expressions in the Act fall to be construed in the civil sense, for it would be absurd to look at the transactions with two pairs of spectacles. Compare the Factories Acts. It has never been suggested that the Factories Acts and the regulations made thereunder are to be construed differently according to whether there is a civil claim or a prosecution is brought in respect of a breach of one of the Acts or regulations. The expression to be considered here in its civil sense is "due diligence." It is the obverse of absence of negligence. It imports the maxim "Facit per alium facit per se." G H

## A.C. Tesco Ltd. v. Natrass (H.L.(E.))

A In the context here of an offer the test of due diligence stops at the end of the chain of those exercising supervisory functions and therefore the default of Clement is the lack of due diligence on the part of the company. The most helpful case as to what is implied by the expression "due diligence" is *Dobell (G. E.) & Co. v. Steamship Rossmore Co. Ltd.* [1895] 2 Q.B. 408.

B If the criminal test is to be applied to this Act, it will erode the purpose of large parts of the statute. The purpose of the Act is to prevent articles being offered for sale at one price and sold at another. The individual customer is entitled to the same standard of care whether the shop be large or small or part of a small or large chain of shops. If the criminal test be applied, then the more remote the owner, the less likely is he to be convicted.

C No system of care can amount to the taking of due diligence unless it reaches down to those acts of offering to supply and of selling with which section 11 is concerned and it is those acts which must be supervised. If those acts are not supervised, then there is no nexus between the duty of care and the system of supervision.

D Clement is exercising here the totality of the company's managerial functions. Tesco are retail sellers and in respect of this shop Clement is king, albeit the empire extends beyond this one shop. The managing director of Tesco must have been at one time in the position of Clement, that is, managing one shop. Each manager of Tesco shops is standing in the shoes of the managing director in that shop. In that shop he still carries on the obligations of the owner. It makes no difference that eventually the owner forms a company. On the defendants' argument, the standard of care will be less in Piccadilly and Oxford Street than at the village shop. The public is entitled to the same duty of care whatever be the nature of the control of the shop in question. As a matter of law, an employer is liable in respect of his employee where he has delegated the whole responsibility for the running of the premises: *Vane v. Yiannopoulos* [1965] A.C. 486, 499, 500, 503, 507, 510, 511, *per* Lord Evershed, Lord Morris, Lord Hodgson and Lord Donovan. Clement was responsible for the whole running of this shop in Northwich. Dicta in *Coppen v. Moore (No. 2)* [1898] 2 Q.B. 306 support the respondent's contention on the policy of the Act of 1968.

F *Rankin Q.C.* was not called upon to reply.

Their Lordships took time for consideration.

G March 31, 1971. LORD REID. My Lords, the appellants own a large number of supermarkets in which they sell a wide variety of goods. The goods are put out for sale on shelves or stands, each article being marked with the price at which it is offered for sale. The customer selects the articles he wants, takes them to the cashier, and pays the price. From time to time the appellants, apparently by way of advertisement, sell H "flash packs" at prices lower than the normal price. In September 1969 they were selling Radiant washing powder in this way. The normal price was 3s. 11d. but these packs were marked and sold at 2s. 11d. Posters were displayed in the shops drawing attention to this reduction in price.

These prices were displayed in the appellants' shop at Northwich on September 26. Mr. Coane, an old age pensioner, saw this and went to buy a pack. He could only find packs marked 3s. 11d. He took one to the cashier who told him that there were none in stock for sale at 2s. 11d. He paid 3s. 11d. and complained to an inspector of weights and measures. This resulted in a prosecution under the Trade Descriptions Act 1968 and the appellants were fined £25 and costs.

Section 11 (2) provides:

“ If any person offering to supply any goods gives, by whatever means, any indication likely to be taken as an indication that the goods are being offered at a price less than that at which they are in fact being offered he shall, subject to the provisions of this Act, be guilty of an offence.”

It is not disputed that that section applies to this case. The appellants relied on section 24 (1) which provides:

“ In any proceedings for an offence under this Act it shall, subject to subsection (2) of this section, be a defence for the person charged to prove—(a) that the commission of the offence was due to a mistake or to reliance on information supplied to him or to the act or default of another person, an accident or some other cause beyond his control; and (b) that he took all reasonable precautions and exercised all due diligence to avoid the commission of such an offence by himself or any person under his control.”

The relevant facts as found by the magistrates were that on the previous evening a shop assistant, Miss Rogers, whose duty it was to put out fresh stock found that there were no more of the specially marked packs in stock. There were a number of packs marked with the ordinary price so she put them out. She ought to have told the shop manager, Mr. Clement, about this, but she failed to do so. Mr. Clement was responsible for seeing that the proper packs were on sale, but he failed to see to this although he marked his daily return “ all special offers O.K.” The magistrates found that if he had known about this he would either have removed the poster advertising the reduced price or given instructions that only 2s. 11d. was to be charged for the packs marked 3s. 11d.

Section 24 (2) requires notice to be given to the prosecutor if the accused is blaming another person and such notice was duly given naming Mr. Clement.

In order to avoid conviction the appellants had to prove facts sufficient to satisfy both parts of section 24 (1) of the Act of 1968. The magistrates held that they

“ had exercised all due diligence in devising a proper system for the operation of the said store and by securing so far as was reasonably practicable that it was fully implemented and thus had fulfilled the requirements of section 24 (1) (b).”

But they convicted the appellants because in their view the requirements of section 24 (1) (a) had not been fulfilled: they held that Clement was not “ another person ” within the meaning of that provision.

A.C.

Tesco Ltd. v. Nattrass (H.L.(E.))

Lord Reid

A The Divisional Court held that the magistrates were wrong in holding that Clement was not "another person." The respondent did not challenge this finding of the Divisional Court so I need say no more about it than that I think that on this matter the Divisional Court was plainly right. But that court sustained the conviction on the ground that the magistrates had applied the wrong test in deciding that the requirements of section 24 (1) (b) had been fulfilled. In effect that court held that the words "he took all reasonable precautions . . ." do not mean what they say: "he" does not mean the accused, it means the accused and all his servants who were acting in a managerial or supervisory capacity. I think that earlier authorities virtually compelled the Divisional Court to reach this strange construction. So the real question in this appeal is whether these earlier authorities were rightly decided.

C But before examining those earlier cases I think it necessary to make some general observations.

D Over a century ago the courts invented the idea of an absolute offence. The accepted doctrines of the common law put them in a difficulty. There was a presumption that when Parliament makes the commission of certain acts an offence it intends that mens rea shall be a constituent of that offence whether or not there is any reference to the knowledge or state of mind of the accused. And it was and is held to be an invariable rule that where mens rea is a constituent of any offence the burden of proving mens rea is on the prosecution. Some day this House may have to re-examine that rule, but that is another matter. For the protection of purchasers or consumers Parliament in many cases made it an offence for a trader to do certain things. Normally those things were done on his behalf by his servants and cases arose where the doing of the forbidden thing was solely the fault of a servant, the master having done all he could to prevent it and being entirely ignorant of its having been done. The just course would have been to hold that, once the facts constituting the offence had been proved, mens rea would be presumed unless the accused proved that he was blameless. The courts could not, or thought they could not, take that course. But they could and did hold in many such cases on a construction of the statutory provision that Parliament must be deemed to have intended to depart from the general rule and to make the offence absolute in the sense that mens rea was not to be a constituent of the offence.

G This has led to great difficulties. If the offence is not held to be absolute the requirement that the prosecutor must prove mens rea makes it impossible to enforce the enactment in very many cases. If the offence is held to be absolute that leads to the conviction of persons who are entirely blameless: an injustice which brings the law into disrepute. So Parliament has found it necessary to devise a method of avoiding this difficulty. But instead of passing a general enactment that it shall always be a defence for the accused to prove that he was no party to the offence and had done all he could to prevent it, Parliament has chosen to deal with the problem piecemeal, and has in an increasing number of cases enacted in various forms with regard to particular offences that it shall be a defence H to prove various exculpatory circumstances.

In my judgment the main object of these provisions must have been to distinguish between those who are in some degree blameworthy and those

170

Lord Reid

Tesco Ltd. v. Nattrass (H.L.(E.))

[1972]

who are not, and to enable the latter to escape from conviction if they can show that they were in no way to blame. I find it almost impossible to suppose that Parliament or any reasonable body of men would as a matter of policy think it right to make employers criminally liable for the acts of some of their servants but not for those of others and I find it incredible that a draftsman, aware of that intention, would fail to insert any words to express it. But in several cases the courts, for reasons which it is not easy to discover, have given a restricted meaning to such provisions. It has been held that such provisions afford a defence if the master proves that the servant at fault was the person who himself did the prohibited act, but that they afford no defence if the servant at fault was one who failed in his duty of supervision to see that his subordinates did not commit the prohibited act. Why Parliament should be thought to have intended this distinction or how as a matter of construction these provisions can reasonably be held to have that meaning is not apparent.

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In some of these cases the employer charged with the offence was a limited company. But in others the employer was an individual and still it was held that he, though personally entirely blameless, could not rely on these provisions if the fault which led to the commission of the offence was the fault of a servant in failing to carry out his duty to instruct or supervise his subordinates.

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Where a limited company is the employer difficult questions do arise in a wide variety of circumstances in deciding which of its officers or servants is to be identified with the company so that his guilt is the guilt of the company.

I must start by considering the nature of the personality which by a fiction the law attributes to a corporation. A living person has a mind which can have knowledge or intention or be negligent and he has hands to carry out his intentions. A corporation has none of these: it must act through living persons, though not always one or the same person. Then the person who acts is not speaking or acting for the company. He is acting as the company and his mind which directs his acts is the mind of the company. There is no question of the company being vicariously liable. He is not acting as a servant, representative, agent or delegate. He is an embodiment of the company or, one could say, he hears and speaks through the persona of the company, within his appropriate sphere, and his mind is the mind of the company. If it is a guilty mind then that guilt is the guilt of the company. It must be a question of law whether, once the facts have been ascertained, a person in doing particular things is to be regarded as the company or merely as the company's servant or agent. In that case any liability of the company can only be a statutory or vicarious liability.

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In *Lennard's Carrying Co. Ltd. v. Asiatic Petroleum Co. Ltd.* [1915] A.C. 705 the question was whether damage had occurred without the "actual fault or privity" of the owner of a ship. The owners were a company. The fault was that of the registered managing owner who managed the ship on behalf of the owners and it was held that the company could not dissociate itself from him so as to say that there was no actual fault or privity on the part of the company. Viscount Haldane L.C. said, at pp. 713, 714:

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A.C. **Tesco Ltd. v. Natrass (H.L.(E.))** **Lord Reid**

A “For if Mr. Lennard was the directing mind of the company, then his action must, unless a corporation is not to be liable at all, have been an action which was the action of the company itself within the meaning of section 502 . . . It must be upon the true construction of that section in such a case as the present one that the fault or privity is the fault or privity of somebody who is not merely a servant or agent for whom the company is liable upon the footing respondeat superior, but somebody for whom the company is liable because his action is the very action of the company itself.”

B Reference is frequently made to the judgment of Denning L.J. in *H. L. Bolton (Engineering) Co. Ltd. v. T. J. Graham & Sons Ltd.* [1957] 1 Q.B. 159. He said, at p. 172:

C “A company may in many ways be likened to a human body. It has a brain and nerve centre which controls what it does. It also has hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company, and control what it does. The state of mind of these managers is the state of mind of the company and is treated by the law as such.”

D In that case the directors of the company only met once a year: they left the management of the business to others, and it was the intention of those managers which was imputed to the company. I think that was right. There have been attempts to apply Lord Denning’s words to all servants of a company whose work is brain work, or who exercise some managerial discretion under the direction of superior officers of the company. I do not think that Lord Denning intended to refer to them. He only referred to those who “represent the directing mind and will of the company, and control what it does.”

E I think that is right for this reason. Normally the board of directors, F the managing director and perhaps other superior officers of a company carry out the functions of management and speak and act as the company. Their subordinates do not. They carry out orders from above and it can make no difference that they are given some measure of discretion. But the board of directors may delegate some part of their functions of management giving to their delegate full discretion to act independently of instructions from them. I see no difficulty in holding that they have thereby put G such a delegate in their place so that within the scope of the delegation he can act as the company. It may not always be easy to draw the line but there are cases in which the line must be drawn. *Lennard’s* case [1915] A.C. 705 was one of them.

H In some cases the phrase alter ego has been used. I think it is misleading. When dealing with a company the word alter is I think misleading. The person who speaks and acts as the company is not alter. He is identified with the company. And when dealing with an individual no other individual can be his alter ego. The other individual can be a servant, agent, delegate or representative but I know of neither principle

Lord Reid

Tesco Ltd. v. Nattrass (H.L.(E.))

[1972]

nor authority which warrants the confusion (in the literal or original sense) of two separate individuals. A

The earliest cases dealing with this matter which were cited were *R. C. Hammett Ltd. v. Crabb* (1931) 95 J.P. 180 and *R. C. Hammett Ltd. v. London County Council* (1933) 97 J.P. 105. In both a servant of the accused company had infringed the provisions of section 5 (2) of the Sale of Food (Weights and Measures) Act 1926. Section 12 (5) exempted the employer from penalty if he charged another person as the actual offender and could prove B

“to the satisfaction of the court that he had used due diligence to enforce the execution of this Act, and that the said other person had committed the offence in question without his consent, connivance or wilful default, . . .”

In the earlier case the offence was committed by the shop manager personally and he knew that he was committing an offence. A conviction was quashed on the ground that the magistrate had treated the question whether the employer had used due diligence as one of law, that it was really one of fact and that there was no evidence on which the magistrate could reach his decision. C

In the second case the offence was committed by a subordinate: the shop manager had warned him but had not exercised due diligence to see that his instructions were obeyed. Again the magistrates convicted on the ground that the owners were responsible for lack of due diligence in their manager. This time the conviction was upheld by the same court. It was argued for the respondents that the employer is responsible for the acts or omissions of all persons above the actual offender. It seems to me obvious that that is a matter of law depending on the proper construction of the statutory provision. But Lord Hewart C.J. did not so regard it. He said that there was evidence on which quarter sessions could arrive at their opinion and that they were entitled to come to the conclusion that the appellants were responsible for the manager’s lack of due diligence. D

I find these cases most unsatisfactory. There is no explanation of how it could be a question of fact whether the provisions of section 12 (5) meant that what the employer had to prove was that he personally had used due diligence, or that he also had to prove that some or all of his servants had also done so. But the court did not deal with that. Nevertheless because the only difference between the two cases appears to have been that in the first the shop manager was himself the offender whereas in the second the fault was lack of supervision, these cases have been thought to afford authority for the proposition that an employer has a defence if the only fault was in the actual offender but not if there was fault of any of his servants superior to the actual offender. I can find no warrant for that proposition in the terms of section 12 (5). Both parts of the provision—that the employer had used due diligence and that the offence had been committed without his consent, connivance or wilful default—appear to me plainly to refer to the employer personally and to no one else. E

I agree with the view of Lord Justice-General Cooper in a case dealing with the same Act *Dumfries and Maxwelltown Co-operative Society v. Williamson*, 1950 S.C.(J.) 76, 80 that “The underlying idea manifestly is H

A.C. Tesco Ltd. v. Nattrass (H.L.(E.)) Lord Reid

A that there should not be vicarious responsibility for an infringement of the Act committed without the consent or connivance of an employer . . .”

In the next two cases a company was accused and it was held liable for the fault of a superior officer. In *Director of Public Prosecutions v. Kent and Sussex Contractors Ltd.* [1944] K.B. 146 he was the transport manager. In *Rex v. I. C. R. Haulage Ltd.* [1944] K.B. 551 it was held that a company can be guilty of common law conspiracy. The act of the managing director

B was held to be the act of the company. I think that a passage in the judgment is too widely stated, at p. 559:

“Where in any particular case there is evidence to go to a jury that the criminal act of an agent, including his state of mind, intention, knowledge or belief is the act of the company, and, in cases where the presiding judge so rules, whether the jury are satisfied that it has been proved, must depend on the nature of the charge, the relative position of the officer or agent, and the other relevant facts and circumstances of the case.”

This may have been influenced by the erroneous views expressed in the two *Hammett* cases. I think that the true view is that the judge must direct the jury that if they find certain facts proved then as a matter of law they must

D find that the criminal act of the officer, servant or agent including his state of mind, intention, knowledge or belief is the act of the company. I have already dealt with the considerations to be applied in deciding when such a person can and when he cannot be identified with the company. I do not see how the nature of the charge can make any difference. If the guilty man was in law identifiable with the company then whether his offence was serious or venial his act was the act of the company but if he was not so

E identifiable then no act of his, serious or otherwise, was the act of the company itself.

In *John Henshall (Quarries) Ltd. v. Harvey* [1965] 2 Q.B. 233 a company was held not criminally responsible for the negligence of a servant in charge of a weighbridge. In *Magna Plant v. Mitchell* (unreported) April 27, 1966, the fault was that of a depot engineer and again the

F company was held not criminally responsible. I think these decisions were right. In the *Magna Plant* case Lord Parker C.J. said:

“ . . . knowledge of a servant cannot be imputed to the company unless he is a servant for whose actions the company are criminally responsible, and as the cases show, that only arises in the case of a company where one is considering the acts of responsible officers forming the brain, or in the case of an individual, a person to whom delegation in the true sense of the delegation of management has been passed.”

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I agree with what he said with regard to a company. But delegation by an individual is another matter. It has been recognised in licensing cases but that is in my view anomalous (see *Vane v. Yiannopoulos* [1965] A.C. 486).

H The latest important authority is *Series v. Poole* [1969] 1 Q.B. 676. That was an appeal against the dismissal of an information that the holder of a carrier's licence had failed to keep or cause to be kept records required by the Road Traffic Act 1960 with regard to the driver of a vehicle. That was

an absolute offence but that was amended by the Road Traffic Act 1962 which provided by section 20 that it should "be a defence to prove that he used all due diligence to secure compliance with those provisions." A  
The respondent proved that he had given proper instructions to the driver, that he employed a secretary to check the driver's records and had to begin with supervised her work, but that thereafter she failed to make proper checks. The justices held, possibly wrongly, that the accused had used all due diligence as required by the Act. The court accepted that B  
finding but nevertheless sent the case back with a direction to convict.

Lord Parker C.J. dealt with the case on the basis that the accused had done everything that was reasonable. He said, at p. 684:

"He may . . . acting perfectly reasonably appoint somebody else to perform his duty, his alter ego, and in that case it seems to me if the alter ego fails in his duty the employer is liable. Equally, if the employer seeks to rely on the defence under section 20, he must show that C  
the alter ego has observed due diligence."

I have already said that the phrase alter ego is misleading. In my judgment this case was wrongly decided and should be overruled. When the second statute introduced a defence if the accused proved that "he used all due diligence" I think that it meant what it said. As a matter of D  
construction I can see no ground for reading in "he and all persons to whom he has delegated responsibility." And if I look to the purpose and apparent intention of Parliament in enacting this defence I think that it was plainly intended to make a just and reasonable distinction between the employer who is wholly blameless and ought to be acquitted and the employer who was in some way at fault, leaving it to the employer to prove that he was in no way to blame. E

What good purpose could be served by making an employer criminally responsible for the misdeeds of some of his servants but not for those of others? It is sometimes argued—it was argued in the present case—that making an employer criminally responsible, even when he has done all that he could to prevent an offence, affords some additional protection to the public because this will induce him to do more. But if he has done F  
all he can how can he do more? I think that what lies behind this argument is a suspicion that magistrates too readily accept evidence that an employer has done all he can to prevent offences. But if magistrates were to accept as sufficient a paper scheme and perfunctory efforts to enforce it they would not be doing their duty—that would not be "due diligence" on the part of the employer.

Then it is said that this would involve discrimination in favour of a large G  
employer like the appellants against a small shopkeeper. But that is not so. Mr. Clement was the "opposite number" of the small shopkeeper and he was liable to prosecution in this case. The purpose of this Act must have been to penalise those at fault, not those who were in no way to blame.

The Divisional Court decided this case on a theory of delegation. In that H  
they were following some earlier authorities. But they gave far too wide a meaning to delegation. I have said that a board of directors can delegate part of their functions of management so as to make their delegate an

A.C. **Tesco Ltd. v. Nattrass (H.L.(E.))** Lord Reid

A embodiment of the company within the sphere of the delegation. But here the board never delegated any part of their functions. They set up a chain of command through regional and district supervisors, but they remained in control. The shop managers had to obey their general directions and also take orders from their superiors. The acts or omissions of shop managers were not acts of the company itself.

B In my judgment the appellants established the statutory defence. I would therefore allow this appeal.

LORD MORRIS OF BORTH-Y-GEST. My Lords, the main question which is raised in this appeal is whether, on the findings of fact of the magistrates, the company Tesco Supermarkets Ltd. (Tesco) established a defence under the provisions of section 24 (1) of the Trade Descriptions Act 1968.

C The terms of section 24 (1) are as follows:

D “24.—(1) In any proceedings for an offence under this Act it shall, subject to subsection (2) of this section, be a defence for the person charged to prove—(a) that the commission of the offence was due to a mistake or to reliance on information supplied to him or to the act or default of another person, an accident or some other cause beyond his control; and (b) that he took all reasonable precautions and exercised all due diligence to avoid the commission of such an offence by himself or any person under his control.”

E There were “proceedings for an offence under” the Act. The company (Tesco) was the “person charged.” The case stated finds that Tesco is “a nationally known public company who own many hundred stores.” There are at least 230 such stores in the north. In one of these on September 26, 1969, there was in the window (and there had been for some days previously) a poster which proclaimed that a customer could purchase a certain package for 1s. less than its normal price of 3s. 11d. An advertisement so stating had appeared in local and national newspapers. For a number of days prior to September 26 there had been displayed upon each of which was the legend “1s. off recommended price.” But at 10 a.m. on September 26 there were no packages so marked. Packages of that variety were displayed for sale—but each had a price marking of 3s. 11d.: they were on a shelf which had a price marking of 3s. 11d. It was at 10 a.m. that a customer searched the store for one of the packages at the price of 2s. 11d. He had expected to find one at that reduced price. He could not. He could only find those at the marked price of 3s. 11d. G He took one of those and asked its price of the cashier. Being informed that there were none of the packages in stock for sale at 2s. 11d. he was charged and paid the higher price.

H A breakdown in the system had occurred. During the period of a special offer all packages marked with the normal price should have been removed from display. If any special offer stock was sold out the manager should have been so informed in order that he could remove any display notice that would be misleading. Actually on the evening of September 26 an assistant had noticed that none of the special offer packages remained on display: she had thereupon filled the appropriate fixture with packages

176

Lord Morris of  
Borth-y-Gest

Tesco Ltd. v. Natrass (H.L.(E.))

[1972]

having the marked price of 3s. 11d.; she had not reported to the manager either the dearth of packages marked 2s. 11d. or her action in placing in the fixture those marked 3s. 11d. The manager had over-estimated his stock of packages at the reduced price: he thought that four cases were full which were in fact empty. Furthermore, the manager did not check the fixture on September 26, though in his weights and measures book for that morning there was an entry "All special offers O.K." Had he realised that the store had sold out of reduced price packages he would either have removed that part of the poster which related to them or he would have reduced the price of the packages in the store to 2s. 11d. The store was, on the date in question, displaying for sale many thousands of different lines including many which were offered at reduced prices (referred to as "flash" offers).

On the facts as found it appeared, therefore, that an offence had been committed. There had been a misleading indication as to price. It is provided by section 11 (2) of the Act as follows:

"If any person offering to supply any goods gives, by whatever means, any indication likely to be taken as an indication that the goods are being offered at a price less than that at which they are in fact being offered he shall, subject to the provisions of this Act, be guilty of an offence."

There was an indication which was likely to be taken as an indication that the packages in question were being offered at 2s. 11d. whereas the customer in the shop found that they were being offered at 3s. 11d. So the question arises as to who was guilty of an offence. An information was preferred against Tesco (i.e. the limited company) for that they in offering to supply the package gave an indication by means of a notice bearing a statement that the goods were being offered at a price less than that at which they were in fact being offered (i.e. 3s. 11d.).

It has not been suggested that Tesco (i.e. the limited company) could not be held to have committed the offence. In this connection reference may be made to a passage in the judgment of Viscount Reading C.J. in *Moussell Brothers Ltd. v. London and North-Western Railway Co.* [1917] 2 K.B. 836. He said, at p. 844:

"Prima facie, then, a master is not to be made criminally responsible for the acts of his servant to which the master is not a party. But it may be the intention of the legislature, in order to guard against the happening of the forbidden thing, to impose a liability upon a principal even though he does not know of, and is not a party to, the forbidden act done by his servant. Many statutes are passed with this object. Acts done by the servant of the licensed holder of licensed premises render the licensed holder in some instances liable, even though the act was done by his servant without the knowledge of the master. Under the Food and Drugs Acts there are again instances well known in these courts where the master is made responsible, even though he knows nothing of the act done by his servant, and he may be fined or rendered amenable to the penalty enjoined by the law. In those cases the legislature absolutely forbids the act and makes the principal liable without a mens rea."

A.C.

Tesco Ltd. v. Nattrass (H.L.(E.))

Lord Morris of  
Borth-y-Gest

A It will have been seen, however, that under section 11 (2) it is only "subject to the provisions of" the Act that a person is guilty of an offence. The Act provides for certain defences which the person charged may prove: if he proves one of them then he is not guilty. The terms of section 24 (1) of the Act have been set out above. Subsection (2) imposes a requirement of serving a notice in cases where the defence involves attributing the offence to the act or default of another person or to reliance on information supplied by another person: the notice is to the prosecutor and it must give information identifying (or assisting to identify) that other person. Tesco gave the requisite notice. It was to the effect that the contravention of section 11 (1) was due to the act or default of the manager of the store in question.

C But for one point the magistrates would have found that the defence was proved: but for that one point they would have acquitted Tesco. They found (1) that Tesco had established that the commission of the offence was due to the act or default of the manager of the store by his failure to see that the company's policy was correctly carried out and/or to correct the errors of the staff under him, and (2) that Tesco had proved that they had taken all reasonable precautions and had exercised all due diligence to avoid the commission of the offence under section 11 (2) either by themselves or by any person under their control. They had exercised all due diligence in devising a proper system for the operation of the store and by securing as far as was reasonably practicable that it was fully implemented. In the careful and ample statement of case the magistrates set out in much detail their reasons for arriving at these conclusions. They need not be here repeated. Suffice it to say that the case describes the system of administration and the various steps taken by Tesco to ensure that the manager was instructed and continuously and fully instructed in regard to the proper management of the store. There was a careful and reasonable system of selection of managers. Furthermore, the case describes in detail the various steps taken by Tesco in the exercise of supervision over the manager and the proper running of the store. The manager of the store had under him an assistant manager and there were various section heads: the total number of the staff in the store was 60. It was found that the company had provided adequate staff and equipment for the running of the store. Then there was a "ladder of responsibility" of those whose work was that of supervision. Thus there were branch inspectors whose duties (involving regular attendance) were solely those of supervision in regard to some six or eight stores. There were area controllers who in regard to some 24 stores supervised the branch inspectors as well as the managers and the operation of such stores: their duties also involved regular attendance at stores. There was a regional director who was responsible for a number of stores and the supervision of the area controllers, branch inspectors and managers for them.

H The one point which resulted in the conviction rather than the acquittal of Tesco was that the magistrates were not satisfied that the manager was "another person" within the meaning of section 24 (1) (a). They considered that the manager represented the company in his supervisory capacity and that the company were responsible for his lack of due diligence in that capacity with the result that he was not "another

person.” They considered that the “original act or default” had been that of a lady on the staff at the store and that the “act or default” of the manager lay in his failure to instruct her or supervise her.

A point had been argued before the magistrates whether an offence under section 11 (2) had been made out. They considered that it had. They stated two questions for the opinion of the High Court, viz. (1) whether they were correct in concluding that an offence under section 11 (2) had been made out and (2) whether they were correct in concluding that the manager was not “another person” within the meaning of section 24 (1) (a). The Divisional Court held that they were correct in regard to (1) and that matter was not pursued before your Lordships. In regard to (2) it was accepted by the respondent in the Divisional Court, and it was common ground, that the manager was “another person” within the meaning of section 24 (1) (a). It was said that where a defendant is an individual then any other individual could be “another person” and that where a defendant is a company or corporate body then any individual could be “another person” provided that he is not a person within section 20 carrying out functions as such person. Section 20 is in the following terms:

“20.—(1) Where an offence under this Act which has been committed by a body corporate is proved to have been committed with the consent and connivance of, or to be attributable to any neglect on the part of, any director, manager, secretary or other similar officer of the body corporate, or any person who was purporting to act in any such capacity, he as well as the body corporate shall be guilty of that offence and shall be liable to be proceeded against and punished accordingly. (2) In this section ‘director,’ in relation to any body corporate established by or under any enactment for the purpose of carrying on under national ownership any industry or part of an industry or undertaking, being a body corporate whose affairs are managed by the members thereof, means a member of that body corporate.”

It was held that the word “manager” in that section denoted someone managing the affairs of the company rather than someone in the position of the manager of a store as in the present case.

On those conclusions it would have followed that on the case as stated the appeal would have been allowed. The Divisional Court, however, took the view and they were invited to take the view that the magistrates had not applied their minds to the “real question” which arose. The Divisional Court considered that that question was whether the defence under section 24 (1) was open to the company in view of the finding of the magistrates that the manager had been guilty of a failure in his duty of supervision of the staff under him in the store. On the assumption that the company had set up an efficient system, or one that could not be criticised, the Divisional Court considered that the question arose whether the company was deprived of a defence under section 24 (1) if it was shown that there was a failure by someone to whom the duty of carrying out the system was “delegated” properly to carry out that function. As the Divisional Court considered that all the facts were sufficiently found so

A.C.

Tesco Ltd. v. Natrass (H.L.(E.))

Lord Morris of  
Borth-y-Gest

A that the “real question” could be answered even though it was not a question raised, and as they considered that the manager of the store was a person to whom the company had, in respect of that particular store, “delegated” their duty to take all reasonable precautions and to exercise all due diligence to avoid the commission of an offence, they concluded that it was impossible for the magistrates to find that the company had satisfied the requirements of section 24 (1) (b). Accordingly, they dismissed the appeal. In granting leave to appeal the court certified the point of law of public general importance in the following terms:

C “Whether a person charged with an offence under section 11 (2) of the Trade Descriptions Act 1968 in a retail shop owned by him would have a defence under section 24 (1) of the said Act if:—(a) he instituted an efficient system to avoid the commission of offences under the Act by any person under his control; (b) he reasonably delegated to the manager of the shop the duty of operating the said system in that shop; (c) the manager failed to perform such duty efficiently; (d) the offence charged was committed by reason of such failure; (e) such failure by the said manager is the ‘act or default of another person’ relied on under section 24 (1) (a).”

D My Lords, we are here only concerned with the question whether the company committed an offence. If the nature of the offence under section 11 (2) was such that, under the perhaps rather exceptional principle already referred to, the company could be held to be guilty of it—it would only be guilty if it failed to prove one of the defences available under section 24 (1). If it is accepted that “the commission of the offence” was due to E “the act or default of another person” then the company would have a defence (and so be entitled to be acquitted) if it further proved that it (i.e. the company) “took all reasonable precautions and exercised all due diligence to avoid the commission” of the offence either by itself or by any person under its control. It is here that it is important to remember that it is the criminal liability of the company itself that is being considered. In F general criminal liability only results from personal fault. We do not punish people in criminal courts for the misdeeds of others. The principle of respondeat superior is applicable in our civil courts but not generally in our criminal courts. So the sole issue in the present case is whether “the company” took all reasonable precautions and exercised all due diligence. We are not concerned to express any opinion as to whether some other or which other person was by reason of the terms of section 11 and of section G 23 guilty of an offence.

How, then, does a company take all reasonable precautions and exercise all due diligence? The very basis of section 24 involves that some contraventions of the Act may take place and may be contraventions by persons under the control of the company even though the company itself has taken all reasonable precautions and exercised all due diligence and that the company will not be criminally answerable for such contraventions. How, H then, does a company act? When is some act the act of the company as opposed to the act of a servant or agent of the company (for which, if done within the scope of employment, the company will be civilly answerable)?

180

Lord Morris of  
Borth-y-Gest

Tesco Ltd. v. Nattrass (H.L.(E.))

[1972]

In *Lennard's Carrying Co. Ltd. v. Asiatic Petroleum Co. Ltd.* [1915] A.C. 705 Viscount Haldane L.C. said, at p. 713:

“ My Lords, a corporation is an abstraction. It has no mind of its own any more than it has a body of its own; its active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation. That person may be under the direction of the shareholders in general meeting; that person may be the board of directors itself, or it may be, and in some companies it is so, that that person has an authority co-ordinate with the board of directors given to him under the articles of association, and is appointed by the general meeting of the company, and can only be removed by the general meeting of the company.”

Within the scheme of the Act now being considered an indication is given (which need not necessarily be an all-embracing indication) of those who may personify “ the directing mind and will ” of the company. The question in the present case becomes a question whether the company as a company took all reasonable precautions and exercised all due diligence. The magistrates so found and so held. The magistrates found and held that “ they ” (i.e. the company) had satisfied the provisions of section 24 (1) (b). The reason why the Divisional Court felt that they could not accept that finding was that they considered that the company had delegated its duty to the manager of the shop. The manager was, they thought, “ a person whom the appellants had delegated in respect of that particular shop their duty to take all reasonable precautions and exercise all due diligence to avoid the commission ” of an offence. Though the magistrates were satisfied that the company had set up an efficient system there had been “ a failure by someone to whom the duty of carrying out the system was delegated properly to carry out that function.”

My Lords, with respect I do not think that there was any feature of delegation in the present case. The company had its responsibilities in regard to taking all reasonable precautions and exercising all due diligence. The careful and effective discharge of those responsibilities required the directing mind and will of the company. A system had to be created which could rationally be said to be so designed that the commission of offences would be avoided. There was no delegation of the duty of taking precautions and exercising diligence. There was no such delegation to the manager of a particular store. He did not function as the directing mind or will of the company. His duties as the manager of one store did not involve managing the company. He was one who was being directed. He was one who was employed but he was not a delegate to whom the company passed on its responsibilities. He had certain duties which were the result of the taking by the company of all reasonable precautions and of the exercising by the company of all due diligence. He was a person under the control of the company and on the assumption that there could be proceedings against him, the company would by section 24 (1) (b) be absolved if the company had taken all proper steps to avoid the commission of an offence by him. To make the company automatically liable

A.C.

Tesco Ltd. v. Natrass (H.L.(E.))

Lord Morris of  
Borth-y-Gest

A for an offence committed by him would be to ignore the subsection. He was, so to speak, a cog in the machine which was devised: it was not left to him to devise it. Nor was he within what has been called the "brain area" of the company. If the company had taken all reasonable precautions and exercised all due diligence to ensure that the machine could and should run effectively then some breakdown due to some action or failure on the part of "another person" ought not to be attributed to the company or to be regarded as the action or failure of the company itself for which the company was to be criminally responsible. The defence provided by section 24 (1) would otherwise be illusory.

B In reaching their conclusion, the Divisional Court placed reliance on and followed the decision in *Series v. Poole* [1969] 1 Q.B. 676. In that case the holder of a carrier's licence was charged with failing, contrary to section 186 of the Road Traffic Act 1960, properly to keep current records. The records were in fact defective but the licence holder had employed someone to check the records. He had instructed such employee as to the method of checking the records; he had supervised the work of such employee until he was satisfied that the system was working well. The justices found that he had used all due diligence to secure compliance with the relevant statutory provisions. Provided that this finding could on the facts be supported I see no reason why the Divisional Court should have denied to him the defence which by section 20 of the Road Traffic Act 1962 was made available. On the justices' finding I consider that the acquittal should have been allowed to stand. The licence holder had not washed his hands of his responsibilities: he had used all due diligence to see that they were discharged so that there should be compliance with the provisions of the statute.

C D E In *R. C. Hammett Ltd. v. London County Council*, 97 J.P. 105, employers were denied the defence available under section 12 (5) of the Sale of Food (Weights and Measures) Act 1926 on the ground that the manager of a shop had not shown due diligence though the employers themselves had in all other respects used due diligence. I do not think that that case was rightly decided.

F On the facts as found and by the application of section 24 (1) I consider that the company should have been absolved from criminal liability. Accordingly, I would allow the appeal.

G VISCOUNT DILHORNE. My Lords, on February 3, 1970, the appellants were convicted at the magistrates' court at Northwich of an offence under section 11 (2) of the Trade Descriptions Act 1968, which reads as follows:

"If any person offering to supply goods gives, by whatever means, any indication likely to be taken as an indication that the goods are being offered at a price less than that at which they are in fact being offered he shall, subject to the provisions of this Act, be guilty of an offence."

H On September 26, 1969, the appellants had a poster attached to the window of their supermarket in Northwich bearing the words "Radiant 1s. off Giant Size 2s. 11d." This meant, and could only have been

182

Viscount Dilhorne Tesco Ltd. v. Natrass (H.L.(E.)) [1972]

taken to mean, that Giant Size packs of Radiant washing powder were being offered for sale at that price. The appellants had also advertised that these packs were being offered for sale at this price in local and national newspapers. A

An old age pensioner sought to purchase one of these packs, but he was only able to find displayed in the supermarket packs marked with the price of 3s. 11d. He took one of these to the cashier who told him that there were no packs for sale at 2s. 11d. and he was charged 3s. 11d. He immediately complained to the inspector of weights and measures. B

On proof of these facts the magistrates were right to convict the appellants if they had not succeeded in establishing one of the defences open to them under section 24 of the Trade Descriptions Act 1968.

Section 24 (1) is in the following terms :

“ In any proceedings for an offence under this Act it shall, subject to subsection (2) of this section, be a defence for the person charged to prove (a) that the commission of the offence was due to a mistake or to reliance on information supplied to him or to the act or default of another person, an accident or some other cause beyond his control; and (b) that he took all reasonable precautions and exercised all due diligence to avoid the commission of such an offence by himself or any person under his control.” C  
D

Section 24 (2) reads as follows :

“ If in any case the defence provided by the last foregoing subsection involves the allegation that the commission of the offence was due to the act or default of another person or to reliance on information supplied by another person, the person charged shall not, without leave of the court, be entitled to rely on that defence unless, within a period ending seven clear days before the hearing, he has served on the prosecutor a notice in writing giving such information identifying or assisting in the identification of that other person as was then in his possession.” E

The appellants gave notice as required by this subsection, alleging that the commission of the offence was due to the act or default of a Mr. Clement, the manager of their supermarket at Northwich. They were consequently entitled to an acquittal if they proved that, and also that they had taken all reasonable precautions and had exercised all due diligence to avoid the commission of the offence by Clement. F

What had happened was that the evening before the commission of the offence Miss Rogers, a shop assistant, whose duty it was to put the packs on display for sale, had discovered that there were no packs displayed for sale at 2s. 11d. and no packs marked with that price available for display. She had, therefore, put out packs marked with the price of 3s. 11d. She had not reported to Clement that there were no 2s. 11d. packs to display. It was his duty to check the display of the special offers and to enter in a book that he had done so. In the entry for September 26, he had written “ All special offers O.K.” when in fact the special offer of Radiant Giant Size packs was not, as no such packs were being offered for sale at 2s. 11d. a pack. G  
H

A.C. **Tesco Ltd. v. Nattrass (H.L.(E.))** **Viscount Dilhorne**

**A** The magistrates found that “the original act or default was that of Miss Rogers and the act or default of the said Clement was in his failure to instruct or supervise her” and that “the commission of the offence was due to the act or default of the said Clement by his failure to see that the appellants’ policy was correctly carried out and/or to correct the errors of the staff under him.”

**B** The magistrates held that the appellants had exercised all due diligence in devising a proper system for the operation of the store and by securing, so far as was reasonably practicable, that it was fully implemented and thus had fulfilled the requirements of section 24 (1) (b). Although they did not in terms say so, they clearly meant that the appellants had, as well as exercising all due diligence, taken all reasonable precautions to avoid the commission of the offence.

**C** They, however, held that Clement was not “another person” within the meaning of section 24 (1) (a) and so that the statutory defence failed. The Divisional Court held that they were right to convict but wrong to conclude that Clement was not “another person.” In their view, the appellants had delegated to Clement “their duty of taking all reasonable precautions and exercising all due diligence” and consequently his failure to do so was failure by the appellants.

**D** Section 23 of the Act is in the following terms :

“Where the commission by any person of an offence under this Act is due to the act or default of some other person that other person shall be guilty of the offence, and a person may be charged with and convicted of the offence by virtue of this section whether or not proceedings are taken against the first mentioned person.”

**E** These provisions in the Act make its policy clear. To secure a conviction for an offence under section 11 (2), the prosecutor is relieved of the burden of proving any intent on the part of any person. If that burden rested on him, it might often prove very difficult to discharge. It suffices to prove (a) that the accused was offering the goods and (b) that, at the time he did so, an indication had been given that the goods were being offered at a price less than in fact was the case.

**F** That could happen without the person offering the goods being in any way to blame. Parliament, therefore, provided the accused person with a number of defences and cast upon him the burden of establishing his innocence. If he was going to allege that the events which took place and amounted to the commission of the offence were due to the act or default of another or in consequence of information supplied by another person, he had to comply with section 24 (2) and then it would be open to the authorities to charge that other person, if they thought fit, but, whether or not another person is charged, the accused is entitled to be acquitted if he proves that he took all reasonable precautions and exercised all due diligence to prevent the commission of the offence and that it was due to the act or default of another or, if that is the defence put forward, in consequence of information supplied by another.

**H** Difficulties may arise with regard to the interpretation of section 23. The offence may have been committed as the result of the act or default of another without that other person having done the acts which constitute

Viscount Dilhorne Tesco Ltd. v. Natrass (H.L.(E.)) [1972]

the offence. Here the magistrates found, as I have said, that the original act or default was that of Miss Rogers, but she does not appear to have had any responsibility for the poster in the window indicating that the packs were for sale at less than 3s. 11d. Clement, on the other hand, was responsible for the poster in the window but he had not displayed or authorised the display of the packs for sale at the price of 3s. 11d.; and if, despite the notice, no such packs had been displayed for sale, no offence under section 11 (2) would have been committed.

In this case the magistrates found not that Clement had committed or had been a party to the offence but that it had occurred through his failure to carry out the appellants' policy and/or to correct the errors of his staff.

The language of the first part of section 23 might be understood to mean that on the facts of this case if Miss Rogers or Mr. Clement had been prosecuted, they would have been convicted though neither of them had done the acts which constitute the offence. In this case one has not to decide that question, and section 23 is only relevant with regard to the meaning to be given to the words "act or default of another person" in section 24 (1) (a). In that subsection, whatever they may mean in section 23, they must be given their literal meaning. To succeed on this defence it is not necessary to show that some other person did the acts which constitute the offence. It will suffice to show that the acts were done as a result of an act or default of another person.

If the chain of supermarkets owned and run by the appellants, some eight hundred we were told, were owned and run by an individual or partnership, then it could not be disputed that Mr. Clement was another person within the meaning of the subsection. Does he cease to be "another person" because the stores are owned by a limited company?

Further, if the stores were owned and run by an individual or partnership and that individual or the partners had themselves exercised all due diligence, is it right that they should be held not to have done so because a shop manager of theirs has not done so? And has the statute here to be interpreted differently where a company is accused than where the accused is an individual?

Prima facie one would have thought it unlikely that Parliament intended "another person" to have a different meaning in relation to a company from that in relation to an individual or that the ambit of section 24 (1) (b) should differ depending on whether the owner of the shop was a company or individual.

In *R. C. Hammett Ltd. v. Crabb* (1931) 95 J.P. 182 Lord Hewart C.J. and Avory J. held, in relation to the Sale of Food (Weights and Measures) Act 1926, that whether or not the principle charged had exercised due diligence was a question of fact in every case. In that case as in this the accused company was seeking as a matter of defence to prove due diligence.

In this case as in that, in my opinion, the questions whether there was due diligence and whether all reasonable precautions were taken are questions of fact.

*R. C. Hammett Ltd. v. London County Council* (1933) 97 J.P. 105 appears to be the first reported case where the extent of a statutory defence similar in many respects to that in this case was considered. There

A.C. Tesco Ltd. v. Natrass (H.L.(E.)) Viscount Dilhorne

A the prosecution was under the Sale of Food (Weights and Measures) Act 1926. There the Divisional Court (Lord Hewart C.J., Avory and Acton J.J.) dismissed the appeal against conviction on the ground that there was evidence on which quarter sessions could arrive at the opinion that due diligence was not used by the shop manager, an assistant at the shop being the actual offender, and that for the purpose of the Act the company was responsible for the absence of due diligence on his part though  
B in all other respects the company had exercised due diligence.

Lord Hewart distinguished this case from the earlier *Hammett* case on the ground that in that case the evidence was clear that there was due diligence on the part of everybody down to the very person who had committed the act. He held that the justices were entitled to come to the conclusion that for that lack of due diligence the appellants were responsible.

C I do not myself regard this as a satisfactory decision. No authorities were cited for the proposition that the company could not establish that they had acted with due diligence if a shop manager of theirs had not exercised due diligence and, in relation to this defence, the question is not was the company responsible for the act of its servant and for his omissions but whether due diligence had been exercised by the company.

D In the course of the argument a great many cases were cited with regard to the criminal liability of a company. A company can only act through individuals, and it is well established that a company can be criminally liable even if the offence involves proof of an intent (*Mousell Brothers Ltd. v. London and North-Western Railway Co.* [1917] 2 K.B. 836; *Director of Public Prosecutions v. Kent and Sussex Contractors Ltd.* [1944] K.B. 146).

E If an offence under section 11 (2) is committed by a company, the acts necessary to constitute the offence must have been done by individuals in their employ. Here the question is not whether the company is criminally liable and responsible for the act of a particular servant but whether it can escape from that liability by proving that it exercised all due diligence and took all reasonable precautions and that the commission of the offence was due to the act or omission of another person.  
F That, in my view, is a very different question from that of a company's criminal responsibility for its servants' acts.

The Act does not exclude a person in the employ of a company from being "another person." In *Beckett v. Kingston Bros. (Butchers) Ltd.* [1970] 1 Q.B. 606, it was argued that it did. That argument was rejected by Bridge J., and rightly, in my opinion. If it had prevailed, the statutory defence would seldom avail an accused company for seldom would it be possible to prove that the act or default was that of someone not employed by the company.

G In *Series v. Poole* [1969] 1 Q.B. 676, a case decided in 1967 and which does not appear to have been cited to the Court in *Beckett v. Kingston Bros. (Butchers) Ltd.*, the appeal to the Divisional Court was from the dismissal of an information for an offence under regulations made under the Road Traffic Act 1960 alleging that the accused unlawfully failed to cause to be kept a current record of the driving periods of his driver.

H The Road Traffic Act 1962 by section 20 provided that it should be a

186

Viscount Dilhorne Tesco Ltd. v. Natrass (H.L.(E.))

[1972]

defence to prove in such proceedings that the accused had used all due diligence to secure compliance with the regulation. A

While I think that on the facts it would be difficult to say that the accused had exercised all due diligence, that was not the ground on which the appeal by the prosecutor was allowed. Lord Parker C.J., with whose judgment Salmon L.J. and Widgery L.J. agreed, regarded the "absolute obligation under section 186 of the Act of 1960" as a personal obligation which an individual could not evade by delegating it to someone else. B

I do not in the least wish to criticise this. Section 186 of the Act of 1960 under which the prosecution was brought created an absolute obligation and as the law stood prior to 1962 what he said was clearly right. By the Road Traffic Act 1962 Parliament qualified that absolute obligation and for the first time provided a defence dependent on proof of the exercise of due diligence by the accused. C

That could not be established merely by showing that a good system had been devised and a person thought to be competent put in charge of it. It would still be necessary to show due diligence on the part of the accused in seeing that the system was in fact operated and the person put in charge of it doing what he was supposed to do. From May to September 1966, the accused does not appear to have taken any steps to ascertain whether the person he had put in charge was doing what she had been instructed to do. If he had taken any steps, he would have found that she was not, and that is why I have said that on the facts in that case it would be difficult to say that the exercise of due diligence had been proved. D

Lord Parker C.J. said that a man under the duty imposed by section 186 might reasonably appoint someone else to perform his duty "his alter ego" and in that case it seemed to him that if the alter ego failed in his duty the employer is liable. He went on to say that to rely on a defence under section 20 of the Act of 1962 an employer must show that the alter ego has observed due diligence. E

That an employer, whether a company or an individual, may reasonably appoint someone to secure that the obligations imposed by the Act are observed cannot be doubted. Only by doing so can an employer who owns and runs a number of shops or a big store hope to secure that the Act is complied with, but the appointment by him of someone to discharge the duties imposed by the Act in no way relieves him from having to show that he has taken all reasonable precautions and had exercised all due diligence if he seeks to establish the statutory defence. F

He cannot excuse himself if the person appointed fails to do what he is supposed to do unless he can show that he himself has taken such precautions and exercised such diligence. Whether or not he has done so is a question of fact and while it may be that the appointment of a competent person amounts in the circumstances of a particular case to the taking of all reasonable precautions, if he does nothing after making the appointment to see that proper steps are in fact being taken to comply with the Act, it cannot be said that he has exercised all due diligence. G

I do not think that the Act is so narrowly drawn that to rely on the defence under section 24 an employer must show that the alter ego has H

A.C. Tesco Ltd. v. Nattrass (H.L.(E.)) Viscount Dilhorne

A observed due diligence. That is not, in my opinion, what the Act provides. He has to show that he used due diligence, and it does not suffice for him to show that others did so.

Lord Parker's reference to an alter ego may have had its origin in the statements made by Viscount Haldane L.C. in *Lennard's Carrying Co. Ltd. v. Asiatic Petroleum Co. Ltd.* [1915] A.C. 705. He said, at p. 713:

B "My Lords, a corporation is an abstraction. It has no mind of its own any more than it has a body of its own; its active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation. That person may be under the direction of the shareholders in general meeting; that person may be the board of directors itself, or it may be, and in some companies it is so, that that person has an authority co-ordinate with the board of directors given to him under the articles of association, and is appointed by the general meeting of the company, and can only be removed by the general meeting of the company."

D Following this, Denning L.J. in *H. L. Bolton (Engineering) Co. Ltd. v. T. J. Graham & Sons Ltd.* [1957] 1 Q.B. 159, 172 said:

E "A company may in many ways be likened to a human body. It has a brain and nerve centre which controls what it does. It also has hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company, and control what it does. The state of mind of these managers is the state of mind of the company and is treated by the law as such."

F If, when Denning L.J. referred to directors and managers representing the directing mind and will of the company, he meant, as I think he did, those who constitute the directing mind and will, I agree with his approach.

G These passages, I think, clearly indicate that one has in relation to a company to determine who is or who are, for it may be more than one, in actual control of the operations of the company, and the answer to be given to that question may vary from company to company depending on its organisation. In my view, a person who is in actual control of the operations of a company or of part of them and who is not responsible to another person in the company for the manner in which he discharges his duties in the sense of being under his orders, cannot be regarded as "another person" within the meaning of sections 23 and 24 (1) (a).

H Section 20 provides that where an offence under the Act has been committed by a body corporate and is proved to have been committed with the consent or connivance or to be attributable to any neglect on the part of any director, manager, secretary or other similar officer of the

body corporate or any person who was purporting to act in any such capacity, he, as well as the company, is to be guilty of the offence. Parliament by this section may have attempted to identify those who normally constitute the directing mind and will of a company and by this section have sought to make clear that although they are not other persons coming within sections 23 and 24 (1) (a), they may still be convicted.

However this may be, shop managers in a business such as that conducted by the appellants—and their number may be of the order of eight hundred if the appellants have that number of shops—cannot properly be regarded as part of the appellants' directing mind and will and so can come within the reference to "another person" in sections 23 and 24 (1) (a).

In my opinion, the ratio decidendi in *Hammett Ltd. v. London County Council*, 97 J.P. 105 and in *Series v. Poole* [1969] 1 Q.B. 676 was wrong. For the reasons I have stated, in my view this appeal should be allowed.

LORD PEARSON. My Lords, in September 1969, the company (Tesco Supermarkets Ltd.) was selling Giant Size packets of Radiant washing powder at a price of 2s. 11d., being a reduced price 1s. below the price of 3s. 11d. which was the ordinary price normally recommended by the manufacturers. Affixed to the window of the company's shop at Northwich in Cheshire was a large poster, of which the upper part bore the legend "Radiant 1s. off Giant Size 2s. 11d." Advertisements to the same effect had been inserted in local and national newspapers. Initially there was at the shop a stock of "flash packs," that is to say, Giant Size packets of the washing powder bearing the legend "1s. off recommended price."

Things went wrong on September 25 and 26, 1969. The stock of such "flash packs" was exhausted. On the evening of September 25 Miss Rogers, an assistant at the shop, discovered that no such "flash packs" remained on display, and she filled up the "fixture" with ordinary packets of the washing powder marked with the ordinary price of 3s. 11d. and she failed to inform the shop manager, Mr Clement, of the dearth of "flash packs" or the action which she had taken. Mr Clement failed to check the washing powder "fixture" on September 26, notwithstanding his entry in his weights and measures book for that morning "All special offers O.K." On the morning of September 26, a customer entered the shop expecting to find a "flash pack" at 2s. 11d. but was able to find only a packet offered at the ordinary price of 3s. 11d. and he had to buy it at that price.

The relevant provisions of the Trade Descriptions Act 1968 are as follows:

Section 11 (2):

"If any person offering to supply any goods gives, by whatever means, any indication likely to be taken as an indication that the goods are being offered at a price less than that at which they are in fact being offered he shall, subject to the provisions of this Act, be guilty of an offence."

A.C.

Tesco Ltd. v. Nattrass (H.L.(E.))

Lord Pearson

Section 20 (1):

- A “Where an offence under this Act which has been committed by a body corporate is proved to have been committed with the consent and connivance of, or to be attributable to any neglect on the part of, any director, manager, secretary or other similar officer of the body corporate, or any person who was purporting to act in any such capacity, he as well as the body corporate shall be guilty of that offence and shall be liable to be proceeded against and punished accordingly.”
- B

Section 23:

- C “Where the commission by any person of an offence under this Act is due to the act or default of some other person that other person shall be guilty of the offence, and a person may be charged with and convicted of the offence by virtue of this section whether or not proceedings are taken against the first mentioned person.”

Section 24 (1): “In any proceedings for an offence under this Act it shall, subject to subsection (2) of this section, be a defence for the person charged to prove—(a) that the commission of the offence was due to a mistake or to reliance on information supplied to him or to the act or default of another person, an accident or some other cause beyond his control; and (b) that he took all reasonable precautions and exercised all due diligence to avoid the commission of such an offence by himself or any person under his control.”

D

In my opinion, the first conclusions to be drawn from the application of these provisions to the facts of the present case are as follows:

- E (1) An offence was committed under section 11 (2).  
 (2) Prima facie the company has committed and is liable for the offence, because the company through its servants offered to supply the goods and gave the indication of the reduced price. The case is similar to *Coppen v. Moore (No. 2)* [1898] 2 Q.B. 306, decided under the Merchandise Marks Act 1887, s. 2, where Lord Russell C.J. said, at pp. 312–313:
- F

- G “The question, then, in this case, comes to be narrowed to the simple point, whether upon the true construction of the statute here in question the master was intended to be made criminally responsible for acts done by his servants in contravention of the Act, where such acts were done, as in this case, within the scope or in the course of their employment. In our judgment it was clearly the intention of the legislature to make the master criminally liable for such acts, unless he was able to rebut the prima facie presumption of guilt by one or other of the methods pointed out in the Act.”

Also relevant is the judgment of Lord Goddard C.J. in *Melias Ltd. v. Preston* [1957] 2 Q.B. 380.

- H (3) In the present case the company was the master of the persons who committed the acts or defaults whereby the offence was committed, and as in *Coppen v. Moore (No. 2)* [1898] 2 Q.B. 306 the company may rebut the presumption of guilt in one or other of the methods pointed out by

the Act. Section 11 (2) is expressly made “subject to the provisions of this Act” and therefore is subject to section 24 (1). The company has sought to prove under section 24 (1) (a) that “the commission of the offence was due . . . to the act or default of another person,” naming Mr. Clement as the other person. In order to complete its defence the company must also prove that the company took all reasonable precautions and exercised all due diligence to avoid the commission of such an offence by itself or any person under its control. The question in this appeal is whether the company has proved those two points. A B

Your Lordships are not concerned in this appeal with the questions whether Miss Rogers and Mr. Clement or either of them could be held liable under section 23 for the commission of the offence, and whether they or either of them would have a defence under section 24. I express no opinion on those questions.

The magistrates have said in paragraph 7 of the case stated that they were of opinion that C

“(ii) the commission of the offence was due to the act or default of the said Clement by his failure to see that the appellants’ policy was correctly carried out and/or to correct the errors of the staff under him; (iii) the appellants had exercised all due diligence in devising a proper system for the operation of the said store and by securing so far as was reasonably practicable that it was fully implemented and thus had fulfilled the requirements of section 24 (1) (b); (iv) the appellants could not rely upon the act or default of the said Clement as he was not ‘another person’ within the meaning of section 24 (1) (a); . . .” D

In giving their reasons for the opinion in (iv) they said that they reached the conclusion that the original act or default was that of Miss Rogers and the act or default of Mr. Clement was in his failure to instruct or supervise her; Mr. Clement represented the company in his supervisory capacity and for his lack of due diligence the company was responsible on the principle laid down in *R. C. Hammett Ltd. v. London County Council* (1933) 97 J.P. 105; accordingly, Mr. Clement was not “another person” for the purposes of section 24 (1) (a) of the Act. E F

The magistrates’ opinion that Mr. Clement was not “another person”—a person other than the company—seems to me to be clearly unsustainable. It would be immediately obvious in the case of an individual proprietor of a business and the manager of one of his shops. It is less obvious in the case of a company which can only act through servants or agents and has generally in the law of tort and sometimes in criminal law vicarious responsibility for what they do on its behalf. But vicarious responsibility is very different from identification. There are some officers of a company who may for some purposes be identified with it, as being or having its directing mind and will, its centre and ego, and its brains. *Lennard’s Carrying Co. Ltd. v. Asiatic Petroleum Co. Ltd.* [1915] A.C. 705, 713; *H. L. Bolton (Engineering) Co. Ltd. v. T. J. Graham & Sons Ltd.* [1957] 1 Q.B. 159, 171–173; *The Lady Gwendolen* [1965] P. 294, 343. The reference in section 20 of the Trade Descriptions Act 1968 to “any director, manager, secretary or other similar officer of the body corporate” affords G H

A.C. Tesco Ltd. v. Natrass (H.L.(E.)) Lord Pearson

- A a useful indication of the grades of officers who may for some purposes be identifiable with the company, although in any particular case the constitution of the company concerned should be taken into account. With regard to the word “manager” I agree with Fisher J. [1971] 1 Q.B. 133 who said, in his judgment in the present case, at p. 142, that the word refers to someone in the position of managing the affairs of the company, and would not extend to include a person in the position of Mr. Clement.
- B In the present case the company has some hundreds of retail shops, and it would be far from reasonable to say that every one of its shop managers is the same person as the company.

- C The Divisional Court, although they affirmed the conviction and dismissed the company’s appeal, took a view that was different from that of the magistrates. They held that Mr. Clement was “another person” distinct from the company, so that the company proved its point under paragraph (a) of section 24 (1). But they held that the company failed under paragraph (b). Their reasoning was that, although the company had devised a proper system for taking precautions and exercising due diligence to avoid the commission of an offence, the company had delegated the function of operating the system to employees, of whom Mr. Clement was one; that Mr. Clement had operated the system negligently; the company was responsible for the negligent operation of the system by one of its delegates; and so the company failed to prove that it had taken all reasonable precautions and exercised all due diligence to prevent the commission of the offence. Some extracts from the judgment of Fisher J. [1971] 1 Q.B. 133 will show clearly how the Divisional Court reached their conclusion. He said, at p. 143:

- E “The taking of such precautions and the exercise of such diligence involves, or may involve, two things. First the setting up of an efficient system for the avoidance of offences under the Act. Secondly the proper operation of that system. Inevitably the second part, the operation of the system, will in most cases have to be delegated by the company to employees falling outside those mentioned in section 20. The question which this court has to consider is whether a company can be said to have satisfied the requirements of paragraph (b) if it satisfies the justices that it has set up an efficient system, or a system which cannot be criticised, or whether it is deprived of the defence under that section if it is shown that there has been a failure by someone to whom the duty of carrying out the system was delegated properly to carry out that function.”

- G Later he said, at p. 145:

“if it be the case that the manager was a person to whom [the appellants] had delegated in respect of that particular shop their duty to take all reasonable precautions and exercise all due diligence to avoid the commission of such an offence, and if the manager had failed properly to carry out that duty, then [the appellants] are unable to show that they have satisfied paragraph (b) of section 24 (1).”

- H The conclusion was, at p. 146:

“It seems clear to me that a person in the position of the manager of a shop, a supermarket, is properly to be considered as being a person

to whom [the appellants] had, so far as concerned that shop, delegated their duty of taking all reasonable precautions and exercising all due diligence to avoid the commission of an offence; and it seems to me that in the light of the findings which I have just read, it was impossible for the justices to find that [the appellants] had satisfied the requirements of section 24 (1) (b).”

A

Fisher J. also cited the case of *Series v. Poole* [1969] 1 Q.B. 676, in which it was held that the defendant was liable under section 186 of the Road Traffic Act 1960, and had failed to prove a defence under section 20 of the Road Traffic Act 1962, when he had “delegated” the checking of certain records to a lady secretary and she had been negligent in the performance of that task. In his judgment in that case Lord Parker C.J. had said, at pp. 683–684:

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“If I can go by stages, the absolute obligation under section 186 of the Act of 1960 is a personal obligation, personal in this sense, that if an employer, acting perfectly reasonably, puts some competent person in charge to perform his, the employer’s, duty, the employer remains liable if the servant fails in his duty. . . . He may, as I have said, acting perfectly reasonably appoint somebody else to perform his duty, his alter ego, and in that case, as it seems to me, if the alter ego fails in his duty the employer is liable. Equally, if the employer seeks to rely on the defence under section 20, he must show that the alter ego has observed due diligence.”

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Clearly the Divisional Court’s decision was based on the theory of “delegation.” One has to examine the meaning of the word “delegation” in relation to the facts of this case and the provisions of the Trade Descriptions Act 1968, ss. 11 (2) and 24. In one sense the meaning is as wide as the principle of the master’s vicarious liability for the acts and omissions of his servants acting within the scope of their employment. In this sense the master can be said to “delegate” to every servant acting on his behalf all the duties which the servant has to perform. But that cannot be the proper meaning here. If the company “delegated” to Miss Rogers the duty of filling the fixture with appropriate packets of washing powder, and “delegated” to Mr. Clement the duty of supervising the proper filling of fixtures and the proper exhibition or withdrawal of posters proclaiming reduced prices, then any master, whether a company or an individual, must be vicariously liable for all the acts and omissions of all its or his servants acting on its or his behalf. That conclusion would defeat the manifest object of section 24 which is to enable defendants to avoid vicarious liability where they were not personally at fault.

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Section 24 requires a dividing line to be drawn between the master and any other person. The defendant cannot disclaim liability for an act or omission of his ego or his alter ego. In the case of an individual defendant, his ego is simply himself, but he may have an alter ego. For instance, if he has only one shop and he appoints a manager of that shop with full discretion to manage it as he thinks fit, the manager is doing what the employer would normally do and may be held to be the employer’s alter ego. But if the defendant has hundreds of shops, he could not be expected personally to manage each one of them and the manager of one of his

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A.C.

Tesco Ltd. v. Nattrass (H.L.(E.))

Lord Pearson

A shops cannot in the absence of exceptional circumstances be considered his alter ego. In the case of a company, the ego is located in several persons, for example, those mentioned in section 20 of the Act or other persons in a similar position of direction or general management. A company may have an alter ego, if those persons who are or have its ego delegate to some other person the control and management, with full discretionary powers, of some section of the company's business. B In the case of a company, it may be difficult, and in most cases for practical purposes unnecessary, to draw the distinction between its ego and its alter ego, but theoretically there is that distinction.

Mr. Clement, being the manager of one of the company's several hundreds of shops, could not be identified with the company's ego nor was he an alter ego of the company. He was an employee in a relatively subordinate post. In the company's hierarchy there were a branch C inspector and an area controller and a regional director interposed between him and the board of directors.

It was suggested in the argument of this appeal that in exercising supervision over the operations in the shop Mr. Clement was performing functions of management and acting as a delegate and alter ego of the company. But supervision of the details of operations is not normally D a function of higher management: it is normally carried out by employees at the level of foremen, chargehands, overlookers, floor managers and "shop" managers (in the factory sense of "shop"). Also reference was made to the case of *R. C. Hammett Ltd. v. London County Council* (1933) 97 J.P. 105, in which, when the reported arguments are taken into account the ground of decision appears to have been that, for the purposes of the Sale of Food (Weights and Measures) Act 1926, ss. 5 (2) and 12 (5), E the employer had to show due diligence on behalf of all the employees concerned except the actual offender. In my opinion, there was no justification for drawing the line of division between the company and its employees at that point, and the case was wrongly decided. As to the case of *Series v. Poole* [1969] 1 Q.B. 676, the decision of the Divisional Court seems to have been in accordance with the general merits of the case, but the treatment of the secretary as an alter ego of the employer F is difficult to uphold, when she had merely been instructed by him to check the records and had failed to do so diligently.

I would allow the appeal.

LORD DIPLOCK. My Lords, this appeal turns on the meaning to be G given to penal provisions contained in the Trade Descriptions Act 1968. The Act, which replaces the Merchandise Marks Acts 1887 to 1953, is concerned with consumer protection. It is a criminal statute and creates a number of offences of giving inaccurate or inadequate information to customers in the course of business transactions relating to the supply of goods or services. Offenders are liable to a fine or to imprisonment for not more than two years or to both.

H Nowadays most business transactions for the supply of goods or services are not actually conducted by the person who in civil law is regarded as the party to any contracts made in the course of the business, but by servants or agents acting on his behalf. Thus, in the majority of

194

Lord Diplock

Tesco Ltd. v. Nattrass (H.L.(E.))

[1972]

cases the physical acts or omissions which constitute or result in an offence under the statute will be those of servants or agents of an employer or principal on whose behalf the business is carried on. That employer or principal is likely to be very often a corporate person, as in the instant appeal.

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Consumer protection, which is the purpose of statutes of this kind, is achieved only if the occurrence of the prohibited acts or omissions is prevented. It is the deterrent effect of penal provisions which protects the consumer from the loss he would sustain if the offence were committed. If it is committed he does not receive the amount of any fine. As a taxpayer he will bear part of the expense of maintaining a convicted offender in prison.

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The loss to the consumer is the same whether the acts or omissions which result in his being given inaccurate or inadequate information are intended to mislead him, or are due to carelessness or inadvertence. So is the corresponding gain to the other party to the business transaction with the consumer in the course of which those acts or omissions occur. Where, in the way that business is now conducted, they are likely to be acts or omissions of employees of that party and subject to his orders, the most effective method of deterrence is to place upon the employer the responsibility of doing everything which lies within his power to prevent his employees from doing anything which will result in the commission of an offence.

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This, I apprehend, is the rational and moral justification for creating in the field of consumer protection, as also in the field of public health and safety, offences of "strict liability" for which an employer or principal, in the course of whose business the offences were committed, is criminally liable, notwithstanding that they are due to acts or omissions of his servants or agents which were done without his knowledge or consent or even were contrary to his orders. But this rational and moral justification does not extend to penalising an employer or principal who has done everything that he can reasonably be expected to do by supervision or inspection, by improvement of his business methods or by exhorting those whom he may be expected to control or influence to prevent the commission of the offence (see *Lim Chin Aik v. The Queen* [1963] A.C. 160, 174; *Sweet v. Parsley* [1970] A.C. 132, 163). What the employer or principal can reasonably be expected to do to prevent the commission of an offence will depend upon the gravity of the injury which it is sought to prevent and the nature of the business in the course of which such offences are committed. The Trade Descriptions Act 1968 applies to all businesses engaged in the supply of goods and services. If considerations of cost and business practicability did not play a part in determining what employers carrying on such business could reasonably be expected to do to prevent the commission of an offence under the Act, the price to the public of the protection afforded to a minority of consumers might well be an increase in the cost of goods and services to consumers generally.

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My Lords, I approach the question of construction of the Trade Descriptions Act 1968 in the expectation that Parliament intended it to

**A.C.** **Tesco Ltd. v. Nattrass (H.L.(E.))** **Lord Diplock**

**A** give effect to a policy of consumer protection which does have a rational and moral justification.

The offence with which the instant appeal is concerned is one created by section 11 (2) of the Act:

“If any person offering to supply any goods gives, by whatever means, any indication likely to be taken as an indication that the goods are being offered at a price less than that at which they are in fact being offered he shall, subject to the provisions of this Act, be guilty of an offence.”

**B**

The section is dealing with offers to enter into contracts for the sale of goods. Prima facie, the offence is committed by the person who would be a party to the contract of sale resulting from acceptance of the offer, notwithstanding that the actual offer was made and the prohibited indication given by a servant or agent acting within the scope of his actual or ostensible authority on his employer's or principal's behalf. So construed the subsection creates an offence of “strict liability” on the part of the employer or principal. But this strict liability is expressed to be “subject to the provisions of this Act.”

**C**

This construction is, in my view, confirmed by sections 23 and 24 of the Act. It is convenient to deal with these sections in reverse order and in their application to an employer or principal who is a natural person before considering the position of an employer or principal who is a corporation.

Section 24 (1) provides:

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“In any proceedings for an offence under this Act it shall, subject to subsection (2) of this section, be a defence for the person charged to prove—(a) that the commission of the offence was due to a mistake or to reliance on information supplied to him or to the act or default of another person, an accident or some other cause beyond his control; and (b) that he took all reasonable precautions and exercised all due diligence to avoid the commission of such an offence by himself or any person under his control.”

**E**

The section speaks of “the commission of the offence” notwithstanding that the person charged may have a defence to the charge under subsection (1). This language refers to a stage in the proceedings at which the prosecution have proved facts necessary to constitute an offence of strict liability on the part of a principal. This is all that it is incumbent upon the prosecution to prove. The onus then lies upon the principal to prove facts which establish a defence under the subsection. The “strict liability” of the principal is thus qualified; but the onus of proving that he was not to blame lies upon him. It is reasonable that this should be so since the facts which can constitute the defence lie within his knowledge and not within that of the prosecution.

**F**

There are two limbs to the defence. Under paragraph (a) the person charged must prove that the commission of the offence was due to one of the causes specified in that paragraph. They have the common characteristic that the offence must have been committed without his knowledge or acquiescence. The particular cause which is relevant to the

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196

Lord Diplock

Tesco Ltd. v. Natrass (H.L.(E.))

[1972]

instant appeal is “the act or default of another person.” But the person charged must also prove under paragraph (b) that he did all that could reasonably be expected of him to prevent offences of that kind being committed by himself or by any person under his control—a class of persons which would include his servants or agents. A

Where the employer or principal is a natural person I can see no reason in linguistics or justice for construing the expression “another person” in paragraph (a) as excluding a servant or agent of the employer or principal, however exalted his grade, whose actual physical act or omission resulted in a commission of the offence. They all fall within the expression “any person under his control” and his duty in respect of their acts and omissions is dealt with in paragraph (b). B

Where the cause of the commission of the offence by him which is relied upon by the person charged is the act or default of another person, subsection (2) requires him, as a condition of relying on the defence, to provide the prosecution, not less than seven days before the hearing, with such information as he possesses which may lead to the identification of that other person. This procedure is calculated to serve two purposes. One obvious purpose is to give to the prosecution in advance of the hearing an opportunity to investigate the validity of the defence. The clue to the other purpose, which is important to the deterrent policy of the Act, is to be found in section 23. It provides: C D

“Where the commission by any person of an offence under this Act is due to the act or default of some other person that other person shall be guilty of the offence, and a person may be charged with and convicted of the offence by virtue of this section whether or not proceedings are taken against the first mentioned person.” E

It is important to observe that this section makes guilty of the offence created by some other section of the Act, such as section 11 (2), persons, such as servants or agents, who do not fall within the description contained in that other section of the person by whom the offence can be committed. They can nevertheless be charged and convicted of that offence by virtue of section 23 if the commission of the offence by a person who does fall within the description contained in that other section was due to any act or default by them. F

In the expression “act or default” in section 23 and in paragraph (a) of section 24 (1) the word “act” is wide enough to include any physical act of the other person which is causative of the offence. But the use of the word “default” instead of the neutral expression “omission” connotes a failure to act which constitutes a breach of a legal duty to act. A legal duty to act may arise independently of any contract or it may be a duty owed to another person arising out of a contract with him. That in paragraph (a) the word “default” embraces a failure to act which is in breach by a servant of his contract of employment, is, in my view, made apparent by paragraph (b) which requires that a person who relies on this defence must show “that he took all reasonable precautions and exercised all due diligence to avoid the commission of such an offence by . . . any person under his control.” This contemplates that the person charged has the G H

A.C.

Tesco Ltd. v. Nattrass (H.L.(E.))

Lord Diplock

**A** power to control the acts or defaults of the other person. The only legal source of such power to control is contractual.

**B** But even where the power to control is derived from a contract, the contract need not necessarily be made directly between the person who has the power to control and the "person under his control." In the context of offences committed in the course of business transactions, a superior servant may owe a duty to his employer under his contract of employment to supervise the work of an inferior fellow servant in the same employment and to give him orders as to how he should do his work; while the inferior servant may owe a corresponding duty to the same employer under his own contract of employment to accept the supervision and to comply with the orders of the superior servant. A failure to supervise, or an omission to give orders to, an inferior servant if it constitutes a breach by the superior servant of his contract of employment with his employer, may be a **C** "default of another person" upon which the employer can rely as a defence under paragraph (a).

**D** So construed these sections provide for a rational and just system of enforcement of the penal provisions of the Act which is calculated to deter anyone engaged in the business of supplying goods or services, whether as principal or as a servant, from conduct, whether careless or intentional, which would result in the commission of an offence, and, where it fails to deter, to impose a criminal sanction upon those who are really to blame and not upon those who are innocent of any carelessness or wrongful intent.

**E** The enforcing authority is the local weights and measures authority (section 26). The powers conferred upon its authorised officers to make test purchases, etc. (section 27), and to enter premises and inspect and seize goods and documents (section 28) are calculated to enable these officers to obtain evidence of the commission of an offence by the principal by whom or on whose behalf the business of supplying goods or services is carried on. It is then for the principal to identify the other person or persons (if any) to whose act or default the offence was actually due and to pass to the prosecutor the available identificatory information. If the principal is not able to do this, it shows a defect in the system which he has laid down for allocating among his servants the duty of taking precautions to avoid the commission of offences under the Act. There is no injustice in requiring him to lay down a reasonably effective system and in treating any failure to do so as a criminal offence. If, on the other hand, the principal is able to identify a person to whose act or default the offence was actually due, he still has to show that he himself exercised due diligence to devise an effective system to avoid such acts or defaults on the part of his servants and to satisfy himself that such system was being observed.

**G** What amounts to the taking of all reasonable precautions and the exercise of all due diligence by a principal in order to satisfy the requirements of paragraph (b) of section 24 (1) of the Act depends upon all the circumstances of the business carried on by the principal. It is a question of fact for the magistrates in summary proceedings or for the jury in proceedings on indictment. However large the business, the principal cannot avoid a personal responsibility for laying down the system for avoiding the commission of offences by his servants. It is he alone who is party to their contracts of employment through which this can be done. But in **H**

198

Lord Diplock

Tesco Ltd. v. Natrass (H.L.(E.))

[1972]

a large business, such as that conducted by the appellants in the instant appeal, it may be quite impracticable for the principal personally to undertake the detailed supervision of the work of inferior servants. It may be reasonable for him to allocate these supervisory duties to some superior servant or hierarchy of supervisory grades of superior servants, under their respective contracts of employment with him. If the principal has taken all reasonable precautions in the selection and training of servants to perform supervisory duties and has laid down an effective system of supervision and used due diligence to see that it is observed, he is entitled to rely upon a default by a superior servant in his supervisory duties as a defence under section 24 (1), as well as, or instead of, upon an act or default of an inferior servant who has no supervisory duties under his contract of employment.

Thus, the supervisory servant may have failed to give adequate instructions to the inferior servant or may have failed to take reasonable steps to see that his instructions were obeyed. In the former case the supervisory servant may alone be to blame. In the latter both may be to blame. Or it may be, as might have been the case in the instant appeal, the commission of the offence is due to a combination of separate acts or omissions by two more inferior servants none of which taken by itself would have resulted in the commission of an offence.

In the instant case there were findings of fact by the magistrates that the commission of the offence was due to the act or default of the appellants' servant Clement in his duties as branch manager to supervise the work of the staff under him, and that the appellants had fulfilled the requirements of paragraph (b) of section 24 (1). They had also fulfilled the requirements of section 24 (2) by serving a notice on the prosecutor identifying Clement as the other person to whose act or default the commission of the offence was due.

On these findings the appellants were, in my view, entitled to succeed in their defence under section 24. The magistrates, however, were of opinion that Clement was not in law "another person" within the meaning of paragraph (a) of section 24 (1) and, accordingly, convicted the appellants.

The Divisional Court were of opinion that Clement was "another person" but achieved the same result by dismissing the appeal upon the ground that under the Act a principal was personally responsible criminally for any failure by any of his servants or agents to exercise diligence in supervisory functions which he had required them to undertake.

The Divisional Court in reaching this conclusion did not rely upon the fact that the appellants are not a natural person but a corporation. But, before turning to the previous authorities which the Divisional Court felt bound to follow, it is convenient to deal with the legal consequences of the corporate character of the appellants, for this has been relied upon by the respondent in your Lordships' House as an alternative ground for dismissing the appeal.

To establish a defence under section 24 a principal who is a corporation must show that it "took all reasonable precautions and exercised all due diligence." A corporation is an abstraction. It is incapable itself of doing any physical act or being in any state of mind. Yet in law it is a person

A.C. Tesco Ltd. v. Nattrass (H.L.(E.)) Lord Diplock

A capable of exercising legal rights and of being subject to legal liabilities which may involve ascribing to it not only physical acts which are in reality done by a natural person on its behalf but also the mental state in which that person did them. In civil law, apart from certain statutory duties, this presents no conceptual difficulties. Under the law of agency the physical acts and state of mind of the agent are in law ascribed to the principal, and if the agent is a natural person it matters not whether the principal is also a natural person or a mere legal abstraction. Qui facit per alium facit per se: qui cogitat per alium cogitat per se.

B But there are some civil liabilities imposed by statute which, exceptionally, exclude the concept of vicarious liability of a principal for the physical acts and state of mind of his agent; and the concept has no general application in the field of criminal law. To constitute a criminal offence, a physical act done by any person must generally be done by him in some reprehensible state of mind. Save in cases of strict liability where a criminal statute, exceptionally, makes the doing of an act a crime irrespective of the state of mind in which it is done, criminal law regards a person as responsible for his own crimes only. It does not recognise the liability of a principal for the criminal acts of his agent: because it does not ascribe to him his agent's state of mind. Qui peccat per alium peccat per se is not a maxim of criminal law.

C Due diligence is in law the converse of negligence and negligence connotes a reprehensible state of mind—a lack of care for the consequences of his physical acts on the part of the person doing them. To establish a defence under section 24 (1) (b) of the Act, a principal need only show that he personally acted without negligence. Accordingly, where the principal who relies on this defence is a corporation a question to be answered is: What natural person or persons are to be treated as being the corporation itself, and not merely its agents, for the purpose of taking precautions and exercising diligence?

D My Lords, a corporation incorporated under the Companies Act 1948 owes its corporate personality and its powers to its constitution, the memorandum and articles of association. The obvious and the only place to look to discover by what natural persons its powers are exercisable, is in its constitution. The articles of association, if they follow Table A, provide that the business of the company shall be managed by the directors and that they may “exercise all such powers of the company” as are not required by the Act to be exercised in general meeting. Table A also vests in the directors the right to entrust and confer upon a managing director any of the powers of the company which are exercisable by them. So it may also be necessary to ascertain whether the directors have taken any action under this provision or any other similar provision providing for the co-ordinate exercise of the powers of the company by executive directors or by committees of directors and other persons, such as are frequently included in the articles of association of companies in which the regulations contained in Table A are modified or excluded in whole or in part.

E In my view, therefore, the question: what natural persons are to be treated in law as being the company for the purpose of acts done in the course of its business, including the taking of precautions and the exercise or due diligence to avoid the commission of a criminal offence, is to be

found by identifying those natural persons who by the memorandum and articles of association or as a result of action taken by the directors, or by the company in general meeting pursuant to the articles, are entrusted with the exercise of the powers of the company.

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This test is in conformity with the classic statement of Viscount Haldane L.C. in *Lennard's Carrying Co. Ltd. v. Asiatic Petroleum Co. Ltd.* [1915] A.C. 705. The relevant statute in that case, although not a criminal statute, was in *pari materia*, for it provided for a defence to a civil liability which excluded the concept of vicarious liability of a principal for the physical acts and state of mind of his agent.

B

There has been in recent years a tendency to extract from Denning L.J.'s judgment in *H. L. Bolton (Engineering) Co. Ltd. v. T. J. Graham & Sons Ltd.* [1957] 1 Q.B. 159, 172, 173 his vivid metaphor about the "brains and nerve centre" of a company as contrasted with its hands, and to treat this dichotomy, and not the articles of association, as laying down the test of whether or not a particular person is to be regarded in law as being the company itself when performing duties which a statute imposes on the company.

C

In the case in which this metaphor was first used Denning L.J. was dealing with acts and intentions of directors of the company in whom the powers of the company were vested under its articles of association. The decision in that case is not authority for extending the class of persons whose acts are to be regarded in law as the personal acts of the company itself, beyond those who by, or by action taken under, its articles of association are entitled to exercise the powers of the company. In so far as there are dicta to the contrary in *The Lady Gwendolen* [1965] P. 294 they were not necessary to the decision and, in my view, they were wrong.

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But the only relevance of this to the appellants' defence under section 24 (1) of the Trade Descriptions Act 1968 was, as the magistrates rightly appreciated, whether the act or default of Clement was that of "another person" than the appellant company itself within the meaning of paragraph (a). The fact that the principal in the business transaction in the course of which an offence under section 11 (2) was committed was a corporation and not a natural person cannot affect the principal's duty to take all reasonable precautions and to exercise all due diligence under paragraph (b).

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The articles of association of the appellants were not produced in evidence. Strictly speaking it may be that they should have been. But it is sufficiently evident from the findings of the magistrates as to the position held by Clement in the appellants' organisation that it was too lowly for him to have had confided in him by the board of directors the co-ordinate exercise of any of the powers of the company itself.

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My Lords, there may be criminal statutes which upon their true construction ascribe to a corporation criminal responsibility for the acts of servants and agents who would be excluded by the test that I have stated to be appropriate in determining whether a corporation has itself committed a criminal offence. The Trade Descriptions Act 1968, however, so far from containing anything which compels one to reject that test, recognises, by section 20, the distinction between "any director, manager,

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A.C.

Tesco Ltd. v. Nattrass (H.L.(E.))

Lord Diplock

A secretary or other similar officer of a body corporate” and other persons who are merely its servants or agents.

Section 20 (1) provides as follows:

B “Where an offence under this Act which has been committed by a body corporate is proved to have been committed with the consent and connivance of, or to be attributable to any neglect on the part of, any director, manager, secretary or other similar officer of the body corporate, or any person who was purporting to act in any such capacity, he as well as the body corporate shall be guilty of that offence and shall be liable to be proceeded against and punished accordingly.”

C The natural persons described in this subsection correspond with those who under the memorandum and articles of association of a company exercise the powers of the company itself. From this it follows that if any of them is guilty of neglect in the exercise of those powers such neglect is that of the company itself. That it cannot be relied upon as “the act or default of another person,” so as to entitle the company to a defence under section 24 (1), is implicit in the provision in section 20 (1) that a person in the described category shall be guilty of an offence “as well as the body corporate.” Without section 20 it would have been open to doubt whether D persons whose acts were in law the acts of the company itself would have been guilty in their personal capacity also of the offence committed by the company.

E For these reasons I agree with the Divisional Court that Clement was “another person” within the meaning of section 24 (1) (a). So all that now remains is to deal with the authorities which that court followed in holding that the appellants’ defence nevertheless failed.

F Those authorities start with the contrasting cases of *R. C. Hammett Ltd. v. Crabb* (1931) 95 J.P. 180 and *R. C. Hammett Ltd. v. London County Council* (1933) 97 J.P. 105. Both were prosecutions under the Sale of Goods (Weights and Measures) Act 1926. The relevant provisions of that Act exempted the employer from any penalty, though not from conviction, if he proved that he had used “due diligence to enforce the execution of this Act.” But his right to exemption was conditional upon his laying an information against the person whom he charged as “the actual offender” and proving that that person had committed the offence in question. In *R. C. Hammett Ltd. v. Crabb* the employer charged as the actual offender his servant who had done the physical act which constituted the offence and that servant had been duly convicted. G The Divisional Court held that the employer was entitled to rely upon his having used due diligence. In *R. C. Hammett Ltd. v. London County Council* the employer again charged as “the actual offender” his servant who had done the physical act which constituted the offence. But the servant charged was acquitted by the magistrates—which would seem to dispose of any claim by the employer to be exempt from the penalty, as the H Divisional Court had itself previously decided in *A. Walkling Ltd. v. Robinson* (1929) 46 T.L.R. 151. The employer, nevertheless, appealed to quarter sessions. Quarter sessions found as a fact that a servant of the employer who was manager of the shop had not used due diligence in

supervising the servant who had been charged (and acquitted) as the actual offender, though in all other respects the employer had exercised due diligence. The case stated by quarter sessions for the opinion of the Divisional Court appears to have been treated as raising the question of law as to whether, in order to avail himself of the exemption from penalty, the employer had to prove that due diligence had been used not only by himself but also by all of his servants who exercised supervisory functions "down to the very person who had committed the act." The Divisional Court apparently thought that the employer had to do so and that this distinguished the case from *R. C. Hammett Ltd. v. Crabb*. But the language of the judgment is far from clear and affords no clue to the reasons which led the court to this conclusion.

This obscure and unsatisfactory judgment appears to have now passed into legal folklore as authority for a general proposition that where a statute creates a criminal offence in relation to a business transaction which is prima facie one of strict liability on the part of the principal who is the party to the business transaction in the course of which the offence is committed, but provides the principal with a defence if he proves that he has exercised due diligence, he cannot avail himself of that defence unless he proves that due diligence was also exercised by all of his servants whom he employed in any supervisory capacity however humble: see *Beckett v. Kingston Bros. (Butchers) Ltd.* [1970] 1 Q.B. 606 a case under the Trade Descriptions Act 1968.

The proposition assumed to have been established in *R. C. Hammett Ltd. v. London County Council*, 97 J.P. 105 has not been followed consistently. In *Melias Ltd. v. Preston* [1957] 2 Q.B. 380, which was also a case under the Sale of Food (Weights and Measures) Act 1926, there were three separate summonses against the employer, in respect of each of which he charged the manager of one of his shops as the actual offender. In two of the summonses the manager had himself done the physical act which constituted the offence (as in *R. C. Hammett Ltd. v. Crabb*, 95 J.P. 180). In the third his default was his failure in supervising an inferior servant who had done the physical act which constituted the offence (as in *R. C. Hammett Ltd. v. London County Council*). The Divisional Court drew no distinction between the three offences and upheld in each of them the employer's defence "that he had used due diligence" to enforce the execution of the Act.

In *Series v. Poole* [1969] 1 Q.B. 676 the case principally relied on by the Divisional Court in the instant appeal was a case under the Road Traffic Acts 1960 and 1962, which contained provisions in relation to the offence by a holder of a carrier's licence in failing to cause records to be kept by his drivers which are in pari materia to those of the Trade Descriptions Act 1968. It is a defence to him to prove "that he used all due diligence to secure compliance with those provisions." The holder of the carrier's licence who was a natural person, not a corporation, had instructed his secretary to supervise the keeping of the records by the drivers. The magistrates found that he himself had exercised all due diligence, but that his secretary had not.

Although *R. C. Hammett Ltd. v. London County Council* was cited in argument in the Divisional Court, Lord Parker C.J. preferred to decide the

A.C. **Tesco Ltd. v. Natrass (H.L.(E.))** **Lord Diplock**

A case as “purely one of principle.” That principle he stated, at p. 683, as being “if Parliament has put an absolute duty on some individual, he cannot evade that duty by delegating it to somebody else.” So far the principle is unexceptionable. Any legal duty, whether arising at common law or imposed by statute, may generally be performed by the person upon whom it is imposed through the agency of some other person. But if it is not performed, the person upon whom the duty is imposed is liable for its non-performance. It is irrelevant that he instructed a servant or agent to perform it on his behalf, if that servant or agent failed to do so. All that is relevant is that the duty was not performed. When the duty is imposed upon a person by statute and non-performance is made a criminal offence without any requirement of mens rea this is what is meant by an offence of “strict liability.”

C The fallacy lies in the next step of the argument. Where Parliament in creating an offence of “strict liability” has also provided that it shall be a defence if the person upon whom the duty is imposed proves that *he* exercised all due diligence to avoid a breach of the duty, the clear intention of Parliament is to mitigate the injustice, which may be involved in an offence of strict liability, of subjecting to punishment a careful and conscientious person who is in no way morally to blame. To exercise due diligence to prevent something being done is to take all reasonable steps to prevent it. It may be a reasonable step for an employer to instruct a superior servant to supervise the activities of inferior servants whose physical acts may in the absence of supervision result in that being done which it is sought to prevent. This is not to delegate the employer’s duty to exercise all due diligence; it is to perform it. To treat the duty of an employer to exercise due diligence as unperformed unless due diligence was also exercised by all his servants to whom he had reasonably given all proper instructions and upon whom he could reasonably rely to carry them out, would be to render the defence of due diligence nugatory and so thwart the clear intention of Parliament in providing it. For, *pace R. C. Hammett Ltd. v. London County Council*, 97 J.P. 105, there is no logical distinction to be drawn between diligence in supervising and diligence in acting, if the defaults of servants are to be treated in law as the defaults of their employer.

G My Lords, the Divisional Court was, I think, right in treating the instant case as governed by the decision in *Series v. Poole* [1969] 1 Q.B. 676. But that case was, in my view, wrongly decided and the proposition of law for which *R. C. Hammett Ltd. v. London County Council* has been treated as an authority is also erroneous, although the actual decision in that case to dismiss the appeal could have been justified on quite different grounds.

I would allow this appeal.

*Appeal allowed.*

Solicitors: *Alsop, Stevens, Batesons & Co.; Gregory, Rowcliffe & Co.*

J. A. G.

# Gencor ACP Limited and Others v Glenn Bryan Dalby and Others



Positive/Neutral Judicial Consideration

## Court

Chancery Division

## Judgment Date

27 July 2000

HC 1999 0204

High Court of Justice Chancery Division

**2000 WL 1881279**

Before: Mr Justice Rimer

Thursday 27 July 2000

## Representation

Mr Christopher Pymont QC (instructed by Hammond Suddards ) appeared for the claimants.

Mr Adrian Francis (instructed by Jay Benning & Peltz ) appeared for the first, second, third, fourth, ninth, eleventh and twelfth defendants.

## JUDGMENT

The Hon Mr Justice Rimer

### Introduction

1.. This is the claimants' application for summary judgment under [Part 24 of the Civil Procedure Rules 1998](#) , alternatively for an interim payment under [Part 25](#) . The first claimant is Gencor ACP Limited (“ACP”). ACP and the third claimant, ACP Technical Services (Australia) Pty Limited (“ACP Australia”), are both wholly owned subsidiaries of the second claimant, Gencor ACP Holdings Limited (“ACP Holdings”). They all appear by Mr Christopher Pymont QC.

2.. There are 12 defendants. Mr Adrian Francis appears for seven of them. They are Glenn Dalby (“Mr Dalby”), his son Brett Dalby, Kevin Meehan (“Mr Meehan”) and Burnstead Limited (“Burnstead”), who are the first to fourth defendants; Swallow International Limited (“Swallow”), the ninth defendant; Wingspan Enterprises Limited (“Wingspan”), the eleventh defendant; and Pacific Holdings Limited (“Pacific”), the twelfth defendant.

3.. The fifth defendant is Roadmec Limited (“Roadmec”). It has not been represented before me. R G Frisby & Small (“Frisby”) are its solicitors. The only relief sought against it on this application is a declaration as to the claimants' beneficial title to a property in Australia. Frisby has informed the court that Roadmec has no objection to the court making such declaration if it is minded to do so, but would wish any declaration to record that Roadmec has never claimed any interest in the property. Frisby has also objected to any suggestion that the claimants should ask for costs against Roadmec on this application, but Hammond Suddards, the claimants' solicitors, have put its mind at rest about that and have indicated that they will not.

4.. The sixth defendant is Roadmec International Limited (“Roadmec International”). It has taken no part in the proceedings and has not been represented before me.

5.. The seventh defendant is Recycling Equipment International Limited. No claim is made against it on this application and it has not been represented before me.

6.. The eighth defendant is Intermek Limited (“Intermek”). It was incorporated on 19 May 1998 and its sole director was Stanley Tibbles, who features fairly widely in the evidence. It served a defence and counterclaim but later failed to comply with an “unless” order in relation to the giving of disclosure and on 14 January 2000 Deputy Master Weir struck out its defence and entered judgment for the claimants for damages to be assessed and costs. The claimants proposed to ask the court to assess those damages at the hearing of their [Part 24](#) application against other defendants and on 6 March 2000 they purported to serve Intermek at its registered office with an application for such relief. They then discovered that Intermek had been struck off the companies register on 29 February 2000 under [ss 652\(4\) and \(5\) of the Companies Act 1985](#) and was dissolved on 7 March 2000. Thus it no longer exists and, unsurprisingly, no one appeared before me purporting to represent it. Nor can the claimants proceed further with their application against it.

7.. The tenth defendant, Metaphor Limited, is an Isle of Man company. Its solicitors are Jay Benning & Peltz, who instruct Mr Francis. It is not a respondent to the present application and has not been represented on it.

#### The ACP group

8.. There are some seven companies in the group of which ACP Holdings is the parent. ACP is the main operating company. The business of the group is the design, manufacture and sale of static and mobile asphalt-making plant and equipment and ancillary products used in the manufacture of asphalt, including shredders, screens and related equipment. Mr Dalby was at all the material times until 21 January 1999 a director of ACP, ACP Holdings and ACP Australia. Mr Meehan was at like times and until the same date also a director of each of these companies. He was also the secretary of ACP and ACP Holdings.

9.. On 13 November 1997 the ACP group as I have described it was acquired by the Gencor group (the claimants' names were subsequently changed to their present names so as to include the name Gencor). The takeover was effected by the acquisition by Gencor Industries Limited (“Gencor Industries”) of the entirety of the shares in ACP Holdings. Gencor Industries was the UK subsidiary of Gencor Industries Inc (“Gencor Inc”), a Delaware company based in Orlando, Florida. The vendors of the ACP Holdings shares were listed in schedule 1 to the November 1997 agreement. They were Mr Dalby, Swallow, Wingspan, Legis Trust Limited (“Legis”), Paving Plant and Processes (M) Sdn Bhd, The Royal Bank of Scotland Plc, Julius Baer Trust Company Limited, C D Grant and J W Vine. The last three were the trustees of what was described as the GMO settlement. Mr Dalby controlled Swallow, Wingspan and Legis, and Legis was the trustee of a trust of which he was the settlor and is a beneficiary. Part of the consideration immediately payable was £2 million, which was divided between the vendors other than Wingspan. A further part of the consideration was 240,000 shares of Gencor Inc Common Stock, which was allotted to Wingspan conditionally on certain profit targets being achieved by the ACP group. Mr Dalby and Mr Meehan remained as officers of the ACP group after the takeover. Mr Dalby entered into a new service agreement with ACP on 13 November 1997 at a salary of £130,000 a year. Mr Meehan had a service contract dated 1 May 1992 with ACP, which was not replaced by a new one after the takeover, but was varied from time to time.

10.. Ian Hogg became the managing director of ACP with effect from 1 December 1998. Investigations that he carried out into its affairs led to the dismissal in January 1999 of Mr Dalby and Mr Meehan as officers and employees of the ACP companies. That was followed by an application by the claimants to me on 22 April 1999 for freezing and search orders against Mr Dalby and Mr Meehan, which I granted. The freezing orders have since been continued and remain in force. The claimants' case against Mr Dalby and Mr Meehan is that they have dishonestly diverted ACP group assets and opportunities away from the ACP group and either into their own pockets or into companies they control, including Burnstead (the fourth defendant) and Pacific (the twelfth defendant).

11.. The writ is dated 23 April 1999 — it must have been one of the last to be issued — and the statement of claim has since been amended four times. That should not be read as suggesting that the claimants do not know what their case is. They admit they have no first hand knowledge of what the defendants have been doing. Their knowledge is derived from documents they have obtained pursuant to the original search order or subsequently from various sources and they have learnt more about their case as the action has continued. The fruit of the obviously considerable efforts of the claimants and their advisers is a carefully pleaded statement of claim and some equally carefully prepared evidence in support of this application.

12.. By contrast, the defendants appear to have applied little like care and effort to providing an answer to the case. Their pleaded defence was largely in the nature of denials or non-admissions although it raised at least some positive allegations that the claimants foresaw as potentially presenting an obstacle to a proposed application for summary judgment. The claimants therefore obtained an order for the trial of preliminary issues on those matters with a view to having them finally decided in

their favour and so clearing the way for the making of a [Part 24](#) application. That hearing came on before me in January 2000, although Mr Dalby and Mr Meehan then made no attempt to establish the pleaded allegations they had lent their names to and called no evidence in support of them. The result was that the whole of the preliminary issue exercise proved to be a complete waste of costs. I dealt with that aspect of this litigation in my judgment of 26 January 2000.

13.. The defendants' response to this application has also been somewhat casual. They eventually served their evidence nearly a month after it was due and only a matter of days before the hearing was due to commence. They sought to explain their delay by a witness statement from Mr Saffron, their solicitor, which I do not regard as providing any explanation at all. He said it was not until 4 May 2000 that the payment of his firm's costs was sufficiently secured to permit it to continue to act on the defendants' behalf, and said that this was the reason for the delay. But that does not square with the fact that on 8 May 2000 he informed Hammond Suddards that counsel would complete the drafting of the evidence by 12 May 2000 and that on 15 May he informed them that he was "aiming to serve that evidence by [19 May 2000]". Despite the lateness of the evidence, Mr Pymont did not ask for time to consider or answer it, and justice obviously demanded that I should permit it to be used on this hearing, as I did. One effect of it has been that the claimants have moderated their application to the extent that they no longer ask for judgment in relation to those issues in respect of which they accept the defendants' evidence has raised an arguable defence.

14.. The claims on this application are in part based on straightforward allegations of misfeasance by Mr Dalby and Mr Meehan by misapplying money or other property belonging to the ACP companies. Examples of this are the procuring of the payment by ACP to Brett Dalby, Mr Dalby's son (then a schoolboy), of a salary and the provision to him of a company car, and also the apparently extravagant use by Mr Dalby of ACP's money for his own purposes. Other claims are based on the principle that a director must not put himself in a position in which his duty to the company and his personal interest are or may be in conflict and that he must account to the company for any profit he makes by reason of his office as a director and in the course of the execution of that office. This is said to apply, in particular, to the transactions involving Burnstead. Burnstead is Mr Dalby's company and it is said that Mr Dalby diverted to it the benefit of business opportunities which put him in just such a position of conflict, and which came to him as a director of ACP and so could and should have been made available to ACP.

15.. This principle is a strict one and has enjoyed a long history. It is illustrated by [Regal \(Hastings\) Ltd v Gulliver and Others \[1967\] 2 AC 134](#). Lord Russell of Killowen said at p 144G:

"The rule of equity which insists on those, who by use of a fiduciary position make a profit, being liable to account for that profit, in no way depends on fraud or absence of fraud, or absence of bona fides; or upon such questions or consideration as whether the profit would or should otherwise have gone to the plaintiff, or whether the profiteer was under a duty to obtain the source of the profit for the plaintiff, or whether he took a risk or acted as he did for the benefit of the plaintiff, or whether the plaintiff has in fact been damaged or benefited by his action. The liability arises from the mere fact of a profit having, in the stated circumstances, been made. The profiteer, however honest and well-intentioned, cannot escape the risk of being called upon to account."

Lord Macmillan said at p 153:

"The issue, as it was formulated before your Lordships, was not whether the directors of Regal (Hastings) Ltd, had acted in bad faith. Their bona fides was not questioned. Nor was it whether they had acted in breach of their duty. They were not said to have done anything wrong. The sole ground on which it was sought to render them accountable was that, being directors of the plaintiff company and therefore in a fiduciary position to it, they entered in the course of their management into a transaction in which they utilised the position and knowledge possessed by them in virtue of their office as directors, and that the transaction resulted in a profit to themselves. The point was not whether the directors had a duty to acquire the shares in question for the company and failed in that duty. They had no such duty. We must take it that they entered into the transaction lawfully, in good faith and indeed avowedly in the interests of the company. However, that does not absolve them from accountability for any profit which they made, if it was by reason and in virtue of their fiduciary office as directors that they entered into the transaction.

The equitable doctrine invoked is one of the most deeply rooted in our law. It is amply illustrated in the authoritative decisions which my noble and learned friend Lord Russell of Killowen has cited. I should like only to add a passage from *Principles of Equity* by Lord Kames, 3rd ed (1778) vol 2, p 87, which puts the whole matter in a sentence: 'Equity,' he says, 'prohibits a trustee from making any profit by his management, directly or indirectly.'

The issue thus becomes one of fact. The plaintiff company has to establish two things: (i) that what the directors did was so related to the affairs of the company that it can properly be said to have been done in the course of their management and in utilisation of their opportunities and special knowledge as directors; and (ii) that what they did resulted in a profit to themselves.”

16.. The principle was recently revisited in the decision of the *Court of Appeal in Don King Productions Inc v Warren and Others [2000] 1 BCLC 607*. Morritt LJ delivered the main judgment, with which Aldous and Hutchison LJ agreed. He referred at p 629, with apparent approval, to the judgment of Deane J in the decision of the *High Court of Australia in Chan v Zacharia (1984) 154 CLR 178*, in which Deane J said:

“Stated comprehensively in terms of the liability to account, the principle of equity is that a person who is under a fiduciary obligation must account to the person to whom the obligation is owed for any benefit or gain (i) which has been obtained or received in circumstances where a conflict or a significant possibility of conflict existed between his fiduciary duty and his personal interest in the pursuit or possible receipt of such a benefit or gain or (ii) which was obtained or received by use or by reason of his fiduciary position or of opportunity or knowledge resulting from it. Any such benefit or gain is held by the fiduciary as constructive trustee ...”

17.. The principles are well established. It is no answer to them that the company could not or would not have taken up the business opportunity that the director took up for his own benefit. Nor is it an answer that the director's own skill or property were also used in the course of making the profit. The only escape from potential accountability is the obtaining of the prior approval of the company's shareholders after full disclosure of all the facts and circumstances.

18.. Before turning to the allegations concerning Burnstead I comment that most of the relevant transactions involved the supply, or ostensible supply, by Burnstead of second hand equipment of one sort or another. Mr Dalby's case is that, by the time of these transactions, ACP no longer dealt in second hand equipment and that by about mid-1993 Mr Oldroyd, the director on the ACP board representing 3i's interest, had made it clear that 3i would not agree to ACP dealing in second-hand equipment. He also gives evidence which, on one view, is to the effect that the ACP board decided that they would endorse 3i's views about such dealing. In the light of the outcome of the preliminary issues to which I have referred, Mr Pymont has reserved his position as to whether it was thereafter open to Mr Dalby to seek to contend, as he now does, that ACP had in any manner determined not to deal in second hand equipment. He indicated that it might be an abuse of the court's process for Mr Dalby to attempt to do so. I need not explain further the precise basis on which Mr Pymont founds that suggestion, since for the purposes of this application he was prepared to take the stance that, even if ACP had made some such determination, it can make no difference to the application of the principle on which the claimants rely. That is because, as I have just said, it is no answer to it that the company either could not or would not in practice have taken up the opportunity which the director has diverted to his own benefit. I turn now to the Burnstead allegations.

#### *A. The Burnstead allegations*

19.. Burnstead was incorporated in the British Virgin Islands in 1994. Its registered office is at Tortola. It has always been wholly owned and controlled by Mr Dalby. Its administration was carried out by Augres Secretaries (Jersey) Limited, who acted on Mr Dalby's directions. The individual to whom he communicated his instructions was Mrs Whiteside. It had a bank account with Barclays Bank plc at St Helier, Jersey (No 10362786). Mr Dalby and Mr Meehan both admit that prior to 13 November 1997 they caused Burnstead to deal in second hand asphalt and equipment. The claims against Mr Dalby and Burnstead are based on the assertion that Mr Dalby diverted to Burnstead commissions and business opportunities which ought to have been paid and made available to ACP, that he did so without the prior consent of ACP so that he and Burnstead are now liable to account for the profit so diverted. Mr Dalby did not control ACP, there were outside shareholders in it including RBS and 3i and there is no suggestion that anything of which complaint is made in this litigation had the prior approval and consent of the shareholders of ACP. The claim against Mr Meehan is that, save with regard to the diversion of two commission payments, he dishonestly assisted Mr Dalby in the diversions to Burnstead and so is also liable to account to ACP for the profits wrongly diverted. I turn now to each of the transactions involving Burnstead. I shall take each transaction in turn and deal first with the claims against Mr Dalby and Burnstead. I shall then deal separately with the claim against Mr Meehan.

(i) Balfour Beatty (UK) Limited (“Balfour Beatty”)

20.. Burnstead opened its bank account with a payment of £24,043.39 made by Balfour Beatty in May 1994. This was commission payable by Balfour Beatty on the introduction to it of a sale opportunity to WesTrac, an Australian company. The claimants' case is that WesTrac was an ACP customer, ACP made the introduction and the commission was due to ACP.

21.. Mr Dalby's evidence is that during a business trip he made on ACP's behalf he ended up in Perth. He made a cold call on WesTrac and asked its Mr Perich if he would be interested in acquiring any caterpillar earth moving excavators (“CATs”). This was not equipment which ACP could or did ordinarily supply, but Mr Dalby had shortly before seen Mr Hillier of Balfour Beatty, a friend of his, and learnt that Balfour Beatty had three CATs it wanted to dispose of. Mr Perich was interested and Mr Dalby agreed to contact him when he returned to England. On his return he engaged in negotiations with WesTrac for the supply of equipment, including CATs, using photographs of them he had obtained from Mr Hillier. The negotiations started with Mr Dalby's letter of 28 January 1994 on the notepaper of ACP (then known as ACP Technical Services Limited) and he enclosed details of equipment which could be supplied. The correspondence led to WesTrac placing an order with ACP for the supply of equipment, which Mr Dalby acknowledged on its behalf on 21 February 1994. ACP could not itself supply the equipment, but Mr Dalby arranged for Balfour Beatty to do so, as it did. Balfour Beatty then paid the commission on that introduction to Burnstead.

22.. Mr Dalby's case is that this transaction had nothing to do with ACP but was his own personal venture and so he was entitled to enjoy the commission himself through Burnstead. He said it was just laziness on his part that he used ACP notepaper in all his negotiations with WesTrac. Mr Francis emphasised during his submissions that the question raised by this claim is whether or not this particular business opportunity arose only by reason of the fact that Mr Dalby was a director of ACP and in the course of his execution of that office. He submitted that this question is essentially one of fact and degree and that Mr Dalby's evidence supported the conclusion that it was arguable that this particular opportunity was one that Mr Dalby was entitled to enjoy personally.

23.. I agree with Mr Francis that the relevant question will usually be one of fact and degree. For example, if Mr Dalby had a passion for collecting paintings and whilst on an ACP business trip he had spotted a painting in a gallery, had bought it with his own money and had resold it shortly afterwards at a profit, I doubt if ACP would have been entitled to require him to account for the profit. This would, I consider, fairly plainly have been a personal enterprise that could not be said to have arisen because of Mr Dalby's role as a director of ACP. I doubt if the mere fact that he bought the painting during a business trip on behalf of ACP would be enough to bring the relevant principle into play.

24.. This case, however, appears to me to be very different. In my judgment it is no answer for Mr Dalby to explain away ACP's apparent involvement in the matter by saying that he had simply used its notepaper for reasons of laziness. The fact is that, following Mr Dalby's return to England, and whatever his original intentions, he made this business opportunity available to ACP. It was ACP which carried out the negotiations with WesTrac and the correspondence gives no clue that this was in any sense a personal Dalby transaction: Mr Dalby even signed the letters as “group managing director”. Most importantly, the end result is that it was ACP with which WesTrac placed its order. In my view that sequence of events makes it impossible for Mr Dalby to pretend that ACP's role in the matter was a mistake. This was a case in which he arranged for ACP to receive the order and, having done so, he could not then divert its benefit into his own pocket. I regard it as a plain case in which the commission earned on the transaction was commission for which, subject to the next point, Mr Dalby is accountable to ACP.

25.. That point is this. Mr Francis submitted that even if he was otherwise wrong on his argument, there is still no one who was, is or can be accountable to ACP for the commission. Mr Dalby is not accountable because he did not receive it: it went straight into Burnstead, albeit at Mr Dalby's direction. Burnstead is not accountable because, although it received the commission, it was and is not in a fiduciary relationship with ACP.

26.. I do not accept that argument which, if correct, would provide the easiest possible escape from the rigours of equity's strict principle of accountability. All that would be required would be for the profiting director to ensure that he diverts the profit into his own creature company. The facts of this case are that Burnstead was an offshore company which was wholly owned and controlled by Mr Dalby and in which nobody else had any beneficial interest. Everything it did was done on his directions and on his directions alone. It had no sales force, technical team or other employees capable of carrying on any business. Its only function was to make and receive payments. It was in substance little other than Mr Dalby's offshore bank account held in a nominee name. In my view this is the type of case in which the court ought to have no hesitation in regarding Burnstead simply as the alter ego through which Mr Dalby enjoyed the profit which he earned in breach of his fiduciary duty to ACP. If the

arrival at this result requires a lifting of Burnstead's corporate veil, then I regard this as an appropriate case in which to do so. Burnstead is simply a creature company used for receiving profits for which equity holds Mr Dalby to be accountable to ACP. Its knowledge was in all respects the same as his knowledge. The introduction into the story of such a creature company is, in my view, insufficient to prevent equity's eye from identifying it with Mr Dalby: see generally, as to the readiness of the courts in appropriate cases to pierce the corporate veil, *Re H and Others (restraint order: realisable property)* [1996] 2 BCLC 500, at 511, per Rose LJ. I hold that Mr Dalby and Burnstead are both accountable for the profit represented by this commission and I will make an order against them accordingly.

(ii) The ACP payment

27.. In August 1994 ACP paid a further sum to Burnstead. It amounted to £47,890.39. There is no suggestion that Burnstead ever rendered any services to ACP justifying this payment, or that ACP was indebted to it in any such sum. The inference, on the face of it, is therefore that the payment was either a loan by ACP or else a purported gift, or else a simple misapplication of ACP's money. Burnstead's draft accounts in fact show this money as deriving from GCM Pacific ("GCM"), an Australian company. There is no journal entry in ACP's books relating to this payment.

28.. Mr Dalby's explanation is that, following a direction from Mr Oldroyd that all ACP's second-hand plant in stock should be sold, he sold some of its second-hand asphalt plant to Steve Bykiw of GCM. Mr Bykiw had in turn negotiated an onward sale to an Australian customer. The customer was proposing to raise a letter of credit in ACP's favour in an amount that was to include GCM's commission. Mr Dalby says that Mr Bykiw asked if the commission — amounting to £47,890.39 — could be kept by ACP on his behalf whilst he looked for second-hand equipment he wanted to buy from dealers in the UK and Europe. Mr Dalby says he agreed to this and, because the financial position of the ACP group was weak, he suggested it should instead be paid to Burnstead. Mr Bykiw agreed and it was. Mr Dalby says that later the whole amount was paid out of Burnstead on Mr Bykiw's instructions as he bought equipment from time to time. He says that Mr Meehan dealt with the accounting of this transaction as between ACP, Burnstead and GCM. Mr Dalby's case is, therefore, that the £47,890.39 never belonged beneficially to either ACP or Burnstead. It belonged beneficially to GCM and was later wholly paid out of Burnstead in accordance with GCM's instructions.

29.. The difficulty with that explanation is that Mr Hogg has identified all the payments out of the Burnstead account and comments on them in his witness statement under various heads. In particular, he identifies payments for which credit is to be given in the claimants' claim, those for which credit is not to be given and those he cannot explain. Mr Dalby comments on all that evidence in his own evidence in answer, and one might expect him to identify which of the payments out are said to make up the £47,890.39. He does not do so and it appears to me that the combined effect of his and Mr Hogg's evidence is that none of the payments out can be said to be even arguably referable to the alleged Bykiw purchases. That would be consistent with information supplied by Mr Bykiw to Mr Hogg which is set out in the latter's witness statement of 7 June 2000 and confirmed as true in a witness statement which Mr Bykiw made on 9 June 2000. This was that the £47,890.39 does not and never did belong to Mr Bykiw or his companies and that Mr Bykiw was adamant that he had no reason to leave any such money in the hands of Mr Dalby or Burnstead.

30.. If there were any truth in Mr Dalby's case about this, he could have supported it by identifying the payments out of the Burnstead account which he claims were made on Mr Bykiw's behalf. He and Mr Meehan must have been able to do that. They have had every opportunity to do so, but have not taken it. Nor have they even attempted to identify the particular purchases for GCM to which they claim the money was applied. In these circumstances, and given Mr Bykiw's wholesale denial of Mr Dalby's story, I do not consider that Mr Dalby has any real prospect of establishing his account at trial. He has simply failed to adduce any evidence suggesting that there is anything to have a trial about. This is a plain case in which Mr Dalby procured a payment of ACP money for his own benefit, a transaction for which there was no justification, and I hold that he and Burnstead must also account to ACP for it.

(iii) The payments from Kirinyaga Construction (Kenya) Limited ("Kirinyaga")

31.. Two payments to Burnstead are in question. £17,000 paid on 24 April 1996; and £151,074.40 paid on 26 November 1996. The claimants originally also had a claim in respect of a payment of £270,000; but, having read Mr Dalby's assertion that the transaction relating to this did not proceed, they do not pursue that claim on this application.

32.. Mr Hogg's evidence about the transactions with Kirinyaga is very detailed. The story starts in October 1995 when ACP wrote to Kirinyaga quoting for the supply of some second-hand equipment, a refurbished M356 Blackmobile asphalt plant. Mr Dalby signed on behalf of ACP. On 12 March 1996 Kirinyaga wrote to ACP saying they were placing an order. Mr Dalby then wrote back saying ACP had a different M356 to offer Kirinyaga. There was further correspondence about this and also a meeting between Mr Dalby and Mr Mama of Kirinyaga on 2 April 1996. On 5 April 1996 Mr Dalby wrote to Mr Mama on ACP notepaper with order acknowledgements for two pieces of equipment: one was a second-hand Bramobile asphalt plant at a price of £170,000 and the other was a Mixabatch mobile asphalt plant at a price of £45,000. He also sent two sets of documents bearing the reference E4926/R1, one of which was on ACP notepaper and the other on Burnstead paper, the latter being for a second-hand refurbished M356 Blackmobile asphalt plant at a price of £153,000. It appears that the latter was produced on ACP's computer system and merely substituted Burnstead's name for ACP. It includes Mr Dalby's reference. The shipping documentation for the M356 to Kirinyaga referred to the seller/consignor as Burnstead or Roadmec International rather than ACP, but it appears that the shipping was arranged by Mr Sherriff, the ACP group's shipping manager, using the ACP group's computer system. On 5 April 1996 Burnstead raised invoices on Kirinyaga for both the £153,000 and a deposit of £17,000 (i.e. totalling £170,000, the price at which ACP had quoted for the M356). On 24 April 1996 Kirinyaga paid Burnstead the £17,000 deposit and on 26 November 1996 Burnstead received the balance under a letter of credit, less interest charges of £1,925.60, ie £151,074.40 net.

33.. The plant supplied to Kirinyaga was sourced in Norway from Bardel Maskin A/S by Roadmec (the original M356 for which ACP quoted appears to have been sold to another customer, Tate Export Inc). The replacement M356 appears to have been invoiced to Roadmec at NOK 685,000, which equated to approximately £68,500. Burnstead paid 20 per cent of this — £13,700 — on 30 August 1996, and it later paid a further £36,500 towards the price, its total payments therefore being £50,000 out of the £68,500. It appears that the balance was paid by Mr Dalby personally out of his account with the Bank of Valletta International Limited in Malta, although Mr Dalby does not appear to accept this and believes it was paid by Roadmec.

34.. Mr Dalby asserts that the claimants are asking the court to assume that ACP met the costs of the transaction with Kirinyaga. They do not so ask, and I have indicated how the purchase of the M356 appears to have been financed. Mr Dalby also points out that ACP did not pay for the shipping costs to Kirinyaga but Burnstead did. The claimants accept that, and as their claim is only for the profit that Mr Dalby made on this transaction they give credit for those costs in their claim against Mr Dalby and Burnstead.

35.. In my judgment the taking by Mr Dalby, via Burnstead, of the benefit of these two payments of £17,000 and £151,074.40 represented a plain case of a director profiting personally from a business opportunity which came his way as a director. I hold that both Mr Dalby and Burnstead are accountable to ACP for the profit on these transactions. ACP accepts that in calculating the profit credit must be given to the accounting parties for the payments of £13,700 and £36,300 paid by Burnstead towards the cost of the sales to Kirinyaga and for the £42,656.52 shipping costs which Burnstead bore.

(iv) Tate Export Inc (“Tate”)

36.. ACP dealt with Tate for the supply of equipment and on 22 November 1995 Tate placed an order with ACP on behalf of their customer, NH International Limited (“NH”), at a price of £155,000, including £15,000 for Tate. ACP, by Mr Dalby, acknowledged the order on 23 November 1995.

37.. In about early December 1995 Mr Dalby diverted the benefit of the order to Burnstead. This is evidenced by a letter of 4 December 1995 from Tate to Mr Dalby in which Tate records that “We have directed our clients to establish the letter of credit with Burnstead Ltd, as requested by you.” Tate added that “For the sake of good order would you be so kind as to confirm that Burnstead Ltd and [ACP] will honour all conditions of sale as previously agreed.” Mr Meehan gave Tate this confirmation on 8 December 1995 (on ACP notepaper), Burnstead then invoiced Tate for £155,000 on 28 November 1995 and NH established a letter of credit in favour of Burnstead. Burnstead received the payment, less bank charges, on 12 January 1996. The net sum it received was £154,981.

38.. Mr Sherriff arranged the shipment of the plant, although the documents refer to Burnstead as the consignor. ACP paid various costs associated with the supply and it installed the plant. On 21 February 1996 ACP quoted for some parts suitable for the equipment which had been supplied. There were also problems with it. On 7 May 1996 Tate wrote to NH about the matter, referring throughout to ACP as having supplied the plant and the installation engineers. Mr Dalby saw this letter and wrote to Tate on 18 October 1996 confirming its accuracy.

39.. I regard the diversion of the benefit of this contract by Mr Dalby as another plain example of his profiting from an opportunity that was available to ACP. I hold that both Mr Dalby and Burnstead are accountable for the profit they enjoyed. This is in principle the full £154,981.00 received by Burnstead, subject to the question of what credits should be allowed in the calculation of the profit. I deal later with the question of credits.

(v) CJP Tarmac Limited (“CJP”)

40.. On 7 June 1995 ACP gave a quotation to CJP in Malta for a free-standing Titan 1500 Asphalt Plant. It appears that CJP placed an order. On 24 November 1995 Mr Penza of CJP wrote to Mr Dalby at ACP asking for a pro forma invoice for the plant at a price of £12,000. An invoice was then issued by Burnstead on 27 November 1995, the equipment being described as “One second-hand Heat Exchange System, fully refurbished installed and commissioned”. The price was £12,000. This is consistent with entry no 71 in a list of Burnstead transactions prepared by Mrs Turner (Mr Meehan's assistant in the accounts department), which shows the sale to CJP of a heat exchange system for £12,000 in November 1995.

41.. The equipment was shipped to Malta on 25 January 1996 and the commercial export invoice shows ACP as the seller. Mr Hogg's evidence is that heat exchange units (or pre-heaters) are an integral part of the systems supplied by ACP to its customers and are commonly sold by ACP as part of such systems, although Mr Dalby disputes this.

42.. There is some uncertainty as to what, if any, payment Burnstead received on this transaction. A document dated 21 August 1995 entitled “Charles Penza Plant Budgets” bears Mr Dalby's initials and appears to record a receipt of £10,000 in cash for a pre-heater, apparently relating to this transaction. Mr Hogg's evidence is that ACP did not receive any such cash payment, and so if anyone did it was probably Burnstead. Against this, the Burnstead transaction list as at November 1995 appears to show CJP as a debtor of £12,000 in respect of this transaction, and Mr Penza's request for an invoice for £12,000 was only made on 24 November 1995. The Burnstead bank statements do not show the receipt of any payment in respect of this matter.

43.. Mr Dalby's position is that there is no evidence that any payment was made for this equipment, although he does not expressly deny that payment was made. He appears to suggest that CJP is still a debtor for the £12,000. He does not comment on the document of 21 August 1995. His stance is that the supply by Burnstead of this second-hand equipment played a beneficial part in enabling ACP to obtain an order for new equipment.

44.. Mr Francis submits there is insufficient evidence to justify a finding that any payment was made to Burnstead for this equipment and therefore there is no evidence of any profit having been enjoyed by Mr Dalby or Burnstead. Mr Pymont's submission is that it makes no difference in principle whether the £12,000 has or has not been paid: Mr Dalby and Burnstead are still accountable for the benefit of that debt, and there is no evidence that CJP is not good for the money. He also says that I should anyway find that the only inference from Mr Dalby's statement of August 1995 is that in fact CJP paid Burnstead £10,000 in or towards satisfaction of this contract. The claimants are prepared to give Mr Dalby and Burnstead the benefit of any doubt on the point and to confine their claim to £10,000.

45.. I agree with that approach. I do not see what inference can be drawn from Mr Dalby's schedule other than that CJP did pay £10,000 in cash to Burnstead for this equipment. Mr Dalby has not adduced any evidence that satisfies me that, were the matter to go to trial, he would have a realistic prospect of showing that CJP had not paid the £10,000, or alternatively did not owe and could not pay £12,000. In line with the moderate approach offered by the claimants, I hold that Mr Dalby and Burnstead are each accountable for £10,000 as representing the profit taken by them on this transaction. Again, I will come later to the question of what, if any, credits should be allowable.

(vi) Trio Development Limited (“Trio”)

46.. Trio operates in Mauritius. On 24 July 1995 Burnstead received a payment of £113,757.29 from Trio for the sale of an SRM Asphalt plant in March 1995; and on 2 August 1996 it received a payment of £33,627.81 from Trio for the sale of a bag filter in January 1996.

47.. ACP gave a quote to Trio in March 1995 for the asphalt plant. The total cost, ex-works, was £111,000. The technical drawings for the installation were provided by ACP. The plant was shipped to Trio's own customer in Mauritius in June 1995. The shipping documents show the exporter to be Burnstead and the price of the plant £118,000. The shipping papers were

forwarded by Mr Dalby to Mrs Whiteside at Augres. Burnstead thereafter received a payment net of a discounts and charges amounting to £113,757.29.

48.. In January 1996 ACP quoted Trio for the supply of a second hand dust collector (or bag filter) at a cost of £30,000 ex works. On 4 January 1996 Burnstead invoiced Trio for the supply of a bag filter at a cost of £30,000 “ex works Leicester” and “inclusive of engineers services for two weeks to install”, although Burnstead had no employees who could provide such services. On 5 April 1996 Burnstead sent Trio another invoice for the bag filter, this one for £35,000 ex works Leicester, also inclusive of installation costs. It appears that this was the relevant invoice and payment of it was made under a letter of credit opened in March 1996. The beneficiary under the letter of credit was originally described as ACP, but it was changed to Burnstead. Burnstead then received £33,627.81 in payment, which was the gross sum of £35,000 less bank charges and discounts. It is unclear where the bag filter was originally sourced, but it appears that ACP provided at least the ducting comprised in it. ACP provided an engineer to install the bag filter and also bore the cost of later supplying various replacement and extra parts.

49.. Mr Hogg's evidence is that the equipment supplied to Trio was of a nature commonly supplied by ACP. It was second hand but could have been supplied by ACP. It was anyway ACP that originally quoted for their supply. Burnstead was merely interposed into the arrangement in order to receive the sale proceeds.

50.. I can see no answer to the claim that Mr Dalby and Burnstead should be accountable to ACP for these proceeds, which total £147,385.10, subject again to any allowable credits.

(vii) International Construction Consortium (“ICC”)

51.. ICC operate in Colombo, Sri Lanka. The claim here is in respect of a Burnstead receipt for £42,732.16. This was for the supply in January 1996 to ICC of hot storage equipment at a cost of £45,000.

52.. ICC had been a customer of ACP since February 1995. On 10 August 1995 ACP, by Mr Dalby, gave quotes to ICC for the supply of equipment. On 19 October 1995 ACP sent ICC a pro forma invoice for the supply of a new RM750 Mobile Asphalt Production Plant at a price of £176,000. On 25 October 1995 Mr Dalby wrote to ICC acknowledging receipt of their letter of credit and confirming that the order was being processed.

53.. On 27 November 1995 ICC wrote to ACP indicating that they wanted to add a 100 ton storage bin to the plant at a later date. Burnstead invoiced ICC for this item, a second hand one, on 4 January 1996 at a price of £45,000. It received payment for this under a letter of credit on 5 March 1996. The amount received, £42,732.16, was net of various charges. The storage bin was shipped on 3 March 1996. Mr Sherriff arranged the shipment. ACP provided an engineer to assist in the installation and commissioning of the bin. Mr Hogg's evidence is that storage bins are an integral part of systems supplied by ACP, and in this case it was for use with a piece of new plant which ACP had supplied. He says there is no reason why ACP could not have supplied ICC with the storage bin.

54.. Mr Dalby's explanation is that this illustrates the efforts he made to procure sales of new plant by ACP and the benefit to ACP of the provision by Burnstead of second hand plant. Even assuming there may be something in that, it provides no answer to the claim made, namely that the Burnstead receipt represents a personal profit obtained by Mr Dalby in the course of acting as a director of ACP and for which he is accountable to ACP. Mr Dalby also suggests that ACP received a commission of £4,551 from the shipping agent, which it ought to be required in some way to bring into account. I am disposed to agree with Mr Pymont that the suggestion that this sum was a commission is a mistake on Mr Dalby's part. I anyway do not see how it falls to be brought into account in the claim in respect of the profit received by Mr Dalby and Burnstead. I hold that they are both accountable for that profit, represented by Burnstead's receipt of the £42,732.16.

(viii) Nyoro Construction Company Limited (“Nyoro”)

55.. Nyoro is a Kenyan company. It purchased a Venturi wet scrubber suppression system in early 1995. It appears to have been purchased as an item ancillary to a Roadbatch 40-ton asphalt plant that ACP had supplied in 1993. Burnstead issued an invoice to Nyoro on 2 March 1995 for the supply of the scrubber at a price of £10,000 ex works Leicester. It received payment of this sum on 1 May 1995. The equipment was not, however, delivered and Nyoro wrote to ACP on 13 January 1996 complaining about this and pressing for its shipment. On 27 June 1996 Mr Dalby wrote to Nyoro on ACP notepaper and referred to the scrubber as having been “purchased from us [ie ACP] some 15 months ago”. His complaint was that although Nyoro had paid

for it — it had of course paid Burnstead — the scrubber was still in ACP's yard and was causing the incurring of storage fees. It appears that the scrubber was never delivered because Nyoro decided it no longer wanted it and that some arrangement was made under which the price paid for it by Nyoro would be set off against money due from Nyoro on future purchases from ACP. Whether it was or was not, the £10,000 received by Burnstead for the scrubber was not remitted to ACP. Mr Hogg confirms that scrubbers of this type are items of equipment regularly supplied by ACP to its customers and asserts that there is no reason why ACP rather than Burnstead could not have supplied the scrubber to Nyoro.

56.. Mr Dalby says the scrubber supplied to Nyoro was an obsolete one, because Nyoro could not afford a new one. He denies that ACP could have supplied it, although I do not understand why. Burnstead was simply Mr Dalby in corporate disguise and, if Burnstead could supply the scrubber, so could ACP. Mr Dalby says it was sourced from SJS Engineering (“SJS”) but says he does not know how the transaction was accounted for as between Burnstead and SJS. He says the cost should have been passed on to Burnstead, but it does not appear that it was.

57.. This is another plain case of Mr Dalby obtaining a personal profit by taking advantage of a corporate opportunity open to ACP. I hold that he and Burnstead are accountable to ACP for the £10,000, subject again to any allowable credits.

(ix) Alfred Schembri & Sons Limited (“Schembri”)

58.. Schembri is a Maltese company. Burnstead made several sales to it in 1995 and 1996. The Burnstead bank statements show five receipts totalling £187,351.86, their dates being 1 March, 5 April, 5 May, 10 July and 24 July 1995. Burnstead's aged debtor analysis also shows Schembri as a debtor for £37,018, although it appears that this has not been paid and the claimants make no claim in respect of it on this application.

59.. Schembri was a prospective customer of ACP from as early as 1991. In 1992 it asked ACP to quote for the supply of a drum mix plant. In February 1995 it placed an order with SJS for the supply of a refurbished cold mix asphalt plant at a cost of £125,000 ex works Leicester. ACP drawings were used for the production of this plant. SJS's invoice was dated 9 February 1995. Although the order was placed with SJS, the plant was ultimately sold by Burnstead, which issued four invoices between February and April 1995 in sums totalling £125,000. Each invoice included the reference 1151/3447 (the same reference as on the SJS invoice) and referred to “our order acknowledgement, dated 9 February 1995, ref. 1151/3447”. The inference from this is that SJS and Burnstead were either one and the same outfit, or were at least closely connected. Mr Dalby says the plant was sourced from Roadmec (which had acquired the plant from ACP in the first place), although it is unclear how the transaction was accounted for between Roadmec and Burnstead. Mr Dalby says the background to this transaction was that Mr Goddard of SJS obtained an order from Schembri but that “He could not finance the transaction and approached me for assistance”. I find it impossible to conclude otherwise than that the approach to Mr Dalby was made because he was involved in this type of business at ACP and that the business opportunity which Mr Goddard offered him was one which it was open to ACP to take up.

60.. ACP appears to have played a part in arranging the shipping of the plant to Malta. It also carried out engineering work on its installation and invoiced Schembri for this. On 27 April 1995 Burnstead issued a further invoice to Schembri for £5,500 in respect of a supply of extra conveyors to the plant. Mr Dalby says these were supplied by SJS. Complaints about the various supplies by Burnstead to Schembri were all directed to Mr Dalby at ACP, and ACP dealt with them.

61.. In March 1995 SJS corresponded with Schembri about the supply of a dryer unit. Burnstead then took this contract over and issued its invoice to Schembri on 29 March 1995. The invoice was for the supply of a refurbished dryer with a burner, at price of £38,000 ex-works Leicester. Mr Dalby says the equipment was sourced from Roadmec. The unit appears to have been shipped to Malta in April 1995. Schembri paid Burnstead under a letter of credit and Burnstead received a discounted payment of £36,243.86 on 24 July 1995. ACP carried out the work involved in installing and converting the burner, although there is no evidence that it ever rendered an invoice to Schembri for this. No payment for such work has been traced.

62.. In February 1995 Schembri placed an order with SJS for a refurbished Powerscreen Mark 2 screening plant for £10,526. A memorandum from SJS to ACP on 15 March 1995 suggests the supply was to be dealt with by ACP, but Mr Dalby says this is a misunderstanding of it. As before, the goods were invoiced by Burnstead, its invoice being dated 24 February 1995. Mr Dalby says that ACP do not trade in this type of equipment, which plays no part in asphalt production and so in this respect too he disagrees with Mr Hogg's evidence. I am prepared to accept that it is arguable that ACP did not ordinarily deal in that type of equipment. It appears to me clear, however, that the business opportunity to supply was one that came Mr Dalby's way in his capacity as a director of ACP. It involved a sale to the same customer and as part of the same project, and I cannot accept that Mr Dalby was entitled to pocket the benefit of that transaction without first obtaining ACP's informed consent.

63.. On 17 July 1995 ACP, acting by Mr Dalby, quoted Schembri for the supply of a second hand dust collector at a cost of £45,000. The supply was then undertaken by Burnstead. It issued two invoices, for £22,500 each, on 3 July 1995 and 16 February 1996. Mr Dalby says the equipment was sourced from Roadmec, which had originally bought it from ACP, and that the second instalment of the price was not paid. Mr Sherriff arranged the shipment. A job sheet from the ACP group installation department shows that a good deal of work had to be undertaken on the collector, which I have no doubt was done by ACP. Whilst the plant itself was supplied by Burnstead, ACP bore the cost of supplying and shipping many spare parts to Schembri.

64.. I hold that Burnstead's receipts in respect of these transactions, totalling £187,351.86, subject to any allowable credits, represent profit for which Mr Dalby and Burnstead are accountable to ACP.

(x) White Mountain (Surfacing) Limited (“White Mountain”)

65.. The claim here is in respect of £23,000 received into Burnstead's bank account on 28 November 1997. The claimants do not know much about this and the highest they originally put their case was that, because White Mountain was a customer of ACP, the payment must represent the fruit of an opportunity for which Mr Dalby is accountable to ACP. They suggested it may have related to a sale of equipment for which ACP, by Mr Dalby, quoted to Lagan Holdings Limited in July 1995 and in respect of which the invoice was later directed to be issued to White Mountain.

66.. Mr Dalby says the claimants are wrong in the inferences they invite the court to draw. He says that the background to this was that he received a telephone call from Michael Lagan whose company had equipment in Hong Kong that had been used on the new international airport. Mr Lagan told him he was on the point of securing a deal for the sale of second hand equipment to Pioneer Asphalt and asked him to speak to the principal of that company “to ascertain the lie of the land, in particular whether he [Mr Lagan] should drop his price”. Mr Dalby says he made the call, which took ten minutes. Mr Lagan then effected the sale and paid Mr Dalby a commission of £23,000. Mr Dalby says this was not business in which ACP engaged and nor did it deprive ACP of the opportunity of selling new equipment.

67.. In my view, even if the claimants' evidence might have been insufficient to establish a case in respect of this payment, Mr Dalby's admissions about the matter make their case good. The evidence shows that by July 1995 Mr Lagan's company was a customer of ACP and had placed an order with ACP for the supply of asphalt plants for its work in Hong Kong. The orders were substantial ones, for prices totalling £1,660,000. It is obvious that Mr Lagan's approach to Mr Dalby must have been made because of Mr Dalby's connection with ACP and his knowledge of the type of equipment in question; and the opportunity for Mr Dalby to make a £23,000 commission out of it for his personal benefit was equally obviously something he could not properly take up without the prior, informed consent of ACP. I hold that Mr Dalby and Burnstead are also accountable to ACP for this £23,000.

(xi) Another ACP payment

68.. On 20 May 1998 Burnstead received a payment of £24,575 from ACP's Royal Bank of Scotland account. Mr Dalby wrote to Mrs Whiteside about it on the same day. He said that “This sum will be shown as received from [ACP], but in fact it is a payment of the loan made by Burnstead to Evesham Developments Limited on the 18 November 1996.” Another document shows that on 18 November 1996 Mr Dalby had given instructions to Mrs Whiteside to make a payment by Burnstead to R. Driscoll & Sons (“Driscolls”), by way of a loan to Evesham Developments Limited (“Evesham”).

69.. On the face of it, Mr Dalby's letter of 20 May 1998 makes little sense. It might make more sense if there had, for example, been some sort of novation between Burnstead, Evesham and ACP under which ACP assumed a direct liability for the repayment of Evesham's loan, although any such transaction would probably be an improper one for ACP to enter into unless it also received some corresponding benefit.

70.. Mr Dalby offers an explanation. He says the transaction illustrates how ACP benefited from Burnstead's trade. He says Driscolls was a small two-man business that supplied lagging and cladding to ACP. It was one of ACP's preferred suppliers, but ran into financial difficulties. These were principally due to ACP's poor payment record, which was in turn due to its cashflow problems. In order to solve Driscolls' immediate difficulties Mr Dalby says “it was agreed that a capital injection of £24,575 would be made”. He admits he had an interest in Driscolls. He says that Burnstead had funds for this purpose, whereas ACP did not, and that the plan was that Burnstead's investment was to be made by a loan to Evesham — which he says was a dormant

company — although the money was apparently paid directly to Driscolls. In substance, Mr Dalby's case is that the transaction was one under which Burnstead lent to Evesham and Evesham then lent on to Driscolls.

71.. Mr Dalby says that at the time of the Gencor acquisition he undertook to give up his interest in Driscolls. He says that Burnstead had to be repaid and “this was subsequently achieved by ACP repaying the investment to Burnstead, with a like amount being deducted from the substantial sums due from ACP to Driscolls. Hence, this payment was not at ACP's expense”.

72.. In my view, that argument does not work. The short reason is that Mr Dalby's case is that Burnstead's loan was to Evesham, not to Driscolls, and he advances no justification for the assumption by ACP of the burden of repaying Evesham's loan. The procuring of the payment by ACP to Burnstead appears to have been a simple example of self-dealing between Mr Dalby and ACP, resulting in Mr Dalby enjoying a profit at ACP's expense to which he was not entitled. In my view there is no answer to a claim by ACP for a repayment of the £24,575 Burnstead can always look to Evesham for the repayment of the money that Mr Dalby says it lent it. I hold that Mr Dalby and Burnstead are both liable to repay the £24,575.

(xii) The Midland Bank and sundry payments

73.. On 12 December 1997 Burnstead received a payment of £1,800, identified in its bank statement as “Received from Midland 407037”. On 26 March 1999 it received a credit of £767.20 described in the bank statement as “Received from Sundry Persons U 609359 Repurchase.” Mr Hogg suggests that “Persons” should read “Pensions”.

74.. The claimants do not know what these payments relate to and Mr Pymont does not suggest they are entitled to an order for the payment of this money. But he does submit that they are entitled to an account from Mr Dalby in respect of them, since he says Mr Dalby must be under an obligation to tell the claimants what they represent.

75.. I am unable to agree. Since there is no evidence suggesting that these payments have anything to do with the claimants, it is possible that they have nothing to do with them. Merely because so many of Burnstead's bank transactions are related to the claimants' affairs does not justify the inference that they all are. I am not satisfied that there is any evidence which would justify the court making an order against Mr Dalby requiring him to explain these payments.

(xiii) Credits

76.. It follows from my conclusions on items (i) to (xi) above (and taking account of the total credits of £92,656.52 that the claimants accept should be given in relation to the Kirinyaga transactions) that in principle Mr Dalby and Burnstead are accountable to ACP in the total sum of £747,376.39, but less any further amounts which should be allowable in calculating the profit which they derived from these transactions. It is only their profit for which they are accountable.

77.. The claimants accept that they should also give credit in the calculation of the profit for further sums totalling £361,567.64. This comprises payments by Burnstead to ACP of (i) £300,000 on 31 July 1996, (ii) £40,000 on 18 February 1997, (iii) £10,000 on 5 December 1997 and (iv) £11,567.64 also on 5 December 1997. These were all shown as loans to ACP in Burnstead's books. The claimants' recognition that credit should be given for these payments is on the basis that the so-called loans are not repayable, so that the payments can be regarded as made in part satisfaction of the obligation to account.

78.. I do not understand that I am being asked to, or can, rule on this application on whether or not the alleged loans are repayable. However, the claimants have made plain the basis on which they offer the allowance of a credit for these payments. I propose to allow the offered credits, which further reduces the maximum sum for which Mr Dalby and Burnstead might be accountable to £385,808.75.

79.. Mr Hogg indicates that the claimants are not prepared to allow any credit either for the general banking charges that Burnstead incurred, nor for the fees incurred in the operation of Augres. I agree with that. Those charges and fees were no doubt referable to the general expenses of the operation of Burnstead, but I do not accept that they should be treated as forming part of the charges which ought to be brought into account in calculating the profit made on each of the transactions complained of.

80.. Mr Hogg identifies eight payments out of the Burnstead account that he cannot explain and in respect of which the claimants therefore offer no credit. They total £7,914.84. Mr Dalby suggests that they are referable to expenses of letters of credit, but does not condescend to further detail. I am not at present satisfied that there is any justification for the allowance of a credit in respect

of these payments, although I am prepared to accept that the point might be arguable in respect of one or more of them and I will leave open to Mr Dalby and Burnstead the opportunity to do so in the account which, as I explain below, I propose to order.

81.. Mr Hogg also identifies various further payments out of the Burnstead account, in respect of which he ventures explanations and which he says do not qualify for being allowed as credits in the accounting exercise. Mr Dalby says that three of them (for £10,000, £4,000 and £5,250, totalling £19,250) represent “loans made to Roadmec which should have been subsequently accounted for in offsets against equipment supplied by Roadmec”. That is a typical reflection of the confused way in which Mr Dalby and Mr Meehan ran their affairs, and on the face of it the assertion is an unimpressive one. Why should the claimants give credit for sums said to represent loans by Burnstead to Roadmec? On the other hand, I have indicated that certain of the equipment ostensibly supplied by Burnstead is said to have sourced from Roadmec, and in principle it would seem likely that that ought to have resulted in a cost to Burnstead which would properly fall to be brought into the account taking exercise. Three further payments identified by Mr Hogg — £8,000 on 15 May 1995, £2,000 on 16 May 1995 and £11,969.78 on 9 January 1996, totalling £21,969.78 — are ones in respect of which, in the light of the explanations given by Mr Dalby in his evidence, the claimants accept that it is arguable that a credit should be allowed. This further reduces to £363,838.97 the maximum amount for which I might on this application hold Mr Dalby and Burnstead to be accountable. Mr Dalby also says that a payment of £6,500 on 29 November 1995 relates to a purchase of second hand plant sourced from Roadmec, and whilst I cannot decide that he is right about that, nor can I decide that he is wrong. He makes a similar point about a payment of £5,400 on 18 February 1997. The claimants disagree with it, but again I cannot finally decide it one way or another. Another payment in issue is one for £10,000 made on 7 April 1997, which Mr Dalby says was made on behalf of ACP. If so, which I also cannot decide, then it would be consistent with the claimants' approach to the accounting exercise that this payment too should be treated as made in part satisfaction of Mr Dalby's and Burnstead's liabilities to account. Another payment identified by Mr Hogg is a payment of £150,000 on 26 April 1995, apparently by way of a loan to Wingspan. I do not accept that any credit is allowable in respect of this.

82.. Whilst I have concluded, for reasons given, that Mr Dalby and Burnstead are accountable to ACP in respect of the profit on each of the transactions I have referred to under sub-headings (i) to (xi) above, I am not in a position to take that account. I propose therefore to order an account in respect of these transactions against Mr Dalby and Burnstead and also to order the payment of what is found due on the taking of the account. I consider that I can and should also make orders against Mr Dalby and Burnstead for an interim payment under [Part 25.7\(1\)\(b\) of the CPR](#) (see also the notes against para 25.7.2). On the figures I have discussed (and giving Mr Dalby and Burnstead the benefit of the matters of doubt I have referred to in the previous paragraph), I consider that the claimants have a solid case to recover at least £341,938.97 on the taking of the account, and in addition they will have claims for interest, I must, however, take care to ensure that I do not award by way of an interim payment a sum which might exceed the sum ultimately found due on the taking of the account and I consider that I ought, therefore, to give Mr Dalby and Burnstead the benefit of any doubts I have on that score. Taking due account of that, and taking account also of the interest to which the claimants will in principle be entitled, I will order an interim payment of £300,000.

(xiv) The claim against Mr Meehan

83.. I have so far dealt only with the liability of Mr Dalby and Burnstead in respect of these transactions. I do not understand the claimants to claim against Mr Meehan in respect of the Balfour Beatty and White Mountain payments, but I understand that they do assert that he is liable to account to ACP for the profits diverted to Mr Dalby and Burnstead on the other transactions. Mr Meehan has no interest in Burnstead and it is not suggested that he personally derived any benefit from the profits so diverted. The case is that he dealt with the accounting matters relating to them and so became mixed up in facilitating them. It is said that by doing so he dishonestly assisted Mr Dalby to commit his breach of fiduciary duty and so became personally liable to account to ACP for the profit for which I have held Mr Dalby and Burnstead to be accountable.

84.. Mr Meehan's liability is therefore said to be in the nature of an accessory liability and is based on what used to be known as “knowing assistance” but is now known as “dishonest assistance”. Its origins lie in Lord Selborne LC's statement of principle in *Barnes v Addy* (1874) *LR 9 Ch App 244*, at 251, where he explained the circumstances in which a stranger to a trust might become liable as a constructive trustee. The principle was the subject of a modern restatement by Lord Nicholls of Birkenhead in *Royal Brunei Airlines Sdn Bhd v Tan* [1995] *2 AC 378*. Lord Nicholls there said, at p 392F:

“Drawing the threads together, their Lordships' overall conclusion is that dishonesty is a necessary ingredient of accessory liability. It is also a sufficient ingredient. A liability in equity to make good resulting loss attaches to a person who dishonestly procures or assists in a breach of trust or fiduciary obligation. It is not necessary that, in addition, the trustee or fiduciary was acting dishonestly, although this will usually be so where the third party who is assisting him is acting

dishonestly. ‘Knowingly’ is better avoided as a defining ingredient of the principle, and in the context of this principle the *Baden [1993] 1 WLR 509* scale of knowledge is best forgotten.”

85.. The case against Mr Meehan is founded on this principle. There are, however, two aspects of it which have caused me concern, and which have led me to the conclusion that I ought not to enter judgment against Mr Meehan under this head on this application.

86.. First, it is still something of an open question whether the principle identified by Lord Nicholls has any application to what is alleged to be a dishonest assistance in a breach of fiduciary duty, not being a breach of duty involving the misapplication of a trust fund or other property subject to a fiduciary obligation. In *Satnam Investments Ltd v Dunlop Heywood & Co Ltd and Others [1999] 1 BCLC 385*, after referring to the *Royal Brunei Airlines* case, Nourse LJ said at p 404 that “Before a case can fall into either category [knowing receipt and dishonest assistance] there must be trust property or traceable proceeds of trust property”. That suggests that the answer to the question is clear, but in *Goose v Wilson Sandford & Co (a firm), Court of Appeal, 14 March 2000, unreported*, Morritt LJ, in delivering the judgment of the court, said that the court did not regard that statement of Nourse LJ as binding on the point and that:

“The issue is whether the dishonest breach of trust in which the defendant assisted must have involved the misapplication of trust property or its proceeds of sale. The formulation of the principle by Lord Nicholls of Birkenhead . . . does not embrace such a requirement. Whether or not such a requirement is an essential feature of this head of liability is not a point we have to decide and, like the Court of Appeal in that case, we should not like to shut out the possibility of such a claim in its absence.”

87.. The Court of Appeal therefore left the point open. Its relevance is that Mr Pymont advanced the claimants' case primarily on the basis that the breach of fiduciary duty to which Mr Meehan is said to have lent dishonest assistance is a breach of duty to account for profit. He did not in terms submit that the relevant profit should be regarded as trust property, although I understood him to accept that it might be so regarded. A proposition to that effect would, I think, find support in the authorities, including the last line of the passage I have earlier quoted from Deane J's judgment in *Chan v Zacharia*. I have, however, concluded that I cannot and should not approach this case on the basis that it has been demonstrated that any of the money diverted to Burnstead was in the nature of trust property. Nor am I deciding that it was not. I am simply saying that the point is not a clear one, on which I did not have full argument, and I consider that in those circumstances I should not express a view on it. In particular, bearing in mind that it is only the profit on these transactions for which there is said to be a liability to account — that is, at its simplest, the difference between receipts and expenditure — I find it difficult to identify a fund that might qualify as a trust fund or be subject to a fiduciary obligation. If the true view is that there was no such fund, then the question arises whether the “dishonest assistance” principle has any application, which is a difficult one.

88.. Secondly, the case against Mr Meehan is that his participation in the diversion of the profit to Burnstead was dishonest: and this is because Lord Nicholls's statement of the principle shows that nothing less will do. Lord Nicholls also pointed out that the question of whether, in this context, a person has acted dishonestly or not has to be answered objectively (see *[1995] 2 AC 378*, at 389 to 381). In theory, therefore, I ought to be able to form a decision on whether Mr Meehan had been dishonest merely by looking at the papers and ascertaining precisely what he did do. I will simply say that I would not find that an easy exercise on the facts of this case, and would have considerable reservations about making a final finding of dishonesty against a defendant on a summary application such as this. In my judgment fairness to Mr Meehan points to the conclusion that the question of any dishonesty or otherwise on his part is one which ought to be determined at a trial. I am not, therefore, prepared to enter judgment against Mr Meehan under this limb of the claimants' case.

#### *B. Pacific Holdings Limited (“Pacific”)*

89.. Pacific is owned beneficially by Mr Dalby and Mr Meehan, with 95 per cent and 5 per cent shares respectively. It is incorporated in Malta. Mr Dalby and Mr Meehan used it to acquire a factory property in Australia at 36 Colebard Street East, Acacia Ridge, Brisbane (“the property”). ACP claims this constituted the improper diversion to Mr Dalby and Mr Meehan, via Pacific, of an opportunity that was open to ACP to buy the property. Pacific's knowledge of all relevant matters was the same as that of Mr Dalby and Mr Meehan, and ACP claims it is to be regarded as holding the property on trust absolutely for

ACP. ACP claims, both additionally and alternatively, that its own money was anyway used to buy the property so that Pacific holds the property for it beneficially under a resulting trust. Pacific subsequently let the property to ACP Australia and others and ACP not only makes its claim to the property, it also claims an account of the rents received and does so against each of Pacific, Mr Dalby and Mr Meehan.

90.. The claim is complicated by several factors, one of which is that Roadmec International provided money which went towards the purchase price, which might on one view be said to have given it a beneficial interest. However, Roadmec International has played no part in defending the action and although (with the leave of Master Bowles) it has been made a respondent to this application and has been served with the evidence, it has not appeared before me to raise any defensive answer to ACP's claim. Mr Pymont submits this is because the inference is that Roadmec International may have been bought out in some way and no longer has any interest; or else that it never had an interest of its own and merely did what it did on behalf of ACP. Alternatively, it is possible that Roadmec International's only interest was as a lender of the money it put up, although if so the identity of the borrower is unclear.

91.. The story starts on 2 May 1996 when Mr Dalby, on behalf of ACP Australia, spoke to National Australia Bank ("NAB") with an enquiry as to loan finance for the purchase of a commercial property. NAB wrote to ACP Australia on 3 May 1996 with its basic requirements for the provision of such finance. It enclosed, for the attention of Mr Firth at ACP Australia, an indication of the terms on which it might lend Aus\$440,000.

92.. The property is a large industrial property. King & Co ("King"), a firm of land agents, was marketing it at an asking price of \$1,260,000. The vendor was Roche Brothers (Qld) Pty Limited ("Roche"). On 3 June 1996 Mr Firth wrote to King on ACP Australia notepaper with an offer of \$1,000,000. A sale had been agreed in principle by 13 June 1996, when King produced a memorandum recording Roche as the seller and ACP Australia as the purchaser and sent Mr Tibbles of ACP Australia (he had replaced Mr Firth as a director) details as to the payment of the \$100,000 deposit, which was to be paid into a King trust account.

93.. Mr Tibbles then sent Mr Dalby and Mr Meehan a copy of the draft contract and asked for instructions. He provided details of King's account number, to which the deposit was payable. The draft contract identified the vendor as Roche, left the purchaser's name blank and showed the price as \$1,100,000, with a deposit payable of \$100,000. The unnamed purchaser's solicitors were shown as Wheldon & Associates ("Wheldon").

94.. Mr Meehan replied to Mr Tibbles at ACP Australia by an ACP fax dated 17 June 1996. He headed it "ACP Property". He asked questions about fees, stamp duty and so on in order "to enable [Mr Dalby] to finalise matters" and instructed Mr Tibbles to "instruct the solicitor to set-up new Australian Company which will own property". He did not say who was to own the new company. Mr Tibbles replied on 18 June 1996 with answers to Mr Meehan's questions and a list of available names for a new Australian company. He said that at least one Australian director would be required. Mr Meehan replied by an ACP fax on the same day expressing preference for the company to be called Ampaville Pty Limited ("Ampaville"), asked if the solicitors could recommend a "nominee" Australian director and said the deposit would be paid that week. Mr Tibbles replied on 20 June, on an ACP Australia fax, saying that a nominee director was not possible in Australia and that Roche was pressing for the sale to proceed.

95.. At about this time a further draft contract was produced which showed the purchaser as "[Ampaville] or Nominee" (although Ampaville did not exist) but by 27 June 1996 Wheldon appears to have understood that the proposed purchaser was to be Pacific (which did not exist either, although its birth was imminent). Wheldon wrote to "the directors" of ACP on that day with a letter whose heading identified Pacific's interest as a proposing purchaser and saying that they looked forward to being "of further assistance to you in this matter", the natural inference from the letter being that the "you" referred to ACP or its directors.

96.. The incorporation by Mr Dalby and Mr Meehan of a Maltese company had been the subject of consideration since at least April 1996. On 16 April 1996 Mr Dalby had a meeting in Malta at the offices of International Corporate Services Limited ("ICS"), a company which carries on nominee and trustee services. The purpose was to discuss the incorporation of a Maltese company. By 9 May 1996 Mr Curmi, ICS's managing director, had heard nothing further and so he sent Mr Dalby, at ACP Holdings, a fax asking as to the position. On 4 June 1996 Mr Dalby and Mr Meehan responded by sending Mr Curmi instructions for the incorporation of a Maltese company. It was to be an "International Holding Company", its principal object was to be the "holding of foreign international participations", and it was to have an authorised and issued capital of US\$10,000 divided into 10,000 shares of US\$1 each. ICS was to be the sole director and shareholder and Mr Dalby and Mr Meehan were to own the issued shares beneficially in the proportions 95 per cent and 5 per cent. ICS was to act on Mr Dalby's instructions. Pacific was incorporated on 9 July 1996.

97.. The contract for the sale and purchase of the property was signed on 24 July 1996. Pacific was named as the purchaser. The purchase was completed on 20 August 1996. Mr Dalby was in Australia at the time and no doubt was giving instructions. On 21 August 1996 Wheldon wrote to Pacific giving details of the “settlement figures”, which included a breakdown of the payments made towards the deposit and balance of the purchase price. The sources of the purchase money are clear, but there is a question as to whether those sources were providing their contributions as loans either to Pacific or someone else or as contributors to the purchase price. The sources of the money were as follows.

98.. The deposit was Aus \$100,000. This was paid in part by Roadmec International. It did so by raising an invoice dated 20 June 1996 on Penza Construction Limited (“Penza Construction”) for a deposit of £51,000 said to be payable on the supply of an RM750 Mobile Asphalt Plant and weighbridge at a price of £340,000. By 24 June 1996 Penza Construction, at Roadmec International's request, had paid King £33,943.97 in part satisfaction of the £51,000 and towards payment of the deposit on the property. The balance of the deposit, amounting to Aus \$35,305.75, was paid to King on 4 July 1996 by ACP Australia.

99.. Of the balance of the purchase price, (i) £150,000, equating to Aus \$294,406.28, came from Mr Dalby's account at the Bank of Switzerland. Mr Dalby has to date failed, despite requests from the claimants and an order of the court, to provide statements in respect of this account; (ii) Aus \$626,000 was provided by ACP Australia; and (iii) £43,000, equating to Aus \$83,711, came from Roadmec International: it had recently been put in sufficient funds to enable it to pay this by a payment for £35,696 from Gatt Asphaltting Limited, a company to which I shall return.

100.. This left a balance of Aus\$111.36 to be found, which was paid by Wheldon and added to their bill of costs. That bill totalled Aus \$47,837.36 and it was paid by Roadmec Limited (not Roadmec International) by a sterling payment of £24,383.43. Mr Meehan was the secretary of Roadmec. It has never claimed that this payment was other than a loan to ACP and disclaims any beneficial interest in the property. This is made clear by a witness statement from Mr Clive James, the sole director of Roadmec, in which he said he had never heard of Pacific until the commencement of this action and that Roadmec made its payment of the £24,383.43 to Wheldon because Mr Dalby asked him if Roadmec could lend ACP that money in order to enable it to buy a property in Australia.

101.. Audited accounts for Pacific have been produced for its trading period from 9 July to 31 December 1996. Mr Curmi signed them on 28 November 1997, but he would only have done so with Mr Dalby's prior authority. Pacific's only fixed asset is the property, which is shown in the accounts at a cost figure of US \$800,457. The notes show the whole of this to have been financed by unidentified third party loans. The balance sheet describes these as “falling due after more than one year” as do the notes, although the notes add that the loans are unsecured, interest free and “have no fixed date for repayment”, which would suggest that they were payable on demand. The inference from the accounts is that Pacific is the beneficial owner of the property, which is the case made by Mr Dalby, Mr Meehan and Pacific.

102.. These accounts were prepared following the provision by Mr Meehan to ICS of information about the purchase of the property. By a letter of 8 October 1997 he informed ICS that the total cost had been Aus \$1,003,932.74. His figure was Aus \$100,000 light as he appears to have overlooked the deposit. He told ICS that the Aus \$1,003,932.74 had all been provided by loans made by (i) Burnstead as to Aus \$600,000, (ii) Roadmec International as to Aus \$83,711 and (iii) ACP (not ACP Australia) as to Aus \$320,221.74. It is idle to try and reconcile those figures with what other evidence shows to have been the source of the finance, and I will not attempt it. Even Mr Meehan had a second go on 20 November 1997, when he told ICS that Burnstead's claimed contribution had been by way of a loan to ACP, not to Pacific, and that the only lenders to Pacific were therefore (i) Roadmec International as to Aus \$83,711 and (ii) ACP as to Aus \$920,221.74.

103.. Whether or not Mr Meehan's second attempt was to any extent a correct analysis — and, given his error as to the total cost, it was certainly not a complete one — it constituted a recognition by him that Burnstead made no contribution to the purchase such as to entitle it to a beneficial interest in the property. It also appeared tacitly to reflect his recognition that the use by Mr Dalby of his Bank of Switzerland account money had not given Mr Dalby any such interest either, a stance which Mr Dalby himself endorsed by his agreement to the Pacific accounts and his claim in this action that Pacific is the beneficial owner of the property. Mr Meehan was also denying that Roadmec International's contribution to the purchase money had given it a beneficial interest in the property; and as Mr Meehan was secretary of Roadmec International he can presumably claim to have had some understanding of the basis on which it provided its money. It is worth noting that Mr Meehan informed ICS that the loans were interest free with no specific payment date. Thus he was blatantly asserting that ACP had made a present to him and Mr Dalby of interest free finance so that they could buy a property via Pacific.

104.. I return to Roadmec International's position, as to which the picture is obscure. This also requires a return to Gatt Asphaltting Limited (“Gatt”), which was incorporated in Malta on 24 July 1996 and had its registered office in Gozo. Gatt had

an issued share capital of LM800 (Maltese Lire), divided into four classes of shares, each comprising 200 shares designated A, B, C and D shares respectively. Those four classes were respectively owned by Ranfra Limited, Gatt Development Limited, Asset Investments Limited and Ranfra Limited. Carmel and Joseph Penza appear to have been interested in the Ranfra shares, Raymond and William Gatt in the Gatt Development shares and Sebastian Dalli in the Asset Investment shares. However, the documents all show that Mr Dalby also had an interest in Gatt.

105.. Thus on 19 August 1996 Mr Clive James of Roadmec International wrote to Mr Charles Penza saying he had spoken to Mr Dalby “on the matter of the weighbridge”, that Mr Dalby was disappointed he had not been consulted on it and that he, Mr Dalby, “would remind you that he is also a partner in the company as well.” Mr Penza appears to have recognised this last point. He replied to Mr James by a Penza Construction fax dated 27 August 1996. He asked him to show it to Mr Dalby “because all the partners of [Gatt] and myself want to clear these matters”. The substance of the fax was that Penza Construction would be remitting £10,000 to Roadmec International on the following day, but would not be sending the rest of the money for the weigh bridge because it could not afford to and could anyway “wait to acquire the Weigh Bridge”. He complained that Roadmec International had promised to book the paver for shipment to Gozo but had not yet done so. He said the government was pressing Gatt to finish the road in Gozo. He continued:

“As for the rest of the money, tell [Mr Dalby] that we have already presented all the documentation to the Bank of Valletta. But you know what Banks are like. ... tell [Mr Dalby] also that he is not to worry about the money, because if we come to the worst, and the plant is operating, he will get paid from the hot asphalt we are laying in Gozo. I am not saying that this is going to happen. But the earlier we start production is best for everybody's sake, even for [Mr Dalby] himself as he is one of the shareholders of [Gatt].”

106.. I referred earlier to the Roadmec International invoice to Penza Construction dated 20 June 1996 for the £51,000 deposit payable on a supply contract. Roadmec International generated some further, somewhat confusing, invoices on 11 April 1997. They were directed to Gatt Ready Mix Limited in Gozo, although some manuscript amendments on them suggest that the author was uncertain of the correct name of the addressee and that they may have been intended for Gatt. They were for the supply of (i) a new RM750 asphalt plant for £320,000, (ii) a weigh bridge for £20,000, and (iii) a paver and two rollers for a total of £51,000. The last figure matches the amount of the 1996 deposit invoice to Penza Construction, of which a part payment went towards the deposit on the property. An accompanying statement, also dated 11 April 1997, showed the total invoiced amount to be £391,000, of which £97,750 had been paid by Brookwood Contractors and that a deposit of £35,696 had been received, leaving a net balance due of £257,554. That deposit had been paid to Roadmec International on 19 August 1996 and had enabled it to make the payment of £43,000 (equating to Aus \$83,711) to King which went towards the balance of the purchase price for the property. On 30 June 1997 Roadmec International generated similar invoices for the same amounts — this time they were indisputably addressed to Gatt.

107.. On 8 July 1997 there was a meeting at Penza Construction's offices attended by the Penzas, Mr Dalli and Mr Dalby. There is a manuscript note of the meeting, signed by Mr Dalby and the others present. The purpose appears to have been to discuss the amount due to Roadmec International from Gatt under the Gozo contract, its payment and certain matters connected with further work on the contract. The note records that any modifications made by Gatt so as to have the asphalt plant operational were to be agreed with Mr Dalby and any expenses incurred would be deducted from the balance due. On 2 November 1997 Mr Meehan wrote on Roadmec International notepaper to Mr Charles Penza at Penza Construction about the Gatt contract at Gozo and enclosed “our” — presumably Roadmec International's — reconciliation of the contract. He wrote, inter alia, that the calculations “do not include a calculation of [Mr Dalby's] quarter share in [Gatt] which I understand is subject of a separate discussion”. On 14 November 1997 Penza Construction generated a manuscript document which purports to show the “Total amount due to Roadmec/Glenn [Roadmec International/Mr Dalby]”.

108.. On 3 March 1998 Mr Meehan sent an internal note to his assistants at ACP in relation to the Gatt contract. He said this:

“The selling price for the plant to [Gatt] is the sum of £320,000. I would be grateful if you could raise an invoice to this value.

At the time of shipping ACP were responsible for freight charges and these were paid by [Gatt] to the sum of £10,348.23. Sue, would you please raise an internal debit note charging the contract with this value and crediting the sales ledger account.

Roadmec International Limited has collected on our behalf the sum of £223,058.58 as at the 9 December 1997. This sum should be credited against the sales ledger account for [Gatt] and charged against the inter-company account for Roadmec International Limited. Please liaise with Andrea Turner for the relevant entries.

This then leaves the following entries required to clear up this debtor:

1. the sum of £33,543.97, this amount will be dealt with by Andrea through inter-company accounts once we can track where this entry has gone to.
2. the sum of £39.22 which should be written off to small differences.
3. the sum of £89,000 which will be cleared off in due course.”

109.. Someone at some stage crossed out the figure of £89,000. The inference from this note is that ACP was directly interested in the Roadmec/Gatt contract, presumably because the plant which Mr Meehan refers to as having a selling price of £320,000 was an ACP RM750, which had been supplied by Roadmec International at the same figure of £320,000. As for the £33,543.97 payment to which Mr Meehan referred, this was the payment which Penza Construction had made to King at Roadmec International's request and which was applied towards the Aus \$100,000 deposit on the property. One inference from Mr Meehan's note is that ACP had been directly interested in the Roadmec International/Gatt contract and that, in so far as Roadmec International had made payments in connection with that purchase, it had been doing so on ACP's behalf and that Mr Meehan's note reflects his efforts to tidy up the inter-company account position as between ACP and Roadmec International.

110.. Reverting now to the property, Pacific granted various leases of parts of it. One was to Green West Pty Limited for a three month term ending on 26 April 1997 at a rent of Aus \$1,069.12 per month, and then for a further term at what appears to have been a rent of Aus \$1,261.13 per month. Another was to ACP Australia from 1 September 1996 at a rent of Aus \$12,500 per month. Another was to GCM (Qld) Pty Limited from 1 September 1996 at a rent of Aus \$2,000 per month. Another was a five year lease to Crowmont Investigative Consultants Pty Limited from 9 June 1997 at a rent of Aus \$1,750 per month.

111.. The collection of rent was administered from ACP in Leicester under the instructions of Mr Dalby and Mr Meehan. Rent invoices would be sent to the tenants, who would send their cheques to ACP. They were then forwarded to Mr Curmi of ICS where they were banked at Mid-Med Bank in Malta. The accounts records for Pacific show that, during the period 28 May 1997 to 13 January 1999, out of total rent invoiced of Aus \$515,972.60, Pacific received Aus \$473,733.73. Analysis of the bank statements for the Mid-Med Bank shows that during the period 13 June 1997 to 6 April 1999 identifiable rent receipts of Aus \$380,545.70 were paid into Pacific's account. Other payments totalling Aus \$70,005.50 were also credited, including interest of Aus \$5,059.12. Withdrawals from the account over the same period totalled Aus \$449,169.01.

112.. Mr Dalby devoted some 14 pages of his witness statement to explaining the purchase of the property. Its essence was as follows. He started marketing ACP products in Australia in 1993 and in due course decided that the way to make ACP Australia's business viable was to manufacture equipment there. To do this it needed to lease a factory and employ a local workforce. Steps were taken to find premises, and the property was found. However, Mr Dalby says the owners did not want to lease it, they wanted to sell the freehold. Mr Dalby said that ACP was not seeking to buy because it could not afford to and it was clear to him there was no reasonable prospect of NAB financing a purchase by ACP Australia. However, he was anxious that the purchase opportunity should not be lost, and his idea was that he, or a vehicle of his, should buy so that it could then let it on favourable terms to ACP Australia. Pacific was formed for the purpose of making the purchase, which Mr Dalby says was to his detriment and to ACP's benefit. He says that ACP could anyway not have bought the property without the consent of both 3i and RBS under the terms of ACP's agreements with them, and they would have refused their permission to a purchase by ACP; that none of the people who contributed to the purchase intended to profit from it, nor have they done so; that the property is now under a contract for a sale at Aus \$1.2 million and that the net proceeds of sale will be likely to be no more than Aus \$1,155,149.87; and that the rents received by Pacific do not represent profit either for Pacific or those who contributed towards the purchase price. He says the rents have in part been applied in (i) repayments due to Mr Chong's companies (I come to those below, under the heading Wingspan, but comment here that any such payments appear to have been in discharge of Mr Dalby's personal liabilities, not in discharge of any liabilities of the ACP group), (ii) the purchase of two second-hand crushers, which he says Gencor has since appropriated and sold for about Aus \$450,000, and (iii) in meeting the general expenses of Pacific, including the fees payable to ICS and tax liabilities. He believes that actual rent receipts by Pacific have not exceeded the figure of Aus \$380,554.70 given by Mr Hogg. He says the purchase has been of great benefit to ACP Australia, which has thrived since the purchase and paid a favourable rent.

113.. Mr Dalby explains the sources of the money paid towards the purchase of the property. He says the money from his Bank of Switzerland account represented commissions earned by him in the same way as he earned the Balfour Beatty commission, although in this case they were derived from Massenza SA, an Italian manufacturer of bitumen, emulsion and polymer equipment, which he introduced to new overseas markets. He said these transactions did not impinge on ACP's business and that, save for bitumen tanks, Massenza's equipment was not of a type which ACP usually supplied. He said he was introduced to Massenza by a business acquaintance, Tony Hill.

114.. He said Burnstead had cash it could contribute to the purchase, and this was the original intention. But he said that by July 1996 ACP was suffering from critical cash flow difficulties and so on 31 July 1996 Burnstead lent it £300,000, which had the effect of reducing the cash in Burnstead's account to about £18,500. The payment of the £300,000 enabled ACP to make a number of payments on 31 July and 1 August 1996. Mr Dalby says the expectation was that ACP could repay the £300,000 shortly afterwards, leaving Burnstead in a position to contribute to the purchase of the property. In fact, ACP did not repay it. What did happen is that ACP Australia paid Aus \$626,000 towards the purchase, which Mr Dalby claims represented (i) a repayment by ACP Australia to Burnstead of the £300,000 which had been lent to ACP (but which does not appear to have been transferred by ACP to ACP Australia, but to have been disbursed elsewhere) and, therefore, (ii) a contribution by Burnstead of £300,000 towards the purchase of the property.

115.. Mr Dalby deals with the Roadmec International payments. He believes, consistently with the documents, that Roadmec International's contribution towards the deposit on the property derived from the Gatt contract, and suggests they derived in particular from the supply of the paver and roller at a cost of £51,000. He denies Mr Hogg's suggestion that the payment of this sum was made under an agreement under which he, Mr Dalby, had any personal benefit, although he does not explain the references in the documents which suggest that he was personally interested in Gatt. He says that Roadmec International's contribution of its further Aus \$83,711 was accounted for as a loan to Pacific. He says that Roadmec's payment of the Aus \$112.36 was also treated as a loan to Pacific (although Roadmec says it believed it was a loan to ACP). He says the balance of the purchase price — the Aus \$35,305 paid by ACP Australia — was an advance to Pacific of part of the first quarter's rent which would be due from ACP Australia under the lease of the property that Pacific was proposing to grant it. It is accepted that credit in the rent demands was given to ACP Australia for that payment.

116.. Against that complicated factual background, I come to the claimants' assertion that there is no answer to their claim that the property belongs beneficially to them and that they are entitled to an account for the rents received by Pacific against Pacific, Mr Dalby and Mr Meehan. Having reviewed the evidence fairly fully, I have decided that I ought not to enter judgment for the claimants on any part of this claim.

117.. Having so decided, I do not propose to discuss at length the issues arising under this claim. I am disposed to accept (but do not decide) that, even on the basis of Mr Dalby's evidence, the opportunity which he and Mr Meehan took for the purchase of the property arose in consequence of the search by ACP Australia of a factory to lease, and that it follows from the Regal principles that, absent an informed prior consent to their activities by the claimants (and it is not suggested there was any), the claimants have a strong case against Mr Dalby and Mr Meehan and/or against Pacific for an account of the profit achieved as a result of the property purchase.

118.. Moreover, Mr Francis was also disposed to accept that, if — contrary to his argument — the purchase did infringe the “no profit” principle, then Morritt J's decision in *Carlton v Halestrap & Ors* (1988) 4 BCC 538 supported the further conclusion that Pacific became a constructive trustee of the property for the claimants and would be accountable to them for the rents it had received from the lettings. However, that authority also shows that if the fiduciary has put up his own money towards the purchase, then he is entitled to be repaid what he put up. In this case Mr Dalby provided £150,000 towards the purchase and, at least on the face of it, he would therefore be entitled to be repaid that on the accounting exercise which would follow if the property is held on trust for the claimants.

119.. I say “on the face of it” because Mr Pymont challenges the suggestion. He referred to an ACP letter written by Mr Dalby to Schembri on 28 June 1996 which appears to show that Massenza was a contact known to Mr Dalby in the context of his role as an ACP director and he says it follows that if, as Mr Dalby claims, his Bank of Switzerland account represented Massenza commissions, then they must be commissions for which Mr Dalby is accountable to ACP for like reasons as he is, as I have held, accountable for the Balfour Beatty commission. Therefore, Mr Pymont submitted, that part of the contribution to the purchase price of the property was really a contribution of ACP's money, not Mr Dalby's, so that there can be no question of there being any obligation on the claimants to have to account to Mr Dalby for the £150,000.

120.. Mr Pymont may be right about that, although I think he would also have to show that the commissions in the Bank of Switzerland account were held on constructive trust for the claimants. But the evidence about the Massenza connection is anyway so exiguous that I am not prepared on this application to rule finally in the claimants' favour on the point. I simply do not know enough about the matter and consider that it would be unfair to deprive Mr Dalby of the opportunity of defending his position in relation to this at trial. Mr Pymont relied also on Mr Dalby's failure to date to provide bank statements of his Swiss account, but I do not regard that as requiring me to take a different view on this point. Those statements, if and when they are produced, may or may not illuminate it. An order has been made for their production, and Mr Francis told me that Mr Dalby has sought their provision by the Bank of Switzerland. In the meantime, no order has been made preventing Mr Dalby from asserting what he does about the source of the money in that account, and I do not consider that I ought on this summary application to draw any inferences adverse to Mr Dalby merely because he has not yet produced the statements.

121.. Mr Pymont also submitted that anyway it is no part of Mr Dalby's case that he personally contributed to the purchase of the property. His case is that the true position is reflected in the Pacific accounts, which were prepared on the basis of Mr Meehan's instructions to ICS, and which purport to show that the purchase was financed by interest free loans to Pacific by Roadmec International and ACP. As to the loan allegedly made by ACP, Mr Pymont submitted that any such loan would be the fruit of self-dealing between Mr Dalby and Mr Meehan (via Pacific) and ACP, the company of which they were both directors, and so ACP is entitled to avoid the suggestion that it made any such loan; and given that the defendants' own documents assert that ACP money was applied towards the purchase, it must therefore follow that it was so applied as a purchaser, not as a lender. As to Roadmec International, I have earlier outlined what Mr Pymont said about its contribution to the purchase: and he is entitled to say that even Mr Dalby's evidence does not justify the conclusion that it provided its money as a purchaser.

122.. I regard Mr Meehan's explanation of the sources of finance for the purchase of the property with considerable suspicion and I doubt if they provide any reliable guide as to the beneficial ownership of the property. My present view is that a rather better guide as to that is to identify who provided the money that actually went towards the purchase and on what basis they did so.

123.. The answer to that is that it was apparently provided by (i) ACP Australia, (ii) Roadmec, (iii) Roadmec International, and (iv) Mr Dalby. Since I do not see how Mr Dalby and Mr Meehan could validly give themselves, via Pacific, an interest free loan of ACP Australia's money, my provisional view is that ACP Australia's contribution should be regarded as having been provided as a purchaser and as having given it a corresponding beneficial interest, which would not have been divested from it by Mr Meehan's subsequent book entries. Roadmec admits it provided its money by way of a loan to ACP, so that the further inference is that ACP's application of that money towards the purchase thereby gave ACP a like corresponding beneficial interest. The Roadmec International contribution is obscure. Since it is obscure I am reluctant to declare on this summary application that it has no interest, and my reluctance is not materially lessened by the absence of any appearance by Roadmec International before me. If the court is to be asked to make a declaration as to rights of property, being a declaration which will exclude someone who might at least arguably have an interest, then I consider that it must first be satisfied as to the evidential basis for the declaration it is being asked to make. Mr Pymont fairly concedes that there are some unanswered questions about Roadmec International's role in this matter. Since it appears to have made a decision not to defend the action, it is unlikely that it will take any part at a trial and so will not itself provide further illumination. But Mr Dalby, Mr Meehan and Pacific would take part in the trial, the first two would be witnesses and their evidence will enable the true position with regard to Roadmec International to be explored further, if not necessarily wholly resolved. As for Mr Dalby I have already accepted that I consider a question arises as to whether the money he provided belonged to him beneficially or is money for which he has always been accountable to ACP or was held on constructive trust for it. If it belonged to him beneficially, then even if the claimants establish that the property belongs to them, he would be entitled to be repaid what he provided. That sum would therefore probably have to be brought into account on any claim by the claimants to an account of the rents received by Pacific. So also, if there is anything in the point, would the Aus \$450,000 which Mr Dalby says the claimants have received from the sale of the two crushers that were apparently originally bought with the rents from the property. Mr Dalby's evidence about that is imprecise and vague. But I feel unable on this application to reject it as incredible and untrue.

124.. The result is that I have decided that all claims relating to the property and its rents must be determined at trial. I do not consider that there are any aspects of the claim that are so clear that I can usefully make orders or declarations about them at this stage.

### *C. Wingspan Enterprises Limited ("Wingspan")*

125.. Until about June 1995 Mr Dalby controlled Wingspan, another British Virgin Islands company. Like Burnstead, it was administered by Augres Secretaries, and Mrs Whiteside was the main contact for the passing of information and instructions.

126.. In about March 1994 Mr Dalby or Mr Meehan entered into arrangements with a Malaysian company for the investment by it of £1 million in ACP Holdings. This was Paving Plant & Processes (M) Sdn Bhd (“PPP”), a company in which a Mr Chong ultimately had an interest. The method was that (a) ACP Holdings would issue shares to PPP for an investment of £700,000 and (b) a PPP subsidiary called Sumbangan Pasifik (M) Sdn Bhd (“Sumbangan”) would take a 71 per cent interest in Wingspan (with the remaining 29 per cent being held by or for Mr Dalby) and ACP Holdings would then issue further shares to Wingspan in consideration of an investment of £300,000 which was to be lent by PPP to Sumbangan for that purpose.

127.. These arrangements are reflected in some draft minutes of a directors' meeting of ACP Holdings held on 23 March 1994 and attended by Mr Dalby, Mr Meehan, Mr Lockington and Mr Oldroyd. The minutes also recorded a proposal to issue shares in ACP Holdings to Royal Bank of Scotland Plc, the ACP group's bank, in return for a continued overdraft facility of £1.5 million.

128.. The arrangements were put into effect in 1995. The outcome was that, in exchange for a subscription of £300,000 deriving from a loan by Sumbangan to Wingspan, ACP Holdings issued 1873 “A” Ordinary shares to Wingspan, which it retained until the Gencor acquisition in November 1997. Wingspan's issued share capital was, or became, US \$480,000 divided into 480,000 shares of \$1 each, of which 340,800 (71 per cent) were issued or transferred to Sumbangan and 139,200 (29 per cent) were issued to nominees for Mr Dalby. Mr Dalby also transferred to Wingspan his personal holding of 969 Ordinary Shares in ACP Holdings for £1, and Wingspan also continued to hold these shares until the Gencor acquisition. In addition, and in consideration of its investment of £700,000, PPP was allotted 1404 “A” Ordinary Shares in ACP Holdings, which it also retained until the Gencor acquisition.

129.. In August 1997 Gencor displayed its interest in acquiring the ACP group. In September 1997 it offered to acquire it for £2 million cash and the issue of some Gencor Common Stock. At the same time Mr Dalby engaged in an acquisition of Sumbangan's 340,800 shares in Wingspan. This was negotiated by Stones Porter, Sumbangan's solicitors, and by Spearing Waite, Mr Dalby's solicitors. Spearing Waite were also acting for the proposing vendors in the Gencor acquisition.

130.. Agreement for the acquisition by Mr Dalby of the Sumbangan shares was reached. Its terms are recorded in a draft agreement in evidence and an agreement in this form was executed on 13 November 1997, the same date as that of the agreement for Gencor acquisition. The terms were that he was to buy Sumbangan's 340,800 shares in Wingspan for £324,649. It was to be completed contemporaneously with the completion of the Gencor acquisition and on completion Mr Dalby was to pay to Sumbangan both the purchase price of £324,649 and an amount of £300,000 acknowledged to be outstanding from Roadmec to PPP. If the money due from Mr Dalby was not paid in full within three months of completion, then the overdue amount was to carry interest at 10 per cent per annum compounded monthly. Mr Meehan guaranteed the due payment to Sumbangan of what was due from Mr Dalby, and in consideration of that (and an extra £1) on 13 November 1997 Mr Dalby assigned to Mr Meehan the benefit of a life policy on his life, the sum assured being £750,000.

131.. The due discharge by Mr Dalby of his obligations under this agreement therefore required the prompt payment by him to Sumbangan of £624,649. ACP's complaint is that he sought assistance in discharging this personal liability by the diversion to PPP of money owed to ACP under contracts with an Egyptian company called Transworld for Development & Trading Co (“TDTC”). The facts are as follows.

132.. In June 1996 Mr Dalby, on behalf of ACP, gave quotations to TDTC for the supply of an RM1000 Mobile Batch Production Asphalt Plant. In July 1996 he appointed TDTC ACP's exclusive dealer and sales agent in Egypt. TDTC placed orders with ACP for the supply of various pieces of equipment and on 30 December 1996 ACP rendered three invoices to TDTC for US\$322,000, US\$499,100 and US\$499,100 respectively. Payment in each case was to be made by letter of credit but the beneficiary was not ACP but Asphalt & Crushing Plant (Asia) Sdn Bhd (“ACP Asia”). ACP Asia had been set up by Mr Dalby in 1993 as a joint venture company between ACP International Limited (another subsidiary of ACP Holdings) and PPP. All parties agreed that ACP Asia was required to account to ACP for the full value of these proceeds.

133.. Payment of the first invoice, for US\$322,000 was duly made to ACP Asia. Problems arose with the payment of the other two. The letters of credit for them expired and payment was to be made by a bill of exchange drawn on TDTC. The collection instruction to ACP Asia's bank accompanying the bill included an instruction to obtain a guarantee for the payment from TDTC's bank. Such a guarantee was not given and payment was not made. There were then said to be difficulties with the plant that had been supplied and the result was that TDTC refused to pay the full amount. Mr Dalby made representations to TDTC and in due course, in about November 1997, TDTC made two payments of US\$200,000 and US\$400,000 and Mr Dalby gave instructions to solicitors to take action to recover the balance. This was of course the time of the Gencor acquisition. Instructions with regard to this were still being given at the time that Mr Dalby and Mr Meehan were dismissed from the group in January 1999.

134.. On 10 November 1997 Mr Meehan sent an ACP fax to Binaan Setegap Berhad (“Setegap”), for the attention of Mr Allan Chin Kong Yaw (“Mr Chin”). Setegap was the parent company of PPP, which was the parent of Sumbangan. Mr Meehan referred to “the Egyptian problem”, a reference to the TDTC contracts, and said that in view of that “we would like to defer the whole of the monies payable to Sumbangan for three months, but I must emphasise that this is not in any way conditional on the receipt of the Egyptian monies so you would receive your monies regardless three months after completion.”

135.. On 12 November 1997 Stones Porter, solicitors for PPP, sent a reply to that fax to Spearing Waite, solicitors for ACP Holdings. That was to the effect that PPP agreed to a deferred payment of the whole £624,649 on the basis of an enclosed draft agreement. An agreement in that form was then executed separately on behalf of ACP Holdings (by Mr Meehan) and, as a deed, by ACP (by Mr Moore and Mr Meehan). Both were in the same form. They were each addressed to PPP and provided as follows:

“We are writing to confirm our agreement regarding the application of USD 998,000 which may be received through [ACP Asia] in relation to the [TDTC] contract in Egypt whether such sums are received from Egypt or from Hongkong Bank Malaysia Berhad through documentary credit reference no. OBCPJA972703 COR. We hereby direct that all and any such payment received shall be paid by [ACP Asia] to yourselves in satisfaction of amounts due to you and Sumbangan pursuant to an agreement dated 13 November 1997 and in relation to the transfer of the issued share capital of [Wingspan] subject to your agreement to refund any balance over and above such amounts to us.”

136.. The effect of this was that ACP's right to receive the payment due to it from ACP Asia under the TDTC contracts was assigned to PPP and Sumbangan in or towards satisfaction of (i) Mr Dalby's liability to Sumbangan under the Wingspan share acquisition agreement and (ii) Mr Meehan's liability as a guarantor of Mr Dalby's obligations.

137.. One of the documents recovered from Mr Meehan's home under the search order I made on 22 April 1999 was a PPP schedule showing the state of account between Mr Dalby and PPP as at 31 January 1999. This shows a net balance of £145,528.43 still due from Mr Dalby, but also shows that PPP has received under the assignment two payments of US\$199,950 and US\$400,050 (total US\$600,000) — both payments being described on the schedule as “from Egypt”. It also shows further payments to have been made by Spearing Waite (£45,000), Swallow (US\$50,000 and US\$20,000) and Pacific (US\$30,000). The net amount of £145,528.43 still due was arrived at after converting the dollar payments into sterling at agreed exchange rates referred to on the schedule. The claim on this part of the application is for judgment against Mr Dalby and Mr Meehan for US\$600,000 by way of compensation for their misapplication of that part of ACP's debt towards the discharge of their personal liabilities under their agreement with Sumbangan of 13 November 1997. ACP also asks for an account of any further payments that have been made to PPP under the assignment since 31 January 1999.

138.. Mr Dalby covered many pages of his witness statement in explaining these transactions, and in setting them in what he would say was their proper context, but I do not propose to extend an already overlong judgment by setting out his explanations. I understand him to accept that the assignment to PPP involved the disposition of an asset of ACP. I do not understand him to contend that it was disposed of in or towards discharge of an obligation owed by ACP, and I am satisfied it was not. It was simply an example of Mr Dalby and Mr Meehan applying ACP's money towards the discharge of their own liabilities. Mr Dalby's defence appears to be that his various transactions with PPP and Sumbangan were all exclusively for ACP's benefit. At the beginning of the relationship with Mr Chong ACP benefited by the receipt of much needed investment, without which Mr Dalby says it would have failed. The events of November 1987 are said to have benefited ACP by facilitating the Gencor acquisition itself.

139.. I do not accept that there is any substance in Mr Dalby's argument, or that they provide any answer to this claim. The short point emerging from a long story is that the purpose of the assignment to PPP was to enable Mr Dalby and Mr Meehan to enjoy a personal profit at the direct expense of ACP by using its money for the purpose of reducing their personal liabilities. I will order an account of all moneys paid to PPP under the assignment and payment of the sums due under such account. I will also make an order against both of them for an interim payment of US\$600,000.

*D. Swallow International Limited (“Swallow”)*

140.. Swallow was incorporated in Malta on 9 July 1996 and, like Pacific, is administered by ICS on behalf of Mr Dalby and Mr Meehan. Like Pacific, ICS is again the sole shareholder and director, but the shares are held beneficially by Mr Dalby and Mr Meehan in the proportions 95 per cent and 5 per cent.

141.. When the prospect of a sale of the ACP group emerged in August 1997 Mr Dalby and Mr Meehan conceived the idea that Swallow might acquire 3i's shares in ACP Holdings and then sell them on to Gencor for a capital gain. This saga too has given rise to claims on this application, but in the light of the defendants' evidence Mr Pymont has not pursued it and I will say no more about it.

*E. Mr Brett Dalby ("Brett")*

(i) Salary payments

142.. Mr Meehan was responsible for the payroll records of the ACP group. They show that Mr Dalby's son Brett (the second defendant) was employed by ACP from January 1997 to December 1998. He was a schoolboy, but was purportedly paid a salary of £24,000 a year. He was paid all his 1997 salary (less tax) by three payments in November 1997, December 1997 and January 1998 (the gross amounts in fact totalled £25,928.77); and he was paid £2,000 a month (less tax) in 1998. These sums were paid by BACS payments via ACP's bank into an account at Midland Bank plc, Blaby, Leicestershire entitled "Mr G Dalby re Brett Lee Dalby". The payments were all authorised by Mr Meehan. ACP accounted to the Inland Revenue for the tax deducted at source and paid employer's National Insurance contributions at 10 per cent of Brett's salary, totalling £4,800 over 24 months. The total sum of salary, tax and contributions paid out in respect of Brett's employment was £52,728.77.

143.. This exercise, for which Mr Dalby and Mr Meehan were both responsible, was an inexcusable misapplication of ACP money. I need say little about it, because Mr Francis has not resisted this part of the claim. Reducing Mr Dalby's explanation to its essentials he proposed to Mr Meehan that he, Mr Dalby, should have a salary increase and that the increased salary should be "notionally paid to Brett". Mr Meehan agreed and it was done. It appears that the purpose of the arrangement was to enable the pretence to be made the Inland Revenue that this was a separate head of income properly earned by Brett, whereas in fact, as Mr Dalby admits, the money was regarded at all times as his, Mr Dalby's. He alone operated the Blaby account and Brett neither received any of the money nor even, so Mr Dalby claims, even knew anything about it. Brett has made a witness statement that supports this account.

144.. The purported increase in salary was anyway invalid. It only took effect after the Gencor acquisition, and cl 5(2) of Mr Dalby's service agreement provided that his salary of £130,000 a year was to "be reviewed by the Gencor Board based on performance of the Group and [Mr Dalby's] performance." That reference to Gencor was to Gencor Industries Inc, of which ACP was a sub-subsidiary. It was not open to Mr Dalby and Mr Meehan to purport to review Mr Dalby's salary themselves.

145.. The present application seeks judgment against Mr Dalby, Brett and Mr Meehan for the salary wrongfully paid, or purportedly paid, to Brett. The claimants joined Brett as a defendant because they assumed, quite reasonably, that he had enjoyed the benefit of the payments, although it was plain that he had done nothing for ACP to earn them. In the light of the belated explanation now vouchsafed by Mr Dalby, they no longer seek judgment against Brett, who emerges as an innocent pawn in the operation. I will enter final judgment against Mr Dalby and Mr Meehan for the ACP money they wrongly misapplied in carrying out this exercise. That is not just the purported salary but also the associated tax and National Insurance payments. There will be final judgment against each of them for £52,728.77

(ii) The Rover

146.. Mr Dalby also proposed, and Mr Meehan agreed, that ACP should also give Brett the free use of a car, an M registration Rover 216 Coupe. ACP purchased it under a hire-purchase agreement signed by Mr Meehan. It was with Wilson Finance Plc ("Wilson"), was dated 29 August 1997 and committed ACP to payments totalling £12,146.90, of which the last instalment included a £25 payment entitling ACP to acquire title to the car. Brett used the car from September 1997 onwards. ACP recovered it at the end of June 1999. During this period ACP paid a total of £7,816.10 to Wilson comprising the initial deposit of £1,000 and hire purchase instalments.

147.. Brett was involved in an accident with the car in December or January 1999, causing it substantial damage. He took it to repairers who repaired it at a cost of £3,029.14. Brett failed to pay the bill, and ACP had to pay in order to recover the car.

The car was covered by ACP's insurance, but prompt notice of a claim was not given at the time of the accident and ACP was advised by its insurance brokers in June 1999 that a claim would not succeed, so none was made. The problem was not just that the accident had happened so long before, it was also that the repairers were not ones the insurers would have recommended and they did not have the chance to inspect the car before work started.

148.. Brett admits he used the car — and had the accident — but says he was unaware that it belonged to ACP. He thought it was simply a generous present from his father. Mr Dalby confirms this, and says he first told Brett it was a company car in early 1999.

149.. Again, this exercise represented an inexcusable misapplication of ACP money, for which both Mr Dalby and Mr Meehan were equally responsible — Mr Meehan knew the car was to be provided to Brett and he agreed it would be all right if it was. Brett, however, was not providing any services to ACP, nor is there any suggestion that the purchase of the car was of any benefit to ACP: it was simply a gift to Brett at ACP's expense.

150.. Following the recovery of the car from the repairers ACP came to an arrangement under which it paid £3,600.18 to Wilson in settlement of the outstanding hire purchase payments less £115.42 and sold the car for £400 more than that settlement figure. It now claims from Mr Dalby and Mr Meehan the £7,816.10 it paid in hire charges to Wilson during the time when Brett was using the car, plus the £3,029.14 it had to pay to the car repairers to recover the car, a total sum of £10,854.24.

151.. Mr Francis does not dispute that Mr Dalby and Mr Meehan are answerable to ACP for something in respect of this episode, but he said I cannot decide what the right amount is on this application. In particular, he said it would be essential to bring into the accounting exercise the value of the car, about which there is insufficient evidence. He also questioned whether I can or should find on this application that ACP could not in fact have recovered the repair costs from its insurers.

152.. As regards the last point, I consider that Mr Francis is right. This is not the trial and I doubt whether I can or should attempt to rule finally on that question on this application. However, it appears to me clear that this episode at least involved the payment by ACP of hire charges amounting to £7,816.10 for the use by Brett of a car which was of no benefit to ACP. I am satisfied that Mr Dalby and Mr Meehan are answerable to ACP for the reimbursement of these payments, even if they may have a defence to the claim in respect of the repair costs. I will order an inquiry as to damages or compensation under this head of the claim and also order an interim payment of £7,816.10 by each of Mr Dalby and Mr Meehan.

#### *F. The overcharging claim*

153.. This involves Mr Dalby, Mr Meehan, Roadmec International and Intermek. ACP's business included the supply of filter cages, which are sieves used to sort rock into grades. Until about October 1995 ACP obtained its cages from Hilson Wire Products Limited (“Hilson”). From about then until about June 1998 it instead obtained them from Roadmec International. From June 1998 until about March 1999 (when Mr Hogg learnt what had been going on and stopped it) it obtained them from Intermek.

154.. The complaint is that it is said that both Roadmec International and, later, Intermek obtained their supplies of cages from Hilson at the latter's ordinary prices, but then supplied them to ACP at grossly inflated prices. It is said there is no reason why ACP could not have continued to obtain them from Hilson at the prices at which Hilson supplied Roadmec International and Intermek.

155.. ACP's complaint is well illustrated by the evidence. On 3 April 1997 ACP placed a purchase order with Roadmec International for 960 cages at £11 each, a total of £10,560 exclusive of VAT. On 7 April 1997 Roadmec International placed a purchase order with Hilson for 960 cages at a cost of £5 each, a total of £4,800 exclusive of VAT. The order provided for delivery to ACP and was in the form of a standard order that had been generated on ACP's computer system. Hilson acknowledged Roadmec International's order by a fax to Roadmec International dated 10 April 1997 addressed for the attention of Mr Meehan — who was Roadmec International's secretary. Hilson's invoice for the goods dated 28 June 1997 was addressed to Roadmec International. The cages were delivered to ACP on 21 August 1997 under a delivery note dated 28 June 1997 from Hilson to Roadmec International. Roadmec International then invoiced ACP for the cages at the inflated price to which I have referred, the invoices being also generated on ACP's own computer system. ACP administered the payment of Roadmec International's invoices to Hilson. This is illustrated by an ACP fax dated 27 February 1998 from Martine Knight, Mr Meehan's personal assistant, to Hilson, the subject being various Roadmec International orders and Hilson invoices.

156.. The above transaction is merely an example. ACP has analysed the transactions between ACP, Roadmec International and Hilson. It reveals that ACP paid Roadmec International £347,433.28 for cages that the latter purchased from Hilson for

£183,552.74, a difference of £163,880.54. It is clear that Mr Meehan was at the centre of the cage ordering operation, both at ACP and at Roadmec International. On 6 January 1997 Mr Hilditch, Hilson's managing director, sent him Hilson's 1997 price list for cages, with copies also to Mr Dalby and Mr Firth. The prices for standard cages were £5 and £5.60. Prices at £17.95 and £4.50 are also added in manuscript for two other items, but it is not suggested they were the subject of any relevant orders. The quotation is headed "Roadmec International Ltd (ACP Group)" and the prices quoted are "per cage, delivered Leicester, and ex-VAT ...". Mr Meehan appears to have been assisted in the matter from January 1997 onwards by his assistant Martine Knight, who wrote to Mr Mistry at Hilson on 23 January 1997 to introduce herself. She said:

"I would like to introduce myself as the person who will be dealing with the liaison between yourselves and Roadmec International/ACP with regard to Purchase Orders for cages. You will still continue to speak on a daily basis to our ACP Purchase Department, but all paperwork pertaining to these orders will be processed through myself."

157.. On 5 June 1997 Mr Hilditch wrote to Mr Meehan at ACP to notify him of a move by Hilson into a new building. On 21 January 1998 he sent him, again at ACP, Hilson's 1998 price list, again prepared for "Roadmec International Ltd (ACP Group)". This showed that the prices for the two standard cages had gone up to £5.25 and £5.85 respectively.

158.. In about June 1998 Intermek took over Roadmec International's role in the supply of cages to ACP. A sample order in evidence is one dated 22 June 1998, by which ACP ordered 1276 cages from Intermek at £11 each (VAT exclusive), a total cost of £14,036, although on 2 September 1998 Mr Tibbles of Intermek wrote to Mr Oakes of ACP informing him that it would be necessary to increase the price of the standard cage to £1,250 "due in main to increased manufacturing and material costs". On 19 March 1999 — following the removal of Mr Dalby and Mr Meehan from the scene — ACP was able to place an order with Hilson for the supply of 960 cages at just £9.45 each (exclusive of VAT), a total of £9,072. A profit and loss account for Intermek for the nine-month period to 31 January 1999 shows its turnover for cages to have been £56,826, at a cost of £24,325, a difference of £32,501.

159.. The claim against each of Mr Dalby and Mr Meehan is for £163,880.54 (in respect of the Roadmec International transactions) and £32,501 (in respect of the Intermek transactions). The claim for the first amount is also made against Roadmec International. There is now no like claim against Intermek, which was dissolved in March 2000. The pleaded allegation against Messrs Dalby and Meehan is that they were parties to a dishonest inflation of the price at which ACP purchased cages from Roadmec International and Intermek.

160.. This claim is roundly disputed by Mr Dalby, who denies he or Mr Meehan had any interest in Roadmec International or Intermek. He says he believes Roadmec International was set up by Mr Tibbles and was controlled by him until he went to Australia in 1996 when, Mr Dalby said, Mr Tibbles told him he was going to resign as a director. He said Mr Tibbles returned from Australia in about May 1998 when he set up Intermek and thereafter controlled it.

161.. Mr Dalby has given an extensive explanation as to why he says there is a good defence to this claim. He said that until about 1993 ACP purchased its cages from one or other of three companies, of which Hilson was one, who operated a cartel and charged £11 or £12 a cage. ACP was apparently a bad payer, which resulted in a stop in its supplies from time to time and it had to move between suppliers to obtain its requirements. Mr Dalby said he asked Mr Tibbles, ACP's production director, to find an alternative source of supply, and this led to Mr Tibbles discovering that another small supplier of cages was on the point of failure and was willing to sell its filter cage machine.

162.. This led to a discussion as to whether ACP should buy it and make its own cages, which Mr Dalby did not favour, partly because Mr Dalby said ACP could not afford to buy the machine. Mr Tibbles then proposed that he should buy it and supply ACP. Mr Dalby agreed, and offered Mr Tibbles the use of a barn at his home from which he, through Roadmec International, then started producing cages for ACP. Mr Dalby said he believed ACP paid Roadmec International slightly less for the cages than it had paid the cartel. There is a dispute on the evidence as to the cost of such a machine. There is no dispute that a machine was installed in Mr Dalby's barn and the view of Mr David Lane, who claims to have installed it (although Mr Dalby disputes that he did), is that it would have cost between £8,000 and £10,000. Against this, Mr Meehan's recollection is that the machine cost between £20,000 and £25,000 and Mr Dalby said it cost about £25,000.

163.. Mr Dalby said that, following this, he had a meeting with Mr Hilditch of Hilson, showed him the machine and explained ACP's arrangement with Roadmec International. He told him he had worked out that the prime cost of producing each cage was £5 and, untruthfully, that ACP was considering going into competition with Hilson and the other cage producers. Mr Dalby said

that this led to a visit by Mr Hilditch to Roadmec International as a result of which the latter's machine was moved to Hilson's premises in return for which Hilson agreed to produce machines for Roadmec International at cost price and undertook to keep 1,000 cages on hand at all times so as to satisfy Roadmec International's needs.

164.. Mr Dalby said he regarded this as an extremely satisfying outcome. Quite why I do not understand since the main beneficiary of his piece of bluffing appears to have been Roadmec International, in which he disclaims that he or ACP had any interest. For reasons that are unexplained Hilson was apparently prepared to supply Roadmec International with its cages at cost. Roadmec International, which was now doing precisely nothing with regard to the manufacture or supply of cages, was then able to sell them at a substantial mark up to ACP. Its outlay in the whole venture seems to have been at most some £25,000, which was the key to its later ability to enjoy the enormous profits I have referred to. As far as I can see, the main benefit which Mr Dalby claims that ACP derived from the exercise was that Roadmec International allowed it credit which alleviated what would otherwise have been a serious cashflow problem. The real benefit, however, accrued to Roadmec International and, later, Intermek, which purchased from Roadmec International the machine which was apparently still at Hilson's premises.

165.. I find Mr Dalby's explanation about all this close to incredible. Even after reading it, the picture I am left with is that this appears to have all the hallmarks of having been a cosy little arrangement under which Roadmec International and Intermek profited at ACP's expense, a profit of which Mr Dalby and Mr Meehan (ACP directors) and Mr Tibbles (an ACP employee) were the architects.

166.. I remind myself, however, that the pleaded allegation is that this was an exercise in dishonesty by Mr Dalby and Mr Meehan. I am reluctant to make any such finding against them in relation to this issue on this application. There is too much about it I do not understand. In particular, I feel unable to make any finding that either Mr Dalby or Mr Meehan had a beneficial interest in Roadmec International or Intermek, or were deriving some secret profit from the operation. In short, even though I have considerable suspicions about Mr Dalby's account, I do not regard as fanciful the possibility that he may be able to establish it at a trial. If he can, he and Mr Meehan may have a defence to the claim. I refuse to give summary judgment on this part of the application.

#### *G. Mr Dalby's expenses*

167.. A recurrent theme of Mr Dalby's evidence is that the ACP group was always on the edge of insolvency and was only saved from it by his selfless devotion to the obtaining of financial assistance from others (including himself, through Burnstead and Pacific) and Mr Chong's companies. ACP's cash resources were not so limited, however, as to prevent Mr Dalby from procuring it to indulge Brett in the relatively minor way I have referred to or, more particularly, to incur substantial expenditure for his own benefit. Mr Hogg's investigations have not satisfied him that this expenditure was justified. They include expenses totalling £14,922.25 for purchases in relation to Peatling Lodge, Mr Dalby's house; labour costs for work done there totalling £11,973.58; transactions on ACP credit cards totalling £62,386.35; cash payments totalling £2,467.95 where the purpose of the payments has been disclosed; and cash payments totalling £25,900.97 where it has not.

168.. Mr Dalby admits ACP has rendered services to and made purchases for him. He says it was all done lawfully and openly and that if any transaction has not been properly recorded or accounted for he was unaware of it. He has not sought to explain each of the many payments referred to in the evidence and asserts that it would be a burdensome and inappropriate for him to have to undertake that exercise on this application.

169.. I do not have to rule on this part of the claim. Mr Francis admits that Mr Dalby has to account properly for all the payments in question and Mr Dalby is prepared to submit to an order that such an account should be directed and taken. I will make such an order.

Crown copyright

433 B.R. 68  
 United States District Court,  
 S.D. New York.

In re Michael G. TYSON, Debtor (Three cases).

Nos. 09 Civ. 9966(DLC), 09 Civ.  
 9967(DLC), 10 Civ. 313(DLC).

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 July 26, 2010.

**Synopsis**

**Background:** Plan administrator for liquidating trust created by confirmed joint Chapter 11 plan of debtor, who was former world heavyweight boxing champion, and debtor's company brought adversary proceeding against Kentucky boxing match promoters, Gibraltar shell corporation assigned international distribution rights to Kentucky promoters' boxing match, and British boxing promoter, his British partnership and corporate minority partner, and partnership's chief executive officer (CEO), asserting claims for breach of contract, unjust enrichment, and fraudulent inducement. Kentucky promoters asserted cross-claims for breach of contract against Gibraltar corporation and for veil-piercing against remaining defendants. Following trial, the United States Bankruptcy Court for the Southern District of New York, Allan L. Gropper, J., 412 B.R. 623, ruled in plan administrator's favor on contract claims against Gibraltar corporation and Kentucky promoters and pierced Gibraltar corporation's corporate veil to hold remaining defendants liable for its breach of contract. Appeals were taken.

bankruptcy court had “core” jurisdiction over adversary proceeding;

under English law, corporate form of Gibraltar corporation could not be pierced to hold British defendants liable for corporation's obligations; and

remand for further proceedings on claims for fraud and unjust enrichment was warranted.

Vacated in part and remanded.

**Procedural Posture(s):** On Appeal.

**Attorneys and Law Firms**

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OPINION & ORDER

DENISE COTE, District Judge:

**Holdings:** The District Court, Denise Cote, J., held that:

**TABLE OF CONTENTS**

BACKGROUND..... 72

    I. Tyson's Bankruptcy Petition..... 72

    II. Pre–Fight Contract Negotiations..... 73

    III. The July 26 Assignment..... 74

    IV. Breach of the July 26 Assignment..... 75

    V. Procedural History..... 75

DISCUSSION..... 76

    I. Jurisdiction and Standard of Review..... 76

    II. Warren's and Simons' Appeal..... 78

        A. Principles of Determining Foreign Law..... 78

        B. Piercing the Veil Under English Law..... 79

            1. The Veil of Incorporation..... 79

            2. Survey of English Law..... 81

            3. Principles of English Law..... 86

        C. Factual Findings on Veil-Piercing Claim..... 90

        D. Application of English Law..... 93

        E. Plaintiff's Fraud and Unjust Enrichment Claims..... 95

        F. Warren's Claim for Attorney's Fees..... 95

    III. Kentucky Defendants' Appeal..... 97

        A. Kentucky Default Judgment..... 97

            1. Facts and Procedural History..... 97

            2. Analysis..... 99

        B. Rule 15(b)(2) & Rule 54 Motions..... 100

        C. Attorney's Fees..... 101

CONCLUSION..... 101

\*72 These three bankruptcy appeals arise out of a professional boxing match featuring bankruptcy debtor Mike Tyson (“Tyson”), a former world heavyweight champion. The principal issue on appeal is whether English law permits piercing the veil of a Gibraltar corporation, Brearly (International) Ltd. (“Brearly”), which breached its contracts with Tyson and Straight-Out Promotions, LLC (“Straight-Out”) in connection with a boxing match held in Louisville, Kentucky on July 30, 2004 (the “Fight”). Following trial, the Honorable Allan L. Gropper, United States Bankruptcy Judge, concluded that appellants Frank

Warren (“Warren”) and Edward Simons (“Simons”), two British boxing promoters, were liable under English law for Brearly's breaches of contract. For the following reasons, the Bankruptcy Court's holding of liability on the veil-piercing claims is reversed, the judgment of the Bankruptcy Court is vacated in part, and the case is remanded for further proceedings.

*BACKGROUND*

The following facts, which are undisputed unless otherwise indicated, are taken from the record on appeal, the submissions of the parties, and the Bankruptcy Court's August 19, 2009 opinion. See *Neilson v. Straight-Out Promotions, LLC (In re Tyson)*, 412 B.R. 623 (Bankr.S.D.N.Y. Aug. 19, 2009) (“*In re Tyson*” or the “*August 2009 Opinion*”). Only those facts relevant to the issues on appeal are discussed below.

### I. Tyson's Bankruptcy Petition

On August 1, 2003, Tyson and his wholly owned corporation, Michael Mike Tyson Enterprises Inc., each filed a voluntary petition for Chapter 11 bankruptcy in the United States Bankruptcy Court for the Southern District of New York (“Bankruptcy Court”). Their joint bankruptcy reorganization plan (the “Chapter 11 Plan”)—which was filed in June 2004, confirmed in September 2004, and made effective in November 2004—created a liquidating trust (the “Liquidating Trust”) and named R. Todd Neilson as plan administrator (the “Plaintiff”).<sup>1</sup> The Chapter 11 Plan contemplated that Tyson would pay his creditors, in part, by participating in a series of boxing matches and evenly splitting the proceeds with his creditors.

<sup>1</sup> Under the Chapter 11 Plan, the Plaintiff was given authority to prosecute legal claims on behalf of the Liquidating Trust, including claims for breach of post-petition contracts entered into by Tyson.

### \*73 II. Pre-Fight Contract Negotiations

In May 2004, while the Chapter 11 Plan was taking shape, Tyson's manager reached agreement with Chris Webb (“Webb”) to have Tyson fight in a boxing match in Kentucky that Webb and his company, Straight-Out (collectively, the “Kentucky Defendants”), would arrange and promote. This match, the Fight, was the first in a series of bouts in which Tyson fought pursuant to his Chapter 11 Plan.

On June 10, 2004, Webb's friend, the matchmaker Sampson Lewkowicz (“Lewkowicz”), attended a promotional event in Manchester, England hosted by Sports Network, PLC (“Sports Network”), a partnership between Warren and his minority partner, Sports & Leisure Boxing, Ltd. (“Sports & Leisure”).<sup>2</sup> At the Manchester event, Lewkowicz ran into Stephen Heath (“Heath”), an attorney for Sports Network,

and began talking business. In particular, Lewkowicz asked Heath whether Warren would be interested in acquiring the international pay-per-view rights to the Fight (the “International Rights”) from Straight-Out and then selling the International Rights to distributors or business partners on a country-by-country basis.

<sup>2</sup> The Bankruptcy Court described Warren as “a well-known English boxing promoter with over 35 years of experience, who has promoted multimillion-dollar boxing matches around the world.” *In re Tyson*, 412 B.R. at 627. The court found that “[a]s Sports Network's majority stakeholder and managing director, Warren held a tight grip over every aspect of the partnership's operations, and people in the boxing industry perceive him and Sports Network as one and the same.” *Id.*

Heath got Warren on the phone, and Warren said that he was not interested in selling the International Rights.<sup>3</sup> After this conversation, however, Warren instructed his business partner, Simons,<sup>4</sup> to follow up with Lewkowicz about the possibility of arranging for Danny Williams (“Williams”), an English boxer for whom Warren acted as an agent, to be Tyson's opponent in the Fight. After Simons, Heath, and Lewkowicz met in person, Simons called Webb to propose that Tyson fight Williams and that the Kentucky Defendants sell the International Rights for \$2 million.

<sup>3</sup> The Bankruptcy Court found that Warren did not want to deal with Tyson because the two had once been in a physical altercation. *In re Tyson*, 412 B.R. at 629 n. 6. In his submissions on appeal, Warren concedes that he possesses “animus towards Tyson” and describes himself as a “known enemy” of Tyson.

<sup>4</sup> The Bankruptcy Court found that Simons was “a veteran of the boxing business with decades of experience” who, at the time of the Fight, was also “Sports Network's chief executive officer and Warren's right-hand man.” *In re Tyson*, 412 B.R. at 627. Simons also held a minority interest in Sports & Leisure and served as one of its directors. *Id.* at 627–28.

Webb was receptive to this proposal. Direct negotiations then ensued between Webb, acting for Straight-Out, and Heath, purportedly acting for Sports & Leisure. After several weeks of negotiation, the parties reached an agreement (the

“Distribution Agreement”) along the following lines: (1) Tyson's opponent in the Fight would be Williams; (2) the International Rights would be assigned to Brearly, which would then coordinate the sale of the International Rights in foreign countries; (3) before the Fight, Brearly would pay Straight–Out a “minimum guaranteed compensation” of \$2.7 million as an advance against Straight–Out's negotiated share of Brearly's proceeds (the “International Proceeds”) from selling the International Rights; and (4) after payment of commissions and overhead, all International \*74 Proceeds above \$2.7 million would be split 45/45/10 among Brearly, Straight–Out, and Lewkowicz. Brearly was a Gibraltar shell company incorporated by Peter Abbey (“Abbey”), an English investor acquainted with Simons.<sup>5</sup> The decision to introduce Brearly into the transaction, filling the role that the parties had previously contemplated for Sports & Leisure, lies at the heart of these appeals.

<sup>5</sup> The facts concerning Brearly's origins and ownership are set forth in detail in Section II.D of the discussion below.

On or about June 30, Heath flew to Louisville to meet with Webb and reduce the Distribution Agreement to written form. Final agreement could not be reached, however, on whether the \$2.7 million minimum guarantee was to be secured by a letter of credit or deposited in an escrow account, nor on whether the forum for litigating any disputes arising under the contract would be Kentucky or Gibraltar. Nevertheless, the parties proceeded to carry out their respective tasks under the Distribution Agreement as it then existed. Beginning in mid-June and continuing until the end of July, Simons and others, acting on Brearly's behalf, sold the International Rights to distributors, broadcasters, or business partners in some three dozen countries or groups of countries throughout Europe, Asia, and Latin America.

On July 16, two weeks before the Fight, Straight–Out and Tyson signed a contract (the “Event Agreement”) under which Straight–Out agreed to pay Tyson a total purse of \$7.2 million and to secure that purse with a series of letters of credit before the Fight. Also on July 16, Straight–Out reached an agreement with Showtime, a premium television network, under which Showtime would broadcast the Fight in the United States and Straight–Out would pay Showtime's marketing expenses. Straight–Out was required to immediately post a \$1.3 million letter of credit to secure that obligation.

### III. The July 26 Assignment

Only five days later, on July 21, the Fight was put in jeopardy when Straight–Out failed to meet certain deadlines with respect to its payment obligations. In particular, Straight–Out failed to provide Showtime its \$1.3 million letter of credit and failed to provide Tyson a letter of credit for the final \$1.975 million installment of his purse. According to the Kentucky Defendants, they experienced a funding shortfall only because Brearly had not yet paid Straight–Out its \$2.7 million minimum guarantee under the Distribution Agreement.

On July 26, four days before the Fight, Straight–Out and Brearly reached an assignment agreement (the “July 26 Assignment”) that enabled the Fight to proceed.<sup>6</sup> The July 26 Assignment provided that the first \$1.3 million of the International Proceeds would be paid to Showtime on Straight–Out's behalf, and Warren also provided a personal guarantee that Showtime would be paid. The July 26 Assignment also assigned to Tyson certain rights to payment held by Straight–Out under the latter's Distribution Agreement with Brearly. Specifically, Tyson was guaranteed to receive at least \$1.4 million (less certain “Recoupable Expenses”) from Brearly in lieu of Brearly's payment to Straight–Out, but Tyson would receive up to \$1.9 million, assuming available proceeds. \*75 <sup>7</sup> The July 26 Assignment specifically contemplated, however, that Straight–Out remained liable to Tyson for the final \$1.9 million of his purse in the event that Brearly did not pay or in the event that the International Proceeds were insufficient.

<sup>6</sup> The July 26 Assignment, styled as a “Notice of Irrevocable Authority and Assignment,” was signed by Straight–Out and Brearly alone, but Tyson's attorney Stephen Espinoza (“Espinoza”) actively participated in the pertinent negotiations as Tyson's representative.

<sup>7</sup> Tyson had also been given \$75,000 worth of tickets to the Fight, reducing the outstanding balance of his purse from \$1.975 million to \$1.9 million.

### IV. Breach of the July 26 Assignment

The Fight was held as planned on July 30. Williams scored a major upset by knocking out Tyson in the fourth round.

The international pay-per-view sales of the Fight, however, were disappointing. An income statement prepared by Sports Network on Brearly's behalf (the "Income Statement") showed that the International Proceeds amounted to only about \$1.9 million in gross revenue, which was not enough to satisfy all of Brearly's contractual obligations. Indeed, after all overhead and fees were paid,<sup>8</sup> only \$135,795 was available to satisfy Tyson's claim, far short of the amount guaranteed by the July 26 Assignment.<sup>9</sup> Brearly then failed to fulfill its obligations under the July 26 Assignment, and its counsel, Marrache, reserved Brearly's rights to object to any obligations that the July 26 Assignment purportedly placed on Brearly. Thereafter, Tyson was not paid any portion of the remaining \$1.9 million of his purse by either Brearly or Straight-Out.

<sup>8</sup> These amounts included the payment of \$1.3 million to Showtime; a \$109,746 commission to Sports Network for handling the UK sales on Brearly's behalf; and various other direct and indirect expenses, including sales commissions and attorney's fees.

<sup>9</sup> Tyson's contractual entitlement under the July 26 Assignment worked out to approximately \$1.24 million, which represents the minimum guarantee of \$1.4 million less Brearly's "Recoupable Expenses."

#### V. Procedural History

On June 15, 2005, the Plaintiff initiated an adversary proceeding (the "Adversary Proceeding") in the Bankruptcy Court to pursue claims of breach of contract, unjust enrichment, and fraudulent inducement against Brearly, Warren, Straight-Out, and Webb. Warren answered the complaint on October 6, 2005, while Brearly purported to file a *pro se* answer on October 11, 2005.

The Kentucky Defendants, however, did not answer, and on May 31, 2006, a default judgment was entered against them. One year later, they moved to vacate the default judgment. By Opinion and Order of August 17, 2007, the Bankruptcy Court granted the Kentucky Defendants' motion and vacated the default judgment. *See Neilson v. Straight-Out Promotions, LLC (In re Tyson)*, Adv. No. 05-02210(ALG), 2007 WL 2379624 (Bankr.S.D.N.Y. Aug. 17, 2007) (the "*August 2007 Opinion*").

Meanwhile, on June 20, 2007, the Plaintiff filed an amended complaint naming additional defendants, including Simons, Sports Network, and Sports & Leisure (collectively, with Warren, the "UK Defendants"). Upon re-joining the litigation, the Kentucky Defendants asserted a cross-claim for breach of contract against Brearly and for veil-piercing against the UK Defendants. The Plaintiff's second amended complaint was filed on January 17, 2008.

Following Brearly's putative *pro se* answer in October 2005, Brearly ceased to participate in the litigation. Accordingly, a default was entered against Brearly on January 23, 2008.

A trial on the Plaintiff's claims and the Kentucky Defendants' cross-claims was held on March 23-27, 2009. On August 19, \*76 2009, Judge Gropper held in favor of the Plaintiff on his breach of contract claims against the Kentucky Defendants and Brearly; pierced Brearly's corporate veil to hold the UK Defendants liable for Brearly's breach; and denied all other claims for relief. *In re Tyson*, 412 B.R. at 629. Following post-trial motion practice, the Bankruptcy Court entered final judgment on October 27, 2009 (the "Judgment").<sup>10</sup> These three bankruptcy appeals ensued and collectively became fully briefed on April 2, 2010.

<sup>10</sup> The Bankruptcy Court entered judgment in favor of the Plaintiff and against the following defendants in the following amounts: Straight-Out, in the amount of \$1,900,000; Brearly, in the amount of \$1,237,850; and Simons, Warren, Sports Network, and Sports & Leisure, each in the amount of \$1,237,850. The Judgment also provides for pre- and post-judgment interest on all claims. The Judgment provides, however, that the Plaintiff's aggregate recovery from all parties may not exceed \$1,900,000 plus applicable interest, and that the Plaintiff's aggregate recovery from Brearly and/or the UK Defendants may not exceed \$1,237,850 plus applicable interest.

#### DISCUSSION

##### I. Jurisdiction and Standard of Review

The parties contest on appeal whether the Adversary Proceeding fell within the Bankruptcy Court's core jurisdiction. The Plaintiff and Simons contend that the

proceedings were “core,” while the Kentucky Defendants and Warren contend that the proceedings were “non-core.” In the alternative, Warren asserts that the Bankruptcy Court’s exercise of jurisdiction in the Adversary Proceeding was unconstitutional under *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 102 S.Ct. 2858, 73 L.Ed.2d 598 (1982) (“*Marathon*”).

“A bankruptcy court’s power to enter appropriate orders and judgments in a given bankruptcy proceeding ... hinges on whether the proceeding is ‘core’ or ‘related,’ consistent with the constitutional limits that *Marathon* established.” *Bankr.Servs., Inc. v. Ernst & Young (In re CBI Holding Co., Inc.)*, 529 F.3d 432, 460 (2d Cir.2008) (“*In re CBI*”) (citation omitted). Core proceedings are those that are “essential or basic to the administration of a bankruptcy case.” *Cent. Vt. Pub. Serv. Corp. v. Herbert*, 341 F.3d 186, 190 (2d Cir.2003). A non-exhaustive definition is set forth in 28 U.S.C. § 157(b)(2), which specifies, *inter alia*, that the bankruptcy court possesses core jurisdiction with respect to “matters concerning the administration of the estate.” 28 U.S.C. § 157(b)(2)(A). This provision is broadly construed. “In crafting § 157, Congress realized that the bankruptcy court’s jurisdictional reach was essential to the efficient administration of bankruptcy proceedings and intended that the ‘core’ jurisdiction be construed as broadly as possible subject to the constitutional limitations established in *Marathon*.” *In re CBI*, 529 F.3d at 460 (citation omitted); see also *Luan Inv. S.E. v. Franklin 145 Corp. (In re Petrie Retail, Inc.)*, 304 F.3d 223, 228–29 (2d Cir.2002). Section 157 provides that “[t]he bankruptcy judge shall determine ... whether a proceeding is a core proceeding under this subsection or is a proceeding that is otherwise related to a case under title 11.” 28 U.S.C. § 157(b)(3).

The Adversary Proceeding fell within the Bankruptcy Court’s core jurisdiction. At least two reasons for this conclusion are evident. First, proceedings to enforce a bankruptcy debtor’s post-petition contracts fall within core bankruptcy jurisdiction. See \*77 *U.S. Lines, Inc. v. Am. S.S. Owners Mut. Prot. & Indem. Ass’n, Inc. (In re U.S. Lines, Inc.)*, 197 F.3d 631, 637–38 (2d Cir.1999) (“The bankruptcy court has core jurisdiction over claims arising from a contract formed post-petition under § 157(b)(2)(A).”); *Ben Cooper, Inc. v. Ins. Co. (In re Ben Cooper, Inc.)*, 896 F.2d 1394, 1400 (2d Cir.1990) (observing that “[t]he adjudication of [post-petition contract] claims is an essential part of administering the estate”), *vacated on other grounds*, 498 U.S. 964, 111 S.Ct. 425, 112 L.Ed.2d 408 (1990), *reinstated*, 924 F.2d 36 (2d

Cir.1991).<sup>11</sup> Indeed, the Bankruptcy Court itself observed as much in an earlier opinion. See *August 2007 Opinion*, 2007 WL 2379624, at \*3 (“Bankruptcy courts clearly have core jurisdiction to enforce a debtor’s post-petition contracts.”).

11 Warren relies upon *Wood v. Wood (Matter of Wood)*, 825 F.2d 90, 97 (5th Cir.1987), for the proposition that a post-petition dispute arising under state law is not embraced within the core jurisdiction provided by 28 U.S.C. § 157. That case has been expressly disapproved in this Circuit, however. See *In re Ben Cooper, Inc.*, 896 F.2d at 1400 (“To the extent that *Wood* conflicts with our holding, we decline to follow it.”).

Second, even if the Adversary Proceeding was not “core,” Warren and the Kentucky Defendants did not object to the Bankruptcy Court’s assumption of jurisdiction and therefore impliedly consented to the exercise of that jurisdiction. See *Universal Oil Ltd. v. Allfirst Bank (In re Millennium Seacarriers, Inc.)*, 419 F.3d 83, 98 (2d Cir.2005) (“Parties may, by their conduct, submit themselves to the bankruptcy court’s jurisdiction.... [Parties who] actively litigate in the bankruptcy court without contesting personal jurisdiction can transform a non-core proceeding into a core one.”); *Herbert*, 341 F.3d at 190 (“bankruptcy jurisdiction can exist” when “consented to by the parties”); *Men’s Sportswear, Inc. v. Sasson Jeans, Inc. (In re Men’s Sportswear, Inc.)*, 834 F.2d 1134, 1137–38 (2d Cir.1987) (concluding that a party’s “failure to object to [the court’s] assumption of ‘core jurisdiction’ at any point in th[e] extensive proceedings before the bankruptcy court ... constitutes consent to [its] final adjudication of this controversy”).<sup>12</sup> Therefore, the Bankruptcy Court properly entered the Judgment, and this Court possesses appellate jurisdiction to review the Judgment pursuant to 28 U.S.C. § 158(a)(1).

12 Warren also argues that the Plaintiff failed to comply with the Bankruptcy Rules by not pleading the Bankruptcy Court’s core jurisdiction in his complaint. See Fed. R. Bankr.P. 7008(a) (“In an adversary proceeding before a bankruptcy judge, the complaint, counterclaim, cross-claim, or third-party complaint shall contain a statement that the proceeding is core or non-core....”). Warren waived his objection on this ground, however, by impliedly consenting to the Bankruptcy Court’s exercise of jurisdiction.

The standard of review applicable to matters within core bankruptcy jurisdiction is governed by the Federal Rules of Bankruptcy Procedure. On appeal, the court “may affirm, modify, or reverse a bankruptcy judge’s judgment, order, or decree or remand with instructions for further proceedings.” Fed. R. Bankr.P. 8013. “Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous....” *Id.*; see *Solow v. Kalikow (In re Kalikow)*, 602 F.3d 82, 91 (2d Cir.2010) (noting that “[f]indings of fact are reviewed for clear error.”). Likewise, “due regard shall be given to the opportunity of the bankruptcy court to judge the credibility of the witnesses.” Fed. R. Bankr.P. 8013; cf. *U.S. v. Iodice*, 525 F.3d 179, 185 (2d Cir.2008) (counseling “particularly strong deference” to findings based on “credibility determinations”). Although the Bankruptcy Court’s findings of fact “are not conclusive on appeal, the party \*78 that seeks to overturn them bears a heavy burden,” *H & C Dev. Grp., Inc. v. Miner (In re Miner)*, 229 B.R. 561, 565 (2d Cir. BAP 1999), and the reviewing court must be “left with the definite and firm conviction that a mistake has been made.” *ASM Capital, LP v. Ames Dep’t Stores, Inc. (In re Ames Dep’t Stores, Inc.)*, 582 F.3d 422, 426 (2d Cir.2009). Legal conclusions of the Bankruptcy Court, however, are “reviewed *de novo*.” *In re Kalikow*, 602 F.3d at 91. Finally, mixed questions of law and fact are reviewed either “*de novo* or under the clearly erroneous standard depending on whether the question is predominantly legal or factual.” *Serv. Emps. Int’l, Inc. v. Dir., Office of Workers Comp. Program*, 595 F.3d 447, 455 (2d Cir.2010) (citation omitted).

## II. Warren’s and Simons’ Appeal

Warren and Simons assert on appeal that the Bankruptcy Court erred in piercing Brearly’s corporate veil.<sup>13</sup> By stipulation of all parties, the Plaintiff’s and Kentucky Defendants’ veil-piercing claims against Brearly are governed by English law.<sup>14</sup> These appeals therefore require the Court to determine the content of English law in order to resolve the disputed legal questions on appeal.

<sup>13</sup> On appeal, both Warren and Simons contest not only the availability of veil-piercing in general, but the sufficiency of the Bankruptcy Court’s fact-finding as to each of them individually. Because the Bankruptcy Court’s decision to pierce the veil

is reversed on general grounds, the Court need not reach the latter question.

<sup>14</sup> Brearly was incorporated in Gibraltar, a self-governing overseas dependency of the United Kingdom. Courts regularly look to English law in ascertaining the law of Gibraltar, see, e.g., *Carbotrade S.p.A. v. Bureau Veritas*, 99 F.3d 86, 89 (2d Cir.1996), and the parties have stipulated to doing so here. See also English Law (Application) Act, Act No. 1962–17 § 2(1) (Gib.) (providing, in pertinent part, that “[t]he common law and the rules of equity from time to time in force in England shall be in force in Gibraltar”).

### A. Principles of Determining Foreign Law

“Determination of a foreign country’s law is an issue of law.” *Itar–Tass Russian News Agency v. Russian Kurier, Inc.*, 153 F.3d 82, 92 (2d Cir.1998) (“*Itar–Tass*”). The Federal Rules of Civil Procedure provide that “[i]n determining foreign law, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence.” Fed.R.Civ.P. 44.1. Under Rule 44.1, the court is free to conduct “[its] own research and interpretation” into the content of foreign law. *Ackermann v. Levine*, 788 F.2d 830, 838 n. 7 (2d Cir.1986); see also *In re Magnetic Audiotape Antitrust Litig.*, 334 F.3d 204, 209 (2d Cir.2003) (per curiam); *Bartsch v. Metro–Goldwyn–Mayer, Inc.*, 391 F.2d 150, 155 n. 3 (2d Cir.1968). “[A]ppellate courts, as well as trial courts, may find and apply foreign law,” *Itar–Tass*, 153 F.3d at 92 (quoting *Curley v. AMR Corp.*, 153 F.3d 5, 12 (2d Cir.1998)), and the Court of Appeals has “urge[d] district courts to invoke the flexible provisions of Rule 44.1 to determine issues relating to the law of foreign nations.” *Curley*, 153 F.3d at 13. Although a court may “enlist the parties in th[e] effort” to determine foreign law, “[u]ltimately, the responsibility for correctly identifying and applying foreign law rests with the court.” *Rationis Enters. Inc. of Panama v. Hyundai Mipo Dockyard Co., Ltd.*, 426 F.3d 580, 586 (2d Cir.2005).

The parties have not offered expert testimony concerning the content of English law at any point during the instant litigation, nor were they required to do \*79 so.<sup>15</sup> Accordingly, the Court considers the authorities cited by the parties on appeal, the authorities relied upon by the Bankruptcy Court, and the Court’s independent investigation of relevant primary and secondary authorities. Because “[t]he court’s determination [of foreign law] must be

treated as a ruling on a question of law,” the Bankruptcy Court’s conclusions of English law are reviewed *de novo*. Fed.R.Civ.P. 44.1; see *Nordwind v. Rowland*, 584 F.3d 420, 429 (2d Cir.2009).

15 Several courts have cautioned against undue reliance on the testimony of experts in determining foreign law. See, e.g., *Sunstar, Inc. v. Alberto-Culver Co.*, 586 F.3d 487, 495 (7th Cir.2009) (describing “articles, treatises, and judicial opinions” as “superior sources” of foreign law compared with the testimony of experts, who are often “selected on the basis of the convergence of their views with the litigating position of the client”); *Itar-Tass*, 153 F.3d at 92 (observing that a court determining foreign law should consider “not the credibility of the experts,” but rather, “the persuasive force of the opinions they express[ ]”).

## B. Piercing the Veil Under English Law

### 1. The Veil of Incorporation

Under English law, a corporation is a separate legal entity from its directors, officers, members, shareholders, or other controlling parties. This principle was definitively established in the case of *Salomon v. A. Salomon & Co., Ltd.*, [1897] A.C. 22 (H.L.).<sup>16</sup> In that case, the creditors of a shoe-making business operated by Aron Salomon sought to establish that his company was “a myth and a fiction,” “a mere scheme,” or “only an ‘alias’ ” in order to require Salomon to pay the debts of his company, which had become insolvent. *Id.* at 31–32, 42. The Court of Appeal, which is England’s intermediate appellate court, ruled in favor of Salomon’s creditors, accepting “the[ir] proposition that the formation of [Salomon’s] company and all that followed on it were a mere scheme to enable the appellant to carry on business in the name of the company, with limited liability, contrary to the true intent and meaning of the Companies Act, 1862.” *Id.* at 43 (Lord Herschell).

16 Citations for English cases in this Opinion are given in modified Bluebook format. The following case reporter abbreviations are used: “A.C.” for The Law Reports, Appeal Cases; “Ch.” for The Law Reports, Chancery Division; “Q.B.” for The Law Reports, Queen’s Bench Division; “All E.R.” for All England Reports; “S.C.(H.L.)” for Session Cases (House of Lords); “W.L.R.” for

The Weekly Law Reports; “S.L.T.” for Scots Law Times; “B.C.C.” for British Company Cases; and “B.C.L.C.” for Butterworth’s Company Law Cases. For cases since 2001, the following neutral citation forms are used: “EWCA Civ” for the Court of Appeal of England and Wales (Civil Division); “EWCA Crim” for the Court of Appeal of England and Wales (Criminal Division); and “EWHC” for the High Court of England and Wales. To designate the court rendering each decision, the following abbreviations are given parenthetically the first time a case is cited: “H.L.” for House of Lords; “C.A.” for Court of Appeal; “Ch.” for the High Court Chancery Division; “Q.B.D.” or “K.B.D.” for the High Court Queen’s/King’s Bench Division; and “Fam.” for the High Court Family Division. Bracketed dates in citations for pre-2001 cases reflect the year a case was published, not the year it was decided.

On further appeal, the House of Lords unanimously reversed the Court of Appeal in a landmark *seriatim* opinion that continues to be widely cited.<sup>17</sup> Lord Macnaghten’s speech has become the key passage:

17 See, e.g., *Yukong Line Ltd. of Korea v. Rendsburg Invs. Corp. of Liberia (The Rialto)*, [1998] 1 W.L.R. 294, 303 (Q.B.D.) (Toulson, J.) (“*Yukong*”) (relying on *Salomon* for the proposition that “a limited company has a legal existence independent of its members and is not the agent of its members”).

The company is at law a different person altogether from the subscribers to the memorandum [of incorporation]; and, \*80 though it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers, and the same hands receive the profits, the company is not in law the agent of the subscribers or trustee for them. Nor are the subscribers as members liable, in any shape or form, except to the extent and in the manner provided by the [Companies] Act. That is, I think, the declared intention of the enactment.

*Id.* at 51. The four other Law Lords who heard the case concurred with the same reasoning.<sup>18</sup> Moreover, the Law Lords made clear that their reasoning applied with equal force even to the putative “one-man company.” See, e.g., *id.* at 44 (Lord Herschell) (“It is said that the respondent company is a ‘one-man’ company.... [But] I am unable to

see how it can be lawful for three or four or six persons to form a company for the purpose of ... limited liability, and not for one person to do so....”).

18 See [1897] A.C. at 30–31 (Lord Halsbury L.C.) (“[I]t seems to me impossible to dispute that once the company is legally incorporated it must be treated like any other independent person with its rights and liabilities appropriate to itself ... whatever may have been the ideas or schemes of those who brought it into existence.”); *id.* at 42 (Lord Herschell) (“I am at a loss to understand what is meant by saying that [the company] is but an ‘alias’ for A. Salomon. It is not another name for the same person; the company is ex hypothesi a distinct legal persona.”); *id.* at 54 (Lord Morris) (concurring generally); *id.* at 56 (Lord Davey) (finding Salomon not liable because his company was a “duly formed legal persona”).

Notwithstanding the *Salomon* principle, English courts do recognize that the veil of incorporation may be pierced, or “lifted,”<sup>19</sup> under certain circumstances,<sup>20</sup> as *Salomon* itself suggested. See, e.g., *id.* at 33 (Lord Herschell) (implying that, if Salomon had used his company to commit fraud, the result would have been different). The parties agree on appeal with the Bankruptcy Court’s articulation that, under English law, the corporate veil “ ‘may be pierced only in extremely limited circumstances’ ” and that “ ‘[i]n order for the veil to be pierced, the corporate structure must have been devised as a mere facade concealing true facts.’ ” *In re Tyson*, 412 B.R. at 640 (quoting UK Defendants’ Post–Trial Memorandum of Law).

19 At least one court has distinguished between “piercing” and “lifting” according to the purpose for which corporate personality is disregarded. See *Atlas Mar. Co. S.A. v. Avalon Mar. Ltd. (The Coral Rose)*, [1991] 4 All E.R. 769, 779 (C.A.) (Staughton, L.J.) (“*Atlas*”) (“To pierce the corporate veil is an expression that I would reserve for treating the rights and liabilities or activities of a company as the rights or liabilities or activities of its shareholders. To lift the corporate veil or look behind it, on the other hand, should mean to have regard to the shareholding in a company for some [other] legal purpose.”). Nevertheless, this Opinion follows the more common practice of using these two terms interchangeably.

20 This Opinion discusses only judicial veil-piercing, and therefore, does not consider circumstances in which disregard of the corporate form is authorized or required by statute. See, e.g., Insolvency Act 1986 (c. 45) § 213 (individual liability to the bankruptcy estate for debts of insolvent company where “fraudulent trading” has occurred during the winding-up process); *id.* § 214 (same for “wrongful trading,” wherein individual “knew or ought to have concluded that there was no reasonable prospect that the company would avoid going into insolvent liquidation”); Companies Act 2006 (c. 46) § 993(1) (“If any business of a company is carried on with intent to defraud creditors of the company or creditors of any other person, or for any fraudulent purpose, every person who is knowingly a party to the carrying on of the business in that manner commits a [ ] [criminal] offence.”).

Nevertheless, the parties vigorously disagree as to how that general statement of \*81 law applies to the facts of this case. The Bankruptcy Court did not elaborate that general statement into a formal legal standard, if only because such standards do not appear to exist. Indeed, U.S. courts have previously noted that “ ‘[u]nlike American law, English case law does not provide an enumerated set of factors that a court can evaluate in deciding whether to lift the corporate veil.’ ” *Gabriel Capital, L.P. v. NatWest Fin., Inc.*, 122 F.Supp.2d 407, 433 n. 13 (S.D.N.Y.2000) (“*Gabriel Capital*”) (quoting *United Trade Assocs. Ltd. v. Dickens & Matson (USA) Ltd.*, 848 F.Supp. 751, 760 (E.D.Mich.1994)).<sup>21</sup> A resolution of these appeals requires the Court to survey English law concerning piercing the corporate veil in some detail.<sup>22</sup>

21 The court in *Gabriel Capital*, for its part, reiterated the general statement that “ ‘English law ... will pierce the corporate veil and recognize one entity as the alter ego of another only where special circumstances exist indicating that the relationship of one corporation to another is a mere facade concealing the true facts.’ ” *Gabriel Capital*, 122 F.Supp.2d at 433 n. 13 (quoting *Great Lakes Overseas, Inc. v. Wah Kwong Shipping Grp., Ltd.*, 990 F.2d 990, 997 (7th Cir.1993)).

22 The secondary sources that have been most helpful include: Georgina Andrews, *The Veil of Incorporation—Fiction or Façade?*, Bus. L.Rev., Jan. 2004, at 4 (“Andrews”); Thomas

Cheng, *Piercing the Veil Across the Atlantic: A Comparative Study of the English and the U.S. Corporate Veil Doctrines* (unpublished manuscript) (2010); P.L. Davies et al., *Gower & Davies' Principles of Modern Company Law* (8th ed. 2008) (“Davies”); Gore–Browne, *Company Law Precedents* (Lord Millett et al. eds., 44th ed. 2010) (“Gore–Browne”); Simon Goulding, *Company Law* (2d ed. 1999) (“Goulding”); Andrew Hicks & S.H. Goo, *Cases & Materials on Company Law* (6th ed.2008); John Lowry & Alan Dignam, *Company Law* (2d ed. 2003) (“Lowry & Dignam”); Marc Moore, “A Temple Built on Faulty Foundations”: *Piercing the Corporate Veil and the Legacy of Salomon v. Salomon*, J. Bus. L., Mar. 2006, at 180; S. Ottolenghi, *From Peeping Behind the Corporate Veil, to Ignoring It Completely*, 53 Mod. L.Rev. 338 (1990); Jennifer Payne, *Lifting the Corporate Veil: A Reassessment of the Fraud Exception*, 56 Cambridge L.J. 284 (1997) (“Payne”); Len Sealy & Sarah Worthington, *Cases and Materials in Company Law* (8th ed. 2008) (“Sealy & Worthington”); Susan Watson, *Two Lessons from “Trustor”*, 119 L.Q. Rev. 13 (2003) (“Watson”); Peter Ziegler & Lynn Gallagher, *Lifting the Corporate Veil in the Pursuit of Justice*, J. Bus. L., July 1990, at 292. The Court has also relied upon a similar survey of English veil-piercing law contained in Justice (now Lord Justice) Munby's opinion in *Hashem v. Shayif*, [2008] EWHC 2380 (Fam.) [¶¶ 101–08, 144–221].

## 2. Survey of English Law

The earliest leading case holding that the veil of incorporation may be lifted under appropriate circumstances is *Gilford Motor Co., Ltd. v. Horne*, [1933] Ch. 935 (C.A.) (“*Gilford*”).<sup>23</sup> In *Gilford*, the defendant, Horne, attempted to evade his contractual obligations under a nonsolicitation agreement by forming a company to compete with Horne's former employer and actively solicit its customers. The Court of Appeal, reversing the decision below and granting the plaintiff an injunction to enforce the covenant, held *seriatim* that the injunction bound not only Horne but his company as well. Lord Justice Lawrence reasoned that “the company was a mere cloak or sham for the purpose of enabling the defendant to commit a breach \*82 of his covenant against solicitation.” *Id.* at 965 (Lawrence, L.J.). Likewise, Lord Hanworth M.R. reached the conclusion that “th[e] company was formed as a device, a stratagem, in order to mask the effective carrying on

of a business of Mr. E.B. Horne. The purpose of it was to try to enable him, under what is a cloak or a sham, to engage in business ... in respect of which he had a fear that the plaintiffs might intervene and object.” *Id.* at 956; *see also id.* at 969 (Romer, L.J.) (“[T]his defendant company was formed and was carrying on business merely as [a] cloak or sham for the purpose of enabling the defendant Horne to commit the breach of the covenant that he entered into deliberately with the plaintiffs....”).

23 Earlier cases are also sometimes cited, albeit less frequently. *See Daimler Co., Ltd. v. Cont'l Tyre & Rubber Co. (Gr.Brit.), Ltd.*, [1916] 2 A.C. 307 (H.L.) (concluding that the corporate veil may be lifted to determine the nationality of a company's ownership in a time of war); *Re Darby, ex parte Brougham*, [1911] 1 K.B. 95, 101 (K.B.D.) (“*Darby*”) (holding liable the two incorporators of an insolvent Guernsey company for the company's debts, where the company was “merely an alias” for the incorporators and where the incorporators had already been convicted of fraud relating to the company's issuance of materially misleading prospectuses).

Thirty years later, in *Jones v. Lipman*, [1962] 1 W.L.R. 832(Ch.) (Russell, J.), the Chancery Division pierced the corporate veil on facts somewhat similar to those in *Gilford*. In *Jones*, the first defendant, Lipman, contracted to sell some London property to the plaintiffs, but then changed his mind before the closing. Instead, Lipman conveyed the property to another defendant, Alamed Ltd. (“Alamed”), which was a company formed by Lipman and “under [his] complete control.” *Id.* at 835. The court awarded specific performance of the sale contract not only against Lipman, but against Alamed as well, holding that “specific performance cannot be resisted by a vendor who, by his absolute ownership and control of a limited company in which the property is vested, is in a position to cause the contract to be completed.” *Id.* at 835–36. Citing the Lord Justices' observations in *Gilford*, and concluding that they “appl[ied] even more forcibly to the present case,” Justice Russell declared that “[t]he defendant company is the creature of the first defendant, a device and a sham, a mask which he holds before his face in an attempt to avoid recognition by the eye of equity.” *Id.* at 836. The court concluded, as a matter of principle, that “an equitable remedy is rightly to be granted directly against the creature in such circumstances.” *Id.* at 836–37.

Principally based on the authority of *Gilford* and *Jones*, the English courts thereafter became increasingly amenable to granting applications to lift the corporate veil. In *Littlewoods Mail Order Stores Ltd. v. Inland Revenue Comm'rs*, [1969] 1 W.L.R. 1241 (C.A.) (“*Littlewoods*”), Lord Denning M.R. stated:

I decline to treat the Fork Manufacturing Co. Ltd. as a separate and independent entity. The doctrine laid down in *Salomon v. Salomon & Co.* [1897] A.C. 22, has to be watched very carefully. It has often been supposed to cast a veil over the personality of a limited company through which the courts cannot see. But that is not true. The courts can and often do draw aside the veil. They can, and often do, pull off the mask. They look to see what really lies behind.... I think that we should look at the Fork Manufacturing Co. Ltd. and see it as it really is—the wholly-owned subsidiary of Littlewoods. It is the creature, the puppet, of Littlewoods in point of *fact*: and it should be so regarded in point of *law*.

*Id.* at 1254.<sup>24</sup> Likewise, in *Wallersteiner v. Moir*, [1974] 1 W.L.R. 991 (C.A.), the \*83 Court of Appeal considered the corporate personality of various foreign entities owned by an influential London businessman named Dr. Wallersteiner. Lord Denning M.R. stated:

<sup>24</sup> In his separate opinion, Lord Justice Karminski observed that although “Fork and ... Littlewoods[ ] are two separate entities in law” based on “the rule in *Salomon*,” it was nevertheless “necessary here, as I think, to look at what I believe to be the realities of this situation.” *Littlewoods*, [1969] 1 W.L.R. at 1256 (Karminski, L.J.); see *Adams v. Cape Indus. Plc*, [1990] Ch. 433, 543 (C.A.) (Slade, L.J.) (observing that Lord Justices Karminski and Sachs “refrained” from adopting Lord Denning M.R.’s reasoning, thereby making it *dicta* ).

I am prepared to accept that the English concerns—those governed by English company law or its counterparts in Nassau or Nigeria—were distinct legal entities.... I will assume, too, that [the Liechtenstein concerns] were distinct legal entities, similar to an English limited company. Even so, I am quite clear that they were just the puppets of Dr. Wallersteiner. He controlled their every movement. Each danced to his bidding. He pulled the strings. No one else got within reach of them. Transformed into legal language, they were his agents to do as he commanded.... I am of the opinion that the court should pull aside the corporate veil and treat these concerns as being his creatures—for whose doings he should be, and is, responsible.

*Id.* at 1013 (citing *Gilford* ). *But see id.* at 1027 (Buckley, L.J.) (“[W]ith the greatest deference to Lord Denning M.R., I do not think we are justified in identifying Dr. Wallersteiner with I.F.T. [the Bahamian company] ... on the ground that I.F.T. was merely the puppet of Dr. Wallersteiner or on any other ground.”).<sup>25</sup>

<sup>25</sup> In *D.H.N. Food Distributors Ltd. v. Tower Hamlets London Borough Council*, [1976] 1 W.L.R. 852 (C.A.) (“*D.H.N.*”), Lord Denning M.R. pierced the corporate veil separating three companies in order to enable the parent company to recover “disturbance” payments (i.e., compensation for the exercise of eminent domain) on behalf of one of its subsidiaries, thereby inaugurating the “single economic entity” doctrine. As made clear by subsequent cases, however, this doctrine never gained broad support and was ultimately short-lived. See *Adams*, [1990] Ch. at 532–39.

Finally, in 1985, the Court of Appeal applied *Wallersteiner* to impose liability on an individual defendant who had created a “sophisticated and intricate network” of some eighty “interrelated English and foreign companies and foreign trusts as a mechanism through which [he] could at will dispose of his English assets.” *Re a Company*, [1985] 1 B.C.C. 99421, 99425 (C.A.) (Cumming–Bruce, L.J.). The court, relying on *Wallersteiner*, declared that “the court will use its powers to pierce the corporate veil if it is necessary to achieve justice irrespective of the legal efficacy of the corporate structure under consideration.” *Id.*

The extension of British veil-piercing law suggested by *Littlewoods*, *Wallersteiner*, *D.H.N.*, and *Re a Company* was tempered, however, by a contrary tendency beginning in the late 1970s. Most importantly, in 1978, the House of Lords cautioned that it “ha[d] some doubts whether ... the Court

of Appeal [in *D.H.N.*] properly applied the principle that it is appropriate to pierce the corporate veil only where special circumstances exist indicating that [it] is a mere façade concealing the true facts.”<sup>26</sup> *Woolfson v. Strathclyde* \*84 *Reg'l Council*, [1978] S.C.(H.L.) 90, 96 (Lord Keith of Kinkel).

<sup>26</sup> This passage from *Woolfson* is widely cited as embodying the general rule on veil-piercing under English law. See, e.g., *Jennings v. Crown Prosecution Serv.*, [2008] 1 A.C. 1046, 1048 (H.L.) (citing and paraphrasing *Woolfson*). *Woolfson* derived this statement from *Tunstall v. Steigmann*, [1962] 2 Q.B. 593 (C.A.), in which the Court of Appeal observed: “Whilst it may be argued that in the above circumstances the courts have departed from a strict observance of the principle laid down in [*Salomon*], it is true to say that any departure, if indeed any of the instances given can be treated as a departure, has been made to deal with special circumstances when a limited company might well be a facade concealing the real facts.” *Id.* at 601–02 (Ormerod, L.J.).

In 1989, a case was decided that strongly re-asserted the *Salomon* principle and thereby cast into doubt the foregoing developments in English veil-piercing jurisprudence. That decision was *Adams v. Cape Industries Plc.*, [1990] Ch. 433 (C.A.), a complex litigation involving the plaintiff’s attempt to enforce in the United Kingdom a default judgment he had obtained in Texas federal court against the defendant (“Cape”), a global asbestos manufacturer and distributor. The Court of Appeal concluded that Cape had been “present” in the United States at the time of the Texas default judgment was entered only if the corporate veil between Cape and its U.S. affiliates were lifted.

After surveying the existing body of English veil-piercing cases, the court noted “one well-recognized exception to the rule prohibiting the piercing of ‘the corporate veil,’ ” namely, “ ‘where special circumstances exist indicating that it is a mere façade concealing the true facts.’ ” *Id.* at 539 (Slade, L.J.) (quoting *Woolfson*, 1978 S.C.(H.L.) at 96). The plaintiff suggested three scenarios in which he believed the *Woolfson* exception should be applied, the last being “where a defendant by the device of a corporate structure attempts to evade ... such rights of relief as third parties may in the future acquire.” *Id.* at 544. The court considered whether the third condition was an accurate statement of the law, and concluded that it was not:

As to condition (iii), we do not accept as a matter of law that the court is entitled to lift the corporate veil as against a defendant company which is the member of a corporate group merely because the corporate structure has been used so as to ensure that the legal liability (if any) in respect of particular future activities of the group (and correspondingly the risk of enforcement of that liability) will fall on another member of the group rather than the defendant company. Whether or not this is desirable, the right to use a corporate structure in this manner is inherent in our corporate law.

*Id.* at 544. Elsewhere in his opinion—the sole opinion offered by the Court of Appeal in the case—Lord Justice Slade likewise concluded:

If a company chooses to arrange the affairs of its group in such a way that the business carried on in a particular foreign country is the business of its subsidiary and not its own, it is, in our judgment, entitled to do so. Neither in this class of case nor in any other class of case is it open to this court to disregard the principle of *Salomon v. A. Salomon & Co. Ltd.*, [1897] A.C. 22 merely because it considers it just so to do.

*Id.* at 537. Lord Justice Slade’s controlling opinion thus not only ruled that the plaintiff was not entitled to enforce his default judgment in the United Kingdom, but also sent a clear message that the English courts had strayed too far from the orthodoxy of *Salomon*.

The extent to which *Adams* would reverse course was at first unclear. Despite *Adams*’ sweeping language, a lower court opinion three years later applied *Adams* narrowly. In *Creasey v. Breachwood Motors Ltd.*, [1992] B.C.C. 638

(Q.B.D.), Richard Southwell Q.C., sitting as a Deputy High Court Judge, distinguished *Adams* on its facts, observing that the case before him did not involve the defendants' intentions to structure a corporate group to shield against hypothetical liabilities in the future, but rather, "to evade responsibility for the contingent liabilities to [the plaintiff] for breach of his contract of employment" by transferring assets away from the company that had employed plaintiff, thereby rendering it judgment-proof. \*85 *Id.* at 647. The *Creasey* court also stated that "[t]he most important factor in this case" was that the individual defendants "themselves deliberately ignored the separate corporate personalities" of their companies, thereby "disregard[ing] their duties as directors and shareholders" to the company whose assets were stripped. *Id.* at 647–48.

*Creasey*, however, was soon criticized. In *Ord v. Belhaven Pubs Ltd.*, [1998] B.C.C. 607 (C.A.), the Court of Appeal relied on *Adams* to reverse the trial court, finding that it had "disregard[ed] the distinction between the legal entities that were involved" by erroneously concluding that "since the company cannot pay, the shareholders who are the people financially interested should be made to pay instead." *Id.* at 615 (Hobhouse, L.J.). Lord Justice Hobhouse, writing for the panel, then went out of his way to address *Creasey*, which in his view had relied on "a very similar train of thought to that which was followed by the [trial] judge in the present case." *Id.* at 616. The Court of Appeal declared that *Creasey* "represents a wrong adoption of the principle of piercing the corporate veil" and that the case "should no longer be treated as authoritative." *Id.*

Nevertheless, it is clear that *Adams* has not, as a practical matter, foreclosed all judicial veil-piercing. For example, in *Trustor AB v. Smallbone*, [2001] 1 W.L.R. 1177(Ch.) ("*Trustor*"), Sir Andrew Morritt V–C pierced the corporate veil to hold liable Smallbone who, in breach of his fiduciary duty to the plaintiff corporation (for which he served as managing director), directed certain funds to be withdrawn from the corporation and transferred to a Gibraltar company, Introcom (International) Ltd., which Smallbone controlled.<sup>27</sup> The court held that Smallbone was personally liable for Introcom's receipt of the misappropriated funds because Smallbone had interposed Introcom as "a device or facade ... used as the vehicle for the receipt of the money" diverted from Trustor.<sup>28</sup> *Id.* at 1186 [¶ 25].

27 In particular, Smallbone was the beneficiary of a Liechtenstein "Anstalt" entity, which in turn was the sole owner of Introcom. *Trustor*, [2001] 1 W.L.R. at 1183 [¶ 15].

28 At least one commentator has subsequently questioned whether it was necessary to pierce the veil in order to hold Smallbone liable, given his breach of fiduciary duty to the plaintiff corporation. See Watson at 13–17.

Despite many decades of veil-piercing jurisprudence since *Salomon*, only the highlights of which are set forth above, English courts caution that it remains difficult to determine when it is appropriate to lift the veil. In *Adams*, the Court of Appeal observed:

From the authorities cited to us we are left with rather sparse guidance as to the principles which should guide the court in determining whether or not the arrangements of a corporate group involve a façade within the meaning of that word as used by the House of Lords in *Woolfson*, 1978 S.L.T. 159. We will not attempt a comprehensive definition of those principles.

*Adams*, [1990] Ch. at 543 (Slade, L.J.). Recent cases have expressed a certain measure of bewilderment as to the current state of the law.<sup>29</sup> Moreover, the metaphorical \*86 language in which the holdings of *Gilford*, *Jones*, *Wallersteiner*, and similar cases are couched has exacerbated the difficulties of achieving analytical clarity. See *Yukong*, [1998] 1 W.L.R. at 305 (observing, with regard to veil-piercing, that "metaphor can be used to illustrate a principle; it may also be used as a substitute for analysis and may therefore obscure reasoning").

29 See, e.g., *Raja v. Van Hoogstraten*, [2006] EWHC 2564(Ch.) [¶ 30] (observing that English veil-piercing law "is not clear"), *aff'd*, [2008] EWCA Civ 1444; *Kensington Int'l Ltd. v. Congo*, [2005] EWHC 2684 (Q.B.D.) ("*Kensington* ") [¶ 177] (noting "a number of cases where the courts have thought it right to 'pierce the corporate veil,' although the meaning of the expression and its out-working differs in the varying contexts of the

authorities concerned”); *Yukong*, [1998] 1 W.L.R. at 310 (“The cases have not worked out what is meant by ‘piercing the corporate veil.’ It may not always mean the same thing.” (citation omitted)); *Creasey*, [1993] B.C.C. at 647 (“The [case law] authorities ... provide only limited guidance as to the circumstances in which this power [of veil-piercing] is to be exercised.”). To similar-effect, Gore–Browne has observed that “[i]t is not possible to formulate any single principle as the basis for these decisions, nor are all the decisions, as to when the separate legal entity of the company must be respected or when it may be disregarded, entirely consistent with one another.” Gore–Browne ¶ 1.3.1.

### 3. Principles of English Law

Bearing in mind these words of caution, some general conclusions about the current state of English veil-piercing law may be drawn. First, given *Salomon*, the fact that a person engages in the “carrying on of a business” using a duly incorporated, yet seemingly artificial, entity is not sufficient to justify piercing that entity’s veil. Legal formalisms must be respected even at the risk of abiding a seeming injustice: “[S]ave in cases which turn on the wording of particular statutes or contracts, the court is not free to disregard the principle of [*Salomon*] merely because it considers that justice so requires.” *Adams*, [1990] Ch. at 536 (Slade, L.J.); see also *Hashem*, [2008] EWHC 2380 [¶ 160] (“[T]he court cannot pierce the corporate veil ... merely because it is thought to be necessary in the interests of justice.”); *Kensington*, [2005] EWHC 2684 [¶ 177] (“The authorities make it plain that the separate personality of the company cannot be ignored merely because a court considers that it might be just to do so.”); *Trustor*, [2001] 1 W.L.R. at 1185 [¶ 21] (rejecting “interests of justice” approach to veil-piercing). But see *Ratiu v. Conway*, [2005] EWCA Civ 1302 (C.A.) (Auld, L.J.) [¶ 78] (arguing in favor of “lifting the corporate veil where the facts require it,” when a breach of fiduciary duty has occurred). Likewise, courts may no longer have regard to the “the realities of the situation” in an attempt to align the law with economic circumstances. *Adams*, [1990] Ch. at 534.<sup>30</sup> Accordingly, veil piercing is quite rare under English law. See *Hashem*, [2008] EWHC 2380 [¶ 221] (noting that opportunities for veil-piercing are “‘extremely limited indeed’” and that “[r]eported cases in any context where the claim has succeeded are few in number and striking on their facts.” (quoting *Ord*, [1998] B.C.C. at 615)).<sup>31</sup>

30 See also *Adams*, [1990] Ch. at 538 (“[Counsel] suggested beguilingly that it would be technical for us to distinguish between parent and subsidiary company in this context; economically, he said, they were one. But we are concerned not with economics but with law. The distinction between the two is, in law, fundamental and cannot be bridged.”) (quoting *Bank of Tokyo Ltd. v. Karoon*, [1987] A.C. 45, 64 (C.A.) (Goff, L. J.)); *Kensington*, [2005] EWHC 2684 [¶ 180] (noting that although “a court looks for the substance of a matter” in determining whether to pierce the corporate veil, it “looks for the legal substance, not its economic substance, if different.”).

31 Commentators express similar caution about the usefulness or viability of the veil-piercing doctrine. See, e.g., Davies at 208–09 (“The doctrine of lifting the veil plays a small role in British company law.... Even where the case for applying the doctrine may seem strong, as in the undercapitalised one-person company ... the courts are unlikely to do so.”); Sealy & Worthington at 53 (“The topic of ‘lifting the veil’ persists in company law textbooks ... yet all the signs are that, after a brief flurry of interest some decades ago, there is now little potential for it to develop into a doctrine of any substance.”).

\*87 Second, courts may “pierce the corporate veil only where special circumstances exist indicating that [it] is a mere façade concealing the true facts.” *Woolfson*, 1978 S.C. (H.L.) at 96; see *Hashem*, [2008] EWHC 2380 [¶ 151] (describing *Woolfson’s* “statement of principle” as “[t]he starting point” for veil-piercing analysis). In construing the *Woolfson* principle, courts observe that “an element of impropriety or dishonesty” is required to pierce the veil. *Kensington*, [2005] EWHC 2684 [¶ 178]; see also *Hashem*, [2008] EWHC 2380 [¶ 161] (“[T]he corporate veil can be pierced only if there is some ‘impropriety.’”); *Ord*, [1998] B.C.C. at 615 (discussing *Adams* and stating “there must be some impropriety before the corporate veil can be pierced”). This requirement may be satisfied, in part, by evidence of the defendant’s subjective intent to defraud. “Following *Jones v. Lipman*, we agree ... [that] where a façade is alleged, the motive of the perpetrator may be highly material.” *Adams*, [1990] Ch. at 542; see also *id.* at 540 (“In our judgment ... whenever a device or sham or cloak is alleged in cases such as this, the motive of the alleged perpetrator must be legally relevant....”).

Nevertheless, although evidence of impropriety is necessary, it is not in itself sufficient to justify veil-piercing. “[T]he court cannot, on the other hand, pierce the corporate veil merely because the company is involved in some impropriety.” *Hashem*, [2008] EWHC 2380 [¶ 162]. For example, the fact that a “façade” company has breached a contract is not, in itself, dispositive of the veil-piercing inquiry. *See Dadourian Grp. Int’l Inc. v. Simms*, [2006] EWHC 2973(Ch.) (“*Dadourian*”) [¶ 683] (“It is not permissible to lift the veil simply because a company has been involved in wrong-doing, in particular simply because it is in breach of contract.”), *aff’d*, [2009] EWCA Civ 169 (C.A.).<sup>32</sup> Instead, “the court is entitled to ‘pierce the corporate veil’ ... [and hold liable] the individual(s) in control of it [only] if the company was used as a device or facade to conceal the true facts thereby avoiding or concealing any liability of those individual(s).” *Trustor*, [2001] 1 W.L.R. at 1185 [¶ 23]. *Trustor* has subsequently been interpreted to mean that “[t]he impropriety must be linked to the use of the company structure to avoid or conceal liability.” *Hashem*, [2008] EWHC 2380 [¶ 162]. “[I]t follows from all this that if the court is to pierce the veil it is necessary to show *both* control of the company by the wrongdoer(s) *and* impropriety, that is, (mis)use of the company by them as a device or façade to conceal their wrongdoing.” *Id.* [¶ 163].<sup>33</sup> Moreover, the court may pierce the veil “only so far as is necessary to provide a remedy for the particular wrong which those controlling the company have done.” *Id.* [¶ 164]; *see also Dadourian*, [2006] EWHC 2973 [¶ 682] (“[T]he veil, if it is to be lifted at all, is to be lifted for the purposes of the relevant transaction.”).

<sup>32</sup> Likewise, in *Trustor*, the Vice-Chancellor observed that “[c]ompanies are often involved in improprieties” and that “it would make undue inroads into the principle of *Salomon’s* case if an impropriety not linked to the use of the company structure to avoid or conceal liability for that impropriety was enough.” *Trustor*, [2001] 1 W.L.R. at 1185 [¶ 22].

<sup>33</sup> Note that the veil-piercing inquiry does not turn on the purpose for which the corporate structure was originally formed. “[A] company can be a façade even though it was not originally incorporated with any deceptive intent.” *Hashem*, [2008] EWHC 2380 [¶ 164]; *see also Payne* at 290. For example, in *Trustor*, the fact that Introcom was a genuine company with a separate trading existence did not prevent its corporate veil from being pierced.

*Trustor*, [2001] 1 W.L.R. at 1185 [¶ 16]. “The question is whether [the company] is being used as a façade at the time of the relevant transaction(s).” *Hashem*, [2008] EWHC 2380 [¶ 164].

\*88 Third, where a corporate structure is interposed for the purpose of shielding a defendant from liability to the plaintiff or other third parties, the plaintiff’s ability to recover from the defendant on a veil-piercing theory turns on whether the defendant had already incurred some liability to the plaintiff at the time he interposed the corporate structure. In *Adams*, a corporate structure that was “clearly a façade in the relevant sense” was nevertheless not able to be pierced because “there was nothing illegal as such in [the parent corporation] arranging its affairs” to avail itself of the *Salomon* principle in order to shield itself from contingent future liabilities. *Adams*, 1990 Ch. at 543–44. *Adams* thus drew a clear distinction between a defendant using a corporate structure to “evade ... such rights of relief against him as third parties already possess”—conduct for which veil-piercing may apply—and a defendant using a corporate structure to evade “such rights of relief as third parties may in the future acquire”—conduct which, good or bad, was thought “inherent in our corporate law.” *Adams*, [1990] Ch. at 544. Indeed, the court in *Hashem* observed:

The common theme running through all the cases in which the court has been willing to pierce the veil is that the company was being used by its controller in an attempt to immunize himself from liability for some wrongdoing which existed entirely *dehors* [i.e., outside or irrespective of] the company. It is therefore necessary to identify the relevant wrongdoing—in *Gilford* and *Jones v. Lipman* it was a breach of contract which, itself, had nothing to do with the company, in *Gencor [ACP Ltd. v. Dalby]*, [2000] 2 B.C.L.C. 734(Ch.) and *Trustor* it was a misappropriation of someone else’s money which again, in itself, had nothing to do with the company—before proceeding to demonstrate the wrongful misuse or involvement of the corporate structure.

*Hashem*, [2008] EWHC 2380 [¶ 199]; see also *Lindsay v. O'Loughnane*, [2010] EWHC 529 (Q.B.D.) [¶¶ 132–40] (quoting and relying upon *Hashem's* analysis); *Law Soc'y of Eng. & Wales v. Habitable Concepts Ltd.*, [2010] EWHC 1449(Ch.) (“*Law Society*”) [¶ 20] (same).

Other recent veil-piercing cases have reached the same conclusion as *Hashem* in this respect. In *Kensington*, the High Court stated that “[t]he corporate structure could legitimately be used” to limit “the legal liability (if any) in respect of particular *future* activities,” while “transactions or structures, which have no legal substance, and which are set up with a view to defeating *existing* claims of creditors ... can, if they are purely a sham and a façade, be treated by the court as lacking validity.” *Id.* [¶¶ 185, 187] (emphasis added). Indeed, the *Kensington* court's decision to pierce the veil expressly depended on a finding that “[u]nlike *Adams*, the liabilities of the [defendant] are not future potential liabilities but existing liabilities under extant judgments.” *Id.* [¶ 190]. Moreover, in *Kuwait Oil Tanker Co. SAK v. Al Bader*, Justice Teare permitted post-judgment veil-piercing to treat a company's assets as those of the judgment debtor, but only because the court was “satisfied that [the company] was acquired by Mr. Al Bader ... for the purpose of ensuring that his assets would not be available to meet his *then existing (though not yet established)* liability to the Claimants for fraud.” [2008] EWHC 2432 (Q.B.D.) [¶ 35] (emphasis added).<sup>34</sup> Commentators also \*89 regard the distinction between existing legal duty and potential future liability as fundamental to understanding English veil-piercing law.<sup>35</sup>

<sup>34</sup> Note, however, that *Creasey* also lifted the corporate veil where the defendants had used the corporate form to defeat “existing (though not yet established) liability” to the plaintiff, who sued after they had caused him to be unlawfully discharged from employment. *Creasey* was explicitly disapproved by the Court of Appeal in *Ord*.

<sup>35</sup> See, e.g., *Andrews* at 7 (“[S]heltering behind the fictional veil of incorporation to limit personal liability for future business activities in the absence of any specific planned impropriety linked to the company structure, is simply legitimate reliance on the principle articulated in [*Salomon*].”); *Goulding* at 72 (“[*Ord's* ] rejection of *Creasey* makes it unlikely that the courts will ever be willing to

lift the veil unless there is clear evidence of a transfer designed to avoid an *existing* contractual or other liability.” (emphasis added)); *Payne* at 290 (“In order for the fraud exception to the *Salomon* principle ... to be successfully invoked, the defendant must have the intention to use the corporate structure in such a way as to deny the plaintiff some pre-existing legal right.”); *Sealy & Worthington* at 63 (“In both [*Gilford* ] and [*Jones* ], the company whose separate existence was disregarded had been set up deliberately in an attempt to evade an *existing* obligation,” while in *Adams*, it “was made clear that the law does not look with similar disfavour on the formation of a limited liability company in order to confine the *future* or *contingent* liabilities of an enterprise within specific limits.”).

Fourth, where the plaintiff may recover in fraud or “deceit” against a defendant directly, that path is preferable to indirect liability via veil-piercing. This principle was made plain by the High Court in *Dadourian*, where the plaintiffs' claims against the defendants included fraudulent misrepresentation, civil conspiracy, and breach of contract on a veil-piercing theory. *Dadourian*, [2006] EWHC 2973 [¶¶ 15–16]. In a preceding arbitration, the defendants had been found liable for fraudulent misrepresentation. *Id.* [¶ 2]. The High Court observed that “whilst a person committing the tort of deceit should be liable for all the loss which flows from his misrepresentation, it would be unprincipled to impose a liability on him for the loss of bargain [i.e., contract damages] suffered by a misrepresentee in respect of a contract with a third party with whom he had been induced to contract by the misrepresentation.” *Id.* [¶ 684]. The court reasoned:

[I]t may well be that where A contracts with B as a result of B's fraudulent misrepresentation and the contract has been completed ... A is able to claim (a) damages for loss of bargain as a result of B's breach of contract and (b) reliance loss, although he could not obtain double recovery. It does not follow that B should be liable for contractual damages to A where the contract which he procured was one between A and C, even where C is the creature of B. To put the point another way, where in that example

the principle of corporate separation exemplified in [*Salomon*] would apply absent a misrepresentation by the person controlling the company, there is no need, and it would be inappropriate, to lift the veil in order to provide A with a contractual remedy against B; A recovers all his loss arising as a result of the misrepresentation by his tortious claim in deceit.

*Id.* [¶ 685] (Warren, J.).<sup>36</sup> Applying this reasoning, where an individual (“B”) has, \*90 by making fraudulent misrepresentations, procured a contract between the plaintiff (“A”) and a third party (“C”), and C subsequently breaches that contract, any claim that A possesses against B sounds in tort rather than in contract, “even where C is the creature of B.” Thus, where “[t]he Claimants have their remedy ... in the form of an action for fraudulent misrepresentation,” “[t]here is simply no need ... to lift the veil at all.” *Id.* [¶ 686].<sup>37</sup>

<sup>36</sup> To the extent this reasoning reflects the common law preference for legal remedies over equitable ones, a similar principle applies under U.S. law. “It is well-established under New York law that equity will not entertain jurisdiction where there is an adequate remedy at law.” *Superint’t of Ins. v. Ochs (In re First Cent. Fin. Corp.)*, 377 F.3d 209, 215 (2d Cir.2004) (citation omitted); see also *Reg’l Airport Auth. of Louisville v. LFG, LLC*, 460 F.3d 697, 711 (6th Cir.2006) (“Kentucky follows the traditional rule that equitable relief is not available where there exists an adequate remedy at law.”).

<sup>37</sup> Although Justice Warren proceeded to articulate alternative grounds for his decision “in case [he was] wrong in that approach,” *id.* [¶ 688], his judgment was affirmed, see *Dadourian*, [2009] EWCA Civ 169, and subsequent justices of the High Court have relied on *Dadourian’s* reasoning. See, e.g., *Lindsay v. O’Loughnane*, [2010] EWHC 529 (Q.B.D.) [¶ 130] (Flaux, J.) (applying *Dadourian* for the principle that “where a claim in deceit succeed[s] against the person controlling the company, it would be inappropriate to permit the veil to be lifted to enable the claimant to

pursue a contractual claim against that person”); *Law Society*, [2010] EWHC 1449 [¶ 22] (Norris, J.) (refusing to “press the principle of piercing the corporate veil beyond its proper bounds[;] particularly when there is an alternative” in tort); *Hashem*, [2008] EWHC 2380 [¶¶ 158–59, 165].

Although *Dadourian* was the first case to articulate this fourth principle clearly, it was not the first to suggest its existence. For example, in 2002, Lord Hoffmann observed in *dicta* that, if an individual defendant makes a fraudulent misrepresentation on behalf of a company, that individual defendant need not be held liable through a circuitous veil-piercing theory but rather, may be made to answer for his own tort. *Std. Chartered Bank v. Pak. Nat’l Shipping Corp.*, [2002] UKHL 43 [¶¶ 20–22], [2003] 1 A.C. 959, 968–69 (H.L.) (“SCB ”); see also Lowry & Dignam at 47 (citing *SCB* and observing that “if the tort is deceit rather than negligence the courts will allow personal liability to flow to a director or employee”). The seeds of *Dadourian’s* reasoning were, in fact, sown as early as *Salomon*, wherein Lord Davey observed that “[i]f [*Salomon*] has committed a fraud or misdemeanour ... he may be proceeded against civilly” by the plaintiff). *Salomon*, [1897] A.C. at 57.

Finally, although not a veil-piercing principle *per se*, English courts have observed that parties may avoid the harsh effects of the *Salomon* principle by the exercise of due diligence, for instance, by contracting around a potential problem. As Lord Herschell observed in *Salomon* itself: “[I]t must be remembered that no one need trust a limited liability company unless he so please, and that before he does so he can ascertain, if he so please, what is the capital of the company and how it is held.” *Salomon*, [1897] A.C. at 46 (Lord Herschell). More recently, in *Yukong*, the High Court stated that “[i]t has long been recognised that the *Salomon* principle can cause hardship, although those dealing with one-man companies may, and commonly do, seek to protect themselves by requiring a personal guarantee.” *Yukong*, [1998] 1 W.L.R. at 305 (citation omitted). As such, assuming a plaintiff has acted prudently to protect itself, veil-piercing is unnecessary because the plaintiff may recover directly on a breach of guarantee against the defendant.

#### C. Factual Findings on Veil-Piercing Claim

Before applying this determination of English law to the question of whether Brearly’s corporate veil may be lifted to impose liability on the UK Defendants, it is helpful to describe the Bankruptcy Court’s decision. The court held,

following trial, that Brearly's liability for breach of contract should be imposed on the four UK Defendants as a matter of English law. In ascertaining the content of English law, the Bankruptcy Court relied upon the UK \*91 Defendants' post-trial memorandum of law; various English cases (including *Gilford*, *Trustor*, *Kensington*, and *Ord*); and a number of New York and Kentucky cases, whose reasoning the court relied upon by analogy.

The Bankruptcy Court's factual findings, construed in the light most favorable to the Plaintiff, are as follows. Brearly was a "shell corporation" formed under Gibraltar law by Abbey, an English investor "who was a friend and business acquaintance of Simons." *In re Tyson*, 412 B.R. at 628. Abbey permitted Simons to use Brearly "as the vehicle to carry out the transactions relating to the international rights to the Fight" on the sole condition that "Simons perform all the work." *Id.* at 631. Abbey was Brearly's sole shareholder,<sup>38</sup> and "[a]t the time of the Fight, Brearly had minimal capitalization (if any), no assets, no offices and no employees, and it had never engaged in any business." *Id.* at 628; *see also id.* at 640–41. Further, although some of the contracts entered into by Brearly required Fight proceeds to be deposited into a "Brearly" bank account, there was no evidence that Brearly had its own bank account. *Id.* at 640–41. The Bankruptcy Court thus concluded that "Brearly was not what the UK Defendants said it was"—"an offshore subsidiary or affiliate of Sports Network used for the purpose of saving taxes"—but rather, "someone else's shelf entity, a corporate shell, with no employees, capital or business, used as a 'facade concealing true facts.'" *Id.* at 640.

38 According to the parties' submissions on appeal, Abbey was one of two corporate officers of Brearly. The other officer was an unidentified individual at Marrache, Brearly's counsel in Gibraltar.

It was undisputed at trial that none of the UK Defendants were incorporators, owners, directors, shareholders, or employees of Brearly, or otherwise legally related to that entity. Nonetheless, the Bankruptcy Court made ample findings concerning activities undertaken by the UK Defendants—and, in particular, by Simons—on Brearly's behalf. Simons and Heath "were the only parties who negotiated with Straight Out in connection with the acquisition of the international rights to the Fight." *Id.* In representing Brearly, Simons and Heath "used Sports Network's stationery and business facilities in England to carry on all [of Brearly's] business."<sup>39</sup> *Id.* at 641. The actual sales of the International Rights were

conducted on Brearly's behalf by Simons, among others.<sup>40</sup> *Id.* at 632. Simons took responsibility for approving all of Brearly's licensing deals, collecting revenues, paying out expenses, keeping all accounting records, and overseeing administrative tasks performed by others.<sup>41</sup> *Id.* at 631. The post-Fight income statement summarizing the International Proceeds was prepared on Brearly's behalf by a Sports Network accountant. *Id.* at 635 & n. 13. Indeed, aside from Abbey's initial consent to allow Brearly to be used, and aside from Marrache's apparent role in approving (and later repudiating) the July 26 Assignment, every person who acted on Brearly's behalf \*92 in connection with the Fight was someone who was also affiliated with, or employed by, Sports Network or Sports & Leisure.

39 On appeal, the Plaintiffs also rely on evidence that all communications sent by Heath were from Sports Network or Warren-affiliated email addresses.

40 Simons also involved David McConachie ("McConachie") and Chester English in selling the International Rights on Brearly's behalf. In addition to working for Sports Network, McConachie had his own business, and the parties disagree on appeal regarding the capacity in which McConachie was asked to work for Brearly.

41 The Plaintiff contends on appeal, for example, that McConachie prepared Brearly's invoices at Simons' instruction.

Based on this and other evidence, the Bankruptcy Court concluded that "Brearly never had a real interest in the transaction or a true economic stake, and the UK Defendants ignored its position when it suited their interests." *Id.* at 641. For instance, the UK Defendants caused Brearly to assign to Sports Network its right to sell the Fight in the United Kingdom, apparently because Sports Network had an exclusive contractual relationship with the only broadcaster capable of televising the Fight there. *Id.* at 632, 641. The UK Defendants also paid Showtime its \$1.3 million out of Sports Network's revenues from the UK sales, thus satisfying Warren's personal guarantee to Showtime (as well as Brearly's obligation to Showtime under the July 26 Assignment). *Id.* at 641. Likewise, the UK Defendants caused Brearly to appear and then default in certain post-Fight litigation in Kentucky<sup>42</sup>—conduct which the Bankruptcy Court regarded as an "abuse of the process of two courts ... [that] constitutes

a further misuse of the corporate form that supports veil piercing.” *Id.*

42 This litigation is described in Section III.A below.

The Bankruptcy Court further found that the UK Defendants introduced Brearly to the transaction with improper motives. Namely, the court found that the UK Defendants used Brearly with the intent to “injure and defraud” Tyson and the Kentucky Defendants by causing Brearly to agree to the Distribution Agreement and the July 26 Assignment “without any intention of honoring them.” *Id.* at 642. In reaching this conclusion, the Bankruptcy Court relied on the trial testimony of Espinoza and Webb and the deposition testimony of Abbey. Espinoza, Tyson’s attorney, “testified credibly that Heath had told him, in several conversations in the days leading up to the Assignment Agreement, that Brearly was a Sports Network company being used for tax purposes and that it had been used in this manner previously.” *Id.* at 633–34. The court explained that Espinoza “believed Heath because this use of an offshore company was credible and, [e]ssentially, everything that [Espinoza] saw in connection with Brearly came from Sports Network.” *Id.* at 634. Likewise, the Bankruptcy Court found that Webb had been “told by Simons that Brearly was an offshore Sports Network entity being used to distribute the Fight.” *Id.* at 632. Finally, the Bankruptcy Court credited testimony by Abbey in which he speculated that the reason why Simons had asked him to use Brearly was “ ‘because it helped [the] deal with Frank Warren and Sports Network.’ ” *Id.* at 642.

Finally, the Bankruptcy Court found further evidence of bad faith in the circumstances surrounding Brearly’s breach of the July 26 Assignment. The court found that Marrache repudiated the July 26 Assignment on the basis that “ ‘Brearly ha[d] neither been consulted nor been made a party to any ... agreement.’ ” *Id.* at 634. The court also found, however, that “[t]he signed version of the [July 26] Assignment Agreement bears a fax transmittal line showing a fax transmission from Marrache & Co., Brearly’s law firm in Gibraltar, to Sports Network, and a further fax from Sports Network to Louisville, all on the day of the Fight.” *Id.* As a result, the Bankruptcy Court concluded that the UK Defendants had caused Brearly to disavow the July 26 Assignment for “wholly spurious reasons.” *Id.* at 642.

\*93 Tying together its findings, the Bankruptcy Court concluded that “the UK Defendants used Brearly as part of a scheme or ruse to accomplish Warren’s goals: have Williams fight Tyson and possibly go on to secure a championship fight

for Sports Network, while avoiding any liability to Tyson and Straight Out.” *Id.* at 644. The Bankruptcy Court concluded that “there could be no more apt description of the actions of the UK Defendants than that they devised ‘the corporate structure ... as a mere facade concealing true facts.’ ” *Id.* at 640 (quoting UK Defendants’ Post-Trial Memorandum of Law). As such, the Bankruptcy Court decided to lift Brearly’s corporate veil and hold the UK Defendants personally liable.

#### D. Application of English Law

Notwithstanding all of the foregoing evidence, and the deference owed on appeal to the Bankruptcy Court’s fact-finding, English law does not permit Brearly’s corporate form to be disregarded to hold the UK Defendants liable for Brearly’s debts. At least two considerations compel this conclusion.

First, the Court has located no support in English law for the proposition that parties who are legally unrelated to a corporate entity may be held responsible for that entity’s liabilities, at least in the absence of specific statutory authority.<sup>43</sup> The Plaintiff has also not directed the Court to any legal authority that would refute the arguments made by Warren and Simons on appeal that strangers to a corporate entity may not be held liable through judicial veil-piercing for that entity’s obligations. Nor does the Plaintiff contest the fact that Brearly was incorporated, owned, and controlled (aside from the transaction in question) by one man, Peter Abbey, against whom neither the Plaintiff nor the Kentucky Defendants have brought any claims.

43 Where a statute so authorizes, however, a non-director may be treated as akin to a director. *See Customs & Excise Comm’rs v. Holland (In re Paycheck Servs., 3 Ltd.)*, [2009] EWCA Civ 625 (C.A.) [¶¶ 45–47] (describing the liability of a “de facto” director under the Insolvency Act 1986 §§ 212, 251); *see also R. v. K.*, [2005] EWCA Crim 619 (C.A.) [¶¶ 16–26] (concluding that the legal ownership or control of a corporation may be disregarded for purposes of applying the Proceeds of Crime Act 2002 § 80(3)).

This legal question was insufficiently addressed by the parties during the Adversary Proceeding. The Bankruptcy Court observed that “[n]o case has been cited where someone else’s corporate shell was used in a scheme like the one at bar.” *Id.* at 643. In the absence of legal guidance from the parties regarding how English law would address this question, the

Bankruptcy Court concluded that “the use of an unrelated shell corporation appears more abusive than the use of an entity that is owned by those in control.” *Id.* The court reasoned that “[u]se of someone else’s shell entity would appear to permit those in control to disclaim responsibility and repudiate agreements more easily” than could a parent corporation with respect to its subsidiary or affiliate. *Id.* This appeal to equity, however, runs counter to the principles of English law described above that prohibit piercing the corporate veil on the basis of equity alone.

A comparison to veil-piercing in the United States may be instructive.<sup>44</sup> \*94 U.S. courts proceed from the assumption that, when the corporate veil is pierced, it is done in order to hold liable someone with a legal interest in the corporate entity. Nonetheless, many U.S. jurisdictions, including New York, have recognized a doctrine of “equitable ownership” whereby persons who are not formally affiliated with a corporation by law may nevertheless be held liable on a veil-piercing theory. “New York courts have recognized for veil-piercing purposes the doctrine of equitable ownership, under which an individual who exercises sufficient control over the corporation may be deemed an ‘equitable owner,’ notwithstanding the fact that the individual is not a shareholder of the corporation.” *Freeman v. Complex Computing Co., Inc.*, 119 F.3d 1044, 1051 (2d Cir.1997) (citing *Guilder v. Corinth Constr. Corp.*, 235 A.D.2d 619, 651 N.Y.S.2d 706, 707 (App. Div.3d Dep’t 1997)); see also *Lally v. Catskill Airways, Inc.*, 198 A.D.2d 643, 603 N.Y.S.2d 619, 621 (App. Div.3d Dep’t 1993). Under New York’s “equitable ownership” test, however, it must be shown that the defendant “exercised considerable authority over the corporation to the point of completely disregarding the corporate form and acting as though its assets were his alone to manage and distribute.” *Freeman*, 119 F.3d at 1051 (quoting *Lally*, 603 N.Y.S.2d at 621); see also *Guilder*, 651 N.Y.S.2d at 707. But, even if UK law recognized an “equitable ownership” theory of liability similar to that recognized in many American jurisdictions, the factual findings of the Bankruptcy Court do not support a finding that the UK Defendants—to the exclusion of Abbey, Marrache, and all others—“exercised [such] considerable authority over [Brearly] to the point of completely disregarding the corporate form and acting as though its assets were [theirs] alone to manage and distribute.” *Freeman*, 119 F.3d at 1051 (citation omitted).

44 As the description of English law on veil-piercing demonstrates, however, American and English law

have diverged in their treatment of this doctrine. Thus, there can be limited reliance on analogous American law principles in the absence of a careful examination of the extent to which they may be inconsistent with English law.

For a second and entirely separate reason, the record in this case does not permit the piercing of Brearly’s corporate veil. The factual findings cannot support veil-piercing because of the key distinction in English law between using the corporate form to evade or conceal existing legal obligations or wrongs on the one hand, and using it to insulate oneself from future or contingent liabilities on the other. The evidence, even when construed in the light most favorable to the Plaintiff, reveals that, at the time Brearly was introduced into the transaction, the UK Defendants had not yet incurred any legal obligations to Tyson or the Kentucky Defendants with respect to sale of the International Rights. See *In re Tyson*, 412 B.R. at 630–32. Nor was Brearly’s existence concealed from the parties; although the Bankruptcy Court did appear to conclude that Brearly was introduced into the transaction in bad faith, *id.* at 642, there is no evidence in the record to suggest that either Tyson or the Kentucky Defendants were unaware that Brearly was their contractual counterparty under the July 26 Assignment and Distribution Agreement, respectively. As such, if they had doubts about the UK Defendants’ good faith, Tyson and the Kentucky Defendants could have refused to deal with Brearly and/or the UK Defendants.<sup>45</sup> Even if Brearly was a “perfect set-up” and “came in handy” for the UK Defendants, *id.*, English law provides that a party is entitled to take advantage of the *Salomon* principle in order to limit its future liabilities, even where the corporate entity to be interposed is nothing more than a mere \*95 shell or fiction. To paraphrase *Adams*: “[w]hether or not [the UK Defendants’ use of Brearly was] desirable” as a matter of public policy, “the right to use a corporate structure in this manner is inherent in [English] corporate law.” *Adams*, [1990] Ch. at 544.

45 The Court makes no finding in this Opinion, however, concerning the reasonableness of Tyson’s or the Kentucky Defendants’ reliance for the purposes of analyzing the Plaintiff’s tort claims.

#### E. Plaintiff’s Fraud and Unjust Enrichment Claims

In the Adversary Proceeding, the Plaintiff also asserted a fraud claim against Warren and Simons and an unjust enrichment claim against the four UK Defendants. The Bankruptcy Court determined, applying New York choice-of-

law principles, that Kentucky law governed these claims.<sup>46</sup> The Bankruptcy Court concluded, however, that “the only damages that Plaintiff could assert from [his] fraud claim are the same contract damages that are being imposed on the UK Defendants by virtue of the piercing of Brearly's corporate veil.” *In re Tyson*, 412 B.R. at 645.<sup>47</sup> Likewise, because relief on the veil-piercing claims was granted, the Bankruptcy Court concluded that “there is no cause to resort to the equitable doctrine of unjust enrichment to fashion a remedy in this case against Sports Network.”<sup>48</sup> *Id.* at 640. The Bankruptcy Court thus declined to rule in the alternative regarding whether the Plaintiff would recover for fraud or unjust enrichment if veil-piercing had not been available.

<sup>46</sup> This finding was proper and has not been challenged on appeal. See *Fieger v. Pitney Bowes Credit Corp.*, 251 F.3d 386, 397 n. 1 (2d Cir.2001) (observing that New York conflict-of-law principles recognize “depechage,” or the application of different jurisdictions' laws to different claims for relief).

<sup>47</sup> The Bankruptcy Court revisited the question of a fraud recovery during post-trial motion practice. Ruling from the bench, the court held that “[b]oth plaintiff and cross claimants have failed to establish each of the six issues that must be proved in order to sustain a fraud complaint under Kentucky law.” The court further concluded that “[t]his failure of proof is not cured by the Court's finding, which it reiterates, that the U.K. defendants used Brearly for improper and indeed fraudulent purposes. That finding, however, does not entitle any plaintiff to a recovery sounding in common-law fraud.” Read in context, however, this ruling may have merely reflected the court's judgment that the Plaintiff and Kentucky Defendants could not prove *additional* damages beyond that permitted on a contractual recovery.

<sup>48</sup> In the *August 2009 Opinion*, the Bankruptcy Court implies that the Plaintiff's fraud claim was asserted against all four UK Defendants and that the unjust enrichment claim was brought against Sports Network alone. The Plaintiff's operative complaint, however, asserts a fraud claim against Warren and Simons and an unjust enrichment claim against all four UK Defendants.

Because the Bankruptcy Court erred in piercing Brearly's corporate veil, a question emerges whether the Plaintiff could recover the same money judgment, in full or in part, on his claims of fraud or unjust enrichment. As this Court sits in an appellate capacity pursuant to 28 U.S.C. § 158(a)(1), it declines to make the first determination as to this question. Thus, without expressing any opinion as to the proper outcome, the Court remands this case to the Bankruptcy Court so that it may consider, in the first instance, whether the Plaintiff may recover on his fraud and unjust enrichment claims.<sup>49</sup>

<sup>49</sup> Certain other arguments made by Warren on appeal, including that the Bankruptcy Court erred by failing to apply the Statute of Frauds and that the Bankruptcy Court incorrectly interpreted the July 26 Assignment, need not be addressed in light of this Opinion's disposition of the veil-piercing claim and its remand to the Bankruptcy Court for further proceedings.

#### F. Warren's Claim for Attorney's Fees

Finally, Warren asserts that, in the event that he prevails on appeal, he is **\*96** entitled to his attorney's fees under English law. Under English practice, a prevailing party is ordinarily awarded its “costs,” including attorney's fees. See, e.g., *APL Co. Pte. Ltd. v. UK Aerosols Ltd.*, 582 F.3d 947, 957 (9th Cir.2009) (“Under the English rule, attorneys' fees are generally awarded to the prevailing party.”); *RLS Assocs., LLC v. United Bank of Kuwait PLC*, 464 F.Supp.2d 206, 210 (S.D.N.Y.2006) (“*RLS*”) (“Under the English rule, the prevailing party can generally recover its attorneys' fees from the losing party.”). In commercial litigation, an award of costs is normally entered against the party who is held indebted to the other. See *A.L. Barnes Ltd. v. Time Talk (UK) Ltd.*, [2003] EWCA Civ 402 (C.A.) (“*Time Talk*”) [¶ 28] (“In what may generally be called commercial litigation ... the disputes are ultimately about money. In deciding who is the successful party the most important thing is to identify the party who is to pay money to the other. That is the surest indication of success and failure.”). The determination of such an award, however, rests within the discretion of the court.<sup>50</sup>

<sup>50</sup> See Civil Procedure Rules 1998, R. 44.3(1) (“The court has discretion as to—(a) whether costs are payable by one party to another; (b) the amount of those costs; and (c) when they are to be paid”); *id.* R. 44.3(2) (“If the court decides to make an

order about costs—(a) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; but (b) the court may make a different order.”); *see also* *Hullock v. E. Riding of Yorkshire County Council*, [2009] EWCA Civ 1039 [¶ 19] (C.A.) (“Costs are in the discretion of the trial judge.”); *Lamont v. Burton*, [2007] EWCA Civ 429 [¶ 20] (C.A.) (“The court has a wide discretion under rule 44.3 to make whatever costs order it considers appropriate in the particular circumstances of the case, taking account of the various factors specified in the rule.”); *Multiplex Constrs. (UK) Ltd. v. Cleveland Bridge UK Ltd.*, [2008] EWHC 2280 (Q.B.D.) (Jackson, J.) (“*Multiplex* ”) [¶ 72] (summarizing principles for guiding a court’s discretion in awarding attorney’s fees).

The Bankruptcy Court addressed this same question from the opposite perspective during post-trial motion practice, when the Kentucky Defendants sought an award of their attorney’s fees under English law. The Bankruptcy Court declined to award them attorney’s fees on two separate grounds. First, the Bankruptcy Court determined, citing *Time Talk* and *Multiplex*, that “English law places great emphasis on the monetary recovery obtained by a party in determining whether such party is a prevailing party entitled to attorneys’ fees as part of costs under English law.” Because the Kentucky Defendants did not obtain any net monetary recovery under the Judgment, the Bankruptcy Court concluded that they were not entitled to costs under English law.

Second, the Bankruptcy Court observed that “there is no authority applying the English law on shifting attorneys’ fees” in U.S. court proceedings absent a clear contractual agreement by the parties. In so concluding, the Bankruptcy Court implicitly applied the “American Rule” that each litigant is to bear his or her own costs of litigation, including attorney’s fees. *See, e.g., Oscar Gruss & Son, Inc. v. Hollander*, 337 F.3d 186, 199 (2d Cir.2003) (New York law) (noting that “attorneys’ fees are the ordinary incidents of litigation and may not be awarded to the prevailing party,” and that any contrary intent by the parties should be made “unmistakably clear [in] the language of the contract” (citation omitted)); *AIK Selective Self-Ins. Fund v. Minton*, 192 S.W.3d 415, 420 (Ky.2006) (Kentucky law) (“[W]ith the exception of a specific contractual provision allowing for recovery of attorneys’ fees ... each party assumes responsibility for his or her own attorneys’ fees.” (citation omitted)).

\*97 In the absence of any significant federal bankruptcy policy, a bankruptcy court applies the choice-of-law rules of the forum state. *Bianco v. Erkins (In re Gaston & Snow)*, 243 F.3d 599, 607 (2d Cir.2001). New York’s choice-of-law principles would treat the English rule regarding attorney’s fees as “substantive,” not procedural, and thus where English law governs a given cause of action, so too should the English rule regarding attorney’s fees. *RLS*, 464 F.Supp.2d at 218 (“[T]he English rule creates a quasi-right of action for ‘wrongful’ legal costs.... These quasi-rights of action, which are created by the English rule for attorneys’ fees, accompany every cause of action under English law.”)

Given that any award of attorney’s fees under English law rests in the court’s discretion, and given that the Plaintiff or Kentucky Defendants may ultimately prevail in this litigation on other grounds, it is premature to determine whether, and if so to what extent, Warren should recover any award of attorney’s fees for his victory on the veil-piercing claim. The Court therefore declines to reach this ground of Warren’s appeal, leaving it to the Bankruptcy Court to address this question in the first instance.

### III. Kentucky Defendants’ Appeal

The Kentucky Defendants appeal the Bankruptcy Court’s “refusal to provide them monetary relief.” They assert three points of error, each in the alternative. First, the Kentucky Defendants challenge the Bankruptcy Court’s refusal to recognize a default judgment obtained by Straight-Out against *Brearly* in Kentucky federal court on December 16, 2008 (the “Kentucky Default Judgment”) as binding against the *UK Defendants*. Second, the Kentucky Defendants challenge the Bankruptcy Court’s refusal to grant their post-trial motion for leave to amend their pleadings to assert a fraud cross-claim against the UK Defendants and/or to conform their pleadings to match the evidence at trial. Third, the Kentucky Defendants assert that the Bankruptcy Court erred in refusing to award them attorney’s fees under English law. Each argument is addressed in turn below.

#### A. Kentucky Default Judgment

The Kentucky Defendants’ first argument on appeal is that the Bankruptcy Court erred by failing to recognize and enforce the Kentucky Default Judgment. For the following reasons, the Bankruptcy Court’s Judgment is vacated insofar as it

denies the Kentucky Defendants a monetary recovery, and the case is remanded for further proceedings.

### 1. Facts and Procedural History

On August 13, 2004, shortly after the Fight, Straight-Out filed two lawsuits in the United States District Court for the Western District of Kentucky (the “Kentucky Court”). One lawsuit was filed against Brearly (the “Kentucky Litigation”) alleging breach of contract and unjust enrichment for failure to pay Straight-Out its \$2.7 million minimum guarantee under the Distribution Agreement. The other lawsuit was filed against Warren, Sports & Leisure, and Sports Network for breach of several other contracts that are not at issue in this litigation.<sup>51</sup> The same attorney appeared to represent all defendants in both actions, and the attorney successfully obtained dismissal on *forum non conveniens* grounds \*98 of the non-Brearily action. After the Kentucky Court denied Brearly's motion to dismiss in the Kentucky Litigation and granted Brearly several extensions of time to answer, the Kentucky Court subsequently permitted Brearly's attorney to withdraw, and Brearly thereafter defaulted. After Straight-Out moved for a default judgment, the Kentucky Court granted that motion on or about March 1, 2006 in what it termed its “Default Judgment Order,” subject to the court's retention of jurisdiction over post-judgment discovery.

<sup>51</sup> These contracts included, *inter alia*, a co-promotional rights agreement and a provision-of-services agreement to compensate Tyson's opponent, Williams, for his participation in the Fight.

After no further damages were proved, final judgment was entered on December 16, 2008. The Kentucky Default Judgment entered against Brearly totaled \$4,554,191, including: (1) a principal sum of \$2.7 million, which was the amount of Straight-Out's minimum guarantee under the Distribution Agreement; (2) pre-judgment interest at 8% per annum (totaling \$356,580); (3) attorney's fees for prosecuting the Kentucky Litigation and obtaining the default judgment (totaling \$71,875); (4) a 30% contingent attorney's fee (\$938,537); (5) anticipated costs and expenses to be incurred in attempting to collect on the judgment (\$87,500); and (6) post-judgment interest accruing from March 1, 2006 at the rate of 4.70% per annum, compounded annually.

Meanwhile, on August 17, 2007, the Bankruptcy Court in New York granted the Kentucky Defendants' motion to vacate the default judgment entered against them in the Adversary

Proceeding. *See August 2007 Opinion*, 2007 WL 2379624. On September 10, 2007, the Kentucky Defendants asserted a cross-claim against the UK Defendants alleging, in pertinent part, that “[a]s the alter ego of Brearly, the [UK Defendants] are liable to Straight-Out for the liabilities of Brearly, including the amounts due under the Kentucky [Default] Judgment.” Trial was held on the Kentucky Defendants' veil-piercing cross-claim concurrently with the Plaintiff's claims in March 2009.

In the *August 2009 Opinion*, the Bankruptcy Court declined to recognize the Kentucky Default Judgment as binding against Brearly or the UK Defendants, finding that “[t]he Kentucky Defendants overreach when they argue that the default judgment entered in the Kentucky litigation regarding Straight Out's breach of contract claim against Brearly should be determinative and conclusive on the amount of damages.” *In re Tyson*, 412 B.R. at 639. In particular, the Bankruptcy Court suggested that the Kentucky Default Judgment was premised on an erroneous calculation of damages, given the evidence at trial that Straight-Out had assigned away “the entire amount of its \$2.7 million guaranteed recovery” from Brearly through the July 26 Assignment. *Id.* The Bankruptcy Court concluded that “[s]ince the proceeds from the international sales of the Fight did not exceed \$2.7 million, Straight Out did not establish that it has a right to a net contractual recovery based on the record in this case.” *Id.*

After the *August 2009 Opinion* was issued, the Kentucky Defendants registered the Kentucky Default Judgment in the Southern District of New York pursuant to 28 U.S.C. § 1963 on August 26, 2009. Thereafter, the Kentucky Defendants again sought recognition of the Kentucky Default Judgment by the Bankruptcy Court, and in particular, sought to transform the attorney's fee component of the Kentucky Default Judgment into a monetary recovery against the UK Defendants to be included in the Bankruptcy Court's Judgment. In proceedings held on the record before the Bankruptcy Court on October 22, 2009, the Bankruptcy Court declined to subsume any part of the Kentucky Default Judgment into the Bankruptcy \*99 Court's Judgment. The Bankruptcy Court observed, *inter alia*, that there appeared to be no basis under Kentucky law for the Kentucky Court's decision to award attorney's fees to Straight-Out.

### 2. Analysis

The Kentucky Defendants argue that the Bankruptcy Court “erred by failing to give Full Faith and Credit” to the

Kentucky Default Judgment.<sup>52</sup> The Kentucky Defendants argue that the Bankruptcy Court should have applied the Kentucky Default Judgment against the UK Defendants by using *res judicata* to bar the UK Defendants from contesting the amount of damages on the Kentucky Defendants' veil-piercing claims. While recognizing that the UK Defendants were not actually parties to the supposedly preclusive Kentucky Litigation, the Kentucky Defendants assert that the UK Defendants “completely controlled the legal defense of Brearly before the Kentucky federal district court,” and therefore that the UK Defendants are now bound by the Kentucky Default Judgment pursuant to *Taylor v. Sturgell*, 553 U.S. 880, 128 S.Ct. 2161, 171 L.Ed.2d 155 (2008).<sup>53</sup>

52 Alternatively, the Kentucky Defendants contend on appeal that the Bankruptcy Court has failed to comply with 28 U.S.C. § 1963, which provides:

A judgment in an action for the recovery of money or property entered in any ... district court ... may be registered by filing a certified copy of the judgment in any other district.... A judgment so registered shall have the same effect as a judgment of the district court of the district where registered and may be enforced in like manner.

28 U.S.C. § 1963. This statute has no bearing, however, on whether *res judicata* applies in order to bar defendants in a subsequent proceeding from contesting liability or damages based on the results of a previous proceeding. As such, the Kentucky Defendants' discussion of § 1963 does not appear relevant to their arguments that the Bankruptcy Court should have held that the UK Defendants were estopped from contesting the amount of damages to be imposed against them.

53 The Kentucky Defendants also argue, in the alternative, that the Bankruptcy Court should have directly enforced the Kentucky Default Judgment against the UK Defendants following the Bankruptcy Court's holding that Brearly's corporate veil would be pierced. Because the Court reverses the decision to pierce Brearly's corporate veil, however, this alternative argument is moot.

“The preclusive effect of a federal-court judgment is determined by federal common law.” *Taylor*, 553 U.S. at 891, 128 S.Ct. at 2171. “The preclusive effect of a judgment is defined by claim preclusion and issue preclusion, which

are collectively referred to as ‘res judicata.’ ” *Id.* “Under the doctrine of claim preclusion, a final judgment forecloses ‘successive litigation of the very same claim, whether or not relitigation of the claim raises the same issues as the earlier suit.’ ” *Id.* (citation omitted). Meanwhile, “[i]ssue preclusion, in contrast, bars successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment, even if the issue recurs in the context of a different claim.” *Id.* (citation omitted). Both of these doctrines have the effect of “precluding parties from contesting matters that they have had a full and fair opportunity to litigate.” *Id.* (citation omitted).

“A person who was not a party to a suit generally has not had a ‘full and fair opportunity to litigate’ the claims and issues settled in that suit,” and therefore, a person is not bound by a judgment “in a litigation in which he is not designated as a party or to which he has not been made a party by service of process.” *Id.* (citation omitted). The Supreme Court has, however, enumerated six exceptions to this general \*100 “rule against nonparty preclusion.” *Id.* at 2172. On appeal, the Kentucky Defendants assert that either of two *Taylor v. Sturgell* exceptions should apply. The first proffered exception dictates that a nonparty is bound by a prior judgment if that nonparty “assumed control over the litigation in which that judgment was rendered,” *id.* at 2173 (citation omitted), and the second dictates that a party is bound where the nonparty is a “proxy,” “agent,” or “designated representative” of a “person who was a party to the prior adjudication.” *Id.*

Although the Kentucky Defendants presented their *res judicata* arguments to the Bankruptcy Court on summary judgment and again at trial, the *August 2009 Opinion* does not address this theory of recovery, instead concluding only generally that “the Kentucky Defendants overreach[ed]” in this respect. *In re Tyson*, 412 B.R. at 639. The Kentucky Defendants re-asserted their *res judicata* argument during post-trial motion practice, but the Bankruptcy Court concluded that “it would be an abuse of process for this Court simply to enforce the Kentucky [Default] [J]udgment against the U.K. defendants” given the fact that Straight-Out had “signed all of the recovery proved in this case to Tyson.” The Bankruptcy Court also stated during oral argument at the summary judgment stage, in reference to the potential preclusive effect of the Kentucky Default Judgment, that “the doctrine of *res judicata* requires a final judgment on the merits, which we do not have in this case.”<sup>54</sup>

54 As a general statement of the law, this observation was in error. “[I]t has long been the law that default judgments can support *res judicata* [i.e., claim preclusion] as surely as judgments on the merits.” *EDP Med. Computer Sys., Inc. v. U.S.*, 480 F.3d 621, 626 (2d Cir.2007) (citing *Morris v. Jones*, 329 U.S. 545, 550–51, 67 S.Ct. 451, 91 L.Ed. 488 (1947)). It is not clear, however, that claim preclusion is the right framework for understanding this dispute. If the Kentucky Defendants’ theory is understood instead as relying upon offensive issue preclusion, then the fact that the judgment was obtained by default will prevent recovery. The difference between claim preclusion and issue preclusion may be critical in this context, because “Judgment by default .... does not warrant issue preclusion for the very reason that the issues have not been litigated or decided.” 18A Wright, Miller & Cooper, Fed. Prac. & Proc. § 4442; see *Faulkner v. Nat’l Geographic Enters. Inc.*, 409 F.3d 26, 37 (2d Cir.2005) (describing the requirements for applying offensive collateral estoppel).

Because the Bankruptcy Court did not clearly address the question of whether the Kentucky Default Judgment may preclude the UK Defendants from contesting liability and/or damages on the Kentucky Defendants’ cross-claims pursuant to either of the proffered *Taylor v. Sturgell* exceptions, the Court declines to determine in the first instance whether either of these exceptions applies. On remand, the Bankruptcy Court shall determine, notwithstanding evidence that the Kentucky Court may have been mistaken in calculating the amount of damages, whether the Kentucky Defendants are entitled to use claim preclusion and/or offensive issue preclusion to enforce the Kentucky Default Judgment against the UK Defendants in the Adversary Proceeding.

#### B. Rule 15(b)(2) & Rule 54 Motions

Second, the Kentucky Defendants assert that the Bankruptcy Court should have “[e]ither *sua sponte* or as a result of [their] post-Opinion motion” amended the Kentucky Defendants’ pleading to include a fraud cross-claim against the UK Defendants. The Kentucky Defendants observe that “[t]he issue of fraud [was] litigated and actively contested” throughout the Adversary Proceeding based on the Plaintiff’s \*101 own fraud claim against the UK Defendants and, therefore, that no unfair prejudice would result from such amendment. The Kentucky Defendants further interpret the *August 2009 Opinion* as making “obvious and clear findings

of fact that fraud was *actually committed* by the UK [ ] Defendants against *both* the Plaintiff and [the Kentucky Defendants]—even using the word ‘defrauded.’ ” The Kentucky Defendants assert that the court’s factual findings represented “clear and convincing evidence” sufficient to satisfy the burden of proof as to each of the six elements of fraud under Kentucky law. See *Flegles, Inc. v. Truserv Corp.*, 289 S.W.3d 544, 549 (Ky.2009).

Following oral argument, the Bankruptcy Court concluded that the Kentucky Defendants’ Rule 15(b)(2) and Rule 54 motions must be denied for at least three reasons. First, the Bankruptcy Court concluded that to add “a fraud claim or a claim for punitive damages .... would prejudice the defendants and would not be permitted.” Second, the Bankruptcy Court found that, while the issue of fraud had indeed been litigated at trial, the Plaintiff had failed “to prove entitlement to either a fraud recovery or to punitive damages in its claim.”<sup>55</sup> Third, the Bankruptcy Court again found that the Kentucky Defendants had not suffered any damages because they assigned away their rights to recovery from Brearly under the Distribution Agreement.

55 As discussed above, however, the Bankruptcy Court may simply have been expressing its view that the Plaintiff had proven no right to damages beyond those he could recover under the breach-of-contract claim.

Although the Bankruptcy Court appears to have supported its ruling on the Rule 15(b)(2) and Rule 54 motions on independent grounds, it is nevertheless advisable to allow the Bankruptcy Court to revisit this issue on remand, given that the Bankruptcy Court must now address for the first time the Plaintiff’s fraud and unjust enrichment claims. Accordingly, the Court vacates the Bankruptcy Court’s denial of the Kentucky Defendant’s Rule 15(b)(2) and Rule 54 motions and remands for reconsideration without expressing any view as to whether the applications should be granted.

#### C. Attorney’s Fees

Finally, the Kentucky Defendants assert that the Bankruptcy Court erred in refusing to award them attorney’s fees under English law. In light of the disposition of the veil-piercing claim, however, this aspect of the Kentucky Defendant’s appeal need not be addressed and is dismissed as moot.

*CONCLUSION*

The October 27, 2009 final judgment of the Bankruptcy Court is vacated in part. The case is remanded for further proceedings consistent with this opinion.

SO ORDERED.

**All Citations**

433 B.R. 68

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A Chancery Division

**\*Trustor AB v Smallbone and others (No 2)**

2001 Feb 28;  
March 1; 16

Sir Andrew Morritt V-C

B *Company — Director — Action against — Company controlled by director used as vehicle for receiving money in breach of duty to plaintiff — Company in knowing receipt — Whether receipt by company also receipt by director*

C The first defendant, in breach of his duty as the managing director of the plaintiff company, transferred substantial sums belonging to it to I Ltd. In March 1998 the plaintiff commenced proceedings and later applied for summary judgment against I Ltd. The master ordered I Ltd to pay various sums to the plaintiff on the ground that it had knowingly received moneys belonging to the plaintiff which had been paid out without the plaintiff's authority. I Ltd appealed to the judge, who, in upholding the master's order, found that I Ltd was controlled by the first defendant, that the payments from the plaintiff were effected by the first defendant in breach of his duty as its managing director and that I Ltd was a facade used as a vehicle by the first defendant for receiving money from the plaintiff. On a further application the plaintiff sought an order for summary judgment against the first defendant as being jointly and severally liable with I Ltd on the ground that receipt by I Ltd was, in the circumstances, to be treated as receipt by the first defendant also.

D On the application—

E *Held*, granting the application, that the court was entitled to pierce the corporate veil and recognise the receipt of a company as that of the individual or individuals in control of it if the company was used as a device or facade to conceal the true facts thereby avoiding or concealing any liability of that individual or those individuals; that on the judge's findings the court would recognise the receipt of the plaintiff's money by I Ltd as receipt by the first defendant also and that I Ltd was a facade used as a vehicle for that receipt; and that, accordingly, an order for repayment by the first defendant would be made (post, pp 1185H, 1186A–D).

*Gilford Motor Co Ltd v Horne* [1933] Ch 935, CA applied.

F *Per curiam*. It is not permissible for the court to pierce the corporate veil merely because the company is involved in some impropriety or because it considers that justice so requires (post, pp 1183D, 1185F–G).

Dicta of Slade LJ in *Adams v Cape Industries plc* [1990] Ch 433, 536, CA applied.

The following cases are referred to in the judgment:

*Adams v Cape Industries plc* [1990] Ch 433; [1990] 2 WLR 657; [1991] 1 All ER 929, CA

*Barnes v Addy* (1874) LR 9 Ch App 244

G *Barney, In re* [1892] 2 Ch 265

*Company, In re A* [1985] BCLC 333, CA

*Cowan de Groot Properties Ltd v Eagle Trust plc* [1992] 4 All ER 700

*El Ajou v Dollar Land Holdings plc* [1993] 3 All ER 717

*Gencor ACP Ltd v Dalby* [2000] 2 BCLC 734

*Gilford Motor Co Ltd v Horne* [1933] Ch 935, CA

*H (Restraint Order: Realisable Property), In re* [1996] 2 All ER 391, CA

H *Jones v Lipman* [1962] 1 WLR 832; [1962] 1 All ER 442

*Mubarak v Mubarak* The Times, 30 November 2000

*Ord v Belhaven Pubs Ltd* [1998] BCC 607, CA

*Salomon v A Salomon & Co Ltd* [1897] AC 22, HL(E)

*Westpac Banking Corp'n v Savin* [1985] 2 NZLR 41

*Woolfson v Strathclyde Regional Council* 1978 SC (HL) 90, HL(Sc)

*Yukong Line Ltd of Korea v Rendsburg Investments Corpn of Liberia (No 2)* [1998] 1 WLR 294; [1998] 4 All ER 82 A

No additional cases were cited in argument.

The following additional case, although not cited, was referred to in the skeleton arguments:

*Creasey v Breachwood Motors Ltd* [1993] BCLC 480 B

#### APPLICATION for summary judgment

By a re-re-amended writ dated 22 December 1998 the plaintiff, Trustor AB (a Swedish limited company), claimed (1) against the first defendant, Lindsay James Trevor Smallbone, compensation and/or damages for breach of trust and/or fiduciary duties and/or duties owed as a director under the plaintiff's articles of association and/or Swedish company law, and (2) against the first to eleventh defendants, Lindsay James Trevor Smallbone, Introcom (International) Ltd (a company incorporated in Gibraltar), Guinness Management Ltd, M & A Financial Services Ltd, Thomas Jisander, Joachim Posner (also known as Joe Falk), Yumina Trading Corpn (a company incorporated in Panama), CMB Change Mont Blanc Finance SA (a company incorporated in Switzerland), Peter Claes Mattsson, Selrex Corpn Ltd (a company incorporated in the Republic of Ireland) and Robert Harbord-Hamond, an injunction, restitution, compensation and/or damages on the ground, inter alia, that they had knowingly received funds belonging to the plaintiff obtained unlawfully by the first defendant. C

By a summons dated 3 June 1998 the plaintiff applied for summary judgment pursuant to RSC Ord 14 against the second defendant. On 13 October 1998 Master Bowman allowed that application and ordered the second defendant to pay the plaintiff, Sw Kr 166.7m, Fin Mk 70.45m and £404,000 that it had received from the plaintiff. The second defendant appealed from that order. E

The plaintiff subsequently applied for summary judgment against the first, third and fourth defendants.

The first defendant's appeal from the order of Master Bowman and the plaintiff's application for summary judgment against the first, third and fourth defendants were heard together before Rimer J, who, on 25 June 1999, dismissed the appeal and allowed the plaintiff's application for summary judgment but held that the plaintiff was not entitled to an award representing all its loss but was obliged at that stage of the proceedings to give credit in respect of Sw Kr 417m which was the subject of a claim by the plaintiff against a third party in proceedings in Luxembourg. F

By a notice of appeal dated 28 July 1999 the plaintiff appealed from that order. The Court of Appeal (Sir Richard Scott V-C, Buxton LJ and Gage J) allowed the plaintiff's appeal against the reduction of its restitutionary remedies, indicated that the first defendant's liability was not limited to the amount of the judgment against him but extended to a joint and several liability for the amount for which the second defendant had been found to be liable, but did not then extend the judgment against the first defendant to the larger amount. G

By an application notice dated 12 September 2000 the plaintiff applied pursuant to CPR Pt 24 for summary judgment against the first defendant on H

A the ground that his liability was a joint and several liability with the second defendant.

The facts are stated in the judgment.

*Stephen Smith* QC for the plaintiff.

The first defendant appeared in person.

B

*Cur adv vult*

16 March. SIR ANDREW MORRITT V-C handed down the following judgment.

1 On 25 June 1999 Rimer J gave summary judgment under RSC Ord 14 for the claimant, Trustor AB, against the first defendant, Mr Smallbone, for £426,439 and interest. At the same time he dismissed an appeal of the second defendant, Introcom (International) Ltd (“Introcom”), from the order of Master Bowman giving summary judgment under the same rule in favour of Trustor for Sw Kr 166.7m, £404,100 and Fin Mk 75.5m. On 9 May 2000, on appeal from the orders of Rimer J, the Court of Appeal indicated that, in their view, Mr Smallbone’s liability was not limited to the amount of the judgment against him but extended to a joint and several liability for the much larger amount for which Introcom had been found to be liable. They did not then extend the judgment against Mr Smallbone to the larger amount because counsel for Mr Smallbone had not had adequate opportunity to deal with some of the conclusions of the Court of Appeal. This application was made by Trustor on 12 September 2000 seeking judgment for the additional relief the Court of Appeal had suggested.

E

2 Trustor is a company incorporated in Sweden. Formerly it held major investments in the steel, engineering and automotive parts industries. On about 23 May 1997 Lord Moyne acquired voting control of Trustor. On 13 June 1997 Lord Moyne, Mr Smallbone and others were appointed to the board of Trustor. At a directors meeting held on the same day Mr Smallbone was appointed to be the managing director and it was resolved that Trustor’s bank accounts might be operated on the signature of any two directors.

F

3 Without having obtained the approval of the board, on 18 June 1997 Lord Moyne and Mr Smallbone opened an account for Trustor with Barclays Bank plc, Cheapside and procured the transfer to the credit of that account of moneys of Trustor amounting to Sw Kr 779m. The only signatories to that account were Lord Moyne and Mr Smallbone. Between mid-June and early November 1997 Sw Kr 486m (£38.88m) was paid out of that account on the signatures of Lord Moyne and Mr Smallbone without reference to Trustor or its other directors. The recipients included Mr Smallbone (£33,334.34) and Introcom (Sw Kr 166.7m, £404,100 and Fin Mk 75.5m). Of the sums received by Introcom Sw Kr 43,335 and £327,509 were applied for the benefit of Mr Smallbone in payments to his wife and Cove Investments Ltd, a company incorporated in the Turks and Caicos Islands and controlled by Mr Smallbone.

H

4 Trustor was wound up by the court in Stockholm on 23 December 1997. The writ in this action was issued by Trustor on 17 March 1998. The statement of claim, which has been amended twice, sets out the relevant facts. In paragraphs 16 to 22 it alleges that Sw Kr 486m of Trustor’s money was misappropriated in the manner and in the amounts I have summarised.

In paragraphs 23 to 27 Trustor sets out its allegations of knowledge and complicity. In the case of Mr Smallbone it is alleged that all transfers from the account of Trustor with Barclays were made on the instructions of Mr Smallbone. In addition it is alleged that Mr Smallbone was the controlling mind of Introcom and knew of and gave instructions for all transfers to or from Introcom. In paragraphs 31 to 35 Trustor alleges that the various transfers constituted a breach of duty. In the case of Mr Smallbone it is alleged that he acted fraudulently and dishonestly and in breach of duty as a director of Trustor. Paragraphs 36 to 39 contain allegations concerning claims to trace at law and for money had and received, paragraphs 40 to 42 relate to a claim for damages for conspiracy and paragraph 43 seeks equitable compensation. For present purposes the relevant claims are for knowing receipt (paragraphs 44 to 46) and knowing assistance (paragraphs 47 to 49).

5 The first application of Trustor was for summary judgment against Introcom. It was pursued in respect of all the causes of action relied on in the statement of claim. This application came before Master Bowman. It was successful in respect of the claims for money had and received and knowing receipt. It was unsuccessful in respect of the claims for knowing assistance and conspiracy. By an order made on 13 October 1998 Master Bowman ordered Introcom to pay to Trustor Sw Kr 166.7m, £404,100 and Fin Mk 75.5m.

6 Introcom appealed. Its appeal was heard by Rimer J in conjunction with the application for summary judgment against Mr Smallbone issued by Trustor on 28 August 1998. The hearing took seven days. Rimer J gave judgment on 25 June 1999. In summary he dismissed the appeal of Introcom and gave judgment against Mr Smallbone for (1) £426,439 and interest for knowing receipt, (2) damages and equitable compensation to be assessed for breach of duty and (3) payment of £1m by way of interim payment on account of his liability for damages or compensation.

7 Rimer J made a number of findings to which I should refer. First, he found that Introcom was controlled by a Liechtenstein trust called the Lindsay Smallbone Trust of which Mr Smallbone is a beneficiary. He considered that the directors of Introcom were nominees acting on the instructions of Mr Smallbone so that Introcom could be regarded as Mr Smallbone's company and his knowledge could be treated as Introcom's knowledge. Second, he found that the payments into and out of the Trustor account at Barclays, Cheapside and the account of Introcom at the same bank and branch were made by Mr Smallbone or on his instructions without the authority of Trustor. Third, he concluded that Introcom was simply a vehicle Mr Smallbone used for receiving money from Trustor and that the payments to Introcom "were unauthorised and involved an inexcusable breach of his duty as managing director of Trustor". Fourth, he rejected a submission of Mr Smallbone to the effect that the payments to Introcom were justified by an agreement dated 8 August 1997. Fifth, in the light of those conclusions he found that "the payments to Introcom were unauthorised and improper ones, being payments to Mr Smallbone's own company which was then going to and did devote itself to further unauthorised and improper dissipations of the money". Sixth, in relation to the claim against Introcom based on knowing assistance Rimer J considered that Mr Smallbone did act dishonestly "for there was no sensible explanation for the payment of a single penny to Introcom or for the onward

A payments which Introcom made and Mr Smallbone could not have believed that he was entitled to make them". However as there was some doubt whether English law applied to that claim and as that cause of action added nothing to the claims against Introcom Rimer J refused to grant summary judgment in respect of the knowing assistance claim.

B 8 With regard to the summons against Mr Smallbone Rimer J considered there was no defence to the claim by Trustor to recovery of that part of its money which Mr Smallbone paid to himself and retained. With regard to the claim for knowing assistance Rimer J considered that it was artificial to regard Mr Smallbone as having dishonestly assisted Lord Moyne in the breach of Lord Moyne's duties rather than being in breach of his own.

C 9 Both Trustor, Mr Smallbone and Introcom appealed with the permission of the judge or of the Court of Appeal. In his judgment Sir Richard Scott V-C, with whom Buxton LJ and Gage J agreed, recorded (paragraphs 21 and 22) that it had not been disputed that the circumstances in which £38.88m left Trustor's Barclays, Cheapside account constituted an unlawful misappropriation of Trustor's money and a breach of duty by Mr Smallbone so that Mr Smallbone and Introcom were accountable for the sums of Trustor's money they had respectively received. The issues on the appeal were whether by virtue of other recoveries their liabilities would be reduced to nothing. Each of those contentions was rejected. Sir Richard Scott V-C pointed out, in paragraphs 57 and 58, that Trustor had two types of claim against Mr Smallbone, namely, compensation for breach of duty and claims based on what happened to its money, more specifically the misappropriation arising from the payment out from the Trustor account with Barclays, Cheapside. In his summary of the result of the appeal Sir Richard Scott V-C upheld the order of Rimer J regarding the liability of Mr Smallbone for the sum of £426,439 received by him from the money of Trustor paid to Introcom.

E 10 Sir Richard Scott V-C then considered the order for an interim payment of £1m. He posed the question whether it was clear that Trustor would establish a liability on the part of Mr Smallbone for compensation of at least that amount. He thought that it might be premature to reach that conclusion and continued:

F "97. There is, however, a further point to consider. Introcom is liable, as constructive trustee, to account for and repay to Trustor the Trustor moneys that were paid to it. Hence the order for repayment to Trustor of the Sw Kr 166.7m, the £404,000 and the Fin Mk 70.45m (the whole totalling some £20m in value). In respect of £462,439, the Trustor money received by Mr Smallbone from Introcom, Mr Smallbone, as well as Introcom, is accountable. But what of the balance? Introcom was the creature of Mr Smallbone. He owned and controlled Introcom. The payments out by Introcom of Trustor money were payments made with the knowing assistance of Mr Smallbone. Rimer J, on several occasions in his judgment, characterised Mr Smallbone's participation in the steps taken to extract Trustor's money and pay it out to various recipients without the authority of Trustor's board as being dishonest . . . Mr Hollington's skeleton argument protested that these findings of dishonesty were unnecessary and should not have been made. He did not, however, before us persist in that contention. It would follow, it seems to me, from the judge's finding of dishonesty on Mr Smallbone's part in

respect of the payments out made by Introcom of Trustor's money, that Mr Smallbone would be liable jointly and severally with Introcom for the repayment of that money with interest thereon. Mr Smallbone's joint and several liability would not be confined to the part that he personally received. A

"98. In my judgment, the judge's order for an interim payment by Mr Smallbone of £1m was not justified as an interim payment on account of damages or compensation for loss caused by breach of duty as a director. The amount of that loss is still too uncertain. But Mr Smallbone is, in my view, clearly liable, jointly and severally with Introcom, for the whole of the sums for which Introcom is accountable. It may be, therefore, that paragraph 4 of the judge's order could be left undisturbed save for the deletion of the words 'by way of interim payment' and the substitution of the words 'on account of the sums to be paid by Introcom'. To do so, however, would be to change the basis on which the judge ordered Mr Smallbone to pay the £1m. Since no respondent's notice on this point has been served and since Mr Hollington has had no opportunity on Mr Smallbone's behalf to argue against the conclusions expressed in paragraph 97, it would not, I think, be right at this stage of the litigation to allow the order for the interim payment to stand." B C

The result was that the order against Mr Smallbone for payment of £1m was set aside but otherwise the order of Rimer J stood save that the liability of Mr Smallbone for £426,439 was declared to be joint and several with Introcom. D

11 The judgment of the Court of Appeal was provided to counsel in draft in advance of the proposed date for handing it down, then fixed for 12 April 2000. On 11 April 2000 counsel for Mr Smallbone wrote to Sir Richard Scott V-C with comments on, amongst others, paragraph 97. Counsel pointed out that it had been common ground in the Court of Appeal that the findings of dishonesty made by Rimer J against Mr Smallbone were academic. For this reason he had not pursued them in oral argument, particularly when invited to do so late on the last day of the hearing. He emphasised that in the statement of claim and the argument before Rimer J the only basis on which Trustor had sought to make Mr Smallbone jointly and severally liable with Introcom for the money paid to Introcom was conspiracy to defraud and knowing assistance. He pointed out that Mr Smallbone had succeeded on these issues and that Trustor had not appealed. He submitted that: "It is not open to the Court of Appeal to revisit this finding without further argument . . . nor to make a finding of joint and several liability on the part of Mr Smallbone on some other basis." No alteration to the draft judgment was made before it was handed down on 9 May 2000; the Court of Appeal indicated that Trustor would have to make a further application for summary judgment on which Mr Smallbone would be able to raise any contrary arguments he chose. Mr Smallbone's petition for leave to appeal was dismissed by the House of Lords on 18 December 2000. E F G

12 The application now before me seeks a further order against Mr Smallbone pursuant to CPR r 24.2 or CPR r 25. The order sought is for payment by Mr Smallbone to Trustor (after giving credit for net recoveries received from Mr Smallbone or Introcom) of Sw Kr 166.7m, £404,100 and Fin Mk 75.5m with interest thereon at the rate of 8% from 1 November 1997 H

A until payment, such liability to be joint and several with Introcom. Trustor accepts that it cannot obtain summary judgment for damages or compensation for breach of duty for all the reasons given by Rimer J and the Court of Appeal. Thus the claim for summary judgment is necessarily advanced on a restitutionary basis only. Two such bases were raised in the statement of claim, namely knowing receipt and knowing assistance.

B 13 Paragraph 21 of the witness statement of Mr Wilkes made in support of the application led Mr Smallbone to believe that the application was pursued on the basis of knowing assistance. He protested that the apparent findings of dishonesty made against him by Rimer J were unnecessary to the orders of either Rimer J or the Court of Appeal and could not justify the grant of summary judgment against him. However the oral argument of counsel for Trustor made it clear that Trustor's contention was that the receipt by Introcom was, in the circumstances, to be treated as the receipt by Mr Smallbone too. He submitted that as there could be no question but that Mr Smallbone had the requisite knowledge he should be ordered to repay all the money of Trustor received by Introcom on the basis of knowing receipt.

C 14 Counsel for Trustor submitted that the circumstances were such as to warrant the court "piercing the corporate veil" and recognising the receipt by Introcom as the receipt by Mr Smallbone. He suggested that the authorities justified such a course in three, potentially overlapping, categories, namely (1) where the company was shown to be a facade or sham with no unconnected third party involved, (2) where the company was involved in some impropriety and (3) where it is necessary to do so in the interests of justice and no unconnected third party is involved. I was referred to *Gilford Motor Co Ltd v Horne* [1933] Ch 935, *Jones v Lipman* [1962] 1 WLR 832, *Woolfson v Strathclyde Regional Council* 1978 SC(HL) 90, *In re A Company* [1985] BCLC 333, *Adams v Cape Industries plc* [1990] Ch 433, *Yukong Line Ltd of Korea v Rendsburg Investments Corpn of Liberia (No 2)* [1998] 1 WLR 294, *Ord v Belhaven Pubs Ltd* [1998] BCC 607 and *Mubarak v Mubarak* The Times, 30 November 2000.

D E 15 Counsel suggested that the facts, as found by Rimer J, brought this case within each of the three categories. He pointed out that Introcom, a company incorporated in Gibraltar, has only nominee directors and is controlled by a Liechtenstein Anstalt of which Mr Smallbone is a beneficiary. He relied on the findings of Rimer J that Introcom acted on the instructions of Mr Smallbone, that Mr Smallbone was its directing mind and will and that Introcom had no independent business, third party directors, creditors or shareholders.

F 16 Mr Smallbone, who appeared in person, told me that there was a sensible justification for the payment of Trustor's money to Introcom. He explained that Introcom had been formed in connection with an earlier scheme, having no connection with Trustor, as a vehicle for his remuneration. He contended that Introcom was not a sham, device or facade but a genuine company having its own separate existence. He submitted that the fact that Introcom was controlled by him was well known to the other directors of Trustor. He contended that there was no finding or evidence of impropriety sufficient to justify the order sought by Trustor.

G H 17 It appears to me that the argument for Trustor raises a point of some general importance. In cases of knowing receipt attention is usually focused on the extent of the knowledge required and whether the recipient of the trust property had it. In this case there is no doubt that Mr Smallbone had

the requisite knowledge because the liability of Introcom, upheld by the Court of Appeal, depended on the imputation of the knowledge of Mr Smallbone to Introcom. The issue is whether the court is entitled to regard the receipt by Introcom as the receipt by Mr Smallbone.

18 Liability arising from the knowing receipt of trust property stems from the speech of Lord Selborne LC in *Barnes v Addy* (1874) LR 9 Ch App 244, 251-252 that

“strangers are not to be made constructive trustees merely because they act as the agents of trustees in transactions within their legal powers . . . unless those agents receive and become chargeable with some part of the trust property, or unless they assist with knowledge in a dishonest and fraudulent design on the part of the trustees.”

In *White & Tudor’s Leading Cases in Equity*, 9th ed (1928), vol 2, p 595 in relation to that passage from the speech of Lord Selborne LC the editors say on the authority of the judgment of Kekewich J in *In re Barney* [1892] 2 Ch 265, 273 that there is no liability “unless he has the trust property vested in him, or so far under his control that he can require it should be vested in him”.

19 The only modern work of which I am aware which deals with the problems of receipt in any detail is *Lewin on Trusts*, 17th ed (2000), paras 42-32 to 42-34. The editors suggest that there is a sufficient receipt if, in accordance with the normal rules of tracing in equity, the trust property can be identified in the hands of the defendant. They point out that receipt by a subsidiary company will not count as a receipt by the parent if the subsidiary is acting in its own right, not as agent or nominee, at any rate in the absence of a want of probity or dishonesty. These propositions are supported by the authorities to which the editors refer, namely *Cowan de Groot Properties Ltd v Eagle Trust plc* [1992] 4 All ER 700, 762A-B and *El Ajou v Dollar Land Holdings plc* [1993] 3 All ER 717, 738. It is also necessary that the receipt by the defendant should be for his own benefit or in his own right in the sense of setting up a title of his own to the property so received: *Westpac Banking Corp’n v Savin* [1985] 2 NZLR 41, 69.

20 I should also refer to some of the cases relied on by counsel for Trustor. In *Gilford Motor Co Ltd v Horne* [1933] Ch 935 an individual bound by a non-solicitation covenant after the termination of his employment set up in business through a limited company. The individual was held to be in breach of covenant, notwithstanding the interposition of the company, because the company was formed as the device, stratagem or mask to “the effective carrying on of a business of” the individual: see pp 956, 965 and 969. In each of the passages to which I have referred it was made plain that the conclusion was one of fact. In *Jones v Lipman* [1962] 1 WLR 832 an individual had contracted to sell land. Wishing to avoid his liability he transferred the land to a company he had acquired for the purpose. A decree of specific performance was made against both the individual and the company on two grounds. The first was that the individual had sufficient control of the company to compel it to perform the contract. The second, following the principle applied in *Gilford Motor Co Ltd v Horne*, was that the company was the creature of the first defendant, “a device and a sham, a mask which he holds before his face in an attempt to avoid recognition in the eye of equity”: see [1962] 1 WLR 832, 836. In *Woolfson v Strathclyde Regional Council* 1978 SC (HL) 90, 96 Lord Keith of Kinkel pointed out that

A it was appropriate to pierce the corporate veil “only where special circumstances exist indicating that [the company] is a mere facade concealing the true facts”. This principle was applied by the Court of Appeal in *Adams v Cape Industries plc* [1990] Ch 433, 542A–B. *Adams*’s case was followed by the Court of Appeal in *In re H (Restraint Order: Realisable Property)* [1996] 2 All ER 391, which was applied by Rimer J in *Gencor ACP Ltd v Dalby* [2000] 2 BCLC 734. These authorities plainly establish the first proposition of counsel for Trustor I referred to in paragraph 14 above.

B 21 The third proposition is said to be derived from the decision in *In re A Company* [1985] BCLC 333. In that case a complicated structure of foreign companies and trusts was used to place the individual’s assets beyond the reach of his creditors. Cumming-Bruce LJ described the structure as a facade, at p 336, but expressed the principle, at pp 337–338, to be that the court will use its powers to pierce the corporate veil if it is necessary to achieve justice irrespective of the legal efficacy of the corporate structure under consideration. The latter statement is not consistent with the views of the Court of Appeal in *Adams v Cape Industries plc* [1990] Ch 433, 536, where Slade LJ said:

D “[Counsel for Adams] described the theme of all these cases as being that where legal technicalities would produce injustice in cases involving members of a group of companies, such technicalities should not be allowed to prevail. We do not think that the cases relied on go nearly so far as this. As [counsel for Cape] submitted, save in cases which turn on the wording of particular statutes or contracts, the court is not free to disregard the principle of *Salomon v A Salomon & Co Ltd* [1897] AC 22 merely because it considers that justice so requires. Our law, for better or worse, recognises the creation of subsidiary companies, which E though in one sense the creatures of their parent companies, will nevertheless under the general law fall to be treated as separate legal entities with all the rights and liabilities which would normally attach to separate legal entities.”

F In *Ord v Belhaven Pubs Ltd* [1998] BCC 607, 614–615 Hobhouse LJ expressed similar reservations. It does not appear from the reports that in either of those cases the court was referred to *In re A Company* [1985] BCLC 333. In those circumstances I consider that I should follow the later decisions of the Court of Appeal in *Adams v Cape Industries plc* [1990] Ch 433 and *Ord v Belhaven Pubs Ltd* [1998] BCC 607 and decline to apply so broad a proposition as that for which counsel for Trustor contends in the third principle referred to in paragraph 14 above.

G 22 The second proposition also appears to me to be too widely stated unless used in conjunction with the first. Companies are often involved in improprieties. Indeed there was some suggestion to that effect in *Salomon v A Salomon & Co Ltd* [1897] AC 22. But it would make undue inroads into the principle of *Salomon*’s case if an impropriety not linked to the use of the company structure to avoid or conceal liability for that impropriety was enough.

H 23 In my judgment the court is entitled to “pierce the corporate veil” and recognise the receipt of the company as that of the individual(s) in control of it if the company was used as a device or facade to conceal the true facts thereby avoiding or concealing any liability of those individual(s). On the facts of this case it is unnecessary to decide whether the dictum

of Kekewich J in *In re Barney* [1892] 2 Ch 265, 273 referred to in paragraph 18, is applicable where the recipient is a wholly-owned corporate body. The dictum suggests that complete control of the actual recipient may be enough. But this was not said in relation to a limited company and predates the decision of the House of Lords in *Salomon v A Salomon & Co Ltd* [1897] AC 22.

24 Mr Smallbone is bound by the findings made by Rimer J and the Court of Appeal in relation to the issues before them. Thus it is established that Introcom was and is controlled by Mr Smallbone, the payments from the Trustor account with Barclays, Cheapside to the account of Introcom at Barclays, Cheapside were effected by Mr Smallbone or on his instructions and, in the words of Rimer J, “Introcom was simply a vehicle Mr Smallbone used for receiving money from Trustor”. Rimer J also concluded that the payments to Introcom were unauthorised and involved an inexcusable breach by Mr Smallbone of his duty as managing director of Trustor “being payments to Mr Smallbone’s own company which was then going to and did devote itself to further unauthorised and improper dissipations of the money”.

25 In my view these conclusions are such as to entitle the court to recognise the receipt of the money of Trustor by Introcom as the receipt by Mr Smallbone too. Introcom was a device or facade in that it was used as the vehicle for the receipt of the money of Trustor. Its use was improper as it was the means by which Mr Smallbone committed unauthorised and inexcusable breaches of his duty as a director of Trustor. Mr Smallbone has no real prospect of successfully defending this part of the claim because he is bound by the findings of Rimer J to which I have referred.

26 I have reached this conclusion from a consideration of the facts as found by Rimer J and the principles to be derived from the cases independently from the passage in paragraphs 97 and 98 of the judgment of Sir Richard Scott V-C which I have quoted earlier. I have been concerned whether that passage was referring to a liability based on knowing receipt or knowing assistance. Liability for the former would be consistent with the Court of Appeal’s conclusions regarding the liability of Introcom but liability for the latter would not. Paragraph 97 seems to be dealing with the payments out of the Introcom account and so understood refers prima facie to knowing assistance. But paragraph 98 recognises joint and several liability for “the whole of the sums for which Introcom is accountable”. The judgment of the Court of Appeal recognised liability on Introcom for knowing receipt but not at that stage for knowing assistance. Accordingly my conclusion is consistent with the decision of the Court of Appeal whether or not I was bound by that decision to reach the same conclusion.

27 For all these reasons I make an order under CPR r 24.2 for payment by Mr Smallbone of the sums set out in and on the terms of the draft order accompanying the application notice.

*Order accordingly.*

*Solicitors: Allen & Overy.*

Reported by NICHOLAS MERCER ESQ, Barrister

702

QUEEN'S BENCH DIVISION.

[1956]

C. A.  
1956  
REGINA  
v.  
COUNTY OF  
LONDON  
QUARTER  
SESSIONS  
APPEALS  
COMMITTEE.  
*Ex parte*  
ROSSI.  
Parker L.J.

the notice being "sent." That, however, is only providing a further method by which the clerk of the peace may "give "notice" and cannot alter the nature of the obligation itself. Further, it is, I think, important to appreciate the object of the notice. The appeal to the appeals committee is in every sense a rehearing. It is for the complainant who has lost her case below to begin, and to call her evidence afresh. The respondent to the appeal, who has won below, ought, one would think, to be put into a position to appear and resist the case on the rehearing if he so desires. So far as the original hearing before petty sessions is concerned, there is an elaborate code laid down to ensure that the party against whom the complaint is made should have a full opportunity of appearing: compare sections 45, 46 and 47 of the Magistrates' Courts Act, 1952. It would be odd if section 3 (1) of the Act of 1933 had to be construed so as to put him in a less favourable position in an appeal. I think that the obligation expressed by the words "shall in due course give notice" means in its context "shall cause notice to be received "in a reasonable time to enable the party concerned to prepare "for and attend the hearing."

*Appeal allowed.*

*Leave to appeal to House of Lords  
refused.*

Solicitors: *Good, Good & Co.; Samuel Dalton.*

M. M. H.

C. A.  
1956  
Jan. 12, 13;  
24.

LAZARUS ESTATES LTD. v. BEASLEY.

[Plaint No. L.O. 847.]

Denning,  
Morris and  
Parker L.JJ.

*Landlord and Tenant—Rent restriction—Repairs and rent—Notice of increase and declaration as to repairs served on tenant—Declaration not challenged by tenant within 28 days—Whether tenant precluded after 28 days from challenging validity of declaration on ground of fraud—"Satisfactory evidence"—Particulars required in notice—Housing Repairs and Rents Act, 1954 (2 & 3 Eliz. 2, c. 53), ss. 23 (1), 25; Sch. II, paras. 4, 5, 6.*

*Signature—Company—Rubber stamp—Whether effective. Company. Practice—Notice—Misnomer in—Housing Repairs and Rents Act, 1954, Sch. II.*

*Fraud—Party cannot rely on own fraud—Notice—Alleged fraudulent statement in—Validity—Housing Repairs and Rents Act, 1954, Sch. II.*

**1 Q.B.**

QUEEN'S BENCH DIVISION.

703

A tenant was served with a notice of increase of rent under the Housing Repairs and Rents Act, 1954,<sup>1</sup> together with a declaration purporting to comply with the provisions of the Act, declaring that work of repair to the value of £566 had been carried out in the specified period. The tenant did not challenge the declared value of the repairs in the county court under paragraph 4 of the Second Schedule within 28 days of receiving the notice, but did not pay the increase of rent. The landlords sued her in the county court for the arrears, and by her defence the tenant alleged, inter alia, that the declaration was fraudulent in that, as to £300 of the £566, no such work of repair had been carried out. The county court judge gave judgment for the landlords, holding that after the expiry of the 28-day period he was precluded from hearing evidence as

C. A.  
1956  
LAZARUS  
ESTATES  
LTD.  
v.  
BEASLEY.

<sup>1</sup> Housing Repairs and Rents Act, 1954, s. 23: "(1) Where a dwelling-house is let under a controlled tenancy or occupied by a statutory tenant, and the landlord is responsible, wholly or in part, for the repair of the dwelling-house, then, subject to the provisions of this Part of this Act,—(a) if and so long as the following conditions (hereinafter referred to as 'the conditions justifying an increase of rent') are fulfilled, that is to say—(i) that the dwelling-house is in good repair; and (ii) that it is reasonably suitable for occupation having regard to the matters specified in paragraphs (b) to (h) of section 9 (1) of this Act; and (b) if in accordance with the Second Schedule to this Act the landlord has produced satisfactory evidence that work of repair to the value specified in that Schedule has been carried out on the dwelling-house during the period so specified, the rent recoverable from the tenant shall be increased by virtue of this subsection so as to exceed by the amount hereinafter mentioned the rent which apart from this subsection would be recoverable from the tenant under the terms of the tenancy or statutory tenancy and having regard to the provisions of any enactment."

Sch. II, para. 4: "(1) Within twenty-eight days after the relevant date the tenant may apply to the county court to determine whether work of repair has been carried out on the dwelling-house during the

"period specified in the declaration to a value not less than that so specified and whether that value is at least the value required by the foregoing provisions of this Schedule; and if on such an application the court is not satisfied that work of repair has been carried out as aforesaid and that the value specified in the declaration is at least the value required as aforesaid, the court shall certify accordingly and thereupon the notice of increase shall be, and be deemed always to have been, of no effect."

Para. 5: "Subject to the provisions of the last foregoing paragraph, the service with a notice of increase of such a declaration as is required by this Schedule shall be treated for the purposes of section 23 (1) of this Act as the production of satisfactory evidence that work has been carried out as mentioned in paragraph (b) of that subsection; and subject as aforesaid the validity of a declaration shall not be questioned on the ground that the value of the work of repair stated in the declaration to have been carried out on the dwelling-house is less than that required by the foregoing provisions of this Schedule."

Para. 6: "If in such a declaration any person makes a statement which he knows to be false in a material particular or recklessly makes a statement which is false in a material particular he shall be liable on summary conviction to a fine not exceeding thirty pounds."

704

QUEEN'S BENCH DIVISION.

[1956]

C. A.

1956

LAZARUS  
ESTATES  
LTD.  
v.  
BEASLEY.

to the alleged fraud by the terms of paragraph 5 of the Second Schedule. On appeal by the tenant:—

*Held* (Morris L.J. dissenting), that the terms of paragraph 5 did not exclude the tenant, when sued for the increase of rent, from claiming that the declaration was not "satisfactory evidence" for the purposes of section 23 (1), on the ground that it was fraudulent.

The provisions of the Act entitle a tenant to challenge the validity of a declaration on grounds other than those set out in paragraph 4; and the time to raise such challenges to validity is not that provided under paragraph 4, but when sued for the increase of rent. The present tenant, by challenging the declaration on the ground that it was fraudulent, was challenging its validity on grounds other than that repairs had not been done to the value specified therein, for fraud vitiates all transactions known to the law, and the landlords could not recover increased rent by reason of their fraud.

*Per* Morris L.J. dissenting. If the tenant does not put his landlord to proof in the county court within 28 days of the service of notice and declaration, he cannot challenge them thereafter and must pay the increased rent, for the language of the Act is compelling; Parliament has imposed a time limit and has not made exceptions to cover special cases.

*Woollett v. Minister of Agriculture and Fisheries* [1955] 1 Q.B. 103; [1954] 3 All E.R. 529, C.A.; reversing [1954] 1 W.L.R. 1149; [1954] 2 All E.R. 776 and *Smith v. East Elloe Rural District Council* [1955] 1 W.L.R. 380; [1955] 2 All E.R. 19 distinguished.

Although the documents were not addressed to the tenant in her correct name, but bore the wrongly spelt name of her deceased husband, the misnomer did not invalidate them, since they were addressed to "the tenant" and she was not misled in any way.

*Per* Denning L.J. It has not yet been held, when there is nothing to indicate who affixed the rubber stamp, that a company can sign documents by its printed name affixed with a rubber stamp.

APPEAL from Judge Clothier, sitting at Lambeth County Court.

In October, 1954, Lazarus Estates Ltd., the landlords of a block of flats, The Palatinate, New Kent Road, served on Mrs. Violet Beasley, the statutory tenant of flat No. 13, three documents, each dated October 9, 1954, purporting to be documents in the forms prescribed by the Housing Repairs and Rents Act, 1954,<sup>1</sup> for the purpose of increasing the rent of the flat from 18s. 8d. to £1 2s. 9d. a week. The first document was a notice of election under section 30 (3) of the Act of 1954 by which the landlords disclaimed any responsibility for keeping the interior of the premises in good decorative repair. The second was a declaration (i) that the conditions justifying an increase of rent

<sup>1</sup> For note see p. 703.

**1 Q.B.**

QUEEN'S BENCH DIVISION.

705

were fulfilled (namely, that the premises were in good repair and reasonably fit for occupation) and (ii) that the landlords had done work of repair so as to qualify them for an increase. The declaration contained the following: "During the period of three years ending on the 30th day of September, 1953, being a period falling within the four years ending with the date of service of the notice of increase, work of repair of the general description specified in the Schedule to this declaration has been carried out on the building comprising the premises or solely for the benefit of the premises or of other dwelling-houses comprised in the building to the value of £566 6s. 2d. being a value not less than four times the aggregate of the amounts of the statutory repairs deductions for all the dwelling-houses comprised in the building, namely, £324." In the Schedule it was shown that the £566 6s. 2d. was made up by "External decorative repairs, £266 6s. 2d." and "Other repairs wholly for the benefit of the dwelling-houses comprised in the building, £300." The third document was a notice of repairs increase by which the landlords stated that the existing rent of 18s. 8d. per week would be increased by 4s. 1d. per week as from November 20, 1954. The documents were not signed by the landlords or any person on behalf of the company, but were stamped with a rubber stamp "Lazarus Estates Ltd." They were addressed to "Mr. E. G. Brasley, tenant of 13, The Palatinate, S.E.1," though Mrs. Violet Beasley had become the statutory tenant of the flat on the death of her husband, Mr. E. C. Beasley, two years previously.

The tenant did not apply within 28 days of receiving the notice to challenge the figures in the landlords' declaration under the provisions of paragraph 4 of the Second Schedule to the Act of 1954<sup>1</sup>; but she obtained from the local authority a certificate of disrepair which she served on the landlords on February 1, 1955. She continued to pay the old rent, but did not pay the increase claimed by the landlords. Accordingly, on March 28, 1955, the landlords brought an action against her in the Lambeth County Court, claiming arrears of rent of £2 4s. 11d., being the amount of the increase of rent for 11 weeks. By her defence as amended, the tenant denied that any rent was in arrear; claimed that there had been no valid increase of rent; admitted that a document purporting to be a notice of increase came into her possession, but stated that it was addressed to "Mr. E. G. Brasley," and that the date specified in it on which the increased rent was to become effective was less than six clear

C. A.

1956

LAZARUS  
ESTATES  
LTD.  
v.  
BRASLEY.

<sup>1</sup> Q.B. 1956.

706

QUEEN'S BENCH DIVISION.

[1956]

C. A

1956

LAZARUS  
ESTATES  
LTD.  
v.  
BRASLBY.

weeks after the service of the notice. She alleged further that the declaration accompanying the notice represented that "other works wholly for the benefit of the dwelling-house comprised in the building" had been carried out to the value of £300, whereas in fact no such works had been carried out during the period specified; and that the notice was therefore not valid since the declaration was false and fraudulent to the knowledge of the landlords or their servants or agents.

At the hearing in the county court, the tenant sought to amend the pleadings by adding a counterclaim for damages for the alleged fraud. For the landlords it was contended that the terms of paragraph 5 of the Second Schedule<sup>1</sup> precluded the county court judge from hearing any evidence of fraud either by way of defence or by way of counterclaim after the expiry of the 28-day period provided by paragraph 4 of that Schedule. The county court judge upheld that contention, stating that he had no power to extend the time from 28 days; that it was not open to the tenant to take other action independently of the Act by bringing an action at common law for fraud in order indirectly to attack the landlords' declaration, since that was contrary to the scheme of the Act. Where an Act stated that something must be done within 28 days, there was no power in the court to extend the time by a sidewind by saying that what had been done had been done fraudulently. The object of the scheme was not to have a lot of litigation, and in a number of matters the Act indicated that the decision of the county court judge was to be final. He found that though the documents, which were served by post, were dated October 9, 1954, they had been posted on October 6, such that they would be delivered on October 7, thus giving the necessary six weeks' notice stipulated by the Act. He held that the notice, though incorrectly addressed, was valid and that the declaration could not be set aside; and gave judgment for the landlords for £2 4s. 11d.

The tenant appealed.

*R. Gavin Freeman* for the tenant. Though paragraph 5 of the Second Schedule to the Act plainly imposes a certain limitation on proceedings questioning the landlords' declaration after the 28 days have run, the paragraph is in guarded terms and provides that the declaration shall be "satisfactory evidence" for certain purposes only; it is certainly not in such clear terms as to prevent a litigant either raising a defence of fraud in answer to a claim for the increased rent by the landlords or, alternatively,

**1 Q.B.**

QUEEN'S BENCH DIVISION.

707

claiming damages for fraud, whether by counterclaim or in an independent action, after the 28 days have run. The legislature cannot have intended landlords to be able to rely on a document founded on fraud, and the court will be slow to construe a statute in such a way as to exclude a defence alleging fraud; for the court has undoubted jurisdiction to relieve against every species of fraud. The ground for the submission that an independent action for damages for fraud is maintainable after the 28 days have run is even stronger, for if a landlord serves a declaration with the notice of repairs increase, and the tenant only discovers, say, six months later that the declaration is fraudulent because nothing has been spent on repairs, he would have no remedy and would have to pay the increased rent for the rest of time. The provision in paragraph 6 of the Second Schedule that the landlord may be fined £30 for fraud will not assist the tenant, who will be fixed with the increased rent by the terms of section 23 (1). In those circumstances the tenant must be able to bring an action for damages to recompense her for the increased rent which she has to pay under the terms of the Act.

C. A.

1956

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LAZARUS  
ESTATES  
LTD.  
v.  
BEASLEY.

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It is conceded that the legislature has power to prevent certain types of litigation and that paragraph 5 was intended to exclude endless litigation over honest differences as to the amount spent on repairs, but it would require clearer words than those used in paragraph 5, or express terms, to exclude proceedings alleging fraud. The decisions in *Woollett v. Minister of Agriculture and Fisheries*<sup>2</sup> and *Smith v. East Elloe Rural District Council*,<sup>3</sup> that the words of paragraph 16 of the First Schedule to the Acquisition of Land (Authorization Procedure) Act, 1946, were intended to exclude all litigation after six weeks, are distinguishable, for there the language is clear; it is that after six weeks the certificate "shall not be questioned in any legal proceedings whatever." Moreover, the procedure under that Act is quite different; it is not a question there of an interested party serving a notice on the tenant and the tenant thereby losing his rights; on the contrary, there is a hearing before the agricultural committee appointed by the Minister before the certificate is granted, and many steps have to be taken before the certificate takes effect.

Secondly, it is submitted that the notice served on this tenant was invalid. At the material time she was the statutory tenant of these premises. The notice served on her was wrong as to sex, name and initial. Even if it were capable of being amended

<sup>2</sup> [1955] 1 Q.B. 103; [1954] 2 All E.R. 776.

<sup>3</sup> [1955] 1 W.L.R. 380; [1955] 2 All E.R. 19.

708

QUEEN'S BENCH DIVISION.

[1956]

C. A.

1956

LAZARUS  
ESTATES  
LTD.  
v.  
BEASLEY.

by leave of the court, the amendment should be on terms that the 28 days should begin to run only from the date of the amendment. This is a difficult Act for tenants to understand, particularly if they live in a block of flats and do not know what has been done in the way of repairs on other parts of the building and must incur expense to find out. The period of challenge under paragraph 4 is very short, and if there is any possibility that through mistakes in the notice the tenant may not have had the full 28 days, the court should declare such notices invalid unless they are completely accurate in all details. The tenant can waive any objection if he wishes, but if he takes an objection, he ought to have a remedy.

*H. Heathcote-Williams Q.C.* and *George Dobry* for the landlords. The tenant has the opportunity given by paragraph 4 to question the landlords' declaration within 28 days, but once that period has run there is no power to extend it, and by the compelling words of section 23 (1) of the Act the rent "shall" be increased if the landlord produces "satisfactory evidence"; and "satisfactory evidence" is defined by paragraph 5. Thereafter, by operation of law, the landlords, having done all that the Act requires of them, become automatically entitled to the increased rent. It would be most burdensome to landlords if by a mere allegation of fraud the express provisions of the Act could be evaded.

[MORRIS L.J. If the first part of paragraph 5 means that the production of the declaration is "satisfactory evidence" and that is an end of the matter, what is the purpose of the second half of paragraph 5 as to "validity"? Is it said that "satisfactory evidence" is irrebuttable evidence?]

Yes; it is conclusive if it has not been challenged within 28 days. The scheme of the Act is to provide procedure which, while protecting both parties, will avoid multiplicity of proceedings.

[DENNING L.J. If a tenant is ill or away and misses the notice, surely the legislature cannot have intended that he should be fixed with the increased rent for ever?]

The legislature has imposed that limitation. Though it is conceded that the wording in the Schedule to the Act of 1946 which was considered in *Woollett's* case<sup>4</sup> and *Smith v. East Elloe Rural District Council*<sup>5</sup> is clearer, those decisions are relied on as showing that the legislature here intended to exclude proceedings after a certain period.

<sup>4</sup> [1955] 1 Q.B. 103.

<sup>5</sup> [1955] 1 W.L.R. 380.

**1 Q.B.**

QUEEN'S BENCH DIVISION.

709

[DENNING L.J. The wording of the Act of 1946 is much stronger, and the compulsory acquisition of land is carried out by a very responsible Minister.]

[PARKER L.J. I can understand that once the 28 days have run the declaration becomes "satisfactory evidence," for the purposes of section 23, that work to the value specified has been done. But there is nothing in the Act or the Schedule which excludes the tenant, if he refuses to pay the increased rent, from challenging the declaration on the ground of fraud.]

Nothing in section 23 excludes an independent action for fraud; but that section read with paragraph 5 makes the increase of rent automatic. The tenant has an alternative method of resisting the increase demanded, because if he has been served with a notice of repairs increase, and his premises are in bad repair, he can apply to the local authority for a certificate of disrepair, as this tenant did, and if he obtains it, he does not have to pay the increased rent until the house has been put into order as required by section 23. If the house is in good repair and the tenant has failed to challenge the declaration successfully within 28 days, there is no reason why he should not pay an increased rent. Further, the legislature has provided a penalty in paragraph 6 of the Second Schedule for the landlord who has been guilty of fraud.

The maxim that "fraud unravels all" does not extend to cases where Parliament has laid down that fraud cannot be unravelled after the lapse of a specified period. The landlord has a time limit under the Act too, for if the declaration is successfully challenged under paragraph 4, he cannot serve another notice of increase: see paragraphs 1 and 2 of the Second Schedule.

The decision in *Donegal Tweed Co. v. Stephenson*<sup>6</sup> under the Landlord and Tenant Act, 1927, is authority for the submission that the court has no inherent jurisdiction to extend a period for appeal laid down by Parliament.

*Freeman* in reply. The evidence, though "satisfactory" for one purpose, may be vitiated by fraud. It is correct that if a certificate of disrepair is issued the tenant need not pay the increase. The increase is only permitted if the landlord has spent a certain sum of money on it within a certain period; and a tenant whose rent is increased other than under the provisions of the Act has very good cause to complain.

*Cur. adv. vult.*

<sup>6</sup> (1929) 98 L.J.K.B. 657; [1929] W.N. 214.

C. A.  
1956

LAZARUS  
ESTATES  
LTD.  
v.  
BEASLEY.

710

QUEEN'S BENCH DIVISION.

[1956]

C. A.

1956

LAZARUS  
ESTATES  
LTD.  
v.  
BEASLEY.

Jan. 24. DENNING L.J. stated the facts and continued: Two technical objections were taken to the validity of the documents. The first objection was that the documents did not give the correct name of the tenant. They were addressed to "Mr. E. G. Brasley, "tenant of 13, The Palatinat, S.E.1," whereas they should have been addressed to "Mrs. Violet Beasley." This misnomer was an obvious mistake which does not affect the validity of the documents. The documents were addressed to "the tenant," Mrs. Beasley knew that she was the tenant, and she was not misled in any way. Indeed, she admitted in her defence that she was served with the documents. In these circumstances she cannot complain of the misdescription.

The second objection was that the prescribed six weeks' notice was not given for the increase to operate. The documents were served by post. They bore date October 9, 1954, a Saturday. If they were posted on that day, they would not reach the tenant till October 11 (a Monday), and the increase was to operate from November 20, 1954 (a Saturday), and would thus be two days short of six weeks. The landlords' agent said, however, that the documents were posted on Wednesday, October 6, 1954, not the 9th, and his evidence was not challenged. If this is correct, the documents would be delivered on October 7, 1954, which would give the necessary six weeks. That objection therefore also failed.

No other objections were taken in the county court to the documents, but I do not wish it to be assumed that this court approves of them. The statutory forms require the documents to be "signed" by the landlord, but the only signature on these documents (if such it can be called) was a rubber stamp "Lazarus "Estates Ltd." without anything to verify it. There was no signature of a secretary or of any person at all on behalf of the company. There was nothing to indicate who affixed the rubber stamp. It has been held in this court that a private person can sign a document by impressing a rubber stamp with his own facsimile signature on it: see *Goodman v. J. Eban Ltd.*,<sup>1</sup> but it has not yet been held that a company can sign by its printed name affixed with a rubber stamp. Another point which is very material is that the declaration failed to specify any of the works of repair which had been done. The statutory form requires that a schedule to the declaration should contain a general description of the work done under each heading. The schedule in this case gave no such description. The headings "External

<sup>1</sup> [1954] 1 Q.B. 550; [1954] 1 All E.R. 763.

**1 Q.B.**

QUEEN'S BENCH DIVISION.

711

“decorative repairs” and “Internal decorative repairs” were bracketed together and put at £266 6s. 2d. with nothing to say what was done. The heading “Other repairs wholly for the benefit of dwelling-houses comprised in the building” was put at £300 without a word to say what those repairs were. The statutory form was, therefore, not complied with. No objection, however, was taken in the county court that the declaration was invalid on this ground. We cannot therefore go into it and must approach the case on the footing that that declaration in matters of form complied with the statutory requirements.

C. A.

1956

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LAZARUS  
ESTATES  
LTD.  
v.  
BEASLEY.

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Denning L.J.

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I turn, therefore, to the substance of the case. The tenant seeks to say that the declaration was false and fraudulent. She says that it was quite untrue for the landlords to say that they had spent £300 on “other repairs wholly for the benefit of dwelling-houses comprised in the building.” She alleges that no such works were carried out at all. The judge has held, however, that she cannot go into that matter at all. She had 28 days, he says, in which to do it after the notice was served. As she did not challenge the declaration within that time, he says that she cannot now challenge it at all. The tenant appeals to this court.

In order to justify an increase, the Act requires the landlord to produce “satisfactory evidence” that he has done work of repair to the required value during the appropriate period: see section 23 (1) (b); and he must produce it “in accordance with the Second Schedule.” Inasmuch as the tenant is the person who is to pay the increase, the landlord must, I think, produce the evidence to the tenant. Apart from the Second Schedule (which I will consider in a moment) the evidence, in order to be satisfactory, ought, I think, to be such as to satisfy the tenant that the required work has been done; or if he takes unreasonable objection to it, it ought to be such as would satisfy a reasonable tenant. I do not think that it would be satisfactory for the landlord to rely simply on his own word, uncorroborated and not on oath, as evidence that he had done the required work. The tenant could reasonably require the landlord to produce his contemporaneous records, builders’ accounts, duly receipted, and so forth.

This brings me to the Second Schedule. This shows that the tenant can insist on satisfactory evidence, at any rate, if he acts within 28 days. Paragraph 4 provides that within 28 days the tenant can apply to the court to determine whether the required

712

QUEEN'S BENCH DIVISION.

[1956]

C. A.

1956

LAZARUS  
ESTATES  
LTD.

v.

BEASLEY.

Denning L.J.

work of repair has been carried out. The landlord must then produce evidence to satisfy the county court that work of repair was done so as to justify the increase, and unless he does so the notice of increase will be of no effect. The county court would, I imagine, in most cases insist on the production of records, receipts, and so forth, before it was satisfied. Suppose, however, that the tenant lets the 28 days slip by without applying to the county court. That is what happened in this case. Mrs. Beasley did not apply within the 28 days. The Second Schedule by paragraph 5 then provides that in that case the service of the declaration is itself to be treated as the production of satisfactory evidence that the work specified in it has been done. This means that the landlord can rely on his own word (as contained in the declaration) as satisfactory evidence, without supporting it with any records, receipts, or so forth. But does it mean that his word cannot be challenged at all, and that it is conclusive for all purposes? I do not think so. Paragraph 5 goes on to state one particular ground on which the declaration cannot be challenged, namely, that the value of the work stated in it was insufficient to justify the increase. That seems to import that it is open to the tenant to challenge the declaration on any other ground.

We are in this case concerned only with this point: can the declaration be challenged on the ground that it was false and fraudulent? It can clearly be challenged in the criminal courts. The landlord can be taken before the magistrate and fined £30: see Second Schedule (paragraph 6); or he can be prosecuted on indictment, and (if he is an individual) sent to prison: see section 5 of the Perjury Act, 1911. But the landlords argued before us that the declaration cannot be challenged in the civil courts at all even though it was false and fraudulent; and that the landlords can recover and keep the increased rent even though it was obtained by fraud. If this argument is correct, the landlords would profit greatly from their fraud. The increase in rent would pay the fine many times over. I cannot accede to this argument for a moment. No court in this land will allow a person to keep an advantage which he has obtained by fraud. No judgment of a court, no order of a Minister, can be allowed to stand if it has been obtained by fraud. Fraud unravels everything. The court is careful not to find fraud unless it is distinctly pleaded and proved; but once it is proved, it vitiates judgments, contracts and all transactions whatsoever: see as to deeds, *Collins*

**1 Q.B.**

QUEEN'S BENCH DIVISION.

713

v. *Blantern*<sup>2</sup>; as to judgments, *Duchess of Kingston's case*<sup>3</sup>; and as to contracts, *Master v. Miller*.<sup>4</sup> So here I am of opinion that if this declaration is proved to have been false and fraudulent, it is a nullity and void and the landlords cannot recover any increase of rent by virtue of it.

I would therefore allow this appeal and permit the tenant to raise the defence of fraud. I would just add this. We were told that 55 of the tenants in these blocks of flats applied within 28 days to the county court, and, although there was no hearing in court, the landlords have not insisted on the increase in those cases: but they seek to insist on the increase as against the other tenants who did not apply within 28 days. This failure on the part of the tenants may have been due to ignorance or mistake or some other reasonable excuse. The landlords say that, whatever the reason may be, once the 28 days have expired the tenants are without remedy, and that there is no power in the court to extend the time. It is easy to think of cases where strict insistence on the 28 days may work hardship and injustice to tenants. If it be correct that there is no power in the court to extend the time, the sooner the attention of the legislature is directed to it the better.

C. A.  
1956  

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LAZARUS  
ESTATES  
LTD.  
v.  
BRASLEY.  

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Denning L.J.  

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MORRIS L.J. A notice, which purported to be a notice in the prescribed form, of the intention of the landlords to increase the rent pursuant to the provisions of the Housing Repairs and Rents Act, 1954, was served on the tenant. The notice was addressed to "Mr. E. G. Brasley" as the tenant of No. 13, The Palatinate. The tenant was, however, Mrs. Violet Beasley. She had become the tenant after the death of her husband, Mr. E. C. Beasley, by the operation of section 12 (1) (g) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. The facts were fully known to her, and the fact that the notice referred to the "tenant" as being "Mr. E. G. Brasley," whereas she was the tenant as the successor to her late husband, did not in any way mislead her. She appreciated that a name had been wrongly inserted and wrongly spelt, and she must have understood that notice was being given to her as the tenant of No. 13, The Palatinate, that the rent was being increased. Accompanying the notice of increase were (a) a declaration that the conditions justifying an increase of rent were fulfilled, and (b) a declaration

<sup>2</sup> (1767) 1 Smith's L.C., 13th ed., 406.      <sup>4</sup> (1791) 1 Smith's L.C., 13th ed., 780, 799.

<sup>3</sup> (1776) 2 Smith's L.C., 13th ed., 644, 646, 651.

714

QUEEN'S BENCH DIVISION.

[1956]

C. A.  
1956

LAZARUS  
ESTATES  
LTD.  
v.  
BEASLEY.  
Morris L.J.

in the prescribed form such as is mentioned in the Second Schedule of the Housing Repairs and Rents Act, 1954. There was also a notice of election relating to internal decorative repairs made pursuant to section 30 (3) of the Housing Repairs and Rents Act, 1954.

Under the Second Schedule the " relevant date " is the date of service of the notice of increase accompanying the declaration mentioned in section 25 (1) (b) of the Act. It is provided by paragraph 4 of the Second Schedule as follows: " Within twenty-eight days after the relevant date the tenant may apply to the county court to determine whether work of repair has been carried out on the dwelling-house during the period specified in the declaration to a value not less than that so specified and whether that value is at least the value required by the foregoing provisions of this Schedule; and if on such an application the court is not satisfied that work of repair has been carried out as aforesaid and that the value specified in the declaration is at least the value required as aforesaid, the court shall certify accordingly and thereupon the notice of increase shall be, and be deemed always to have been, of no effect. (2) Where, on such an application as aforesaid, it is necessary for the court to determine the extent to which the landlord is or was responsible for the repair of the dwelling-house,— (a) section 32 of this Act shall apply to that determination, and (b) notwithstanding anything in section 23 (5) of this Act, the determination shall have effect (so far as relevant) for the purposes of that section." There may therefore, within 28 days, be an application to the county court (a) to determine whether work of repair has been carried out on the dwelling-house during the period specified in the declaration to a value not less than that so specified, and (b) to determine whether that value is at least the value required by the provisions in paragraphs 1 and 2 of the Schedule (as reduced in consequence of the service of the notice under section 30 (3)). If on such an application by the tenant the court is not satisfied both (a) that work of repair has been carried out on the dwelling-house during the period specified in the declaration to a value not less than that so specified, and also (b) that the value specified in the declaration is at least the value required by the provisions of paragraphs 1 and 2 of the Second Schedule, then the court must certify accordingly. The consequential result of so certifying is that the notice of increase is of no effect and is deemed always to have been of no effect.

**1 Q.B.**

QUEEN'S BENCH DIVISION.

715

In the present case the landlords elected (pursuant to paragraph 7 (3) of the Second Schedule) that the value of the work carried out on each of the dwellings contained in a building which is a block of flats should be determined by reference to the aggregate value of the work of repair carried out either on the building as a whole or so as to enure solely for the benefit of premises comprised in the building. The declaration of the landlords, which bore date October 9, 1954, contained the following:

C. A.

1956

LAZARUS  
ESTATES  
LTD.  
v.  
BEASLEY.  
Morris L.J.

"During the period of three years ending on the 30th day of September, 1953, being a period falling within the four years ending with the date of service of the notice of increase, work of repair of the general description specified in the schedule to this declaration has been carried out on the building comprising the premises or solely for the benefit of the premises or of other dwelling-houses comprised in the building to the value of £566 6s. 2d. being a value not less than four times the aggregate of the amounts of the statutory repairs deductions for all the dwelling-houses comprised in the building, namely, £324."

In the schedule it was shown that the £566 6s. 2d. was made up by "External decorative repairs, £266 6s. 2d.," and "Other repairs wholly for the benefit of dwelling-houses comprised in the building, £300." The way in which the value of the work carried out on a particular dwelling-house comprised in the block of flats was to be determined from these figures was the way laid down by paragraph 7 (3) (b) of the Second Schedule, which is in these terms: "the value of the work of repair carried out during that period on any of the dwelling-houses comprised in the building shall be taken to be an amount which bears to the amount of the statutory repairs deduction for that dwelling-house the same proportion as the aggregate value mentioned in the last foregoing sub-paragraph bears to the aggregate of the amounts of the statutory repairs deductions for all the dwelling-houses comprised in the building."

When Mrs. Beasley received the declaration it was open to her, as the notes on the declaration stated, to make application within 28 days to the county court. She could have challenged the assertion that work of repair had been carried out on the building comprising the premises or solely for the benefit of the premises or of other dwelling-houses comprised in the building. She could have challenged that the work was carried out during the period specified. She could have challenged that the value of the work was £566 6s. 2d. She could have challenged that the sum of £324 was four times the aggregate of the amounts

716

QUEEN'S BENCH DIVISION.

[1956]

C. A. of the statutory repairs deductions for all the dwelling-houses  
1956 comprised in the building.

LAZARUS  
ESTATES  
LTD.  
v.  
BEASLEY.  
Morriss L.J.

Where there has been service of a notice of increase and of a declaration in the form prescribed in the Second Schedule the provisions of paragraph 5 of the Second Schedule become applicable. They are as follows: " Subject to the provisions of the " last foregoing paragraph, the service with a notice of increase " of such a declaration as is required by this Schedule shall be " treated for the purposes of subsection (1) of section twenty- " three of this Act as the production of satisfactory evidence " that work has been carried out as mentioned in paragraph (b) " of that subsection; and subject as aforesaid the validity of a " declaration shall not be questioned on the ground that the " value of the work of repair stated in the declaration to have " been carried out on the dwelling-house is less than that " required by the foregoing provisions of this Schedule." Where, therefore, there has been service with a notice of increase of a declaration as required by the Second Schedule, and where there has been no application to the county court by the tenant within 28 days which has made the notice of increase to be of no effect, two consequences follow:—(1) such service shall be treated for the purposes of subsection (1) of section 23 as the production of satisfactory evidence that work has been carried out as mentioned in paragraph (b) of that subsection; and (2) the validity of the declaration is not to be questioned on the ground that the value of the work of repair stated in the declaration is less than is made requisite by the Schedule.

In order to see the effect of these provisions reference must be made to section 23 (1) and to section 25 (1). Section 23 (1) is as follows: " Where a dwelling-house is let under " a controlled tenancy or occupied by a statutory tenant, and " the landlord is responsible, wholly or in part, for the repair of " the dwelling-house, then, subject to the provisions of this Part " of this Act,—(a) if and so long as the following conditions " (hereinafter referred to as 'the conditions justifying an " 'increase of rent') are fulfilled, that is to say (i) that the " dwelling-house is in good repair; and (ii) that it is reasonably " suitable for occupation having regard to the matters specified " in paragraphs (b) to (h) of subsection (1) of section nine of " this Act; and (b) if in accordance with the Second Schedule to " this Act the landlord has produced satisfactory evidence that " work of repair to the value specified in that Schedule has " been carried out on the dwelling-house during the period so

**1 Q.B.**

QUEEN'S BENCH DIVISION.

717

C. A.

1956

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LAZARUS  
ESTATES  
LTD.  
v.  
BEASLEY.  
—  
Morris L.J.

“ specified, the rent recoverable from the tenant shall be increased  
“ by virtue of this subsection so as to exceed by the amount  
“ hereinafter mentioned the rent which apart from this sub-  
“ section would be recoverable from the tenant under the terms  
“ of the tenancy or statutory tenancy and having regard to the  
“ provisions of any enactment.” Section 25 (1) provides: “ No  
“ sum shall be recoverable by way of repairs increase unless the  
“ landlord has served on the tenant or a former tenant of the  
“ dwelling-house a notice in the prescribed form of his intention  
“ to increase the rent (hereinafter referred to as a ‘ notice of  
“ increase ’), accompanied by—(a) a declaration in the pre-  
“ scribed form that at the date of service of the notice the condi-  
“ tions justifying an increase of rent were fulfilled; and (b) a  
“ declaration in the prescribed form such as is mentioned in the  
“ Second Schedule to this Act; and no such sum shall be recover-  
“ able before, or in respect of any period before, such date as  
“ may be specified in the notice.”

In the present case there was a service of a notice of increase.  
It was accompanied by two declarations purporting to comply  
respectively with (a) and (b) of section 25 (1). No question has  
been raised as to the adequacy and correctness of the declaration  
that at the date of service of the notice the conditions justifying  
an increase of rent were fulfilled. Neither has it been questioned  
that there was a declaration in the prescribed form as required  
by the Second Schedule. It is possible that it might have been.  
It may be that the sufficiency of the general description of the  
work of repair could have been challenged in the action. It  
may be that the sufficiency as a signature of having the mere  
name of a limited company imposed by a rubber stamp might  
have been challenged in the action. But as these questions  
were not raised I express no opinion in regard to them. The  
only objection that was raised in regard to the form of the notice  
of increase and the declarations was that which I have men-  
tioned, namely, that the name of Mrs. Beasley’s late husband,  
misspelt, was on the notice. That objection I consider in the  
circumstances to be insubstantial and not to invalidate. A point  
was raised in the action (under section 25 (2) of the Act) that the  
date specified in the notice of increase was earlier than six weeks  
after the service of the notice: but the finding of fact of the  
judge as to the date of service disposed of this point.

There being no availing point as to the service of the notice  
and declarations, and no availing point as to the form of the  
notice and declarations, and there having been no application

718

QUEEN'S BENCH DIVISION.

[1956]

C. A.

1956

LAZARUS  
ESTATES  
LTD.  
v.  
BEASLEY.  
Morris L.J.

to the county court within paragraph 4 of the Second Schedule, the result is that "satisfactory evidence" was produced that work of repair to the value specified in the Second Schedule was carried out on the dwelling-house during the specified period. The phrase "satisfactory evidence" is one that by itself might merely denote admissible evidence from which a conclusion might be drawn but which might be rebutted or out-balanced by some other evidence. But section 23 (1) lays it down that on the production of the "satisfactory evidence" stipulated the result is to be that "the rent recoverable from the tenant shall "be increased." The wording is compelling, just as is the wording of paragraph 5 of the Second Schedule which provides that, unless the procedure of paragraph 4 is put into operation successfully, the service with the notice of increase of a declaration as required "shall" be treated as the production of "satisfactory evidence."

The wording of the second part of paragraph 5 is complementary to that in the first part; and both follow the provisions of paragraph 4. As I have mentioned, paragraph 4 provides for an application to the county court on two matters. The first is as to whether work of repair has been carried out on the dwelling-house during the period specified in the declaration to a value not less than that so specified. The first part of paragraph 5 then deals with the position when there has been no application. The position is that the service with the notice of increase of a declaration as required "shall be treated for the purposes of "section 23 (1) of this Act as the production of satisfactory "evidence that work has been carried out as mentioned in "paragraph (b) of that subsection." The other matter that may be the subject of an application to the county court under paragraph 4 is as to whether the value of the work carried out is at least the value required by the provisions in paragraphs 1 and 2 of the Schedule. The second part of paragraph 5 deals with the position where there has been no such application, and the provision is that "the validity of a declaration shall not be "questioned on the ground that the value of the work of repair "stated in the declaration to have been carried out on the "dwelling-house is less than that required by the foregoing "provisions of this Schedule."

In the present case Mrs. Beasley, by her defence, does not assert that no work of repair was done; she says that the sum of £566 is wrong: she does not challenge one of the two items which compose that figure, the item of £266, but she challenges

**I Q.B.**

QUEEN'S BENCH DIVISION.

719

the other, the item of £300. She asserts that the work which that figure is said to represent was never done, and she further asserts that the landlords knew this and fraudulently presented a figure and an item for which they knew there was no warrant at all. Accordingly, she asserts that the notice of increase was not valid because the declaration was false and fraudulent. But Mrs. Beasley's remedy was to have applied to the county court within 28 days of the service of the documents upon her. If she had the pithy case that one out of two items of suggested work was not only erroneous but was erroneous for the reason that the item had never existed and had been fraudulently invented, her task might have been simpler than that ordinarily undertaken by tenants. But whether she would have had an easy task or not, it seems to me that it is just as much too late for her now to attack one figure in the declaration, even though she alleges that the figure was fraudulently inserted, as it would be for her to attack a figure on the ground that it was excessive or was erroneously or mistakenly or carelessly overstated. The matter depends entirely, in my judgment, upon the language of the Act. There was a declaration which in form is not impeached. It cannot, in my view, be said that the declaration is a nullity because one part of its content is assailed. What is said is that one of two items was fraudulently added, and that without the tainted item the remaining figure would be insufficient. But by statute the service of the declaration must, unless the tenant avails himself of his statutory opportunities of putting his landlord to proof, be treated as the production of satisfactory evidence: the words are "shall be treated." Upon such production of satisfactory evidence the rent recoverable from the tenant "shall" be increased. The language appears to me to be compelling. No reason has been given why Mrs. Beasley did not make application to the county court within the prescribed time, and there is no suggestion that she could not have done so, or could not have made any inquiry that she wished. It seems to me that Parliament has imposed a time limit and has not made exceptions to cover any special cases.

We were referred to the provision contained in paragraph 16 of Schedule 1 to the Acquisition of Land (Authorization Procedure) Act, 1946, and to the decisions in *Woollett v. Minister of Agriculture and Fisheries*,<sup>5</sup> and in *Smith v. East Elloe Rural*

C. A.

1956

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LAZARUS  
ESTATES  
LTD.

v.  
BEASLEY.

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Morris L.J.  
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<sup>5</sup> [1955] 1 Q.B. 103; [1954] 3 All E.R. 529; *reversing*, [1954] 1 W.L.R. 1149; [1954] 2 All E.R. 776.

720

QUEEN'S BENCH DIVISION.

[1956]

C. A. *District Council.*<sup>6</sup> The language of the provisions now under consideration is, however, different, and, in my judgment, the decision in the present case depends solely upon the construction of the language used in the Act of 1954.

1956

LAZARUS  
ESTATES  
LTD.  
v.  
BEASLEY.

For these reasons I agree with the conclusions of the judge and I would dismiss the appeal.

PARKER L.J. By section 23 (1) of the Housing Repairs and Rents Act, 1954, where a dwelling-house is occupied by a statutory tenant and the landlord is responsible, wholly or in part, for repairs, then, subject to the provisions of Part II of the Act and to the existence of certain conditions (which are immaterial for the purposes of this case) the rent recoverable from the tenant shall be increased "if in accordance with the Second Schedule to this Act the landlord has produced satisfactory evidence that work of repair to the value specified in that Schedule has been carried out on the dwelling-house during the period so specified."

By section 25 (1) it is provided: "No sum shall be recoverable by way of repairs increase unless the landlord has served on the tenant or a former tenant of the dwelling-house a notice in the prescribed form of his intention to increase the rent (hereinafter referred to as a 'notice of increase'), accompanied by—(a) a declaration in the prescribed form that at the date of service of the notice the conditions justifying an increase of rent were fulfilled; and (b) a declaration in the prescribed form such as is mentioned in the Second Schedule to this Act: and no such sum shall be recoverable before, or in respect of any period before, such date as may be specified in the notice."

Paragraphs 1 and 2 of the Second Schedule lay down the value of the repairs and the period during which they were carried out which the declaration must show if an increase in rent is to be obtained. [His Lordship read paragraph 4 (1) and paragraph 5 of the Second Schedule to the Act and continued:] In the present case a notice of increase and a declaration were served in October, 1954. The latter declared that during the three years ending on September 30, 1953, being within four years ending with the date of service of the notice of increase, work of repair had been carried out to the value of £566 6s. 2d., being as to £266 6s. 2d. decorative repairs, and as to £300 repairs wholly for the benefit of the dwelling-houses comprised in the

<sup>6</sup> [1955] 1 W.L.R. 380; [1955] 2 All E.R. 19.

1 Q.B.

QUEEN'S BENCH DIVISION.

721

building. Since £324 was the aggregate of the amounts of the statutory repairs deductions, an increase of rent was recoverable assuming repairs to that value had been done. The tenant, however, did not within 28 days apply to the county court to determine whether such work of repair had been carried out. She did nothing, but when sued in these proceedings for the increase of rent she sought to dispute the declaration on the ground that the alleged repairs to the value of £300 had never been executed, and that the declaration to that extent was false, and false to the landlords' knowledge. The answer put forward by the landlords was that by reason of paragraph 5 of the Second Schedule a declaration unchallenged within the 28 days becomes "satisfactory evidence" that the work of repair to the value specified in the declaration has been carried out, and that, accordingly, the increase of rent under section 23 (1) automatically followed and could not be disputed.

For my part I am unable to accept this contention, at any rate in its widest form. The declaration to be valid does not merely have to show that the work of repair has been done within the specified period, and that its value is at least the value required in order that the increase in rent should operate. The declaration must also be in the prescribed form; and it must be served on the tenant; and the date specified in the notice of increase must not be earlier than six clear weeks after the service of the notice: compare section 25 (1), (2) and (3). Quite clearly the tenant must be entitled to challenge the validity of the declaration on the ground that one or more of these conditions have not been fulfilled. He cannot do this on an application to the county court under paragraph 4 of the Second Schedule, and it seems to me that the time to raise such a challenge to validity is when sued for the increase in rent.

Accordingly, the question here is whether the tenant is seeking to challenge the validity on some ground other than that repairs had not been carried out during the period specified to a value not less than that specified. That the tenant is seeking to challenge the validity on that ground is clear, but is she also seeking to challenge it on another ground? The contention on her behalf is that should she succeed in proving fraud on the part of the landlords the declaration would be a nullity, whereas mere proof that repairs had not been done to the value specified would not make the declaration a nullity but would merely make it cease to have effect. Therefore, it is said, the tenant is seeking to do something more than challenge the validity of the declaration on

C. A.

1956

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LAZARUS  
ESTATES  
LTD.  
v.  
BEASLEY.  
Parker L.J.

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722

QUEEN'S BENCH DIVISION.

[1956]

C. A.

1956

LAZARUS  
ESTATES  
LTD.  
v.  
BEASLEY.  
Parker L.J.

the ground that repairs had not been done to the value specified. I think that this contention is correct. No doubt it can be said that the real question in any case is whether repairs to the value specified have in fact been done, and that proof of fraud in the making of the declaration is merely proof of the quality of the act or its motive. Nevertheless, that quality, if proved, vitiates all transactions known to the law of however high a degree of solemnity. Suppose that on an application under paragraph 4 of the Second Schedule the landlord by fraud persuades the county court to uphold a declaration and that months later the tenant discovers this and is in a position to prove that fraud. Surely the tenant could refuse to pay the increase in rent, and when sued could allege that the decision of the county court was obtained by fraud. If that be the true position, why cannot a tenant who has not adopted the procedure of paragraph 4 equally claim that on proof of fraud the declaration is not satisfactory evidence for the purposes of section 23?

Reference was made on behalf of the landlords to *Woollett v. Minister of Agriculture and Fisheries*<sup>7</sup> and *Smith v. East Elloe Rural District Council*<sup>8</sup> in support of the view that the words in paragraph 5 of the Second Schedule were sufficient to exclude a challenge of the declaration on the ground of fraud. It is enough to say that the provisions excluding challenge in those cases were in much wider language, and I do not think that those cases assist in the determination of this case.

Finally, the tenant asserted that the declaration was invalid in that it was sent by post addressed to "Mr. E. G. Brasley" and not to Mrs. Violet Beasley. It, however, reached the tenant, and was understood by her to be intended for her. Indeed, she applied for and obtained a certificate of disrepair. I am satisfied that the misdescription in no way affects the validity of the declaration in this case. On the first ground, however, I would allow the appeal.

*Appeal allowed.*

*Judgment below set aside.*

*New trial ordered.*

*Leave to appeal to House of Lords refused.*

Solicitors: *Robert K. George; Chandler & Creeke.*

M. M. H.

<sup>7</sup> [1955] 1 Q.B. 103.

<sup>8</sup> [1955] 1 W.L.R. 380.

**IN THE EASTERN CARIBBEAN SUPREME COURT  
TERRITORY OF THE VIRGIN ISLANDS  
COMMERCIAL DIVISION**

**IN THE HIGH COURT OF JUSTICE**

**CLAIM NO. BVI HC (COM) 108 OF 2016**

**BETWEEN:**

**UVW**

**Applicant**

**And**

**XYZ  
(A Registered Agent)**

**Respondent**

**Appearances:**

Mr Andrew Willins, instructed by Messrs Appleby for the Applicant  
Mr Peter Ferrer, instructed by Messrs Harney Westwood & Riegels for the  
Respondent

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2016: September 19; October 13; 18; 27  
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**JUDGMENT**

*Norwich Pharmacal – post-judgment – in aid of enforcement – overseas proceedings – willful evasion.*

A judgment creditor seeking to enforce overseas judgments identified a company registered in the TVI belonging to the judgment debtor. The judgment debtor demonstrated a pattern of concealment of assets to frustrate enforcement. The judgment creditor applied to this court seeking third party disclosure orders against the local registered agent to obtain information which could lead to the identification of assets available for enforcement. The registered agent took a position of neutrality but sought to

test the merits of the application. The registered agent queried as a matter of principle whether the court has jurisdiction to make third party disclosure orders post-judgment in aid of enforcement, and whether such relief is available to an applicant to assist him in securing compliance with interlocutory freezing orders. *Cur. adv. vult.*

**Held:** Norwich Pharmacal relief is in principle available:

1. post-judgment in aid of enforcement, where there is reasonable suspicion for believing that a disclosure defendant is mixed up in the willful evasion of another's judgment debt;
2. to assist in securing compliance with freezing orders, including such orders made by foreign courts.

[1] **Wallbank J [Ag]:** This ruling concerns an application for a Norwich Pharmacal disclosure order against a corporate registered agency service provider in the TVI. The purpose of the disclosure sought is two-fold. First, it is in aid of enforcement of a number of overseas judgments from superior courts in a civil law jurisdiction. Secondly, it is in aid of on-going proceedings in another common law jurisdiction.

[2] In respect of the pre-judgment disclosure sought, the judgment debtor's assets were frozen by way of an interim injunction by the overseas court, with ancillary disclosure orders made to police it, but the judgment debtor breached those orders. That court's compulsive powers were engaged but to insufficient effect. The judgment creditor has identified a corporate vehicle registered in the TVI which appears to belong ultimately to the judgment debtor, containing at least one substantial asset. The judgment creditor has identified a pattern of conduct on the part of the judgment debtor which, when taken in the round, carries the unmistakable hallmark of efforts to make himself judgment proof by way of deliberate concealment of assets. The Applicant comes to this court, saying it needs disclosure to police the freezing order, to discover assets the judgment debtor may have concealed through the TVI corporate vehicle or other vehicles

registered with the same corporate service provider and to discover possible leads for asset tracing and/or execution efforts.

- [3] I will be delivering an oral ruling determining this application on the facts and the usual Norwich Pharmacal principles. Those facts are somewhat particular. To preserve anonymity, this written decision only addresses a number of legal aspects which Counsel for both parties urged are likely to be of general interest to the TVI financial services community.
- [4] The Respondent remained neutral in relation to the application. It is understandably caught between its duty of confidentiality towards its client and its duty of disclosure, such as this court might find it to be. The Respondent properly seeks to test the application and raised a number of arguments for the court's consideration. I will deal with the more significant of those arguments here.

#### **Omar, and necessity**

- [5] The Respondent argued that Norwich Pharmacal orders should not be granted in aid of foreign proceedings, on the basis set out in **Regina ex p. Omar & Ors v Secretary of State for Foreign and Commonwealth Affairs**<sup>1</sup>.
- [6] In **Omar**, the English Court of Appeal considered whether statutory provisions barred Norwich Pharmacal relief in support of criminal proceedings abroad. The issue was framed whether Norwich Pharmacal relief is available where a statutory evidential disclosure regime 'covers the ground'. The English Court of Appeal considered that ultimately the determinative factor is necessity. If legislation

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<sup>1</sup> [2013] EWCA Civ 118.

provides a means of obtaining disclosure then Norwich Pharmacal relief may not be necessary and is liable to be refused. That situation does not arise here. The Respondent has not identified any statutory regime which supplies the means for obtaining the information sought.

[7] It is also no answer for the Respondent to point to other possible remedies, such as a receivership over the TVI corporate vehicle. In theory a receivership is potentially available, but it is an expensive remedy. Then there is the factor that the Applicant has no direct evidence that the judgment debtor is using the TVI vehicle to conceal assets. A receivership might thus be refused. Or if a receivership were to be granted, and no other assets found, it would be pointless. As the Applicant submitted, a receivership would only apply to that TVI corporate vehicle, not to other entities the judgment debtor may have with the Respondent.

[8] I bear in mind that Norwich Pharmacal relief is not a remedy of last resort.<sup>2</sup> It may be granted where an applicant has no straight forward or available means of finding out the information and when the other conditions for obtaining the relief are met. It has been said that another way of describing the requirement of necessity is whether it would be just and convenient for the relief to be ordered in the interests of justice.<sup>3</sup> Further, as stated in **Macdoel Investments v Federal Republic of Brazil**, *'the determinative question in any particular case is whether justice requires discovery to be ordered.'*<sup>4</sup> Thus the Applicant need not be put to complex, costly and potentially nugatory procedures before being accorded Norwich Pharmacal relief.

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<sup>2</sup> Cf Campaign against Arms Trade v BAE Systems [2007] EWHC 330

<sup>3</sup> President of the State of Equatorial Guinea v Royal Bank of Scotland International [2006] UKPC 7.

<sup>4</sup> [2007] JLR 201.

### **Existence of the jurisdiction to grant post-judgment Norwich Pharmacal relief**

[9] The Respondent contends that the English Courts have doubted whether the Norwich Pharmacal jurisdiction exists after a judgment has been rendered. It cites **NML Capital Ltd v Chapman Freeborn Holdings Ltd et al.**<sup>5</sup> in support of this proposition. If the jurisdiction is nonetheless available, the Respondent argues that its role as registered agent makes it fall outside involvement in wrongdoing. The Respondent equates itself with Chapman Freeborn in that case.

[10] Chapman Freeborn was an aircraft chartering broker. The Republic of Argentina had incurred judgment debts which had been bought by 'vulture funds'. The Republic feared that the funds would distrain against its aircraft if they flew to jurisdictions where they could be seized. The Republic therefore chartered a private jet to carry the President on an overseas trip. One of the judgment creditors sought Norwich Pharmacal disclosure orders against the chartering broker. The wrongdoing which the applicant sought to vindicate was the Republic's alleged evasion of its obligation to pay the debt. The English Court of Appeal ruled that the chartering broker had not been mixed up in wrongdoing. It had had no more than an ordinary trading relationship with the Republic. The latter had no obligation to fly its aircraft to jurisdictions where execution could be levied against them. The Court of Appeal stated:

*"[I]t follows that it is important to analyse with some care in what precisely lies the alleged wrongdoing. There is nothing inherently wrong in chartering an aircraft, unless it be said that any trading by a judgment debtor which involves using his assets for that purpose rather than*

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<sup>5</sup> [2013] EWCA Civ 589.

*satisfying a judgment debt is in itself wrongdoing. However I reject that proposition. It would lead to a jurisdiction of absurd width. It is no answer to that objection that the exercise of the jurisdiction would be subject to discretionary considerations. It would be absurd and exorbitant if parties were exposed to the risk of having to defend applications for discovery on the basis of no more than having traded with a person who turns out to have been at the relevant time a judgment debtor. It would encourage speculative litigation. There is no connection between Chapman Freeborn's activity as chartering broker and the Republic's failure to sell the aircraft. In truth however the relevant wrongdoing here in my judgment lies simply in the failure to satisfy the judgment debt. That is the transaction in which NML must show that Chapman Freeborn has become involved or mixed up. Its conduct is in no real sense connected with the relevant wrongdoing. At the very least, the connection is remote and insufficient."*<sup>6</sup>

[11] The Respondent argues that it is in an equivalent position. All it did was create and maintain a company for the judgment debtor. It was not involved in any wrongful use of that company by him. Here too the wrong lies 'simply' in failure to satisfy the judgment debt, says the Respondent. It must be noted however that the Applicant squarely put it that the present wrongdoing consisted of deliberate concealment of assets, so being more than mere non-payment of the debt.

[12] As a matter of law the Respondent's reasoning ignores the decision in **JSC BTA Bank v Fidelity Corporate Services Limited et al.**<sup>7</sup> A registered agent (or other corporate service provider, depending upon the type of services provided) does

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<sup>6</sup> At para [26].

<sup>7</sup> BVIHCVAP 2010/0035.

more than trade with a company or its underlying owner. By its very role a registered agent facilitates the functioning of a company. It is involved in a company's affairs, even if the registered agent does not know what the company is being used for.

[13] Additionally, as the English Court of Appeal stated, care must be taken to analyse precisely what constitutes the wrongdoing in question. In **NML**, the result would probably have been different if the Republic had, for instance, used Chapman Freeborn's services to hire an aircraft to spirit away the Republic's reserves of bullion to defeat enforcement. That would have been a positive act of wrongdoing, facilitated by the chartering broker. Similarly, in the present case, if the judgment debtor uses the registered agent's services to use a corporate vehicle for evading enforcement efforts, I have no doubt the registered agent becomes liable to give disclosure, if all other Norwich Pharmacal criteria are also satisfied.

[14] The concluding remarks of Tomlinson LJ in **NML**<sup>8</sup> support this. He stated: "*...Norwich Pharmacal type relief in aid of execution should, if it is available at all, be available only in respect of involvement in conduct which necessarily amounts to willful evasion of execution. Anything short of that has the potential to involve the English court in the paralysis or at the very least serious inhibition of international trade.*" I am not sure that the word 'willful' adds anything other than emphasis to 'evasion'. Tomlinson LJ was saying that mere non-payment of a judgment debt would not be enough to trigger the Norwich Pharmacal jurisdiction (assuming it to exist in support of execution). A deliberate effort to obstruct or frustrate enforcement is required. That undoubtedly constitutes wrongdoing. Inability to pay a judgment debt, although unfortunate, can occur in good faith.

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<sup>8</sup> At para. 33.

Justice still demands however that the judgment debtor satisfy the judgment debt. Tomlinson LJ described non-payment of a judgment debt as a wrong – and correctly so – but the fact of non-payment alone is not sufficient to trigger the Norwich Pharmacal jurisdiction. There has to be something sufficiently unconscionable in the alleged wrongdoer’s conduct to trigger what is ultimately a jurisdiction which seeks to do equity. Strategies to obstruct and delay enforcement, on the other hand, are wrong because they frustrate justice. They work against the very purpose of the courts and legal system. Tomlinson LJ’s observations ought not be taken to imply that the court should be slow to see in a judgment debtor’s acts an attempt to obstruct or evade settlement of the judgment debt. To the contrary, the court should be astute and robust to see through a judgment debtor’s acts for what they are. A reasonable suspicion of willful evasion suffices.

[15] The Respondent queried whether this court has jurisdiction at all to grant Norwich Pharmacal relief post-judgment in aid of execution. The Respondent rightly pointed to Tomlinson LJ’s observation in **NML** that the English Court of Appeal’s decision in **Mercantile Group (Europe) AG v Aiyela**<sup>9</sup> ‘*does not compel the conclusion that it is*’ available post judgment in aid of execution. The court in **NML** did not consider it necessary to decide the point, but the length of Tomlinson LJ’s opinion suggests that he considered it likely that the remedy is indeed available.

[16] He explained that in **Aiyela** the disclosure order had been ancillary to a Mareva injunction, with the Court’s power to grant such an ancillary disclosure order being derived from section 37(1) of the English Supreme Court Act 1981, and the court’s ancillary power to ensure that such an order is effective. The ancillary power is

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<sup>9</sup> [1994] QB 366.

also implicitly provided by section 37, by sub-section 2. Section 37(1) and (2) are materially identical to section 24 of our Eastern Caribbean Supreme Court (Virgin Islands) Act:<sup>10</sup>

*“A mandamus or an injunction may be granted...by an interlocutory order of the High Court...in all cases in which it appears to the Court...to be just or convenient that the order should be made and any such order may be made either unconditionally or upon such terms and conditions as the court (...) thinks just.”*

[17] Tomlinson LJ observed further<sup>11</sup>: *“...(1) that the Norwich Pharmacal jurisdiction is an equitable jurisdiction, as appears clearly from the speeches in that case and (2) that the starting point of the exercise of Mareva or freezing injunction relief in aid of enforcement is that the respondent has, or arguably has, within its control assets of the judgment debtor against which the judgment creditor can enforce. The control of such assets raises wholly different considerations from mere trading with a judgment debtor.”*

[18] The English Court of Appeal in **NML** did not need to address in any depth the question whether or not Norwich Pharmacal relief is available post judgment in aid of execution. Its observations concerning this issue cannot have been intended to be definitive. Such an exercise would undoubtedly have led the Court of Appeal to consider the numerous authorities which consider the fundamental bases of the Norwich Pharmacal jurisdiction. In our own jurisdiction there is the Court of Appeal decision in **A, B, C, D v E**<sup>12</sup>, binding upon this court, in which it was held after an

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<sup>10</sup> Formerly the West Indies Associated States Supreme Court (Virgin Islands) Act, Cap. 80, Revised Laws of the Virgin Islands 1991.

<sup>11</sup> At para. 31.

<sup>12</sup> Anguilla HCVAP2011/001 at paras. [9] to [17], dated 19 September 2011.

extensive review of authorities that Norwich Pharmacal orders are a type of injunction.

[19] Our Court of Appeal there adopted the English court's approach to Norwich Pharmacal orders as authoritative:

*"Given the very origin of the **Norwich Pharmacal** principles can it be seriously argued that the English courts' treatment and acceptance of such an order as an injunction is merely persuasive on this Court? I would think not in the circumstances. Indeed given the court's adoption and full embracement of the principle, the English courts' treatment and view of the nature of such an order as borne out by the cases as well as the academic writers can only be treated to all intents and purposes as being of authoritative force."*<sup>13</sup>

[20] It is well settled under English law that freezing orders are available post-judgment in aid of enforcement.<sup>14</sup> I am unaware of any authority to the contrary in this jurisdiction. The jurisdiction conferred by section 24 to grant a mandamus or injunction by an interlocutory order suggests that this power applies only at an interlocutory or pre-judgment stage, but I doubt such a restrictive interpretation is correct. As Lord Hobhouse stated in **Turner v Grovit**:

*"It was the courts of equity that had the power to grant injunctions and the equity jurisdiction was personal and related to matters which should affect a person's conscience."*<sup>15</sup>

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<sup>13</sup> At para [16], by Pereira, JA (as she then was).

<sup>14</sup> E.g. *Stewart Chartering v C & O Managements SA (The Venus Destiny)* [1980] 1WLR 460.

<sup>15</sup> [2001] UKHL 65 at para. 24.

- [21] The jurisdiction to grant injunctions predated the United Kingdom **Supreme Court of Judicature Act 1873**, which combined the courts of equity and common law. That Act was the precursor to the more recent Supreme Court acts.
- [22] Although the criteria for granting a Norwich Pharmacal order are different from those applicable to freezing orders, both are types of injunction. The criteria are different for several reasons. With the case of Norwich Pharmacal orders, the jurisdiction is triggered when a person who is not a mere witness comes under a duty to provide ‘full information’ by reason of having become ‘mixed up’ in ‘wrongdoing’ (in all the various gradations of those words discussed in the authorities). This is, in one sense, a form of specific performance of the disclosure defendant’s obligation, hence an equitable remedy. The court’s equitable jurisdiction is aligned with its statutory power to grant injunctive relief. Upon a conceptual analysis it would seem correct to say that the equitable jurisdiction runs in parallel<sup>16</sup> with the statutory jurisdiction. They appear to be separate but complementary. As stated by **Gee**, “*The court has powers which can be used to make interim orders to preserve the position so that in due course, if appropriate, an effective order for specific performance of a contract can be granted. It may be necessary to grant mandatory relief simply to enable a plaintiff to preserve the possibility of specific performance.*”<sup>17</sup> Thus, if the court’s equitable jurisdiction becomes spent the statutory jurisdiction would continue where equity stops short, and vice versa. I note, with deference, that Tomlinson LJ in **NML** stated that he

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<sup>16</sup> I purposefully avoid using the classifications ‘concurrent’ and ‘auxiliary’ jurisdictions, which, as Gee explains, have been heavily criticized: Commercial Injunctions, 5<sup>th</sup> Ed. Para 1.002. Further, their significance has been severely eroded, if not removed altogether, with the fusion of the courts of law and equity.

<sup>17</sup> Commercial Injunctions, 5<sup>th</sup> Ed. Para 7.12, citing *Astro Exito Navigacion SA v Chase Manhattan Bank (The Messiniaki Tolmi)* [1983] 2AC 787; *HL and Continental Grain Company v Islamic Republic of Iran* [1983]; *Lloyds’s Rep.* 620.

was not convinced that the court's equitable jurisdiction becomes spent when judgment is obtained.<sup>18</sup>

- [23] The Applicant submits that the leading case on post-judgment third party disclosure orders is the English Court of Appeal decision in **Mercantile Group (Europe) AG v Victor Aiyela**.<sup>19</sup> The Court of Appeal held that the two conditions which must be satisfied for making a disclosure order against a third party are that (1) the third party had become 'mixed up' in the transaction concerning which discovery is required and (2) the order for discovery must not offend against the 'mere witness' rule. The Court continued:

*"In the case of discovery against a third party in aid of a post-judgment Mareva, the mere witness rule can have no relevance. The trial, if any, will already have taken place. It follows that all that is necessary to found jurisdiction is that the third party should have become mixed up in the transaction concerning which discovery is required and, of course, that the court should consider it 'just and convenient' to make an order."*<sup>20</sup>

- [24] The terminology used here, referring to the third party as 'mixed up' in the transaction concerning which discovery is required, is the same as in the test for Norwich Pharmacal relief. The reference to 'just and convenient' tracks the terms of section 37(1) of the Supreme Court Act 1981. The same phrase is used in relation to the circumstances when a Norwich Pharmacal order can be ordered as

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<sup>18</sup> At para. 32.

<sup>19</sup> QBCM1 93/0579/B.

<sup>20</sup> Page 6 of the judgment.

propounded by the Privy Council in **President of the State of Equatorial Guinea v Royal Bank of Scotland International**.<sup>21</sup>

[25] With **Aiyela**, a very strong English Court of Appeal held that the jurisdiction exists for the court to make a third party disclosure order post-judgment in aid of enforcement. In line with the dicta of Pereira, JA (as she then was) in **A, B, C, D v E** at paragraph [16]<sup>22</sup> this court should also treat that decision as authoritative.

[26] In the present case, as in **Aiyela**, the Applicant seeks a third party disclosure order to police freezing orders. We are not told in **Aiyela** whether the disclosure orders were made at the same time as the freezing orders. It would seem to me not to matter if the freezing orders were made separately from the disclosure orders. In **A.J. Bekhor & Company Limited v Bilton**<sup>23</sup> the English Court of Appeal by Ackner LJ considered that there must be a power inherent in the Court's statutory power to make all such ancillary orders as appears to the court to be just and convenient to ensure the exercise of the Mareva jurisdiction is effective.<sup>24</sup> The Court there traced the power back to section 25 of the Judicature Act of 1873. **A.J. Bekhor** was a decision made whilst section 37 of what became the Supreme Court Act 1981 was still in Bill form. It was also a decision at a relatively early stage of development of the Mareva jurisdiction. Thus the juridical bases for the newly articulated jurisdiction called for scrutiny. Ackner LJ considered that the power to grant ancillary disclosure orders did not derive from the court's inherent jurisdiction, nor from the court's procedure rules, but from statute. Griffiths LJ agreed, and postulated the position in wide terms. He stated: "*If the court has power to make a Mareva injunction it must have power to make an effective*

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<sup>21</sup> [2006] UKPC 7.

<sup>22</sup> Anguilla HCVAP 2011/001, dated 19 September 2011

<sup>23</sup> [1981] 1 QB 923.

<sup>24</sup> At page 21 A- B of the judgment transcript.

*Mareva injunction. If the injunction will not be effective it ought not be made. (...) [I]t may be necessary to order discovery to make the injunction effective and I would hold that the court has the power to make such ancillary orders as are necessary to secure that the injunctive relief given to the plaintiff is effective. I therefore agree that a judge does have power to order discovery in aid of a Mareva injunction if it is necessary for the effective operation of the injunction.”* It would seem logical that orders in aid of a freezing order can be made after, and thus separately from, the freezing order itself.

[27] The observations in **A.J. Bekhor** were made prior to the advent of the world-wide freezing order instituted by Section 25(2) of the English Civil Jurisdiction and Judgments Act 1982, and this court’s decision in **Black Swan Investment I.S.A v Harvest View Ltd et al.**<sup>25</sup> In the latter this court found that it has the jurisdiction to make a freezing order where there are assets in the TVI and the substantive cause of action is overseas and not here. These are two examples where the English and TVI courts respectively can use their powers to assist the administration of justice in other jurisdictions. Such an approach is based upon, or at least is in line with, principles of comity. As stated by Millett LJ in **Credit Suisse Fides Trust SA v Cuoghi**:<sup>26</sup>

*“In other areas of law, such as cross-border insolvency, commercial necessity has encouraged national courts to provide assistance to each other without waiting for such cooperation to be sanctioned by international convention. International fraud requires a similar response. It is becoming widely accepted that comity between the courts of different countries requires mutual respect for the territorial integrity of each other’s*

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<sup>25</sup> BVIHCV2009/339

<sup>26</sup>[1998] QB 818.

*jurisdiction, but that this should not inhibit a court in one jurisdiction from rendering whatever assistance it properly can to a court in another in respect of assets located or persons resident within the territory of the former.”*

[28] It thus does not matter, it seems to me, that the freezing orders were made by an overseas court. The court’s power to grant Norwich Pharmacal orders in aid of overseas proceedings is well established. This court, by Bannister J in **Black Swan Investment I.S.A. v Harvest View Limited et al.**<sup>27</sup> alluded to this in support of his analysis that a stand-alone order for a freezing injunction can be made in this jurisdiction where a foreign judgment would be amenable to enforcement against assets in this jurisdiction. There is no requirement which limits the Norwich Pharmacal jurisdiction to being used as an ancillary power of this court to ensure that its own orders are effective.

#### **Whether corporate vehicles must be created for wrongful purposes**

[29] The Respondent argued that the Applicant would need to bring cogent evidence identifying a specific transaction where the alleged wrongdoer has transferred assets to the TVI corporate vehicle for no reason other than to avoid execution. The Respondent submits that the Applicant cannot do that because the TVI corporate vehicle was created before any alleged wrongdoing. The Respondent concluded from this that the company was not created for the purpose of insulating the alleged wrongdoer from a judgment.

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<sup>27</sup> BVIHCV2009/339 at para. [11].

[30] The Respondent interprets the Court of Appeal's decision in **JSC BTA Bank v Fidelity Corporate Services Limited et al.**<sup>28</sup> as saying that if a company was not created by a registered agent for wrongful purposes then the registered agent does not come under a duty to provide information. The Respondent relies upon the following sentence in paragraph [27]: "*Registered agents and registered office service providers who are used by others to create and maintain for them corporate vehicles for the purpose of effecting fraud must expect that in due course the victims will come to them seeking discovery of the names and addresses and other information and documents that will enable the perpetrators to be discovered and the misappropriated assets traced*".

[31] With respect I do not agree with this submission. First, this sentence does not say a corporate service provider will only be liable to give disclosure if a company was created for a fraudulent purpose. It is axiomatic that an innocent service provider will not know what the vehicle was intended to be used for. Secondly, the sentence states 'create **and maintain**' (emphasis added). The use of a company can change over time. It might be created for a legitimate use, but then evolve into something used wholly or partially illegitimately. There is nothing about the creation of a company which fixes the registered agent with liability to give disclosure. The point the Court of Appeal was making was that if a corporate service provider involves itself in the life or affairs of a company that is, or becomes, used for wrongful purposes, he can expect to be required to give disclosure of information within its possession. This analysis is consistent with how the English courts treat with piercing the corporate veil. One of the requirements that must be established if the court is to pierce the corporate veil is that the company has been misused as a device or façade to conceal wrongdoing,

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<sup>28</sup> HCVAP2010/035 at para [27].

and a company can be a façade for such purposes even though not incorporated with deceptive intent.<sup>29</sup>

[32] I also do not agree that an Applicant has to show a particular transaction where assets have been transferred to the corporate vehicle for no reason other than to avoid execution. A general pattern of willfully evasive conduct suffices. ‘Reasonable suspicion’ that the third party has been mixed up in the wrongdoing was the evidential threshold applied by the Jersey Court of Appeal in **Macdoel Investments Limited et al. v Federal Republic of Brazil et al.**<sup>30</sup> The Court there explained that ‘reasonable suspicion’ is ‘something less than prima facie evidence’.<sup>31</sup>

#### ‘Fishing’

[33] The Respondent submitted that an order should not be made in this case on grounds that the Applicant is ‘fishing’ for information. The Respondent described the Applicant’s claim as not so much a fishing trip as an ‘industrial trawl’. I will deal here only with the underlying principle.

[34] Historically the court would not make a third party disclosure order if an applicant seeks to use the court’s procedure to gather evidence to decide whether or not to sue.<sup>32</sup> Fishing has been characterized by a situation where there is a dearth of material<sup>33</sup> as a starting point.

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<sup>29</sup> VTB Capital plc v Nutritek International Corp & ors [2012] EWCA Civ 808 at para 78.

<sup>30</sup> [2007] JLR 201 at para. 48.

<sup>31</sup> Ditto, at para 49.

<sup>32</sup> Cf dicta of Webster JA in A,B,C,D v E AXAHCVP2011/001 at [42], dated 22 April 2013.

<sup>33</sup> Ditto.

[35] The Applicant urged that ‘fishing’ is now to be regarded as a ‘discarded test’. It quotes **Hollander**:<sup>34</sup>

*“It has been said that using the jurisdiction to find information, for example, to plead a claim would be a ‘fishing expedition’, but this is not a word used in recent authorities: if there are respectable grounds for thinking that there may be a claim and the claimant simply wants additional documents to plead the claim or which will enable him to ascertain whether an action would have reasonable prospects of success, an application could no more be described as a fishing expedition than could many applications for pre-action disclosure. Norwich Pharmacal orders are rarely intrusive, in that they can usually be complied with relatively readily. It now looks relatively clear that the Norwich Pharmacal jurisdiction can be used in these circumstances too, which involves a significant extension of the jurisdiction”.*

[36] I am grateful for this summary of the current state of the way in which the jurisdiction is applied and see no reason for this court to depart from it. While it may be a significant extension of the jurisdiction, other traditionally accepted checks and balances continue to apply to inform the exercise of the court’s discretion. These include, as stated in **Aiyela**,<sup>35</sup> the need to exercise with care a jurisdiction which invades the privacy of an innocent third party, and whether the Applicant has other straight-forward or available means of finding the information,<sup>36</sup> and, in the context of post-judgment enforcement, the important

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<sup>34</sup> “Documentary Evidence”, para 4-02, p.72.

<sup>35</sup> Page 7 at A.

<sup>36</sup> *President of the State of Equatorial Guinea v Royal Bank of Scotland International* [2006] UKPC 7.

consideration that a judgment debtor is entitled to the court's assistance for obtaining enforcement of judgment debts.

[37] For these reasons, therefore, I shall proceed on the basis that

- i. Norwich Pharmacal relief is in principle available post-judgment in aid of enforcement, where there is reasonable suspicion that a disclosure defendant is mixed up in the willful evasion of another's judgment debt;
- ii. Norwich Pharmacal relief is in principle available to assist in securing compliance with freezing orders, including such orders made by foreign courts.

### **Costs**

[38] In this case the parties have commendably agreed the basis for an award of costs based upon the principles laid down by the English Court of Appeal in **Totalise plc v Motley Fool et al**,<sup>37</sup> should this court order disclosure. Not all Norwich Pharmacal applicants are as responsible. There have been instances of applicants failing to make good on their undertaking to meet a disclosure defendant's costs. This court can require the undertakings to be fortified by a reasonable payment on account, or in escrow, of anticipated costs of compliance pursuant to CPR Part 26.1 (3), (4) and (5). Should this court order disclosure in this instance the disclosure defendant will be at liberty to apply for such fortification but I trust that will not be necessary here.

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<sup>37</sup> [2002] 1 WLR 1233.

[39] I thank learned counsel for both sides for their assistance.

A handwritten signature in blue ink, appearing to read "G. Wainwright".

Commercial Court Judge  
27th October 2016

CA

431

**VTB Capital plc v Nutritek International Corp & Ors.**

[2012] EWCA Civ 808.

Court of Appeal (Civil Division).

Lloyd, Rimer and Aikens L JJ.

Judgment delivered 20 June 2012.

*Service out of jurisdiction – Forum non conveniens – Piercing corporate veil – Worldwide freezing order (WFO) – Lending by state-owned Russian bank to fund acquisition of Russian companies – Alleged misrepresentations as to value of acquired companies and that borrower and vendor not under agreement – Bank's claim in deceit and unlawful means conspiracy – Piercing corporate veil of borrower would not make defendants parties to loan – Antonio Gramsci Shipping Corp v Stepanovs [2011] EWHC 333 (Comm) and Alliance Bank JSC v Aquanta Corp [2011] EWHC 3281 (Comm) overruled – No permission to amend to plead claims in contract – Serious issue to be tried on whether claimant had suffered loss and good arguable case that it had sustained damage within jurisdiction – Significant elements of events constituting torts took place in England but centre of gravity of torts lay in Russia – Claimant failed to establish that England clearly or distinctly appropriate forum – Permission to serve proceedings on defendants out of jurisdiction refused – Good arguable case of fraud would support case of risk of dissipation, but WFO discharged – Civil Procedure Rules 1998, Practice Direction 6B, para. 3.1(9)(a) – Private International Law (Miscellaneous Provisions) Act 1995, s. 11, 12.*

**This was an appeal by the claimant bank (VTB) from a decision of Arnold J ([2011] EWHC 3107 (Ch)) refusing permission to amend the particulars of claim so as to allege a liability on the part of the second, third and fourth defendants in contract, in the alternative to the claim in tort originally pleaded, and acceding to those defendants' challenges to the jurisdiction.**

**VTB was the English subsidiary of a Russian state-owned bank. VTB lent some \$225 million to a Russian company (RAP) under a facility agreement to fund the acquisition by RAP of six Russian dairy plants and associated companies from the first defendant, Nutritek. The funds were provided to VTB by its parent, VTB Moscow. The facility agreement was subject to English law and the non-exclusive jurisdiction of the English courts. RAP defaulted on the loan. VTB recovered less than \$40 million by way of enforcement of securities taken under the facility agreement and under an interest rate swap agreement (ISA) entered into at the same time between VTB and RAP. The ISA was to hedge RAP's liability for interest under the facility agreement. It took the form of a confirmation supplemental to an ISDA master agreement. It was governed by English law and had an English arbitration clause.**

VTB's proceedings alleged that it had been induced to enter into the facility agreements by fraudulent representations made by Nutritek, for which the other defendants were alleged to be jointly liable. Two distinct misrepresentations were alleged: first as to the value of the dairy companies, and secondly that RAP and Nutritek were independent of each other, when in fact they were under common control. The second defendant (Marcap BVI) was a holding company with no employees or operations of its own. According to VTB's evidence, Marcap BVI owned, indirectly, a substantial interest in Nutritek, as well as owning Marcap Moscow, the third defendant Russian company. The fourth defendant, Mr Malofeev, a Russian resident, was alleged by VTB to be the principal beneficial owner and controller of Nutritek, Marcap BVI, Marcap Moscow and RAP.

VTB's original case was pleaded in the torts of deceit and unlawful means conspiracy. It applied for leave to amend to add a claim in contract against Marcap BVI, Marcap Moscow and Mr Malofeev on the basis that, by piercing the corporate veil of RAP, they could be made liable under the facility agreement. The judge refused permission holding that there was no good arguable case for asserting contractual liability on that basis. He regarded *Antonio Gramsci Shipping Corp v Stepanovs* [2011] EWHC 333 (Comm); [2011] 1 CLC 396 as contrary to principle and declined to follow it. He further held that there was no good arguable claim in tort against Marcap BVI and that overall VTB had not demonstrated that England was clearly or distinctly the appropriate forum for the trial of the issues between the parties. Since the challenge to the jurisdiction succeeded, a worldwide freezing order made against the fourth defendant could not continue. The judge would in any event have discharged it because the claimant had not shown a real risk of dissipation and the order had been obtained by material non-disclosure.

*Held*, dismissing VTB's appeal:

1. Arnold J was right to refuse the amendments on the basis that the contract claim that VTB wished to advance against the three defendants was not founded on a cause of action known to English law and there was no principled basis upon which the law might be incrementally developed so as to recognise such a claim. There was no proper analogy with the law relating to undisclosed principals. VTB's submission was contrary to the basic principle that, save in some exceptional cases none of which applied, a stranger to a contract should not be held to be a party to it. The court could, in an appropriate case, 'pierce a company's corporate veil' and, in doing so, substantially identify the company with those in control of it, but the court could not proceed in consequence to a holding either that the puppet company was a party to the puppeteer's contract, or vice versa. Any order made in consequence of such veil piercing was by way of the exercise by the court of a discretionary jurisdiction. It was inherently unreal to suggest that, once the corporate veil was lifted, revelation of the true facts would show Marcap BVI, Marcap Moscow or Mr Malofeev to be parties to

A either of the relevant contracts. The decided corporate veil cases did not provide  
any basis for the proposition that the puppeteer should be regarded as a party.  
B (Antonio Gramsci Shipping Corp v Stepanovs [2011] EWHC 333 (Comm);  
[2011] 1 CLC 396 and Alliance Bank JSC v Aquanta Corp [2011] EWHC 3281  
(Comm) overruled.)

C 2. The judge was correct to reject the defendants' argument that VTB had  
suffered no loss. There was a serious issue to be tried on whether VTB, rather  
than VTB Moscow, had suffered the loss, and VTB had a good arguable case that  
it had sustained damage within the jurisdiction within para. 3.1(9)(a) of Practice  
Direction 6B.

D 3. Although the current case against Marcap BVI was thin, there was enough  
in the pleaded case as supported by uncontested facts to conclude that there was  
a triable issue as to whether Marcap BVI took part in the alleged conspiracy and  
was jointly liable for the fraudulent misrepresentation. The judge was wrong to  
conclude that VTB had no reasonable prospect of success in establishing that  
Marcap BVI was, through the agency of Mr Malofeev, a party to the torts against  
VTB.

E 4. Some elements of the alleged torts occurred in Russia, even on VTB's own  
case. But, in terms of para. 3.1(9)(a) of Practice Direction 6B, VTB was entitled  
to say that it had a good arguable case that its loss was sustained in England and  
Wales. That did not give rise to any presumption that England was the natural  
or the appropriate forum for the resolution of the disputes.

F 5. The arguments were even balanced on the question whether the most  
significant elements constituting the torts of deceit and conspiracy took place  
in England so that, under the general rule in s. 11 of the Private International  
Law (Miscellaneous Provisions) Act 1995, the applicable law was English law. A  
comparison of the factors connecting the torts with England and those connecting  
G the torts with Russia under s. 12 led to the conclusion that it was substantially  
more appropriate for the applicable law for determining the issues concerning  
the torts to be that of Russia. In the circumstances VTB failed to establish  
that England was clearly or distinctly the appropriate forum. Accordingly, the  
judge was correct to set aside the order granting VTB permission to serve the  
proceedings on Nutritek, Marcap BVI and Mr Malofeev out of the jurisdiction.

H 6. In the circumstances the question of continuing the worldwide freezing  
order did not arise for decision. However, it was right to say that findings of a  
good arguable case that Mr Malofeev had been engaged in a major fraud, and  
that he operated a complex web of companies in a number of jurisdictions, which  
enabled him to commit the fraud and would make it difficult for any judgment  
to be enforced, would be capable of providing powerful support for a case of a

434

VTB Capital v Nutritek International

[2012] 2 CLC

**risk of dissipation. (Madoff Securities International Ltd v Raven [2011] EWHC 3102 (Comm) approved.)** A

The following cases were referred to in the judgment:

*Abidin Daver, The* [1984] AC 398.

*Adams v Cape Industries plc* [1990] Ch 433. B

*AK Investment CJSC v Kyrgyz Mobile Tel Ltd* [2011] UKPC 7; [2011] 1 CLC 205.

*Alliance Bank JSC v Aquanta Corp* [2011] EWHC 3281 (Comm).

*Antonio Gramsci Shipping Corp v Stepanovs* [2011] EWHC 333 (Comm); [2011] 1 CLC 396.

*Aramis, The* [1989] 1 Ll Rep 213. C

*Armstrong v Stokes* (1872) 7 QB 598.

*Atlantic Star, The* [1974] AC 436.

*Ben Hashem v Ali Shayif* [2008] EWHC 2380 (Fam).

*Berezovsky v Michaels* [2000] 1 WLR 1004.

*British Westinghouse Electric and Manufacturing Co Ltd v Underground Electric Railways Co of London Ltd* [1912] AC 673. D

*CMS Dolphin Ltd v Simonet* [2001] 2 BCLC 704.

*COLES v Samuel Smith Old Brewery (Tadcaster)* [2007] EWCA Civ 1461; [2008] 2 EGLR 159.

*Cordoba Shipping Co v National State Bank, Elizabeth, New Jersey (The Albaforth)* [1984] 2 Ll Rep 91. E

*Dadourian Group International Inc v Simms* [2006] EWHC 2973 (Ch).

*Dadourian Group International Inc v Simms* [2009] 1 Ll Rep 601.

*Darby, ex parte Brougham, Re* [1911] 1 KB 95.

*DHN Food Distributors Ltd v Tower Hamlets London Borough Council* [1976] 1 WLR 852.

*Distillers Co (Biochemicals) Ltd v Thompson* [1971] AC 458. F

*Dornoch Ltd v Mauritius Union Assurance Co Ltd* [2006] 1 CLC 714 (CA); [2006] Ll Rep IR 127.

*Fiona Trust & Holding Corp v Privalov* [2010] EWHC 3199 (Comm).

*Forster v Outred & Co* [1982] 1 WLR 86.

*Gencor ACP Ltd v Dalby* [2000] 2 BCLC 734. G

*Gilford Motor Co Ltd v Horne* [1933] 1 Ch 935.

*Goss v Chilcott* [1996] AC 788.

*Grupo Torras SA v Al-Sabah* (21 March 1997, unreported).

*Harold Elliott and H Elliott (Builders) Ltd v Pierson* [1948] Ch 452.

*Homawoo v GMF Assurances SA* (Case C-412/100) [2012] ILPr 2.

*Interallianz Finanz AG v Independent Insurance Co Ltd* (30 May 1997, unreported). H

*Jones v Lipman* [1962] 1 WLR 832.

*Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349.

*Lennon v Scottish Daily Record & Sunday Mail Ltd* [2004] EMLR 18.

*Lindsay v O'Loughnane* [2010] EWHC 529 (QB).

CA

VTB Capital v Nutritek International  
(Lloyd LJ)

435

- A *Linsen International Ltd v Humpuss Sea Transport Pte Ltd* [2011] EWHC 2339 (Comm); [2011] 2 CLC 773.  
*Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25.  
*Madoff Securities International Ltd v Raven* [2011] EWHC 3102 (Comm).  
*Morin v Bonhams & Brooks Ltd* [2004] 1 CLC 632 (CA).  
B *Norwich Union v Eden* (25 January 1996, unreported).  
*Salomon v A Salomon & Co Ltd* [1897] AC 22.  
*Secretary of State for Business, Enterprise and Regulatory Reform v Neufeld* [2009] 3 All ER 790.  
*Sim v Robinow* (1892) 19 R 665.  
*Siu Yin Kwan (administratrix of the estate of Chan Ying Lung dec'd) v Eastern Insurance Co Ltd* [1994] CLC 31; [1994] 2 AC 199.  
C *Smith v Hancock* [1894] 2 Ch 377.  
*Smith New Court Securities Ltd v Citibank NA* [1996] CLC 1958; [1997] AC 254.  
*Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460.  
*Thane Investments Ltd v Tomlinson* [2003] EWCA Civ 1272.  
D *Trafigura Beheer BV v Kookmin Bank Co* [2006] 1 CLC 1049.  
*Trustor AB v Smallbone (No. 2)* [2001] 1 WLR 1177.  
*Ultraframe (UK) Ltd v Fielding* [2005] EWHC 1638 (Ch).  
*Wolfson v Strathclyde Regional Council* 1978 SLT 159.
- E Clive Freedman QC, Richard Snowden QC, Paul McGrath QC, Andrew Burrows QC (Hon), Iain Pester, David Davies and David Peters (instructed by PCB Litigation LLP) for the Appellant.
- Nigel Jones QC and David Lewis (instructed by Kearns & Co) for the First Respondent.
- F Michael Lazarus and Christopher Burdin (instructed by SJ Berwin LLP) for the Second Respondent.
- Ian Milligan QC, Cyril Kinsky QC and James McClelland (instructed by SJ Berwin LLP) for the Fourth Respondent.

G

## JUDGMENT

**Lloyd LJ: Introduction**

H

1. This is the judgment of the court, jointly written by all three members of the court, on appeals by the claimant against an order made by Mr Justice Arnold on 29 November 2011. That order was made after a six day hearing of applications by the claimant and by each of the first, second and fourth defendants. The third defendant has not yet been served with the present proceedings and played no part in the hearing before the judge or before this court.

436

VTB Capital v Nutritek International  
(Lloyd LJ)

[2012] 2 CLC

2. The first and second defendants are companies incorporated in the British Virgin Islands; the third defendant is a Russian company; the fourth defendant is resident in Russia. The main issues on the appeal are to do with the exercise of the jurisdiction of the English courts over parties who are not resident, or otherwise to be found, within the jurisdiction, so that they have to be served with the proceedings outside the jurisdiction.

3. The applications heard by the judge were, first, an application by the claimant to amend its Particulars of Claim, so as to allege a liability on the part of the second, third and fourth defendants in contract, in the alternative to the claim in tort originally pleaded. Secondly, the first, second and fourth defendants challenged the jurisdiction of the English court even on the basis of the claims in tort. Thirdly, the fourth defendant applied to set aside a worldwide freezing order (WFO) which had been granted against him by Roth J and continued by Vos J, as against which the claimant applied for that order to be continued.

4. Arnold J refused permission to amend to add the claims in contract. He acceded to the defendants' challenges to the jurisdiction. On that basis the WFO could not be continued. However, approaching it on the basis of the tort claim alone, if the risk of dissipation of assets by the fourth defendant and he also held that the original order was tainted by material non-disclosure by the claimant to the court in one respect so that, even if the WFO had otherwise been justified, it should be discharged on that ground, and that it should not be continued or re-granted. The reference to his judgment is [2011] EWHC 3107 (Ch).

5. The judge gave permission to appeal on the application for leave to amend to plead the case in contract. He continued the WFO for a short time so as to allow the claimant to apply to the Court of Appeal for permission to appeal against the refusal to continue the WFO and for interim continuance of the WFO pending the appeal. The claimant made such an application within the time allowed. On 5 December 2011 Tomlinson LJ and Sir Richard Buxton heard the application and granted permission to appeal, continuing the WFO until after disposal of the substantive appeal. On 19 January 2012 Tomlinson LJ heard the claimant's application for permission to appeal on the remaining points, as to jurisdiction, and granted permission to appeal.

6. Formally there are three appeals before the court, all by the claimant, but they have rightly been treated in a consolidated manner, as if they were one appeal. Between them they raise the three separate points described above: first the contract claims, sought to be added by amendment, secondly the issues of jurisdiction on the basis of the tort claims as already pleaded, and thirdly the continuance of the WFO.

7. The hearing before the judge lasted for six days. Before us the case was listed for five days and took virtually the whole of that time. We have not been able to emulate the judge in his impressive achievement of having given judgment less than

CA

VTB Capital v Nutritek International  
(Lloyd LJ)

437

A three weeks after the conclusion of argument. Counsel before us coped admirably with  
the demands of a tight timetable for oral submissions. If we identify in particular Mr  
Freedman QC, Mr Snowden QC, Mr Milligan QC and Mr Lazarus as contributing to  
the efficient, economical and effective use of time that is because they had the largest  
B task and the greatest challenge in compressing their submissions into the available  
time. We have no doubt that their submissions before us were only the most important  
part of substantial collaborative efforts on the part of the teams acting for each party.

8. Although in some respects we do not agree with the judge's conclusions,  
we also pay tribute to his masterly and careful judgment. Since this is a very long  
judgment, it is appropriate to say now that we will dismiss the appeals.

C

### The factual background

D 9. The claimant (VTB) is a company incorporated in England which carries  
on business as a bank in London. It is majority owned by JSC VTB Bank (VTB  
Moscow) which is a state-owned bank, and the second largest bank in Russia. VTB  
lent some \$225 million to Russagroprom LLC (RAP) under a Facility Agreement (the  
Facility Agreement) dated 23 November 2007, to fund the acquisition by RAP of six  
Russian dairy plants and associated companies (the Dairy Companies) from the first  
E defendant, Nutritek. RAP defaulted on the loan. VTB has recovered less than \$40  
million by way of enforcement of securities taken under the Facility Agreement and  
under the Interest Rate Swap Agreement entered into at the same time between VTB  
and RAP (the ISA). It alleges that it was induced to enter into the Facility Agreement  
by fraudulent representations made by Nutritek, for which the other defendants are  
alleged to be jointly liable. Two distinct misrepresentations are alleged: first as to the  
F value of the Dairy Companies, and secondly that, contrary to the fact, RAP was not  
under common control with Nutritek.

10. As the judge said at his paragraph 4, his account of the factual background was  
based on the evidence then before the court, which was incomplete, untested and in  
some respects highly controversial. His account was necessarily provisional as well  
as being selective, focusing on matters relevant to the applications with which he was  
G then dealing. The same is true, all the more so, of the account set out in this judgment.  
In any event, since the account given by the judge is, allowing for limitations arising  
from the circumstances, full and careful, we can be more brief in our rendering of  
the background, since the judge's own account is available to those who may be  
H interested, as set out in his judgment.

11. At this stage of this judgment we set out the most generally relevant factual  
material. We will need to go into more detail on certain aspects when we come to deal  
with the several points at issue on the appeal.

438

VTB Capital v Nutritek International  
(Lloyd LJ)

[2012] 2 CLC

12. Nutritek, incorporated in BVI, is owned and operated from Russia. It used to be the owner of the Dairy Companies. The purpose of the Facility Agreement was to fund the acquisition of the Dairy Companies from Nutritek by RAP through the purchase of the shares in a special purpose vehicle, a BVI company called Newblade Ltd.

A

13. The second defendant (Marcap BVI) is a holding company with no employees or operations of its own. According to VTB's evidence, Marcap BVI owned, indirectly, a substantial interest in Nutritek, as well as owning Marcap Moscow, the third defendant.

B

14. The fourth defendant, Mr Malofeev, is alleged by VTB to be the principal beneficial owner and controller of Nutritek, Marcap BVI, Marcap Moscow and RAP.

C

15. RAP was incorporated in Russia. Its parent company in November 2007 was Migifa Holdings Ltd (Migifa), a Cypriot company, and the latter's parent was Brentville Ltd (Brentville), a BVI company.

D

16. The judge summarised the agreements entered into (or apparently entered into) at his paragraphs 42 and 43. The first of the main agreements was the Facility Agreement, to which the parties were VTB as lender, RAP as borrower, and Migifa and Brentville as guarantors. The Share Purchase Agreement (SPA) was dated 27 November 2007, and made between RAP (buyer), Nutritek (seller) and Newblade (the subject of the sale). VTB also entered into the ISA with RAP, dated 28 November 2007, and a Participation Agreement (the Participation Agreement) with VTB Moscow dated 28 November 2007.

E

17. The judge set out material provisions of the Facility Agreement at his paragraph 47. We set out some of its provisions in Appendix One to this judgment. In summary, it is governed by English law and is subject to the non-exclusive jurisdiction of the English courts, though VTB has the right to refer any dispute arising out of or in connection with the agreement to arbitration in London. The agreement provided for facilities in two tranches, Tranche A of \$208.7 million, and Tranche B of \$21.7 million. Among other relevant provisions, the availability of Tranche A was subject to VTB having received, in form and substance satisfactory to it, a number of contractual and other documents. The former included the Participation Agreement, as well as the Facility Agreement itself, duly executed by all parties. Another document required as a pre-condition was a financial report of an independent valuer regarding the determination of the market value of various shares, including the shares in Newblade and in the Dairy Companies.

F

G

H

18. In addition to the Facility Agreement, under a share warrant deed made (or purportedly made) between Migifa, VTB, Brentville and RAP, VTB held warrants for shares in RAP amounting to 5% of its share capital. There are issues about the formal validity of the document, but the 5% equity entitlement was provided for in

CA

VTB Capital v Nutritek International  
(Lloyd LJ)

439

A the last version, the fourth, of the draft term sheet for the loan, dated 12 November 2007. (Previous versions, which we mention below, had provided for a larger equity entitlement.)

B 19. The ISA was to hedge RAP's liability for interest under the Facility Agreement, which was calculated by reference, among other things, to LIBOR. It takes the form of a confirmation supplemental to an ISDA master agreement. It is governed by English law and has an English arbitration clause. Appendix Two to this judgment describes some of its provisions, as well as some provisions of the SPA.

C 20. The Participation Agreement provided (in effect) for VTB Moscow to put VTB in funds to make any payment due from VTB to RAP under the Facility Agreement (clause 2), while VTB remained entitled to receive, recover and retain all sums payable under the Facility Agreement, but was obliged, on receipt of sums from the borrower, to pay amounts governed by clause 3.2 to VTB Moscow. Clause 6 stated that the agreement itself did not amount to an assignment or transfer of any rights under the Facility Agreement to VTB Moscow, though the latter might call for such an assignment after a default by the borrower. The agreement was governed by D English law and the English courts had non-exclusive jurisdiction, but with an option for either party to refer any dispute to arbitration in London. Material provisions of this agreement are set out in Appendix Three to this judgment.

E 21. Pursuant to these various agreements, on 28 November 2007 VTB Moscow paid to VTB the whole of Tranche A, \$208.5 million, and VTB credited that amount to RAP's US\$ account at VTB. RAP immediately transferred \$195 million to Nutritek under the SPA. RAP paid \$5 million to VTB as an arrangement fee under the Facility Agreement, and RAP also paid \$3.5 million to Dalford Consultants Ltd, a company F incorporated in Belize.

G 22. Tranche B was paid out by VTB in three stages: \$5.325 million credited by VTB to RAP's account on 7 April 2008, \$5.325 million paid to a BVI company, Madinter Associates Ltd (Madinter) on 21 May 2008 and \$5.7 million paid to Madinter on 5 September 2008. The latter two payments were connected with payments of interest, and other sums due, by RAP to VTB on Tranche A. Madinter was part of the Marshall Capital group of companies.

H 23. Interest and other payments fell due from RAP to VTB at the end of February, May, August and November 2008. The first three payments were met. It seems that in February 2008 Madinter lent RAP the necessary sum (\$5.2 million) on an interest-free basis, with which RAP paid the money due to VTB. It may be that the first instalment of Tranche B, mentioned above, enabled RAP to repay the amount of that loan. In May 2008 RAP and Madinter entered into a strange transaction, the details of which do not matter for present purposes. This led to the payment already mentioned of a second instalment of Tranche B to Madinter and, in turn, to Madinter making the payment due from RAP to VTB at the end of May 2008. Another transaction

440

VTB Capital v Nutritek International  
(Lloyd LJ)

[2012] 2 CLC

ensued between RAP and Madinter late in August, as a result of which Madinter paid the sums due from RAP to VTB at the end of August, and the last instalment of Tranche B was paid to Madinter soon afterwards, as mentioned above. All of these arrangements were necessary because RAP had no income, or not enough, from the Dairy Companies with which to service its obligations under the loan from VTB. It therefore had to resort to other arrangements, including using VTB's own further lending, to pay the sums falling due under the loan already made.

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24. The available arrangements presumably ran out after the third interest payment. RAP defaulted on the interest payment due under the Facility Agreement on 24 November 2008, and made no payment of interest or principal after that. VTB sent notices of default under the Facility Agreement in December 2008 and January 2009. It did not begin to enforce its security until later in 2009, eventually taking control of Newblade, Migifa and RAP itself. According to VTB's evidence there is a very large shortfall on the outstanding debt after realisation of the available assets.

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25. VTB's claims in tort, as originally pleaded, arise from what preceded the entry into the Facility Agreement and the other related agreements. The judge described this in his paragraphs 11 to 39. What follows borrows largely from that description.

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26. VTB Moscow had at that time an employee, Konstantin Tulupov, whose role was to act as project manager in relation to projects assigned to him by the managing director, then Konstantin Ryzhkov. The negotiations leading to the Facility Agreement were one such project. The project started when Mr Tulupov and Mr Ryzhkov met Mr Malofeev and Mr Alexander Provotorov for lunch in the summer of 2007. Mr Malofeev led the discussions. He explained that he had founded a family of funds known as Marshall Capital. As the judge put it at paragraph 12, Marcap Moscow, part of Marshall Capital, controlled Nutritek, a dairy and baby food producer. (For VTB it is contended that the correct understanding, in this context, of Mr Malofeev's reference to Marshall Capital was not just to Marcap Moscow but also (or instead) to Marcap BVI. We will revert to that point.) The Marshall Capital group wanted Nutritek to sell the dairy business but to retain the baby food side. A possible buyer for the dairy business had been found. The group wanted to organise a package which would include finance for the purchaser, of the order of \$200 million. Mr Malofeev wanted to find out what facilities VTB Moscow might be able to offer and what its requirements would be. Mr Tulupov explained the bank's requirements, which included an independent valuation of the business, and due diligence on the borrower. The possible buyer was not identified. Mr Tulupov said in his witness statement that he assumed it was an independent third party, since the discussions were about the sale of the business.

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27. On 18 July 2007 Mr Tulupov instructed the London office of Dewey LeBoeuf, Greene & Macrae (DLGM) in relation to the proposed transaction. On the next day a conference call took place between representatives of VTB Moscow, VTB (Marina Bragina, in London), Marcap Moscow (Mr Provotorov and Mr Yuri Leonov) and

CA

VTB Capital v Nutritek International  
(Lloyd LJ)

441

A DLGM. After the call Mr Bruce Johnston of DLGM sent an e-mail to Mr Tulupov asking who controlled the borrower, because he would need to do conflict searches. Mr Tulupov's answer was 'Marshall Capital controls Nutritek, and the potential purchaser is controlled by a group of individuals with whom, MarCap assures, you can't have any conflict of interest'. Mr Johnston replied that this was an evasive answer, and that VTB would need to do a 'know your client' clearance on the borrower.

C 28. Between late July and early October three draft term sheets were sent by Mr Tulupov to representatives of Marcap Moscow, and others, setting out the currently proposed terms of the deal. By the time of the third document, dated 8 October 2007, the lender was to be VTB (with a participation agreement with VTB Moscow which would provide all the funding for the facility), the borrower was to be RAP, an arrangement fee of \$8.5 million was to be payable, the finance was to be provided in two tranches of \$208.5 million and \$13.5 million, towards an acquisition cost of \$250 million, and an 'additional commission (equity fee)' was provided for, which was to be 15% of the shares in the borrower or the Dairy Companies, and English law was to govern the contract. Mr Tulupov had been told in the meantime that RAP, a new company, was to be the buyer, that it was a friendly transaction under which many of Nutritek's senior management would move to the new company and that Marcap Moscow and Nutritek would help the new company while it established itself.

E 29. In early October work started in earnest on preparing the documentation for the transaction. Mr Tulupov said that as project manager he was primarily responsible for getting information from Marcap Moscow, Nutritek and RAP, and passing that information to others in VTB Moscow and VTB who needed to have it. He said that Mr Leonov (of Marcap Moscow) and Mr Skuratov (of Nutritek) were careful to give him the impression that RAP was an independent third party buyer.

F 30. VTB Moscow's Credit Committee approved the proposed transaction on 31 October 2007.

G 31. Central to VTB's case of misrepresentation as regards the ownership of RAP are two e-mails sent on 6 and 8 November 2007 by Ms Bragina of VTB to others within VTB and VTB Moscow, recording information which, it is said, she got from Nutritek or from Marcap Moscow. The first states that RAP was incorporated on 21 May 2002 (a mistake for 2007) as an SPV for a Nutritek dairy division acquisition 'and has no other operations', and that RAP's beneficiary is a Mr Vladimir Alginin. The second is in response to a list of questions put to her, presumably by VTB H Moscow. It says, relevantly (as question and answer):

'Confirm that [RAP] is 100% owned by Alginin. As per the info just received from Nutritek management, Mr Alginin has a 90% share in [RAP], the remaining 10% share belongs to the management team.'

442

VTB Capital v Nutritek International  
(Lloyd LJ)

[2012] 2 CLC

32. In the meantime, on 7 November 2007 the Moscow office of Ernst & Young Valuation LLC (E&Y) sent the final version of a valuation report on the Dairy Companies dated 5 September 2007 by e-mail to Mr Leonov and to RAP, and on the next day RAP sent it on to Mr Tulupov. He said in evidence that he had seen earlier versions of it, and had put the then latest version to the VTB Moscow Credit Committee before it, and approved the transaction on 31 October. The valuation, based on information provided by Nutritek's management, valued the Dairy Companies at around \$366 million.

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33. On that basis, VTB asserts that it entered into the Facility Agreement and the ISA in reliance on two representations made by Nutritek which were false, and which Nutritek must have known to be false. The first is that Nutritek and RAP were independent of each other, whereas it is alleged that they were in fact under common ownership or control. The second is that the E&Y valuation report, relying on information supplied by Nutritek's management, overvalued the assets of the Dairy Companies substantially.

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34. As to the first of these, VTB knew at the time that Mr Malofeev, through Marcap Moscow, had practical control of Nutritek. What it says it did not know at the time was that Mr Malofeev also controlled RAP, through Marcap BVI. That being so, both seller and buyer were under common control and the transaction was not a commercial transaction at arms' length. The judge recorded that it was not necessary for him to go into the details of how Mr Malofeev controlled RAP, and that is also true for present purposes: see his paragraph 59.

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35. VTB also alleges that it and VTB Moscow relied on the E&Y valuation, and that this was based on false financial figures and unsupportable forecasts provided to E&Y by Nutritek. VTB relies on an opinion provided by Deloitte LLP which supports the proposition that Nutritek very substantially overstated the true performance figures of the Dairy Companies, to an extent such that VTB contends that the overstatement must have been deliberate.

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36. VTB's case is that the misrepresentations were made by Nutritek, but that they were made pursuant to a conspiracy between various persons, including Marcap BVI, Marcap Moscow and Mr Malofeev, the prime movers being Mr Malofeev and Marcap Moscow, all of whom are therefore jointly liable with Nutritek for deceit, or liable in conspiracy, or both.

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37. It is on that basis that VTB's original case was pleaded in tort, specifically in deceit and in unlawful means conspiracy.

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### The issues on the appeal

38. Originally VTB had obtained permission (ex parte) to serve proceedings out of the jurisdiction on Nutritek, Marcap BVI and Mr Malofeev, pursuant to CPR Part

CA

VTB Capital v Nutritek International  
(Lloyd LJ)

443

A 6, Practice Direction 6B, paragraph 3.1 gateway 9, on the basis of VTB's tort claims. The judge held that this permission was not justified: as against Marcap BVI because there was no sufficiently arguable case against it, and as against it and the other two defendants for a variety of reasons, but overall on the basis that VTB had not demonstrated that England was clearly or distinctly the appropriate forum for the trial of the issues between the parties. VTB challenges all the judge's conclusions on these

B topics. It has also sought to reinforce (or save) its case for establishing the jurisdiction of the English courts by its application to amend to add a claim in contract against Marcap BVI, Marcap Moscow and Mr Malofeev. VTB argues that the court should pierce the corporate veil of RAP so as to show that Marcap BVI, Marcap Moscow and Mr Malofeev are all liable as parties under the Facility Agreement. As already

C noted, the judge rejected this application also. He would, in any event, have rejected VTB's claim to a WFO.

39. Thus there are three sets of issues on the appeal, concerning the claims in contract and in tort and the application for a WFO. They may be summarised as follows.

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*The contract issues*

(i) The first set of issues arises from VTB's application for leave to amend its Particulars of Claim so as to assert that Marcap BVI, Marcap Moscow and Mr

E Malofeev are liable to VTB in contract, by piercing the veil of incorporation of RAP. The first and fundamental point is whether there is (at least) a good arguable case for asserting contractual liability on that basis.

(ii) If the answer to that is yes, the second aspect of this set of issues is whether article

F 23(1) of Council Regulation 44/2001/EC on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the Brussels Regulation) applies so that VTB would be entitled to serve the amended Claim Form on the defendants as of right.

(iii) The third aspect, which also depends on a positive answer to the first question, is

G whether, if VTB cannot rely on article 23(1) and so requires permission to serve the amended proceedings out of the jurisdiction, it should have permission to do so (so far as the claim in contract is concerned) pursuant to gateway (6) of paragraph 3.1 of PD 6B of Part 6 of the CPR.

H *The tort issues*

(iv) The second group of issues concerns the tort claims. The three basic requirements that VTB must satisfy in order to obtain permission to serve the proceedings out of the jurisdiction (pursuant to gateway (9)) on Nutritek, Marcap BVI and Mr Malofeev, are common ground. Thus, first, VTB must show that there is a serious issue to be tried on the merits of the claims as against each defendant on which it seeks to serve

444

VTB Capital v Nutritek International  
(Lloyd LJ)

[2012] 2 CLC

the proceedings out of the jurisdiction. That means that VTB must show that there is a substantial question of law or fact or both, with a real, as opposed to a fanciful prospect of success. Secondly, VTB must establish that there is a good arguable case that the claim against each particular foreign defendant falls within the class of case relied on for permission to serve out of the jurisdiction. Thirdly, it is for VTB to establish that the English court is clearly or distinctly the appropriate forum in which to try the issues that arise between the parties.

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(v) On the first of these three requirements, the judge's conclusion that there was no good arguable case for liability on the part of Marcap BVI is challenged by VTB and his finding that there was such a case on the part of Mr Malofeev was challenged by him.

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(vi) On the second requirement, the defendants challenged the judge's conclusion that there was a good arguable case that VTB had suffered a loss as a result of the fraudulent deception of the real defendants. They submitted that he should have accepted their argument that the real loss had been suffered by VTB Moscow and that VTB was protected from any loss by virtue of the Participation Agreement. The defendants argued that if VTB could not show that it had a good arguable case that it had suffered real, as opposed to nominal, loss then it could not bring itself within gateway (9)(a) of Practice Direction 6B to Part 6 of the CPR.

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(vii) As to the third requirement, the argument in this court concentrated on three particular aspects of the overall question as to whether VTB could establish that England was clearly or distinctly the appropriate forum and whether, in consequence, the court should exercise its discretion to give permission to serve proceedings out of the jurisdiction. The first was whether, assuming that there is a good arguable case that VTB has suffered a loss within the jurisdiction as a result of the torts committed, there is, in law, any kind of presumption that England is to be regarded as clearly or distinctly the appropriate forum.

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(viii) The second aspect of the third requirement was what law governs the claims in tort. It was accepted that, at this stage of the case, the question is whether one side or the other has 'by far the better of the argument' as to whether the applicable law of the torts is English or Russian. The issue has to be decided according to sections 11 and 12 of the *Private International Law (Miscellaneous Provisions) Act 1995*. The judge favoured Russian law. VTB challenged that, arguing for English law.

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(ix) The third aspect of the third requirement was whether, overall, the judge was correct to conclude that England was not shown to be clearly and distinctly the appropriate forum for the determination of the issues between the parties. VTB argued that the judge had erred in this regard and that he should have exercised his discretion to permit service out of the jurisdiction on Nutritek, Marcap BVI and Mr Malofeev pursuant to gateway (9).

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CA

VTB Capital v Nutritek International  
(Lloyd LJ)

445

- A (x) There is a subsidiary issue which is relevant to both the contract and the tort claims. VTB's only claim against Nutritek is in tort, but if it can establish jurisdiction against one or more other defendants, whether in tort or in contract, it will be able to rely on gateway (3) in paragraph 3.1 of the Practice Direction ('necessary or proper party') to serve on Nutritek, as a 'proper' (though not a 'necessary') party. Thus Nutritek's position on the appeal depends on the view taken by the court on the merits of the tort claim generally (i.e. the 'no loss' point) and on whether the claim can proceed in these courts against another defendant. If it cannot proceed against another defendant, then jurisdiction as regards Nutritek would depend on gateway (9) in paragraph 3.1 of the Practice Direction, that is to say on the merits of the tort claim. In the circumstances, this aspect of the case did not require or receive any separate submissions.

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*The WFO issues*

- D (xi) The last set of issues arises from VTB's application for a WFO. If VTB can maintain the permission to serve out as originally granted, as regards Mr Malofeev, or can establish that it can or should be allowed to serve out on the basis of its contract claim against him (or both), should it continue to have the benefit of the WFO against him? There are two points here. The first is whether it has shown a sufficiently well arguable case for liability against him, and whether it has established that there is a real risk that, unless restrained by injunction, he will dissipate his assets, otherwise than through ordinary living or business expenditure. The second is whether the WFO as originally obtained ought to be discharged because of material non-disclosure on the part of VTB when applying for it to Roth J.

### **The amendment application: piercing the veil of incorporation**

- F 40. On 11 May 2011 Chief Master Winegarten gave permission to VTB to serve the proceedings out of the jurisdiction on each of the four defendants. Each defendant other than Marcap Moscow was then served. The permission was granted on the basis of the only claims advanced in the Particulars of Claim, namely claims in tort for deceit and for 'unlawful means' conspiracy. The 'unlawful means' were the fraudulent representations alleged in the deceit claim. They are said to have been made primarily G by Nutritek but pursuant to a common design by Marcap BVI, Marcap Moscow and Mr Malofeev. They are (1) that, contrary to the fact, the SPA was a sale between companies (Nutritek and RAP) that were under separate control; and (2) that the figures provided for the Dairy Companies' performance deliberately overstated their true performance. Only the first representation is material to the amendment H application.

41. In October 2011 VTB produced a draft of the amendment to the Particulars of Claim for which permission was sought from the judge. The amendment alleged a claim for breach of contract against each of Marcap BVI, Marcap Moscow and Mr Malofeev. The contracts they are alleged to have breached are the Facility Agreement

446

VTB Capital v Nutritek International  
(Lloyd LJ)

[2012] 2 CLC

made on 23 November 2007 and the amended ISA made on 28 November 2007. Both are written agreements. A

42. The Facility Agreement is stated on its face as being ‘made between’ (1) RAP; (2) the parties listed in Part 1 of Schedule 1, there described as ‘The Original Guarantors’, being Migifa, the immediate 100% parent of RAP, and Brentville, the immediate 100% parent of Migifa; and (3) VTB, the lender. The agreement occupies 135 pages of which section 1, ‘Interpretation’, sets out nearly 200 definitions. Nowhere is mention made of Marcap BVI, Marcap Moscow or Mr Malofeev. Clause 1.3 provides that ‘A person who is not a Party has no right under the Contracts (Rights of Third Parties) Act 1999 to enforce or enjoy the benefit of any term of this Agreement’. ‘Party’ is defined as meaning ‘a party to this Agreement’. The agreement imposes primary obligations upon RAP to repay loans of up to US\$230m to be made to it by VTB; and it imposes upon Migifa and Brentville obligations as guarantors of the due performance by RAP of its obligations. Clause 34 provides for the agreement to be governed by English law; and clause 35.1 confers non-exclusive jurisdiction in relation to any dispute on the courts of England, which the parties agreed were the most appropriate and convenient courts. The parties to the ISA are VTB and RAP. B C D

43. By the proposed contract claim, VTB claims that Marcap BVI, Marcap Moscow and Mr Malofeev are jointly and severally liable with RAP under the Facility Agreement and the ISA. It so claims on the basis that they are parties to those agreements. That proposition is advanced on the basis of the following assertions. First, contrary to the dishonest representation that the four defendants made, RAP was *not* a purchaser in separate control that was buying the Dairy Companies from Nutritek under an arm’s length agreement: it was in fact controlled by Marcap BVI, Marcap Moscow and Mr Malofeev, who also controlled Nutritek. Second, the use by those three defendants of RAP as the vehicle to enter into the two agreements and thereby to obtain the loans made by VTB: E F

‘... involved the fraudulent misuse of the company structure. This was an improper use of the company structure of RAP, which was used as a device or façade to conceal the wrongdoing of each of Marcap BVI, Marcap Moscow and Mr Malofeev’. (Paragraph 72 of the draft amended Particulars of Claim). G

Third, that combination of facts entitles VTB to ‘pierce the corporate veil’ of RAP and to hold the three defendants jointly liable with RAP under the two agreements. That conclusion is said to follow from the assertion that, once the veil is pierced, Marcap BVI, Marcap Moscow and Mr Malofeev can be seen always to have been parties to the two agreements jointly with RAP and the guarantors. H

44. As the judge pointed out at paragraph 67, VTB’s primary motive in wishing to advance the contract claim is to provide an alternative basis for establishing the jurisdiction of the English court for its claims against the defendants. If, as VTB asserts, Marcap BVI, Marcap Moscow and Mr Malofeev are parties to the agreements,

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VTB Capital v Nutritek International  
(Lloyd LJ)

447

A it claims that it follows that they are also parties to their jurisdiction provisions so that  
 court. Alternatively, VTB claims that it ought to be given leave to serve out under  
 paragraph (6) (Claims in relation to contracts) of CPR Practice Direction 6B – Service  
 out of the Jurisdiction. If VTB can get that far, it claims that the court should also  
 B assume jurisdiction in respect of Nutritek as a necessary or proper party to its claim.

45. VTB's case is, therefore, that proof of the first two steps of its case entitles  
 it as of right to the judicial conclusion that Marcap BVI, Marcap Moscow and Mr  
 Malofeev are, and always have been, parties to the two agreements. Indeed, that has to  
 be its case if it is to claim the jurisdictional advantage that it does. Mr Snowden, who  
 C argued this aspect of the case for VTB before us, expressly disclaimed that VTB's  
 proposed contract claim against Marcap BVI, Marcap Moscow and Mr Malofeev  
 is dependent upon the exercise of any judicial discretion. Consistently with that, he  
 rejected the suggestion raised during argument that the contractual obligations that  
 VTB seeks to visit upon these three defendants can only arise under something in  
 D the nature of a 'remedial constructive contract'. VTB's position is simply that the  
 threefold elements of its pleaded case advance what it asserts is a reasonable cause of  
 action. This argument faces the difficulty that, apart from the first instance decisions  
 of Burton J in *Antonio Gramsci Shipping Corp v Stepanovs* [2011] EWHC 333  
 (Comm); [2011] 1 CLC 396 (which pre-dated Arnold J's decision under appeal) and  
 E *Alliance Bank JSC v Aquanta Corp* [2011] EWHC 3281 (Comm) (which post-dated  
 it), there is no authority providing express support for the existence of such a cause of  
 action. Arnold J regarded *Gramsci* as contrary to principle and declined to follow it.  
 He held that VTB's claim was unsustainable as a matter of law and refused to allow  
 the amendment.

F 46. Before us, Mr Snowden advanced excellent submissions to the effect that the  
 judge was in error in this respect, that *Gramsci* was a logical and correct development  
 and application of the law and that this court should endorse it. Counsel for each  
 of the three defendants before the court submitted that the judge was correct. The  
 main burden of that argument was assumed by Mr Lazarus, for Marcap BVI, who  
 also advanced excellent submissions. The opposing arguments disclosed a wide gulf  
 G between Counsel. Whereas Mr Snowden submitted that the contractual cause of  
 action which VTB asserts by its proposed amendment is simply a logical application  
 of the judicial 'veil piercing' in which the courts engage in reaction to the misuse of  
 a company by those in control of it so as to conceal their own wrongdoing, Mr Lazarus  
 came close to submitting that there is no such thing as 'veil piercing'. He submitted  
 H that the concept is ultimately meaningless and that the reported authorities referred  
 to as supposed illustrations of its application can all be explained on other grounds.

47. What is meant by 'piercing the veil of incorporation'? The starting point is  
 that, as illustrated by the decision of the House of Lords in *Salomon v A Salomon &  
 Co Ltd* [1897] AC 22, a duly incorporated company is a legal person separate from its  
 corporators and controllers, with its own separate rights and liabilities (see at 30 to 31,

448

VTB Capital v Nutritek International  
(Lloyd LJ)

[2012] 2 CLC

per Lord Halsbury LC). A company can, however, only act by its human agents and the authorities also show that there can be exceptional cases in which the court will regard it as appropriate to 'pierce the corporate veil' and thereby identify the company with those in control of it. In cases in which that is done, the authorities show that it will or may lead to the granting of remedies against the company which, veil piercing apart, might appear in principle to be available only against those controlling it; and, equally, against the controllers when they might appear in principle to be available only against the company.

48. To the extent that it was part of Mr Lazarus' submissions that there is no such principle as 'piercing the veil', we disagree. In the decision of the House of Lords in *Wolfson v Strathclyde Regional Council* 1978 SLT 159, Lord Keith of Kinkel delivered the only reasoned speech, with which Lord Wilberforce, Lord Fraser of Tullybelton and Lord Russell of Killowen agreed. In reference to the decision of the Court of Appeal in *DHN Food Distributors Ltd v Tower Hamlets London Borough Council* [1976] 1 WLR 852, Lord Keith said, at 161:

'I have some doubts whether in this respect the Court of Appeal properly applied the principle that it is appropriate to pierce the corporate veil only where special circumstances exist indicating that it is a mere façade concealing the true facts.'

49. That statement recognised, therefore, that there is one (and apparently only one) special case justifying a court in looking behind a company's corporate façade. Lord Keith went on to distinguish *DHN Food Distributors* on its facts, so his observation about it may be obiter. However, his statement was quoted and relied on, and the existence of that special case was expressly recognised, in the Court of Appeal's judgment in *Adams v Cape Industries plc* [1990] Ch 433, at 539D to E, although in that case the court declined to pierce the veil. We do not consider that it is open to this court to question the existence of the 'veil piercing' principle. The critical question raised by this appeal is, however, as to the effect and consequences of a finding (if such a finding were to be made on the facts of this case, as to which we take VTB's case to be at least arguable) that the circumstances of the particular case *do* justify the piercing of the corporate veil. In particular, does the proof of the first two steps of VTB's case lead to the legal conclusion that Marcap BVI, Marcap Moscow and Mr Malofeev were also *original* parties to the two agreements?

50. Mr Snowden's submission is that it does. His propositions are that (i) if the controller of a company fraudulently deceives another into entering into a contract with the company in the belief that the company is in fact in different control and therefore so uses the company as a mere façade to conceal the controller's true identity, the discovery of the true facts will lead to the consequence that as a matter of law the controller will be regarded as a party to the contract; and (ii) even though the controller and the company will thus in practice be regarded as one and the same, the controller will not simply be substituted for the company as a contracting party, he will be jointly and severally liable under the contract with the company, his alter

CA

VTB Capital v Nutritek International  
(Lloyd LJ)

449

A ego. Further, if the contract is one that is required to be in writing and signed by or on  
 behalf of the parties to it (as, for example, is required for a sale etc of  
 land: see section 2 of the *Law of Property (Miscellaneous Provisions) Act 1989*), the  
 signing by the company as its controller's alter ego will be a sufficient signing also  
 on behalf of the true contracting party, the controller. Mr Snowden disclaimed that  
 B his proposition involves the making of any inroads into the basic principle recognised  
 by *Salomon's* case to the effect that a company is a corporate body separate from its  
 incorporators. His submission is founded essentially on the fraudulent or dishonest  
 use of a company by its incorporators or controllers so as to conceal the latter's true  
 identities.

C 51. The issue we have to decide is therefore ultimately a narrow, although  
 fundamental, one: it comes down to a question as to the consequences of a judicial  
 determination that, in a particular case, the veil of incorporation of a company ought  
 to be pierced. The answer to the question requires a reference to the authorities cited  
 to us in order to ascertain whether or not they support VTB's proposition; and, if  
 D they do not, whether the adoption of that proposition would represent a principled  
 development of the law. There was no dispute before the judge or us that, in  
 considering this issue, the court must apply English law.

E 52. The earliest authority upon which Mr Snowden relied is *In re Darby, ex parte*  
*Brougham* [1911] 1 KB 95, a decision of Phillimore J. The facts were complicated  
 but, reduced to their essentials, they involved the activities of two fraudsters, D  
 and G, who concealed their apparently notorious identities by incorporating C Ltd,  
 which they controlled. They procured C Ltd to enter into an agreement with W Ltd  
 by which it sold to W Ltd a licence to work a slate quarry that C Ltd had acquired,  
 and some materials and plant. The sale was in consideration of shares, debentures  
 F and cash of £10,500, of which £9,200 was paid on account. The £9,200 was part of  
 £14,000 odd subscribed by the public in answer to prospectuses that D & G procured  
 C Ltd to issue inviting subscriptions to debentures. The prospectuses disclosed that  
 C Ltd was the vendor and promoter of W Ltd and was making a large profit on the  
 sale but did not disclose that D and G were promoters and were to receive the profit  
 through C Ltd. Within a year, C Ltd went into liquidation, its assets realising only  
 G about £160. Three years later D & G were adjudicated bankrupt for a second time  
 and were charged with, and convicted of, making fraudulent misrepresentations in  
 the prospectuses. Two years after that, the liquidator of W Ltd lodged a proof against  
 D's estate for what Phillimore J described as 'damages for breach of trust as promoter  
 of [W Ltd], or alternatively, for moneys had and received to the use of [W Ltd] in  
 H respect of the undisclosed profits as such promoter'. The claim was for £8,950, part  
 of the £9,200. The official receiver rejected the proof but Phillimore J reinstated it on  
 the liquidator's appeal.

53. The liquidator's case was that C Ltd was an 'alias' for D and G and the hand  
 by means of which they secretly and fraudulently obtained the money from the public  
 by means of W Ltd. The case for the official receiver was that D had inflicted no

450

VTB Capital v Nutritek International  
(Lloyd LJ)

[2012] 2 CLC

wrong on W Ltd. Any wrong was done to the public. In any event, the real and only wrong was C Ltd, not D and/or G, and it was immaterial that D and G controlled W Ltd: C Ltd, the real promoter, was not the 'alias' of D and G, and reliance was placed on *Salomon's* case.

54. Phillimore J found that C Ltd was simply an 'alias' for D & G. It was, he said, 'merely a name under which they carried on business'. He found that, by representing that C Ltd was carrying on business and concealing that the business was being done by D & G, they were probably perpetrating a fraud. He said, at [1911] 1 KB 95, 101:

'I say this because their names and their persons were so well known generally that the chance of detection and the chances of repudiation were great in connection with any commercial transactions in which they engaged. The fraud here is that what they did through the corporation they did themselves and represented it to have been done by a corporation of some standing and position, or at any rate a corporation which was more than and different from themselves'.

He found that they purported to sell C Ltd's 'trivial interest' in the quarry for shares and cash to W Ltd and thereby made a large profit. The case for the liquidator was that they concealed that profit from W Ltd and also concealed from it that they were 'the real vendors and promoters'. Phillimore J appears to have accepted, at 102, that the W Ltd prospectuses that were issued to the public were untruthful in describing C Ltd as the promoter and vendor, since D & G were the real promoters. The claim, however, was not by members of the public who had subscribed pursuant to the prospectuses, but was (in effect) by W Ltd. Phillimore J regarded the only issue he had to decide as being whether D & G, having received, through C Ltd, their personal profit on the sale to W Ltd, were entitled to retain it as against W Ltd. In his view, they were not entitled to do so unless they had disclosed their making of that profit to W Ltd. He said, at 103:

'Now they made that profit either directly or through the agency of [C Ltd], it does not matter which, and they may hold it if they disclosed it at the proper time. They may not hold it if they did not disclose it, and the burden of shewing that they did so disclose it is upon them.'

He found that they had not made a disclosure of their profit to W Ltd. Thus the appeal succeeded.

55. We well understand why Mr Snowden referred us to *Darby*, on which he placed considerable reliance. Indeed, as the argument progressed, we sensed that he began to regard it as his best case. We do not, however, regard it as throwing helpful light on the question of principle before us. The case was decided by Phillimore J on the basis that D & G were 'in truth and in fact ... the promoters and vendors' (see at 102) and therefore owed a personal duty to disclose to W Ltd the secret profit that they had personally made through C Ltd on that company's sale to W Ltd, failing

CA

VTB Capital v Nutritek International  
(Lloyd LJ)

451

A which they were accountable to W Ltd for the profit. It is true that Phillimore J described C Ltd as a mere 'alias' for D & G, by which they carried on business. We do not, however, read his judgment as founded on the basis that D & G were to be identified with C Ltd as a result of a piercing of C Ltd's veil of incorporation. That is not how he explained his decision; and the passage quoted in the preceding paragraph

B the agency' of C Ltd. Phillimore J also made no suggestion that the case was one in which the true facts required D & G to be regarded as parties to any contract in addition to C Ltd. His approach to the case may perhaps have been influenced by the fact that the concept of a 'promoter' is an imprecise one, for which the law has provided no comprehensive definition; but he had no doubt as to who the promoters

C were in the case before him.

D 56. *Gilford Motor Co Ltd v Horne* [1933] 1 Ch 935 is a decision of the Court of Appeal, upon which Mr Snowden also placed much reliance. The defendant was appointed the managing director of the plaintiff company for six years from 1 September 1928. Clause 9 of his service contract restrained him, during and after his employment, from soliciting the custom of anyone who was a customer of the plaintiff

E during his employment. His employment terminated in November 1931 following which he started trading in a like field, initially on his own account and later through a company, JM Horne & Co Ltd, which was incorporated on 8 April 1932. The shares in the company were held by Mr Horne's wife and a Mr Howard, an employee, who were the only directors. The plaintiff sued both Mr Horne and the company for injunctions restraining breaches of the covenant in the service agreement.

F 57. Before Farwell J, the issues were (i) whether Mr Horne had been released from the covenant upon the termination of his employment, a case that the judge rejected; (ii) whether the covenant was unenforceable as being in restraint of trade, which the judge held it was. The result was that he dismissed the action, although had the covenant been enforceable, *prima facie* it would have been enforceable only against Mr Horne, the contracting party. Farwell J explained, however, at 937, that the case against the company was that it was 'merely the creature of [Mr Horne], and [he] is committing breaches of the covenant by the agency of [the company].' He found,

G at 943, that the company was 'a company which ... is obviously carried on wholly by [Mr Horne]' and that it was 'the channel through which [he] was carrying on his business'. He also said, at 944, that the plaintiff's claim was wholly dependent on the covenants in the service agreement and that 'unless the plaintiff can succeed on the agreement itself, this action cannot succeed at all'.

H 58. The Court of Appeal, disagreeing with the judge, held that the covenant imposed a valid restraint and allowed the plaintiff's appeal. It granted an injunction not only against Mr Horne but also against the company. The issue of present interest is the basis on which it granted the injunction against the company.

452

VTB Capital v Nutritek International  
(Lloyd LJ)

[2012] 2 CLC

59. Lord Hanworth MR recited Farwell J's findings as to the company being the channel through which Mr Horne carried on his business, expressed his agreement with them and then said, at 956:

'I am quite satisfied that this company was formed as a device, a stratagem, in order to mask the effective carrying on of a business of Mr E.B. Horne. The purpose of it was to try to enable him, under what is a cloak or a sham, to engage in business which, on consideration of the agreement which had been sent to him just about seven days before the company was incorporated [that was a copy of the service agreement], was a business in respect of which he had a fear the plaintiffs might intervene and object.'

Lord Hanworth then explained, at 961, why the injunction should go both against Mr Horne and the company:

'[Leading counsel for the defendants] admitted that if the company were such as is indicated by Lindley LJ in *Smith v Hancock* [1894] 2 Ch 377, 385, it would not be possible to object to the injunction against the company. Lindley LJ indicated the rule which ought to be followed by the Court: "If the evidence admitted of the conclusion that what was being done was a mere cloak or sham, and that in truth the business was being carried on by the wife and Kerr for the defendant, or by the defendant through his wife for Kerr, I certainly should not hesitate to draw that conclusion, and to grant the plaintiff relief accordingly." I do draw that conclusion; I do hold that the company was "a mere cloak or sham"; I do hold that it was a mere device for enabling [Mr Horne] to continue to commit breaches of clause 9, and under those circumstances the injunction must go against both defendants, ...'

Lawrence LJ, at 965, and Romer LJ, at 969, essentially agreed with that as the basis for the grant of an injunction also against the company.

60. Mr Snowden's submission on *Gilford's* case was that the court could only have granted the injunction against the company on the basis of its acceptance that the plaintiff had established a cause of action against the company. He said that what the court was therefore doing was treating the company as party to Mr Horne's service contract. Unless it was found that there would be no cause of action against it; and Farwell J in his judgment had explained how the plaintiff's claim was founded exclusively on a claimed breach of that contract.

61. We respectfully disagree with that interpretation of *Gilford's* case. First, nowhere in the judgments is there a suggestion that the court was enjoining the company on the basis that it was, or must be treated as, a party to the service contract. Second, any such suggestion would have been absurd. The company was not incorporated until some three years after the making of the service contract. For the court to have worked on the basis that the company must be treated as being party to,

CA

VTB Capital v Nutritek International  
(Lloyd LJ)

453

A and in breach of, a contract that was made before it came into existence would have  
 required recourse to a legal fiction of considerable dimensions, but one of which no  
 mention is made in the judgments. Third, the factual basis upon which the injunction  
 was granted was simply that the company was Mr Horne's device for enabling him to  
 continue to commit his own breaches of the restrictive covenant in the (we presume)  
 B rather than by him personally, he would have an answer to any complaint that he was  
 breaching the covenant. The finding was, however, that the company was the channel  
 through which he carried on his own business. He had therefore used it in an attempt  
 to mask from the eyes of the court what in substance were his own wrongful acts;  
 and the court regarded the circumstances as ones in which it was appropriate to pierce  
 C the company's corporate veil and identify it as mere device for Mr Horne's continued  
 commission of such acts.

D 62. As to the legal basis upon which the court thought it appropriate to grant the  
 injunction against the company, the court does not discuss it expressly. That may have  
 been because, as Lord Hanworth explained, counsel for the defendants conceded that,  
 once a finding was made that the company was 'a mere cloak or sham', there could  
 be no objection to the grant of an injunction against it. We agree with Mr Lazarus,  
 however, that *Smith v Hancock* [1894] 2 Ch 377 (apparently the basis for Counsel's  
 concession) does not in fact support the conclusion that an injunction could also go  
 E against the company. The alleged equivalent of the company in *Smith's* case was the  
 defendant's wife and her nephew. But neither was a defendant, no relief was sought  
 against them and the claim against the only defendant (the husband, who was in  
 alleged breach of his covenant) anyway failed on the facts. *Smith's* case supports no  
 more than that if the husband *had* been carrying on the offending business that was  
 ostensibly being carried on by the wife and nephew, an injunction would properly be  
 F granted against *him*.

G 63. Reverting to *Gilford's* case, we therefore find it difficult to conclude that  
 the injunction made against the company was granted otherwise than on the basis  
 that it was regarded by the court as just and convenient to do so. If the injunction  
 had been granted against Mr Horne alone, it would have been in the conventional  
 H form restraining him from doing the prohibited acts by himself, his servants or  
 agents or otherwise howsoever, and such an order would in practice have restrained  
 the continued commission of breaches via the actions of the company, to which  
 knowledge of the injunction and of any continuing infringements by Mr Horne would  
 have been attributed. It therefore made sound practical sense to grant the injunction  
 also against the company. *Gilford's* case provides, in our view, no authority for  
 Mr Snowden's core submission. It is no more than an example of a case in which  
 the court was prepared to pierce the veil and, on the facts, to grant discretionary,  
 equitable relief against both the contract breaker and the company that he was using  
 to perpetrate his own continuing breaches.

454

VTB Capital v Nutritek International  
(Lloyd LJ)

[2012] 2 CLC

64. The next authority is *Jones v Lipman* [1962] 1 WLR 832. Mr Lipman, the first defendant, bargained into a contract to sell registered land to the plaintiffs. He repented of the bargain and, before completion, sold and transferred it to the second defendant, Alamed Limited, a company whose control he appears to have acquired a few days after the plaintiffs had served him with a notice to complete. The plaintiffs' application for summary judgment for specific performance against both defendants (but, we infer, for any claim for damages for breach of contract against Mr Lipman alone: see the facts as summarised at 834) came before Russell J. He noted that it was admitted that Mr Lipman's strategy in selling on the land had been carried through solely for the purpose of defeating the plaintiffs' rights.

65. Russell J ordered specific performance against both Mr Lipman and Alamed. As against the former, it was based on the proposition (illustrated by *Elliott and H Elliott (Builders) Ltd v Pierson* [1948] Ch 452) that, as Mr Lipman wholly controlled the company, he was in a position to procure it to perform the contract by which he was and remained bound. As against Alamed, reliance was placed on *Gilford's* case. Having cited from the judgments of the Court of Appeal in that case, Russell J said, at 836:

'Those comments on the relationship between the individual and the company apply even more forcibly to the present case. [Alamed] is the creature of [Mr Lipman], a device and a sham, a mask which he holds before his face in an attempt to avoid recognition by the eye of equity. [*Gilford's* case] illustrates that an equitable remedy is rightly to be granted directly against the creature in such circumstances ... The proper order to make is an order on both the defendants specifically to perform *the agreement between the plaintiffs and [Mr Lipman]*.' (Our emphasis)

66. Whilst it would have provided no answer to the making of an order against Mr Lipman, a perhaps slightly odd feature of *Jones's* case is that there is no reference in the report to whether, prior to the sale to Alamed, the contract had been protected as an estate contract by an entry against Mr Lipman's title to the land. If it had, Alamed would have acquired the land subject to the contract and the order for specific performance against it would have been uncontroversial, whether or not Alamed was in Mr Lipman's control. If it had not, *prima facie* Alamed would have acquired the land free of the contract (see section 20 of the *Land Registration Act 1925*) and the making of an order for specific performance against it might, on one view, appear questionable. The inference, however, is that such considerations featured neither in the evidence nor in the argument.

67. That being so, we must take *Jones's* case as we find it. On no basis does it support Mr Snowden's proposition. Russell J was certainly piercing the veil so as to identify Mr Lipman with his creature company, Alamed, which he had used with the intention of defeating the plaintiffs' rights: Mr Lipman was advancing Alamed as an unrelated legal person that was in no manner bound by the contract. The case was

CA

VTB Capital v Nutritek International  
(Lloyd LJ)

455

A not, however, decided on the basis that, once the truth was uncovered, Alamed was revealed as an original contracting party. It plainly was not, such a notion would have been absurd and the emphasised closing words of the quoted passage from Russell J's judgment tend to show that he had no such notion in mind. The basis of the order against Alamed was simply that, in the circumstances that had been revealed, *Gilford's*

B the creature ...'. *Jones's* case illustrates no more than that, in a case in which the contracting puppeteer has used his creature company in a bid to escape his contractual obligations, and the circumstances merit the piercing of the company's veil, it may be appropriate also to grant an equitable remedy directly against the company. It does not, we consider, develop the law any further than *Gilford* had taken it.

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68. The only further observation that we would make about *Jones* (and indeed about other 'veil piercing' cases in which the word is used) is that we are not, with respect, clear as to what Russell J meant by his description of Alamed as a 'sham'. If he was using that word as a synonym for façade or device, it adds nothing. But otherwise we do not understand how Alamed could accurately be described as a

D 'sham'. It was a genuine company, genuinely incorporated, with a genuine separate legal personality of its own: see in this context, the observations in the judgment of this court in *Neufeld v Secretary of State for Business, Enterprise and Regulatory Reform* [2009] 3 All ER 790, at paragraph 34.

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69. *Gencor ACP Ltd v Dalby* [2000] 2 BCLC 734 is a decision of Rimer J. The application before him was for summary judgment on a variety of claims, including one by Gencor ACP Ltd against Mr Dalby, a former director, for an account in respect of commission that belonged in equity to ACP but which he had diverted directly to a British Virgin Islands company in his sole control, Burnstead Limited. The defence was that Mr Dalby was not accountable because he had not received the commission; and Burnstead was not accountable because it was not in a fiduciary relationship with

F ACP. That argument was rejected, as Rimer J explained at paragraph 26:

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'I do not accept that argument which, if correct, would provide the easiest possible escape from the rigours of equity's strict principle of accountability. All that would be required would be for the profiting director to ensure that he diverts the profit into his own creature company. The facts of this case are that Burnstead was an offshore company which was wholly owned and controlled by Mr Dalby and in which nobody else had any beneficial interest. Everything it did was done on his directions and on his directions alone. It had no sales force, technical team or other employees capable of carrying on any business.

H Its only function was to make and receive payments. It was in substance little other than Mr Dalby's offshore bank account held in a nominee name. In my view this is the type of case in which the court ought to have no hesitation in regarding Burnstead simply as the alter ego through which Mr Dalby enjoyed the profit which he earned in breach of his fiduciary duty to ACP. If the arrival at this result requires a lifting of Burnstead's corporate veil, then I regard this as an

456

VTB Capital v Nutritek International  
(Lloyd LJ)

[2012] 2 CLC

appropriate case in which to do so. Burnstead is simply a creature company used for receiving profits for which equity holds Mr Dalby to be accountable to ACP. Its knowledge was in all respects the same as his knowledge. The introduction into the story of such a creature company is, in my view, insufficient to prevent equity's eye from identifying it with Mr Dalby: see generally, as to the readiness of the courts in appropriate cases to pierce the corporate veil, *Re H (restraint order: realisable property)* [1996] 2 BCLC 500, at 511, per Rose LJ. I hold that Mr Dalby and Burnstead are both accountable for the profit represented by this commission and I will make an order against them accordingly.'

70. That shows that the rationale for the decision was that Burnstead was being used by Mr Dalby as a mask or device to conceal his own interest in the commission for which he was accountable. Although neither *Gilford* nor *Jones* was apparently cited to Rimer J, the basis of his decision was essentially the same as that of those decisions. It was another example of the court being prepared to grant an equitable remedy against the creature company of the person primarily answerable. It was not, however, a case in which the court proceeded on the basis that, once the facts had been disclosed, Burnstead was held to have been subject from the outset to the like fiduciary duties towards ACP as had been Mr Dalby.

71. *Trustor AB v Smallbone (No. 2)* [2001] 1 WLR 1177, a decision of Sir Andrew Morritt V-C, was factually a very similar case. The essence of the issue was this. Mr Smallbone, a director of Trustor, had misappropriated large sums of Trustor's money, which he had procured to be paid to various recipients, including himself and his creature company, Introcom (International) Limited. An order had earlier been made in Trustor's favour for the repayment by Introcom of the money it had received. The application before the Vice-Chancellor was for a joint and several order against Mr Smallbone for the repayment to Trustor of the same money after giving certain credits. It was said that Mr Smallbone was liable to repay on the basis that his procuring of its payment to Introcom made him answerable in equity for his knowing receipt of it as a constructive trustee. It was argued that the case justified the court in piercing Introcom's veil so as to identify it with Mr Smallbone. As the Vice-Chancellor said, at 1184B, the issue was whether the court was entitled to regard the receipt by Introcom as the receipt by Mr Smallbone.

72. The Vice-Chancellor summarised, at paragraph 14, counsel's submission that the authorities showed that there were three, potentially overlapping, categories of case which warranted the piercing of a corporate veil: (1) where the company was shown to be a façade or sham with no unconnected third party involved; (2) where the company was involved in some impropriety; and (3) where it is necessary to do so in the interests of justice and no unconnected third party was involved. The Vice-Chancellor referred, at paragraph 20, to *Gilford*, *Jones*, *Woolfson*, *Adams* and *Gencor* and held that they all established proposition (1); and, so far as that goes, we respectfully agree. The Vice-Chancellor declined to accept proposition (3), which he considered went further than had been recognised by this court's decision in *Adams*.

CA

VTB Capital v Nutritek International  
(Lloyd LJ)

457

A We also agree and Mr Snowden did not submit otherwise. As for proposition (2), the Vice-Chancellor regarded that as too widely stated unless used in conjunction with proposition (1); and Mr Snowden also disclaimed any disagreement with that. In upholding the claim against Mr Smallbone for knowing receipt, the Vice-Chancellor expressed his conclusions as follows:

B ‘23. In my judgment the court is entitled to “pierce the corporate veil” and recognise the receipt of the company as that of the individual(s) in control of it if the company was used as a device or façade to conceal the true facts thereby avoiding or concealing any liability of those individual(s). ...’

C 24. [The Vice-Chancellor summarised the facts relating to Mr Smallbone’s use and control of Introcom]

D 25. In my view these conclusions are such as to entitle the court to recognise the receipt of the money of Trustor by Introcom as the receipt by Mr Smallbone too. Introcom was a device or façade in that it was used as the vehicle for the receipt of the money of Trustor. Its use was improper as it was the means by which Mr Smallbone committed unauthorised and inexcusable breaches of his duty as a director of Trustor ...’

E 73. Mr Snowden adopted the statement in paragraph 23 as a sound summary of the principle underlying the ‘veil piercing’ theory and we too respectfully agree with it. We do not, however, regard *Trustor* as materially advancing Mr Snowden’s core proposition. It was simply an example of the court being prepared, once it had pierced the veil, to grant an equitable remedy against the controller of the puppet company. It provides no authority for the proposition that a piercing of the veil enables the court to go to the lengths of finding that the puppeteer must, as a consequence of such piercing, be regarded as a party to a contract he had procured between the puppet company and a third party. No such question arose in it.

G 74. Mr Lazarus submitted that a solution leading to the same result in *Trustor*, which would have involved no need to lift Introcom’s veil, would have been simply to treat Introcom’s receipt at the direction of Mr Smallbone as the receipt by Mr Smallbone himself. In support of that, Mr Lazarus referred us to *Goss v Chilcott* [1996] AC 788, a decision of the Privy Council which illustrated a successful common law claim in restitution against B who had directed the relevant money to be paid to C; and, with regard to claims for an account in equity, to *CMS Dolphin Ltd v Simonet* [2001] 2 BCLC 704, at paragraphs 98 to 105, in which Lawrence Collins J indicated that there may be no need to pierce the veil of the corporate recipient in order to make the individual fiduciary personally answerable. Mr Snowden responded to that submission by disputing Mr Lazarus’s explanation of the basis for the decision in *Goss*; and by referring us to the judgment of Lewison J in *Ultraframe (UK) Ltd v Fielding* [2005] EWHC 1638 (Ch), at paragraphs 1550 to 1576, in which doubt was expressed as to the correctness of Lawrence Collins J’s approach in *CMS Dolphin*. Mr

458

VTB Capital v Nutritek International  
(Lloyd LJ)

[2012] 2 CLC

Snowden said that *Goss* was simply a case in which the defendants had, on the facts, been unjustly enriched at the plaintiff's expense. He also submitted that *Ultraframe* shows that the true principle is that if a fiduciary misapplies company property by paying it to a company in which he has an interest, he will be personally liable to pay equitable compensation for the loss so caused. But, as regards claims for knowing receipt and liability to account, he will only be liable to account for the benefits which he has personally received; equally, and on the assumption that the recipient company has the requisite knowledge for the purposes of knowing receipt, the company will also be liable to account for the benefits which it has received. The individual and the recipient company cannot, however, be jointly and severally liable to account for all the misapplied money; and, to the extent that *CMS Dolphin* decided otherwise, it was wrong. The individual and the recipient company can, Mr Snowden said, only be made jointly and severally liable if the company's veil is pierced, which was the basis of the orders made in both *Gencor* and *Trustor*.

75. Whilst the opposing arguments on the authorities and issues discussed in the preceding paragraph were instructive and interesting, we propose to express no view on them. Even if Mr Lazarus is right that *Trustor* could have been decided on a basis that did not require the piercing of Introcom's veil, the fact is that it was not. It was decided on the basis that the case was an appropriate one in which to pierce Introcom's veil. We add that the judgment in *CMS Dolphin* was delivered approximately two months after that in *Trustor*, which does not, however, appear to have been cited to Lawrence Collins J; and Lawrence Collins J himself expressly recognised that a 'piercing of the veil' is an approach known to the law and may be justified in appropriate circumstances: see [2001] 2 BCLC 704, at paragraph 103.

76. The next authority in the chronology is the decision of Warren J in *Dadourian Group International Inc v Simms* [2006] EWHC 2973 (Ch). That case is rather closer to home in that it included a claim akin to that sought to be made by the amendments in issue before us. The assertion was that two of the individual defendants had used a company as a façade designed to conceal their personal involvement and as a vehicle for fraud. The case was that the company's corporate veil should be pierced and the two individuals made liable for the loss of bargain damages for breach of contract that had been awarded against the company in an arbitration. Warren J, at paragraphs 679 to 681, referred to *Woolfson, Adams, Gilford, Jones and Trustor* and continued by saying:

'682. In all of the cases where the court has been willing to pierce the corporate veil, it has been necessary or convenient to do so to provide the claimant with an effective remedy to deal with the wrong which has been done to him and where the interposition of a company would, if effective, deprive him of that remedy against him. It seems to me that the veil, if it is to be lifted at all, is to be lifted for the purposes of the relevant transaction. ...

CA

VTB Capital v Nutritek International  
(Lloyd LJ)

459

A 683. It is not permissible to lift the veil simply because a company has been  
involved in wrongdoing, in particular because it is in breach of contract. And  
whilst it is clear that the veil can be lifted where the company is a sham or façade  
or, to use different language, where it is a mask to conceal the true facts, it is, in  
my judgment, correct to do so only in order to provide a remedy for the wrong  
B which those controlling the company have done ...'

77. Consistently with that approach, Warren J proceeded to reject the claim that  
the company's veil should be pierced in order that those in its control could be made  
jointly and severally liable with it for the contractual damages awarded against it. His  
reason was because the claimant was entitled to recover all his loss by a tortious claim  
C in fraudulent misrepresentation against the two individuals. As he said at paragraph  
686:

'[t]here is simply no need, in order to give the Claimants redress for that  
misrepresentation, to lift the veil at all: indeed, to do so would achieve nothing  
D in relation to that wrong.'

78. *Ben Hashem v Ali Shayif* [2008] EWHC 2380 (Fam) is a judgment of Munby  
J that includes between paragraphs 144 and 221 a comprehensive discussion of the  
principles by reference to which the court may pierce the veil of incorporation. Between  
E paragraphs 159 and 164 Munby J re-stated the principles, which he summarised as  
follows. First, ownership and control of a company are not of themselves sufficient  
to justify piercing the veil. Second, the court cannot pierce the veil, even when no  
unconnected third party is involved, merely because it is perceived that to do so is  
necessary in the interests of justice. Third, the corporate veil can only be pierced when  
there is some impropriety. Fourth, the company's involvement in an impropriety will  
F not by itself justify a piercing of its veil: the impropriety 'must be linked to use of the  
company structure to avoid or conceal liability' (a principle derived from *Trustor*).  
Fifth, it follows that if the court is to pierce the veil, it is necessary to show both  
control of the company by the wrongdoer *and* impropriety in the sense of a misuse of  
the company as a device or façade to conceal wrongdoing. Sixth, a company can be a  
G façade for such purposes even though not incorporated with deceptive intent:

'164. ... The question is whether it is being used as a façade at the time of  
the relevant transaction(s). And the court will pierce the veil only so far as is  
necessary to provide a remedy for the particular wrong which those controlling  
the company have done. In other words, the fact that the court pierces the veil for  
H one purpose does not mean that it will necessarily be pierced for all purposes.'

79. Mr Snowden accepted that summary as a correct statement of the principles  
save that he questioned the correctness of the final principle, as to a requirement of  
necessity, as he also questioned the correctness of Warren J's like point in *Dadourian*.  
He said that it does not follow that a piercing of the veil will be available only if  
there is no other remedy available against the wrongdoers for the wrong they have

committed. In principle, we agree with Mr Snowden's suggested qualification. It appears to us to be illustrated by both *Gilford* and *Jones*. In *Gilford*, there was no need to grant any injunction against the company, although it was obviously convenient to do so: we consider that it would, in practice, although less convenient, have been sufficient to grant an injunction against Mr Horne, which would conventionally have been in a form that restrained him from doing the enjoined act, whether by himself, his servants or agents or otherwise howsoever. In *Jones*, there was also no need to grant an order for specific performance against the company. It was sufficient to grant the order against Mr Lipman on the basis that his control of the company meant that he was in a position to procure the completion of the contract. We refer in that respect to the decision of this court in *Coles (Trustees of the Ward Green Working Men's Club) v Samuel Smith Old Brewery (Tadcaster) (an unlimited company)* [2007] EWCA Civ 1461; [2008] 2 EGLR 159, in which, in circumstances very similar to those in *Jones*, this court made an order for specific performance against the contracting party, but not also against the company in its control to which the land had been sold (see at paragraph 20, per Rimer LJ, with whose judgment Sedley and Pill L JJ agreed). With that qualification, we would, however, respectfully agree with Munby J's summary of the principles.

80. Mr Snowden also submitted, in expansion of Munby J's fourth principle (and in reliance on what Munby J said at paragraph 199) that it is not sufficient for veil piercing purposes merely to show that the company is involved in wrongdoing, for example that it is carrying out a fraud: there will be no question in such a case of the company being used as a façade. The relevant wrongdoing must be in the nature of an independent wrong that involves the fraudulent or dishonest misuse of the corporate personality of the company for the purpose of concealing the true facts. In principle, we agree with that too. Where, however, we have more difficulty, as we shall explain, is in also agreeing with Mr Snowden's submission that the relevant wrongdoing in this case was the misuse of the corporate personality of RAP so as to conceal that the true contracting parties were, or included, Marcap BVI, Marcap Moscow and Mr Malofeev. We add that in the *Ben Hashem* case the bid to pierce the veil failed. Nothing that Munby J said provides any support for the effect of a successful piercing of the veil for which Mr Snowden contends. Such a point simply did not arise before Munby J for consideration.

81. We come now to the decision in *Gramsci* [2011] 1 CLC 396. There is no need to explain the factual background of the application that came before Burton J, an *inter partes* application as to the court's jurisdiction in the proceedings. The primary point was essentially the same as that raised by Mr Snowden's argument. It was summarised by Burton J, at paragraph 8, as follows:

'Whether the claimants can pierce the corporate veil on the basis that the Corporate Defendants were used, by the defendant (and the other Beneficial Owners) controlling them, as a device for the purpose of a fraud on the claimants, and, if so, whether the defendant (with the others) is liable as a

CA

VTB Capital v Nutritek International  
(Lloyd LJ)

461

A party to the charterparties which claimants were caused to enter into with the Corporate Defendants’.

B 82. Burton J referred, at paragraphs 13 and 14 to *Gilford*, *Gencor*, *Trustor* and *Ben Hashem* and, having cited paragraph 23 from the Vice-Chancellor’s judgment in *Trustor*, said that was exactly what had happened in the case before him. He rejected the suggestion to be found in certain of the authorities that it was a condition of any piercing of the veil that it should be *necessary* to do so in order to provide the claimant with an effective remedy, and we have indicated our agreement that necessity is not such a condition. As to whether it followed that a piercing of the veil in the case before him would entitle the claimant to hold the defendant (the puppeteer) jointly and severally liable under the charterparties into which his puppet companies had entered, counsel for the claimant conceded that there was no reported case in which the veil had been pierced so as to place the puppeteer into the puppet’s contract. Burton J appears, however, to have regarded *Gilford* and *Jones* as both cases in which the court was treating the puppet as liable under the puppeteer’s contract (see paragraph 23) and to have favoured the view that there was therefore no reason in principle why, in the reverse situation, the puppeteer should not be held liable under the puppet’s contract. Such a reverse situation arose in both *Dadourian* (where Warren J refused to pierce the veil) and in *Lindsay v O’Loughnane* [2010] EWHC 529 (QB) (where Flaux J did likewise). Burton J explained his reasons for concluding that the claimant had a good arguable case for holding the puppeteers liable on their puppets’ charterparties at paragraph 26:

F ‘I am satisfied that both Warren J in *Dadourian* and Flaux J in *Lindsay* were only ruling out the course of finding the puppeteer liable for breach of contract because in neither case was it appropriate to do so in the event, since a remedy of finding the puppeteer personally liable (as tortfeasor) had already been granted which was, certainly in the case of *Dadourian*, inconsistent with taking the contractual route. None of the reasons which Warren J put forward argues against a conclusion, depending on how the facts fall out at trial, that in this case the puppeteer should be held party to the puppet company’s contract. There is in my judgment no good reason of principle or jurisprudence why the victim cannot enforce the agreement against both the puppet company and the puppeteer who, all the time, was pulling the strings. The claimants seek to enforce the contract against both the puppeteer and the puppet company (as in *Gilford* and *Jones*). ...’

H 83. In *Linsen International Ltd v Humpuss Sea Transport Pte Ltd* [2011] EWHC 2339 (Comm); [2011] 2 CLC 773, another decision of Flaux J, the claimants placed reliance on that part of Burton J’s decision in *Gramsci*, to which Flaux J referred at paragraphs 137 to 142 without questioning its correctness. In the event, however, he regarded neither *Gramsci* nor any other of the veil piercing cases cited to him as relevant to the facts before him, and his decision does not progress the line favoured by Burton J in *Gramsci*.

84. The next first instance decision to consider *Gramsci* was that of Arnold J now under appeal, following which the like question once again came before Burton J in *Alliance Bank JSC v Aquanta Corp* [2011] EWHC 3281 (Comm). Burton J noted Arnold J's disagreement with his decision in *Gramsci* but said, at paragraph 20, that:

'I have no doubt nevertheless that, for the reasons I gave in *Gramsci*, there is a serious issue of fact and law as to whether, in the circumstances described by me above, the Sixth, Seventh and Eighth Defendants are to be treated as being parties to the Loan Agreements, as I found arguable in the case of the defendant and the interposed chartering companies in *Gramsci*. I also am satisfied that, as I concluded in *Gramsci*, the question of whether the veil should be pierced in such a situation, so as to decide whether the puppeteers are parties to the contract, is to be resolved, just as would be issues of agency, undisclosed or otherwise, by reference to the proper law of the contract (see paragraph 46 of *Gramsci*). In this case, the proper law of the Loan Agreements is expressly English law ...'

85. Returning to Mr Snowden's submissions, he said that in a case such as the present, in which on the assumed facts Marcap BVI, Marcap Moscow and Mr Malofeev have misused the corporate structure of a contracting party (RAP) for the purpose of fraudulently concealing their own interest as controllers of RAP and misleading VTB into believing that the character of its contract with RAP was different from its true nature, it is open to the court to pierce the veil, ascertain the true facts that were going on behind RAP's façade and identify the three defendants as such controllers. The true facts show that the controllers of RAP have, by concealing their identity, obtained a loan from VTB; and it is, therefore, logical to proceed to the conclusion that they are true, *additional*, contracting parties to the Facility Agreement and ISA and so answerable jointly and severally with RAP for its breaches. There is, he said, no reason in principle why the (as must be assumed) fraudulent controllers should not be equally liable on the contracts into which they have procured their puppet company, RAP, to enter. It is irrelevant that VTB has, or may have, an alternative claim in the tort of deceit against the three defendants and both Warren J in *Dadourian* and Arnold J in this case were wrong to conclude otherwise. The fact that at trial VTB may have to make an election as to which of its contractual or tortious remedies to pursue is irrelevant. If, however, it elects for contractual remedies against the three defendants, it will be entitled to loss of bargain damages, being the loss of the money lent plus the interest payable under the contract.

86. Mr Snowden adopted by way of supporting analogy for his submissions the position of an undisclosed principal in the law of contract. For a statement of the principle, he referred us to the advice of the Privy Council in *Siu Yin Kwan (administratrix of the estate of Chan Ying Lung dec'd) v Eastern Insurance Co Ltd* [1994] CLC 31; [1994] 2 AC 199. Lord Lloyd of Berwick, in delivering the judgment, said, at 36; 207:

CA

VTB Capital v Nutritek International  
(Lloyd LJ)

463

A 'For present purposes the law can be summarised shortly as follows:

(1) An undisclosed principal may sue and be sued on a contract made by an agent on his behalf, acting within the scope of his actual authority.

B (2) In entering into the contract, the agent must intend to act on the principal's behalf.

(3) The agent of an undisclosed principal may also sue and be sued on the contract.

C (4) Any defence which the third party may have against the agent is available against his principal.

(5) The terms of the contract may, expressly or by implication, exclude the principal's right to sue, and his liability to be sued. The contract itself, or the circumstances surrounding the contract, may show that the agent is the true and only principal.

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The origin of, and theoretical justification for, the doctrine of the undisclosed principal has been the subject of much discussion by academic writers. ... It seems to be generally accepted that, while the development of this branch of the law may have been anomalous, since it runs counter to fundamental principles of privity of contract, it is justified on grounds of commercial convenience.'

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87. Mr Snowden recognised that the law relating to undisclosed principals has anomalous features about it but said that the main criticism of it was in relation to the ability of the undisclosed principal to intervene in the contract as against the third party, who had no inkling of the principal's existence. He submitted, however, that the law has no reservations about allowing the third party to sue the principal once he has discovered his existence. In support of that, he referred us to *Armstrong v Stokes* (1872) 7 QB 598, at 603 to 604, per Blackburn J. Mr Snowden said that that principle could, as a matter of policy, easily be translated to the circumstances of the present case, in which VTB seeks to make answerable on the two contracts the true, undisclosed, contracting parties standing behind RAP. Creature companies that are used to perpetrate the sort of fraud that is alleged in the present case will usually be insufficiently capitalised to be able to satisfy any judgment. It is, moreover, no answer for the controllers to say that they gave no authority to the creature company to act as their agent. That is to commit the error of trying to shoehorn the exercise of veil piercing into an agency relationship, which it is not. Of course fraudsters are not going to grant any such express authority to their creature companies. Veil piercing, however, engages a different technique. It is about substance, not form; and the inability to demonstrate a true agency relationship between controller and its puppet company is no bar to its application.

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464

VTB Capital v Nutritek International  
(Lloyd LJ)

[2012] 2 CLC

88. We come to our conclusions on the appeal against Arnold J’s refusal to allow the amendment. We respectfully consider that Arnold J was correct to hold that the contract claim that VTB wishes to advance against the three defendants is not founded on a cause of action known to English law. We can also identify no principled basis upon which the law might be incrementally developed so as to recognise such a claim. We consider that Arnold J was right to refuse the amendments.

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89. First, we derive no assistance from any analogy with the law relating to undisclosed principals. That corner of the law of contract is recognised as anomalous and we are unable to draw from it any guidance that can be said to assist, let alone support, Mr Snowden’s essential submission. At least one reason why it does not is that the undisclosed principal can neither sue nor be sued unless the agent entering into the contract on his behalf did so with his authority. On the assumed facts of the present case, there is no question of the puppeteers having authorised the puppets to enter into the contracts on their behalf, whether expressly or impliedly, or by any means of apparent or ‘usual’ authority. Therefore there is no analogy with the position of an undisclosed principal. The question that the appeal poses for us must, we consider, be answered by reference to considerations of more general principle.

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90. Second, there is no arguable factual basis for the assertions that, when the Facility Agreement and the ISA were concluded: (i) VTB intended to contract with anyone other than the counterparties named in them; (ii) such counterparties intended to contract with VTB on behalf of anyone but themselves; (iii) any of Marcap BVI, Marcap Moscow or Mr Malofeev intended to contract with VTB; or, therefore, that (iv) on an objective assessment of the evidence, any of those three defendants was a party to either of the contracts. VTB’s submission amounts to the proposition that there is a principle of English law that a person can be held to be a party to a contract when, assessed objectively, none of the undisputed parties to the contract had any thought that he was, let alone an intention that he should be. In our judgment, to accede to VTB’s submission would be to make a fundamental inroad into the basic principle of law that contracts are the result of a consensual arrangement between, and only between, those intending to be parties to them. It is contrary to that principle, which is applicable save in some exceptional cases, none of which applies here, that a stranger to the contract should be held to be a party to it.

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91. Third, whilst we accept that the court can, in an appropriate case, ‘pierce a company’s corporate veil’ and, in doing so, substantially identify the company with those in control of it, no authority has been cited to us, apart from Burton J’s decisions in *Gramsci* and *Alliance*, that supports the proposition that, once the veil is pierced, the court either does or can (or that it is arguable that it does or can) proceed in consequence to a holding either that the puppet company was a party to the puppeteer’s contract, or vice versa. As we have said, we interpret Burton J as having regarded *Gilford* and *Jones* as cases in which the remedies against the companies were granted on the basis that they were themselves parties to the individuals’ contracts. We respectfully regard that as a misreading of both cases.

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CA

VTB Capital v Nutritek International  
(Lloyd LJ)

465

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92. We of course recognise the logic of Mr Snowden's proposition in relation to *Gilford* and *Jones* that, if the remedies of an injunction and specific performance were to be granted against the companies, it was necessary for such orders to be underpinned by the existence of the recognisable causes of action against them. We nevertheless do not regard the orders made against the companies in either case as premised on the basis that there was a cause of action in contract against them. Neither court so explained its decision. We regard the order made in *Gilford* as having been based on the conclusion that, for the reasons we have given, it was convenient to make an order against the company directly. The latter explanation is also clearly the basis on which Russell J made his order in *Jones*. Our consideration of the reported authorities leads us to the conclusion that, in a case in which it is thought appropriate to pierce the veil, any order made in consequence of such veil piercing is by way of the exercise by the court of a discretionary jurisdiction. We do not see how else the orders against the companies in *Gilford* and *Jones* can be explained. Neither case supports VTB's proposition that the judicial piercing of the veil of a company that an individual has used with a view to masking his own breach of contract results in the court treating the company as itself a party to that contract. Insofar as the starting premise for Burton J's decisions in *Gramsci* and *Alliance* was to a different effect, we have indicated our disagreement with it. It follows that we also respectfully regard as wrong Burton J's extension of the decisions in *Gilford* and *Jones* to embrace the proposition that there is a good arguable case in law for the conclusion that, if the puppet can have the puppeteer's contract imposed on it, so can the puppeteer have the puppet's contract imposed on him.

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93. Fourth, we respectfully consider that Mr Snowden's submission is flawed by its own inherent unreality. His proposition is that, once the corporate veil is lifted and the *true facts* are revealed, such facts will require the court to conclude that the puppeteers are additional parties to the contracts into which they have procured the puppet to enter. We do not understand this. It is inconceivable that the revelation of the true facts will show Marcap BVI, Marcap Moscow or Mr Malofeev to be parties to either of the relevant contracts. It will at most show no more than that they induced VTB to enter into the relevant contracts by dishonest deception. The suggestion that the application of the veil piercing principle to the facts will require the court to find that these three defendants were original, additional parties to the contracts is nothing more than an appeal to the court to decide the case on the basis of pure fiction. No authority, *Gramsci* and *Alliance* apart, supports the view that that is something the court might or should do.

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94. Fifth, there remains a question as to whether, even if founded on mistaken reasoning, *Gramsci* and *Alliance* anyway represent a principled development of the law that this court should adopt. We have said enough to show that we consider that they do not. The 'veil piercing' cases show that the principle is, in its application, a limited one, which has been developed pragmatically for the purpose of providing a practical solution in particular factual circumstances. The reported authorities

466

VTB Capital v Nutritek International  
(Lloyd LJ)

[2012] 2 CLC

certainly proceed on the basis that (in the usual case) the puppet company and the  
controlling puppeteer are to be closely identified, an identification that will or may  
be regarded as justifying the grant of a judicial remedy against the puppet as well  
as the puppeteer, if only on the basis that it will be just and convenient to do so. They  
do not, however, go to the length of treating the puppet company as other than a legal  
person that is formally distinct and separate from the puppeteer; and, were they to do  
otherwise, they would wrongly be ignoring the principles of *Salomon*. Consistently  
with that, they do not provide any basis for the proposition that the puppeteer should  
be regarded as having always been a party to a contract to which it or he plainly was  
not a party.

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95. Not only do we not regard the common law as recognising the principle  
for which VTB contends, we are also not persuaded that it would be a principled  
development of the law for us to recognise it by our decision in this appeal. Any such  
development would not be a modest development of existing principle. It would, in  
substance, amount to the adoption by the courts of a jurisdiction to subject parties to  
contractual obligations under a contract to which neither they, nor the only undisputed  
parties to the contract, had ever agreed or intended that they should be subject. Yet  
further, if, which we question, it would ever be appropriate to develop any such  
principle, we do not regard this case as the right one in which to do so. There is no  
need to do so. Mr Snowden submitted that English law needs the tools to deal with  
commercial fraud. In principle, we agree. But if VTB's factual assertions are well  
founded, English law already provides it with a perfectly good remedy against the  
defendants, by way of a claim in the tort of deceit for the wrong which it claims they  
have inflicted upon it. There is no good policy reason for inventing and giving it an  
artificial remedy in contract, which VTB does not need, but which it merely invokes  
in support of its claim that the English courts should assume jurisdiction in its claims.  
In this context, Mr Lazarus referred us to the cautionary words of Lord Goff of  
Chieveley in *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349, at 378A  
to D, as to the manner in which the judges do or should develop the common law. We  
have had regard to them.

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96. We are conscious that we have not referred to Arnold J's full and careful  
reasons for declining to follow and apply Burton J's decision in *Gramsci*. We intend  
no discourtesy to the judge if we do not extend this part of our judgment yet further  
by setting out and discussing his reasons. We say simply that, for the reasons we have  
given, which are similar in substance to those expressed by him, we respectfully agree  
with his conclusion that, contrary to the view favoured in *Gramsci*, VTB's proposed  
contract claim is unsustainable as a matter of law. We therefore dismiss the appeal  
against his refusal to allow the amendments; and, to the extent that *Gramsci* and  
*Alliance* provide support for the view that the proposed amendments assert a cause  
of action for the reasonableness of which there is a good arguable case, we overrule  
them as having been wrongly decided.

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VTB Capital v Nutritek International  
(Lloyd LJ)

467

## A Service out of the jurisdiction

B 97. Having decided that VTB is not entitled to pierce the corporate veil so as to make Marcap BVI, Marcap Moscow and Mr Malofeev parties to the Facility Agreement, we do not need to decide the issue of whether VTB can rely on clause 35 of the Facility Agreement to confer jurisdiction on the English Courts pursuant to article 23(1) of the Brussels Regulation. Nor do we need to consider the alternative argument of VTB that it can rely on paragraph 3.1 (6) of the Practice Direction 6B of the CPR as a basis on which to obtain leave to serve proceedings out of the jurisdiction on Marcap BVI, Marcap Moscow and Mr Malofeev in respect of a claim based on the Facility Agreement. We heard arguments on both these points but they are moot in the light of our conclusion on lifting the corporate veil.

D 98. The issue on jurisdiction, therefore, is whether VTB should have permission to serve proceedings out of the jurisdiction on Nutritek, Marcap BVI and Mr Malofeev in respect of the two claims in tort that are alleged. VTB asserts that it is entitled to obtain permission to serve the proceedings on Nutritek, Marcap BVI and Mr Malofeev out of the jurisdiction pursuant to paragraph 3.1 (9)(a) of Practice Direction 6B, viz. that '... a claim is made in tort where (a) damage was sustained within the jurisdiction; ...'. The defendants dispute this right and the judge held they were correct.

E 99. There was no dispute between the parties on the general principles to be applied when deciding whether permission should be granted to serve proceedings on a defendant who is out of the jurisdiction, under the terms of paragraph 3.1 of Practice Direction 6B of the CPR. The three basic principles were recently restated by Lord Collins of Mapesbury in giving the advice of the Privy Council in *AK Investment CJSC v Kyrgyz Mobile Tel Ltd* [2011] UKPC 7; [2011] 1 CLC 205 at paragraphs 71, F 81 and 88. They can be summarised as follows: first, the claimant must satisfy the court that, in relation to the foreign defendant to be served with the proceedings, there is a serious issue to be tried on the merits of the claim, i.e. a substantial question of fact or law or both. This means that there has to be a real, as opposed to a fanciful, prospect of success on the claim. Secondly, the claimant must satisfy the court that G there is a good arguable case that the claim against the foreign defendant falls within one or more of the classes of case for which leave to serve out of the jurisdiction may be given. These are now set out in paragraph 3.1 of Practice Direction 6B. 'Good arguable case' in this context means that the claimant has a much better argument than the foreign defendant. Further, where a question of law arises in connection with H a dispute about service out of the jurisdiction and that question of law goes to the existence of the jurisdiction (e.g. whether a claim falls within one of the classes set out in paragraph 3.1 of Practice Direction 6B), then the court will normally decide the question of law, as opposed to seeing whether there is a good arguable case on that issue of law.

468

VTB Capital v Nutritek International  
(Lloyd LJ)

[2012] 2 CLC

100. Thirdly, the claimant must satisfy the court that in all the circumstances England is clearly or distinctly the appropriate forum for the trial of the dispute and that in all the circumstances the court ought to exercise its discretion to permit service of the proceedings out of the jurisdiction. This requirement is reflected in Rule 6.37(3) of the CPR, which provides that 'The court will not give permission [to serve a claim] form out of the jurisdiction on any of the grounds set out in paragraph 3.1 of Practice Direction 6B] unless satisfied that England and Wales is the proper place in which to bring the claim'.

101. On the last of the three basic principles, two further points should be made. They arise from the now classic speech of Lord Goff of Chieveley in *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460, at 475-484. They are: first, where a claimant seeks leave to serve proceedings on a foreign defendant out of the jurisdiction, the task of the court is to identify the forum in which the case can be suitably tried for the interests of all the parties and for the ends of justice. Secondly, in such a case the burden is on the claimant to persuade the court that England is clearly or distinctly the appropriate forum.

#### Order of dealing with the three principal components

102. On the first of the three principal components, the respondents all argued that, contrary to the conclusion of the judge, there is no serious issue between them and VTB to be tried because, it was said, VTB had suffered no loss as a result of the alleged fraudulent misrepresentations and conspiracy; if there has been no loss then there is no completed cause of action in tort. The same argument arises in relation to the second of the principal components. If VTB has suffered no loss then VTB cannot claim that damage has been sustained within the jurisdiction; therefore VTB would not come within the ambit of sub-paragraph (9)(a) of paragraph 3.1 of the Practice Direction 6B, so permission to serve out should be refused on that ground also. The defendants say that this is an issue of law which goes to the court's jurisdiction to grant permission to serve out and so should be decided definitively now, in accordance with the principles set out by Lord Collins in the *AK Investment* case, referred to above. VTB accepts that it has to establish a 'good arguable case' that it has sustained damage within the jurisdiction as a result of the torts alleged against the defendants in order to come within sub-paragraph (9)(a) of paragraph 3.1 of Practice Direction 6B.

103. On behalf of Marcap BVI it was also submitted that there was no real prospect of success in VTB's argument that Marcap BVI is jointly liable with Mr Malofeev for the tort of deceit or was a party to the conspiracy. That point goes directly to the first of the three principal components we have identified. But it does not go to the second. If there is a triable issue that Marcap BVI is jointly liable with Mr Malofeev for the tort of deceit or was a party to the conspiracy, there is no independent point that Marcap BVI can take on 'no loss'. Accordingly, it seems to us that VTB has only to establish that there is a serious issue to be tried in relation to its claim against Marcap BVI.

CA

VTB Capital v Nutritek International  
(Lloyd LJ)

469

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104. Before the judge Mr Malofeev had also argued that VTB had no real prospect of establishing: (1) a misrepresentation as to the absence of common control of the seller and buyer companies; (2) that Mr Malofeev was jointly liable in respect of the misrepresentation as to the value of the Dairy Companies; and (3) that there was any reliance by VTB on any understanding as to the ownership or control of RAP. The judge rejected the arguments as regards Mr Malofeev on the evidence before him: see paragraphs 179 to 183 and 226. In Mr Malofeev's 'Skeleton' argument, those conclusions were challenged. Mr Freedman made submissions on those points in opening the appeal for VTB. Mr Milligan did not develop those arguments orally on behalf of Mr Malofeev. We think that he was right not to do so. The judge carefully analysed the evidence that VTB had advanced in support of its case in deceit and conspiracy against Mr Malofeev and made his overall assessment that VTB had established a good arguable case. It would have to be demonstrated that the judge's assessment of the evidence was seriously flawed in some respect. That has not been done, so we say no more on that issue.

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105. Both below and before us, these two issues of 'no loss' and 'no arguable case against Marcap BVI' were argued on the basis of English law. Arnold J decided that Russian law is the applicable law to the torts alleged against all the defendants. That conclusion is challenged by VTB before us. Mr Lazarus, who was principally responsible for arguing the 'no loss' point and who presented the argument that there was no arguable case against Marcap BVI, did not submit that if the defendants were correct on the applicable law of the torts point, then that made a difference to the argument on the issues of 'no loss' or no arguable case against Marcap BVI. Nor did Mr Freedman for VTB. Both approached the 'no loss' issue and the liability of Marcap BVI as issues to be decided according to English law and we shall do so too.

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106. We will deal first with the 'no loss' and 'no arguable case against Marcap BVI' issues. We will then consider the arguments on the third principal component: viz. is England clearly or distinctly the appropriate forum for the trial of these issues? Under that head VTB's main challenge relates to two principal conclusions of the judge. The first is that the 'natural forum' for these disputes is Russia: paragraph 195 of the judgment. In VTB's submission the tort of deceit was committed against VTB in England and the conspiracy was carried out in England by unlawful means by virtue of the deceit which itself was committed in England. Therefore, VTB argues, the judge should have held that there is a presumption that England is the 'natural forum' and he should also have held that such a presumption could not, on the facts of this case, be displaced. The second principal conclusion of the judge that is challenged is that the applicable law of the torts alleged against the defendants is that of Russia. VTB argued that the applicable law is English law and that this has an important consequence in relation to the issue of whether England is clearly or distinctly the appropriate forum for these disputes.

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470

VTB Capital v Nutritek International  
(Lloyd LJ)

[2012] 2 CLC

The ‘VTB has suffered no loss’ point

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107. As noted above, Mr Lazarus argued this point for all three defendants. The steps in Mr Lazarus’ argument were as follows: first, the Facility Agreement and the Participation Agreement are indivisible parts of one transaction and neither would have existed without the other. Secondly, on VTB’s own case, both those agreements must have been induced by the same fraudulent misrepresentations for which Nutritek, Marcap BVI and Mr Malofeev are said to be responsible. Thirdly, therefore the same fraud (and conspiracy) which caused VTB to advance funds to RAP must also have caused VTB Moscow to advance funds to VTB under the Participation Agreement. Fourthly, because the same fraud (and conspiracy) caused both the outflow of funds from VTB to RAP and the inflow of funds to VTB from VTB Moscow, it cannot be argued that the outflow of funds from VTB and the inflow of funds from VTB Moscow were *res inter alios acta*, so as to create a loss when there was none. Fifthly, because VTB Moscow must have its own, independent claim to have suffered loss as a result of the torts committed by the defendants, there are insuperable problems of double recovery if VTB is permitted to pursue its ‘loss’ against the defendants, when the true loser must be VTB Moscow.

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108. In relation to the first point in the argument, Mr Lazarus noted that under Clause 4.1.1 of the Facility Agreement and also Schedule 2, Part 1, paragraph 2.1.2, it was a condition precedent of RAP being able to request an advance under that agreement that VTB should have received funds from VTB Moscow under the Participation Agreement. Further, by Clause 4.2.3 of the Facility Agreement, VTB was only obliged to make an advance to RAP once VTB Moscow had credited VTB’s account with funding in accordance with the Participation Agreement. Mr Lazarus pointed also to the provisions at Clauses 2.1 and 2.2 and 3.2 and 4.5(b) of the Participation Agreement. He submitted that the structure of the two agreements was such that VTB bore no risk from the transaction with RAP because it was bound to obtain funds from VTB Moscow and it was not bound to refund anything to VTB Moscow unless it actually received amounts from RAP. Accordingly, he submitted that VTB had, ‘in fact’, suffered no loss; rather, it was VTB Moscow that had done so.

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109. Mr Lazarus also relied on two well established principles of the law of damages in support of his argument. The first is that damages are to be awarded so as to put the ‘injured party’ in the position that it would have been in had it not sustained the wrong for which it now sought compensation or reparation: see *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25, at 39 per Lord Blackburn. The second is that, in the particular context of the tort of deceit, when a court is assessing the damages recoverable, the claimant has to give credit for any benefits which it has received ‘as a result of the transaction giving rise to the loss’: see *Smith New Court Securities Ltd v Citibank NA* [1996] CLC 1958 at 1965-6; [1997] AC 254 at 266H per Lord Browne-Wilkinson. Mr Lazarus submitted that the comparison in this case must be between the position that VTB would have been in had the torts not been committed and the position it was actually in as a result of the torts. The sums that

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CA

VTB Capital v Nutritek International  
(Lloyd LJ)

471

A VTB received from VTB Moscow were received ‘as a result of’ the operation of the Facility and the Participation Agreements which are to be regarded as part of the same transaction. Therefore the funds paid by VTB Moscow to VTB must, Mr Lazarus submitted, be taken into account; the exercise of ascertaining the loss suffered by VTB is not to be confined to benefits received under the actual Facility Agreement

B Moscow sums are taken into account, then it is clear, he submitted, that VTB itself has suffered no loss. The judge’s error, at paragraph 154, he submitted, was to concentrate on the Facility Agreement alone.

C 110. We can accept that the same fraudulent misrepresentations gave rise to the agreements to conclude both the Facility Agreement between VTB and RAP and the Participation Agreement between VTB and VTB Moscow. We can also accept that VTB would not have been prepared to enter into the obligations of the Facility Agreement if it had not had a source of funds with which to pay RAP pursuant to the Facility Agreement or to make the payment to RAP unless it had received funds from another source beforehand. But those facts alone do not solve the question of

D whether VTB has suffered any loss as a result of the defendants’ (assumed) torts against VTB. Clause 6.1(b) and (c) of the Participation Agreement states that the relationship between VTB and VTB Moscow is one of debtor and creditor and that VTB is not the agent or fiduciary or trustee of VTB Moscow. Thus when VTB Moscow paid over the sum of US\$225 million to VTB, that sum became the property

E of VTB. VTB was the owner of property (viz. a sum of US\$ 225 million) which it lent to RAP under the terms of the Facility Agreement. As soon as VTB parted with that money it suffered loss because (on the assumptions being made) the reason it had done so was the contractual obligation to RAP that was created as a result of the defendants’ torts. The position is the same as in the well-known case of *Forster v Outred* [1982] 1 WLR 86, in which the Court of Appeal held that a claimant who

F agreed to mortgage her house as security for an advance to her son suffered damage as soon as she entered into the mortgage deed in reliance on the negligent advice of her solicitors: see page 98 per Stephenson LJ and page 99 per Dunn LJ; Sir David Cairns agreed with both judgments. We accept that the amount of the loss will have become crystallised at a later stage, i.e. once the insufficiency of the security given by RAP was known. But VTB’s loss occurred, at the latest, when it paid over sums

G under the Facility Agreement.

H 111. Furthermore, we dismiss the argument that the judge erred in rejecting the submission that the funds that VTB received from VTB Moscow had to be taken into account. Those funds were not a ‘benefit received as a result of the transaction’ in Lord Browne-Wilkinson’s words. They were not a ‘benefit’; they were the source of the funding for the loan to RAP, rather than some additional benefit that resulted from the transaction overall and in consequence of the tort of the defendants. That is the type of ‘benefit’ which we think Lord Browne-Wilkinson had in mind. That analysis reflects what Viscount Haldane stated in *British Westinghouse v Underground Electric* [1912] AC 673 at 689, where he said:

472

VTB Capital v Nutritek International  
(Lloyd LJ)

[2012] 2 CLC

‘... when in the course of his business, he has taken action arising out of the transaction, which action has diminished his loss, the effect in the actual diminution of the loss he has suffered may be taken into account ... The subsequent transaction, if to be taken into account, must be one arising out of the consequences of the breach and in the ordinary course of business. This distinguishes such cases from a quite different class of case illustrated by *Bradburn* ... The reason of that decision was that it was not the accident, but a contract wholly independent of the relation between the plaintiff and the defendant which gave the plaintiff the advantage’.

112. The fact that VTB would not have parted with the money in the first place without being put in funds by VTB Moscow is irrelevant. VTB Moscow’s funding, under the separate and distinct Participation Agreement, was the source of VTB’s loan to RAP, not the consequence. Moreover, money is not the same as a physical object, which, once lost, might only be the subject of one damages claim (although there can be successive claims in respect of the same object, e.g. in conversion). Logically, the fact that the ultimate source of the funds defrayed by VTB to RAP was another party cannot diminish VTB’s loss. Otherwise, if Mr Lazarus’ argument were correct, then it would equally follow that VTB would have suffered no loss if the source of the funds advanced to RAP was another, entirely unconnected, third party as opposed to VTB Moscow.

113. Nor, we think, can the fact that the same fraudulent misrepresentation led to the conclusion of the Participation Agreement as well as the Facility Agreement be relevant. Just because the defendants have committed torts of the same type against two entities cannot, by itself, mean that only one of those entities has suffered damage. The torts, although of the same nature, are separate and distinct. In principle, each separate tort can give rise to a loss of a different party who is the victim of the tort.

114. Mr Lazarus relied heavily on the reasoning of Thomas J in *Interallianz Finanz AG v Independent Insurance Co Ltd* (judgment dated 30 May 1997, unreported). In that case Interallianz had lent £25.6 million to an SPV property company to enable it to refinance the purchase of a commercial property. Interallianz had obtained from the fourth defendant surveyors and valuers, Allsop and Company, an open market valuation of the property. Subsequently the SPV borrowers ceased paying interest on the loan and the SPV was eventually put into receivership and the property was sold for much less than the value as assessed by Allsop. Interallianz obtained mortgage indemnity insurance from Independent, who at first refused to pay but eventually the action against it by Interallianz was compromised. However, Interallianz continued its claim against Allsop for damages for professional negligence as to their valuation of the commercial property.

115. One of Allsop’s defences to the claim was that after the SPV had drawn down on the loan pursuant to the contract with Interallianz, the latter entered into sub-

CA

VTB Capital v Nutritek International  
(Lloyd LJ)

473

A participation agreements with five other financial institutions. That was done at a time when no one suspected that Allsop's valuation was negligent. The result of the sub-participation agreements was that Interallianz was left having to fund from its own resources only 12.56% of the total amount of the loan to the SPV. Allsop accepted that it did not owe any duty of care to the sub-participants, but it argued that the fact of these sub-participation agreements reduced Interallianz's loss to the net amount of the loan which it had to fund from its own resources. In response, Interallianz argued that the sub-participation agreements were *res inter alios acta* and, in any event, that it was under a duty to account to the sub-participants for their respective shares of any recovery that Interallianz made from Allsop.

C 116. Thomas J noted first (page 70), that the claim was not one in deceit. Therefore the principle stated by Lord Browne-Wilkinson in the *Smith New Court* case (referred to above) that in a claim in deceit a claimant had to bring into account all the benefits accruing from the relevant transaction, did not apply to that case. Secondly, Thomas J accepted that the issue in that case was whether the 'benefits' that Interallianz had obtained as a result of the sub-participation agreements had to be taken into account D depended on whether they were to be regarded as collateral or whether they were a result of a subsequent transaction which arose out of the consequences of the wrong founding the claim and in the ordinary course of business (page 70-71). He considered a number of statements of principle in leading cases, including that stated by Viscount Haldane in *British Westinghouse v Underground Railway* [1912] AC 673 at 689 E quoted above and those in the then current edition of *McGregor on Damages* (the 15th edn). He concluded that it was not possible to give a comprehensive definition of the circumstances when 'benefits' derived from third parties were to be regarded as collateral and so did not need to be taken into account when assessing the amount of a claimant's loss (page 72-3).

F 117. Thomas J concluded that Interallianz did not have to bring the 'benefits' of the sub-participations into account. He emphasised (at page 73-4): (1) the sub-participation agreements had been concluded when Interallianz had no knowledge of Allsop's breach or of any damage flowing from it; (2) therefore those 'benefits' did not arise out of the breach of duty or the loss, but were wholly independent of G them; (3) Interallianz's loss occurred on draw down of the loans to the SPV; (4) the sub-participation agreements were independent arrangements with others and the sub-participations by them did not have to be repaid; and (5) the fact that the sub-participations were concluded before Interallianz knew of Allsop's negligence, rather than after it became aware of it, was significant.

H 118. Mr Lazarus argued that the last factor was the key to Thomas J's decision. In the present case he submitted that all the relevant facts were known to both VTB and to VTB Moscow before the Facility Agreement was concluded (on 23 November 2007) and the Participation Agreement was concluded (on 28 November 2007). Therefore, the sums received by VTB from VTB Moscow were benefits obtained as a result of the transaction and must be taken into account. We do not agree. The whole

474

VTB Capital v Nutritek International  
(Lloyd LJ)

[2012] 2 CLC

basis of the claims against the defendants is that the two agreements were concluded in ignorance of any fraudulent misrepresentation by the defendants, just as much as Interallianz agreed to loan sums to the SPV in ignorance of the fact that the valuation given by Allsop was negligent.

119. We also cannot accept Mr Lazarus' argument that if VTB is entitled to recover substantial losses that would lead to insuperable difficulties of 'double recovery'. That argument looks at the issue from the wrong perspective. If the defendants have committed the torts alleged then they have committed the torts against both VTB and VTB Moscow. Each has, *prima facie*, suffered loss as a result of those torts. Each loss involves the property of the two separate banks. The fact that VTB Moscow supplied VTB with funds to lend to RAP does not make it 'one' loss. VTB Moscow may have obtained its funds from a third party and if that was the case it surely could not be argued that VTB Moscow had not suffered a loss as well as VTB itself. The fact remains (on the assumptions being made) that VTB Moscow parted with its property as a result of the torts alleged and so did VTB.

120. Lastly, we should deal with the fact that before the judge and before us there was considerable argument on whether, if VTB recovered damages from the defendants in the present litigation, it would be obliged to account to VTB Moscow for such recoveries. The judge held that VTB was under a duty to account to VTB Moscow either by virtue of clause 6.4(b) of the Participation Agreement or by virtue of an implied term of that agreement: see paragraph 168. We do not need to decide the point. Whether VTB is obliged or not to account to VTB Moscow for any damages VTB recovers in the present action cannot, logically, affect the question of whether VTB has suffered loss. Either it has or it has not; what (if any) its obligations are in relation to any damages that VTB recovers because it has suffered a loss as a result of the defendants' torts is a separate question.

121. Our conclusion is that, on the material presently available to us, there is a serious issue to be tried on whether VTB has suffered a loss as a result and VTB does have a good arguable case that it has sustained damage within the jurisdiction within sub-paragraph (9)(a) of paragraph 3.1 of Practice Direction 6B.

#### **VTB's case against Marcap BVI of participation in the alleged fraud/conspiracy**

122. VTB challenges the judge's conclusion, at paragraph 176, that there is no serious issue to be tried between VTB and Marcap BVI that it is jointly liable for the fraudulent misrepresentation or that it took part in the conspiracy. The judge noted (at paragraph 170) that it was common ground before him that the question of whether a person is a party to a conspiracy is essentially the same as whether he is liable as a joint tortfeasor by reason of having participated in a common design and that it was not necessary to show that the person himself committed the tort. (See, respectively: *Clerk & Lindsell on Torts*, 20th edn at 24.94 and *Dadourian Group International Inc v Simms* [2009] 1 Ll Rep 601 at paragraph 84 per Arden LJ.) That remained common

CA

VTB Capital v Nutritek International  
(Lloyd LJ)

475

A ground before us. It was also common ground that Marcap BVI is a BVI holding company which is part of the Marcap group of companies, that it has no employees or operations of its own and that its beneficial owners are Mr Malofeev and Mr Sazhinov.

B 123. VTB's pleaded case is summarised by the judge at paragraph 171 of the judgment. To summarise that summary, its case is: (1) the Marcap group, through Marcap BVI, controlled and beneficially owned Nutritek at the time of the Facility Agreement and the SPA; (2) the Marcap group stood to benefit from the deceit on VTB; (3) the whole transaction under which VTB was defrauded was co-ordinated by the Marcap group; (4) Mr Malofeev exercised substantial control over the Marcap group including Marcap BVI; (5) Mr Malofeev was closely involved in the whole transaction and it was introduced to VTB and VTB Moscow by him and it must have taken place with his approval and encouragement. Finally, VTB alleges in paragraph C 69 of the Particulars of Claim:

D 'The only inference that can reasonably be drawn is that the Marcap group and Mr Malofeev were party to a conspiracy with Nutritek to defraud VTB. Further, it is reasonable to infer that the Marcap companies involved included not only Marcap Moscow but also Marcap BVI which owned at least a little under half of Nutritek'.

E 124. The judge's conclusion (at paragraph 176) was that there was nothing in VTB's pleaded case to found a case that Mr Malofeev had authority, express or implied, to act on behalf of Marcap BVI to involve it in the actions that constituted the torts alleged. His actions were entirely equivocal: reference was made to a case emphasising the difficulty of implying from equivocal conduct a contract for the carriage of goods by sea: *The Aramis* [1989] 1 Ll Rep 213. The judge also rejected F arguments which were not specifically pleaded but were based on evidence to the effect that one of the directors of Marcap BVI, Phillippe Houman, had, in September 2007, signed a loan agreement on behalf of another company, Leskata, which was linked to a subordinated loan obtained by RAP for the balance of the purchase price of the dairy companies; that he had signed another loan agreement, in favour of RAP, G on behalf of a further company, Madinter, in January 2009 and that Mr Houman had signed further documents in September 2011 when Mr Malofeev was attempting to get the WFO discharged.

H 125. Before us, Mr Freedman on behalf of VTB submitted, first, that at this very early stage of the case, VTB cannot be expected to be in a position to set out the precise basis on which Marcap BVI may have been involved in the fraud. However, the fact that Mr Malofeev is one of the two beneficial owners of Marcap BVI is support for the inference that Mr Malofeev had the authority of Marcap BVI to act as its agent in the fraudulent deception of VTB and that Marcap BVI, acting through the agency of Mr Malofeev, was therefore a joint conspirator to defraud VTB. Secondly, Mr Freedman submitted that there were sufficient pleaded facts about the actions of

476

VTB Capital v Nutritek International  
(Lloyd LJ)

[2012] 2 CLC

Mr Malofeev to be capable, if proved, of leading a court to infer that there was an agency relationship between Mr Malofeev (as agent) and Marcap BVI.

126. This issue does not concern the second principal component for deciding whether permission to serve out of the jurisdiction should be granted, viz. whether the claim falls into one of the classes set out in paragraph 3.1 of Practice Direction 6B. It concerns only the question of whether there is a serious issue to be tried as to whether Marcap BVI was a party to the torts alleged to have been committed against VTB. In our view, although the current case against Marcap BVI is thin, there is enough in the pleaded case as supported by uncontested facts to conclude that there is a triable issue. We think this follows from the combination of the following factors: (1) Mr Malofeev is one of the two directing minds and wills of Marcap BVI; in principle the knowledge of a directing mind of a company will be attributed to the company itself (save in circumstances which are not material here). (2) Mr Malofeev set up the Marcap group including Marcap BVI. (3) Marcap BVI was a part owner of Nutritek and therefore an important element in the chain of ownership between Mr Malofeev and Nutritek. (4) Mr Malofeev and the Marcap group were heavily involved in the negotiations leading to the Facility Agreement and SPA and, on VTB's case, Mr Malofeev was the maker of the fraudulent misrepresentations. (5) The actions of Mr Malofeev are capable, if proved, of leading a court to infer that there was an agency relationship between Mr Malofeev (as agent) and Marcap BVI (as principal), in circumstances where Mr Malofeev is part of the 'directing mind' of Marcap BVI.

127. We conclude, therefore: (1) the judge was correct to reject the defendants' argument that VTB had suffered no loss; but (2) the judge was wrong to conclude that VTB had no reasonable prospect of success in establishing that Marcap BVI was, through the agency of Mr Malofeev, a party to the torts against VTB.

### **Is England and Wales clearly or distinctly the appropriate forum in which the claim of VTB against the defendants should be determined?**

#### *General*

128. The judge stated, at paragraph 185 of the judgment, that, based on the principles set out in the speech of Lord Goff of Chieveley in *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460, the question of whether England is clearly or distinctly the appropriate forum so that in all the circumstances the court ought to exercise its discretion to permit service of the proceedings out of the jurisdiction is normally approached in two stages. He said that the first stage is to ask whether England is the 'natural forum', i.e. that with which the action has its 'most real and substantial connection'. If it is not, then the second stage is to ask whether England is nevertheless the appropriate forum, in particular because there is a real risk that the claimant will not obtain substantial justice in the (non-English) 'natural' forum.

CA

VTB Capital v Nutritek International  
(Lloyd LJ)

477

A 129. With great respect to the judge, we think he may have erred in his interpretation of Lord Goff's speech in *Spiliada*. In that case the application was to set aside leave to serve proceedings out of the jurisdiction where shipowners wished to sue (in the Commercial Court) shippers under bills of lading governed by English law. The application to set aside the leave granted *ex parte* was made on the basis that England was not the appropriate forum, but the bills of British Columbia were – for various reasons. Lord Goff (who had been leading counsel in *The Atlantic Star* [1974] AC 436, in which he had argued, with only partial success, for the adoption in England of the Scots doctrine of *forum non conveniens*), used the opportunity to propound the basic principles of how a court should deal with the issue of the appropriate forum in two different circumstances. The first is where a claimant has served proceedings on the defendant in England 'as of right' (e.g. because the defendant was in the jurisdiction or a ship was arrested here) and there is then an application to stay English proceedings on the basis that another forum is more appropriate than England. The second is where there is an application to serve proceedings out of the jurisdiction under what was then RSC Order 11, and is now paragraph 3.1 of the Practice Direction 6B of the CPR. It was in relation to the first of these cases that Lord Goff adumbrated the two stage test. He concluded that, at the first stage, it is for the defendant to satisfy the court that there is another forum which is *prima facie* the 'appropriate' forum for the trial of the action. If the defendant did so, then the second stage is to decide whether there are special circumstances by reason of which justice required that the trial should, nevertheless, take place in England: see page 476D–E. It is in connection with the first stage exercise in such 'stay' cases that Lord Goff used the expressions, (culled from *The Abidin Daver* [1984] AC 398 at 415, per Lord Keith of Kinkel), the 'natural forum', as being that 'with which the action had the most real and substantial connection'.

F 130. Lord Goff accepted that the fundamental principle, as stated by Lord Kinnear in *Sim v Robinow* (1892) 19 R 665, 668: viz. that the court has to identify the forum '... in which the case can be suitably tried for the interests of all the parties and for the ends of justice', is the same in both 'stay' cases and 'service out of the jurisdiction' cases: see page 480G. In 'service out' cases, the burden is on the claimant to show that England is clearly or distinctly that forum: see page 481E. In relation to 'service out' cases the court does, of course, have to consider the issue of legitimate juridical or personal advantages and disadvantages of the contending forums to both sides in the litigation; but it does so by reference to the fundamental principle of which the case may be tried 'suitably for the interests of all the parties and the ends of justice', to use Lord Kinnear's words again: see Lord Goff's speech at 483D. In deciding where the overall balance lies, the court has to consider the factors in favour of one side or another in one jurisdiction or another.

131. Thus, we prefer to formulate the principle in a different way from the judge. In our view the court will only grant permission to serve proceedings out of the jurisdiction if, overall, it is satisfied by the claimant that England is clearly or distinctly the appropriate forum. Alternatively, to adopt the words of the CPR rule

478

VTB Capital v Nutritek International  
(Lloyd LJ)

[2012] 2 CLC

6.37(3), the court has to be satisfied by the claimant that England and Wales is the proper place in which to bring the claim. A

132. VTB challenges the judge's conclusion, at paragraph 195 of his judgment, that Russia is the 'the natural forum' for the resolution of the disputes between VTB and the defendants. VTB's case is that the judge erred in law because (1) he failed to have regard to the fact that the wrongs committed against VTB were committed in England; so that (2) England is the 'presumptive' appropriate forum for the resolution of VTB's claims; and (3) none of the matters relied on by the defendants (including the applicable law of the torts and matters relating to administrative convenience) were sufficient to rebut that presumption. B

133. We will therefore deal the following four questions: (1) can it be said where the wrongs alleged were committed against VTB; if so and if the answer to that question is 'England', then (2) does that mean that England is to be regarded as the 'presumptive' appropriate forum for the resolution of VTB's claims; (3) can VTB establish, on the material presently available, that there is a 'good arguable case' that English law is the applicable law of the torts it alleges have been committed against it by the defendants; if so (4) how does that affect the overall question of whether VTB has demonstrated that England is clearly the appropriate forum for the resolution of the disputes? C

#### Where were the torts committed? D

134. The judge concluded, at paragraph 135 of his judgment, that the misrepresentations alleged were 'made and mainly received in Russia' and that they were primarily relied on in Russia, 'since it was VTB Moscow's Credit Committee and Management Board which made the essential decision to enter into the proposed transaction in reliance on those representations. VTB's reliance was wholly secondary'. He went on to accept that the loss suffered by VTB was sustained in England, but he held that this loss was sustained because of 'the inadequate security provided by assets in Russia which were the subject of the misrepresentations'. Furthermore, the 'ultimate economic impact' was felt by VTB Moscow, to whom VTB had to account for any recoveries, on the judge's construction of the express terms of the Participation Agreement. E

135. In relation to the conspiracy, the judge found that it had been 'hatched in Russia'. The judge held that this fact was important because it not only founded the claim in conspiracy but it was also an important aspect of VTB's claims against Marcap Moscow and Mr Malofeev as joint tortfeasors in relation to the deceit. So the judge's overall conclusion was that 'the most significant events constituting both torts occurred in Russia': see paragraph 135 of the judgment. F

136. Mr Freedman submitted that the judge failed properly to take into account the fact that it was only the representations that were made to VTB that mattered, not G

CA

VTB Capital v Nutritek International  
(Lloyd LJ)

479

A those made to VTB Moscow. He emphasised that, before the judge, the defendants' passed on to or confirmed to VTB in London. Further, he noted two factual points. The first was that there was unchallenged evidence before the judge (in witness statements of Mr Tulupov and Mr Muraviev) that VTB's own procedures and processes had to be completed satisfactorily before any loan could be made by VTB to RAP, whatever the views of VTB Moscow. The second was that Mr Tulupov's evidence was that the person responsible primarily for the conduct of the loan transaction on behalf of VTB was Mr Tulupov's opposite number in London, Ms Marina Bragina. (She has not given any statement, as the defendants were at pains to emphasise). Thus the two vital e-mails of 6 and 8 November 2007, said to evidence the fact that the alleged misrepresentations as to common ownership and control had been made, were sent by Ms Bragina from her office in London.

D 137. Mr Freedman therefore submitted that both of the asserted misrepresentations were received by VTB and acted on by VTB in London. The judge was therefore wrong, he argued, to conclude (at paragraph 135) that the misrepresentations were 'made and mainly received in Russia' and that they were 'primarily relied on in Russia', because it was VTB Moscow's Credit Committee and Management Board who made the essential decision and so VTB's reliance was 'wholly secondary'.

E F G 138. Mr Milligan presented the argument on this issue on behalf of the defendants. He accepted that the misrepresentations may have been received in England but, he submitted, the centre of gravity of the alleged torts was in Moscow, as the judge correctly found. He relied particularly on the fact that, as Mr Muraviev stated in his witness statement, it was sufficient for the loan to proceed if it was approved by Mr Ryzhkov, the head of Acquisitions and Leverage Finance of VTB, who, Mr Milligan stated, was based in Moscow, as appears clearly from his e-mail address. The 2007 E&Y Moscow valuation was also sent to Mr Ryzhkov. He submitted that the judge was correct to characterise the misrepresentations as being made and mainly received in Russia and that they were primarily relied on in Russia. Therefore, even if, as the judge accepted, the loss suffered by VTB was sustained in England, he was correct to say that the ultimate economic impact was sustained in Russia.

H 139. We will have to examine in rather more detail below the significance of the different elements of the events constituting the torts of deceit and conspiracy and where they occurred in the context of the argument concerning the applicable law of the torts alleged. Some elements occurred in Russia, even on VTB's own case. But we think that it has to be accepted that, in terms of sub-paragraph (9)(a) of paragraph 3.1 of Practice Direction 6B, VTB is entitled to say that it has a good arguable case that its loss was sustained in England and Wales. That was the judge's conclusion and there was nothing in Mr Milligan's argument which undermines it. Therefore the next question is whether this gives rise to any 'presumption' that England is the 'natural forum' or the 'appropriate forum' for the resolution of these disputes.

**Does this give rise to a ‘presumption’ that England is the ‘natural forum’ or the ‘appropriate forum’ for the resolution of these disputes?**

140. For VTB, Mr Freedman argued that if it is established that there is a good arguable case that the loss was sustained in England, then there is a ‘presumption’ that England is the ‘natural forum’ in which to prosecute a claim in respect of the tort giving rise to that loss. For this proposition he relied on statements of Lord Pearson in *Distillers Co (Biochemicals) Ltd v Thompson* [1971] AC 458 at 468, and of Ackner and Goff LJ in *Cordoba Shipping Co v National State Bank, Elizabeth, New Jersey (The Albaforth)* [1984] 2 Ll Rep 91 at 94 and 96. Those cases were decided under the old provisions of RSC Order 11 rule 1(1)(h), which entitled the court to grant leave to serve proceedings out of the jurisdiction when the claim was founded on a tort committed within the jurisdiction. Mr Freedman submitted that, after the terms of that paragraph were changed (and when it had become sub-paragraph (f) of RSC Order 11 rule 1(1)) so that leave could be granted when the claim was founded on a tort ‘and the damage was sustained or resulted from an act committed within the jurisdiction’, and after the *Spiliada* case, the majority of the House of Lords applied the same approach in *Berezovsky v Michaels* [2000] 1 WLR 1004, a defamation case. He also relied on the decision of Tugendhat J in a subsequent defamation case, *Lennon v Scottish Daily Record and Sunday Mail Ltd* [2004] EMLR 18.

141. If the words used by Ackner and Goff LJ in *The Albaforth* are examined closely, it is clear that neither Lord Justice stated the proposition that there was a presumption that the country where the tort was committed was the ‘natural forum’ for the resolution of a claim arising out of that tort. Ackner LJ referred to it being ‘prima facie’ the natural forum: see 94. Goff LJ said that ‘if the substance of an alleged tort is committed within a certain jurisdiction, it is not easy to imagine what other facts could displace the conclusion that the courts of that jurisdiction are the natural forum’: page 96. When Lord Steyn came to analyse the effect of the decisions in the *Distillers Co (Biochemicals)* case, *The Albaforth* and subsequent cases in *Berezovsky v Michaels*, he noted (at 1014D) that counsel for Mr Michaels, the editor of *Forbes* magazine and defendant in the libel action, accepted that he could not object to a proposition that the place where the substance of the tort arises ‘is a weighty factor pointing to that jurisdiction being the appropriate one’. Lord Steyn continued (at 1014E):

‘This illustrates the weakness of the argument. The distinction between a prima facie position and treating the same factor as a weighty circumstance pointing in the same direction is a rather fine one. For my part the *Albaforth* line of authority is well established, tried and tested and unobjectionable in principle. I would hold that Hirst LJ [who gave the decision in the Court of Appeal] correctly relied on these decisions’.

CA

VTB Capital v Nutritek International  
(Lloyd LJ)

481

A 142. Lord Nolan gave a short speech to the same effect. Lord Hobhouse of Woodborough agreed with Lord Steyn. Lord Hoffmann and Lord Hope of Craighead dissented, but Lord Hope said, on this point (at 1031E), that he agreed with Lord Steyn for the reasons he gave that Hirst LJ was right to rely on the *Albaforth* line of authority. He continued:

B ‘Like him, I would reject the argument [of counsel] advanced that the application of the *Spiliada* test did not admit of the application in this case of the principle that the jurisdiction in which the tort is committed is prima facie the natural forum for the dispute’.

C 143. The judgment of Tugendhat J in *Lennon v Scottish Daily Record and Sunday Mail Ltd* takes the matter no further.

D 144. We conclude that the most that can be extracted from the House of Lords’ decision in the *Berezovsky* case is that where a tort is committed within this jurisdiction then that jurisdiction is, *prima facie*, the natural forum for the resolution of claims arising from it. But two points are important. First, it has not been stated that this principle applies where the *loss* is sustained in the jurisdiction but other elements of the tort occur elsewhere. We will examine below the submissions of the parties on where the various elements of the torts alleged to have been suffered by VTB took place and what the consequences of our conclusions must be. Secondly,  
E the statements made in the *Berezovsky* case can only describe, at best, a *prima facie* position. That cannot detract from the overall test which has to be applied. This remains that permission to serve out of the jurisdiction will only be granted if the claimant demonstrates that England is clearly or distinctly the appropriate forum for the resolution of the dispute. Thus, we conclude, there is no ‘presumption’ in favour  
F of England being either the natural or the appropriate forum in this case.

### The law applicable to VTB’s claims in tort

G 145. The Council Regulation 864/2007/EC of 31 July 2007 on the law applicable to non-contractual obligations (known as ‘Rome II’), only applies to claims relating to damage which occurred after 11 January 2009. That point was determined by  
H the Court of Justice of the European Union in *Homawoo v GMF Assurances SA* (Case C-412/100) judgment given on 17 November 2011. The damage in this case would have occurred after November 2007 but before January 2009. Therefore it was common ground before us that the question of the applicable law of the torts must be determined in accordance with the English conflict of laws rules set out in sections 11 and 12 of the *Private International Law (Miscellaneous Provisions) Act 1995* (‘the 1995 Act’). It was also common ground that the issues arising in the claims that have been pleaded in tort are ‘... issues relating to tort or delict’ within the terms of section 9(2) of the 1995 Act; see the discussion in *Trafigura Beheer BV v Kookmin Bank Co* [2006] 1 CLC 1049 at paragraphs 63 to 70 per Aikens J.

146. Sections 11 and 12 of the 1995 Act provide as follows:

‘Choice of applicable law: the general rule.

11(1) The general rule is that the applicable law is the law of the country in which the events constituting the tort or delict in question occur.

(2) Where elements of those events occur in different countries, the applicable law under the general rule is to be taken as being:

(a) for a cause of action in respect of personal injury caused to an individual or death resulting from personal injury, the law of the country where the individual was when he sustained the injury;

(b) for a cause of action in respect of damage to property, the law of the country where the property was when it was damaged; and

(c) in any other case, the law of the country in which the most significant element or elements of those events occurred.

(3) In this section “personal injury” includes disease or any impairment of physical or mental condition.

Choice of applicable law: displacement of general rule.

12(1) If it appears, in all the circumstances, from a comparison of:

(a) the significance of the factors which connect a tort or delict with the country whose law would be the applicable law under the general rule; and

(b) the significance of any factors connecting the tort or delict with another country, that it is substantially more appropriate for the applicable law for determining the issues arising in the case, or any of those issues, to be the law of the other country, the general rule is displaced and the applicable law for determining those issues or that issue (as the case may be) is the law of that other country.

(2) The factors that may be taken into account as connecting a tort or delict with a country for the purposes of this section include, in particular, factors relating to the parties, to any of the events which constitute the tort or delict in question or to any of the circumstances or consequences of those events.’

147. These sections have been analysed in four decisions to which both the judge and we were referred: *Morin v Bonhams & Brooks Ltd* [2004] 1 CLC 632 (CA); *Dornoch Ltd v Mauritius Union Assurance Co Ltd* [2006] 11 Rep IR 127 (Aikens

CA

VTB Capital v Nutritek International  
(Lloyd LJ)

483

A J) and [2006] 1 CLC 714 (CA); *Trafigura Beheer BV v Kookmin Bank Co* [2006] 1  
CLC 1049 (Aikens J); and *Fiona Trust & Holding Corp v Privalov* [2010] EWHC  
3199 (Comm) (Andrew Smith J). The following propositions relevant to the present  
case can be derived from those cases and from our own consideration of the statutory  
provisions; the first six concern section 11 and section 11(2)(c) in particular. The  
remainder concern section 12.

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148. (1) Section 11 of the 1995 Act sets out the general rule for ascertaining the  
applicable law of a tort. It adopts a geographical approach to that question. (2) Where  
the elements of the events constituting the tort or delict occur in different countries  
and the cause of action relates to something other than personal injury or damage to  
property, then section 11(2)(c) requires an analysis of all the elements of the events  
constituting the tort in question. (3) In carrying out that exercise, it is the English  
law constituents of the tort that matter. (4) The analysis requires examination of the  
'intrinsic nature' of the elements of the events constituting the tort. It does not, at  
this stage, involve an examination of the nature or closeness of any tie between the  
element and the country where that element was involved or took place. This latter  
exercise is only relevant if section 12 is invoked. (5) Once the different elements of  
the events and the country in which they occurred have been identified, the court has  
to make a 'value judgment' regarding the 'significance' of each of those 'elements'.  
'Significance' means the significance of the element in relation to the tort in question,  
rather than trying to judge which involves the most elaborate factual investigation.  
(6) Under section 11(2)(c), (i.e. in relation to causes of action other than in respect of  
personal injury or damage to property where the elements of the events constituting  
the tort occur in different countries) the applicable law of the tort in question will  
be that of the country where the significance of one element or several elements of  
events outweighs or outweigh the significance of any element or elements found in  
any other country.

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149. If section 12 has to be considered, we derive the following additional  
propositions from our consideration of the statute and the cases. (7) The exercise  
to be conducted under section 12 is carried out after the court has determined the  
significance of the factors which connect a tort or delict to the country whose law  
would therefore be the applicable law under the general rule. (8) At this stage there  
has to be a comparison between the significance of those factors with the significance  
of any factors connecting the tort or delict with any other country. The question is  
whether, on that comparison, it is 'substantially more appropriate' for the applicable  
law to be the law of the other country so as to displace the applicable law as  
determined under the 'general rule'. (9) The factors which may be taken into account  
as connecting a tort or delict with a country other than that determined as being the  
country of the applicable law under the general rule are potentially much wider than  
the 'elements of the events constituting the tort' in section 11. They can include  
factors relating to the parties' connections with another country, the connections with  
another country of any of the events which constitute the tort or delict in question  
or the connection with another country of any of the circumstances or consequences

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484

VTB Capital v Nutritek International  
(Lloyd LJ)

[2012] 2 CLC

of those events which constitute the tort or delict. (10) In particular the factors can include (a) a pre-existing relationship of the parties, whether contractual or otherwise; (b) any applicable law expressly or impliedly chosen by the parties to apply to that relationship, and (c) whether the pre-existing relationship is connected with the events which constitute the relevant tort or delict.

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150. Two further but important points emerge from the decision of Aikens J and this court in the *Dornoch* case. The first is that if this exercise is being carried out at the interlocutory stage as part of an overall exercise to determine whether the English court should have jurisdiction to determine the claim in tort in question, the court cannot finally determine the applicable law of the tort. That was accepted to be so in relation to contract in *Dornoch* (see the CA decision at paragraph 40) and must also follow if there is an interlocutory issue as to the applicable law of the tort. The second is that it is 'quintessentially' for the judge to make an assessment of the significance of the elements of the events constituting the tort for the purposes of section 11(2) (c). The court will not interfere with that assessment unless it is satisfied that the judge 'made such an error in his assessment as to require this court to make its own assessment': see the judgment of Tuckey LJ at paragraphs 46 and 47, with which Sir Mark Potter, President, and May LJ agreed.

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151. The judge identified three elements of the tort of deceit at paragraph 132 of his judgment: (i) the making of fraudulent misrepresentations to a person; (ii) reliance by that person on those misrepresentations; and (iii) resultant loss by that person. He said that the tort of an 'unlawful means' conspiracy added the element of a combination between the conspirators to make the fraudulent misrepresentations. The judge indicated that he would assume the facts alleged by VTB to be true for the purposes of his analysis on the applicable law issue.

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152. The judge's conclusion of his analysis of the elements of the tort of deceit is at paragraph 135 of his judgment. VTB's criticism focused on the following evaluations of the significance of the various elements considered by the judge: (i) that the misrepresentations were made 'and mainly received' in Russia; (ii) that the misrepresentations were 'primarily relied on in Russia', because it was VTB Moscow's Credit Committee and Management Board which made the essential decision to enter into the proposed transaction in reliance on those misrepresentations, whereas 'VTB's reliance was wholly secondary'; and (iii) although VTB's loss was sustained in England it was because of 'the inadequate security provided by assets in Russia which were the subject of the misrepresentations' and, further, the 'ultimate economic impact is felt by VTB Moscow to which VTB must account for its recoveries'.

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153. In the same paragraph the judge said, in relation to the tort of conspiracy, that it 'seems clearly to have been hatched in Russia'. He said that point was important because it founded not only the claim in conspiracy but it was also 'an important aspect' of VTB's claims against Marcap Moscow and Mr Malofeev as

CA

VTB Capital v Nutritek International  
(Lloyd LJ)

485

A joint tortfeasors in relation to the deceit. The judge therefore concluded that the most significant elements of both torts were in Russia so that the applicable law of both torts was Russian law.

B 154. We have concluded that there is some force in VTB's criticisms of the judge's approach to the assessment of the significance of the various elements that he identified. First, we accept that the misrepresentations would have been made in Russia in the first place, but the judge does not appear to have taken account of the admitted fact that they were passed on to or confirmed to VTB in London. Secondly, whilst we accept also that VTB Moscow's Credit Committee and Management Board had to make the decision to take part in the enterprise before the transaction between VTB and RAP could take place, the judge does not appear to have taken into account the unchallenged evidence that VTB had its own procedures and processes that needed to be completed satisfactorily before it could enter into the Facility Agreement. At least one vital person, Miss Bragina, was based in London. Thirdly, whilst we also accept that there was an 'economic impact' on VTB Moscow, that is beside the point when the focus has to be on the significance of the elements of the events that constitute the tort committed against VTB. As we have already stated above, VTB suffered loss as soon as the transfer of funds from it to RAP was made; the crystallisation of the extent of that loss occurred later after credit had been given for the value of such security as did exist in Russia.

E 155. However, we think that the most important error in approach of the judge is that he does not appear to have made a value judgment as to the significance of the 'intrinsic nature of the element(s) of the tort ...' in the phrase of Mance LJ in *Morin v Bonhams & Brooks Ltd*, at paragraph 21. This must mean that the judge has to decide what is or are the most significant element or elements in relation to the tort of deceit (or conspiracy) on the facts of this case. In relation to the deceit, is it the making of the fraudulent misrepresentation that is the most significant element, or its transmission to VTB or its reception by VTB or is it the damage resulting? In relation to the conspiracy, what is the significance of the plot being hatched in Russia?

G 156. As for the tort of conspiracy, VTB argued that there was no evidence that the conspiracy was hatched in Russia and the judge did not explain the basis for that conclusion. However, VTB cannot point to any evidence to show that it has the better of the argument in demonstrating that the conspiracy was hatched elsewhere than in Russia. In our view the judge was entitled to draw the conclusion from the fact that Mr Malofeev is a Russian businessman, whose business activities are at least heavily centred in Russia and where the companies at the centre of the alleged conspiracy, that is to say Nutritek, Marcap Moscow and RAP, are also either owned or operated in Russia.

H 157. We have concluded that the errors in the judge's approach to the significance of the different elements of the events constituting the two torts entitles this court to make a reassessment of their significance. In our view, on the facts of this case, we

486

VTB Capital v Nutritek International  
(Lloyd LJ)

[2012] 2 CLC

judge that the most important elements of the facts constituting the tort of deceit are, by their 'intrinsic nature', the reliance on the misrepresentations by VTB and the loss suffered by VTB. Although there was some reliance by VTB in Russia (because the statements were first made there), the more important reliance must have been in England because the completion of the Facility Agreement and the necessary regulatory processes in England would not have gone ahead without reliance in this country. The judge accepted that the loss suffered by VTB was sustained in England.

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158. Based on section 11(2)(c) alone, our tentative conclusion would be that the most significant elements of the events constituting the tort of deceit took place in England so that, under the 'general rule', the applicable law of the deceit is English law. However, we are not convinced that VTB has 'by far the better of the argument' on this question. It seems to us that the arguments are evenly balanced. In relation to conspiracy, we think that there is considerable significance in the element of the initial agreement of the conspirators. Our inclination is to say that, in relation to conspiracy, the arguments on the significance of the events constituting that tort are very evenly balanced.

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159. This means that, in both cases, we have to go on to consider section 12, which requires us to make a comparison of the significance of the factors which connect a tort with the country whose law would be the applicable law under section 11(2)(c) with any factors which connect the tort with another country. We have to ask: is it substantially more appropriate for the applicable law of that other country to be the one that determines the issues (in tort) arising in the case; if it is then the applicable law will be that of the other country. The test is specific to the issues that arise in the particular case concerned. As already noted, section 12(2) makes it plain that a broad range of factors can be considered in this exercise.

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160. We agree with the judge's conclusion that the fact that the Facility Agreement, ISA and SPA all contained English law and English jurisdiction or arbitration agreements is not a significant factor, for the reasons that he gives at paragraphs 142 and 143, which we need not repeat. As to other pointers, we have to take into account factors relating to the parties, the events constituting the torts in question and the circumstances and consequences of those events. Moreover, these are all factors that also have to be taken into account in deciding whether England is the appropriate forum. The judge considered those factors, (albeit for the purposes of seeing whether England was the 'natural' forum as part of a two stage exercise, on which we have commented above), at paragraphs 186 to 195. The judge concluded that the factors pointed to Russia being the 'natural' forum for the resolution of these disputes.

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161. On appeal, VTB has only criticised certain conclusions to which the judge referred in those paragraphs, viz. the reliance of VTB being secondary to that of VTB Moscow and the loss being caused because the Russian assets provided inadequate security: see paragraph 187 of his judgment. We have accepted that those criticisms have force. However, VTB does not challenge the judge's analysis of the connection

CA

VTB Capital v Nutritek International  
(Lloyd LJ)

487

A with Russia of the parties to the transactions and the other entities involved in the  
circumstances and consequences of the events which constitute the torts in question,  
as set out at paragraph 188 of his judgment. Nor does VTB challenge the connections  
with Russia of the events constituting the torts that are identified in paragraph 189 of  
the judgment, apart from the conclusion that the misrepresentations were primarily  
B Board in Russia. Even if that is discounted, it still leaves many factors connecting the  
torts with Russia.

162. Mr Freedman did argue, however, that when the judge was considering  
section 12 for the purposes of deciding the applicable law issue, he failed to take  
C relevant factors into account. The first was that VTB is an English company.  
Secondly, he should have taken account of the fact that the purpose of the fraud was  
to induce VTB to enter into a loan facility contract in London governed by English  
law. This, he submitted, was clear from the third term sheet of 8 October 2007 and the  
D e-mail of DLGM of 15 October 2007 which stated that the facility was to be governed  
by English law. These indications were given before the key misrepresentations were  
made as to the companies being under separate control and before passing on the 2007  
E&Y valuation based on the Nutritek figures. Mr Freedman submitted that those were  
powerful factors connecting the torts with England, not Russia.

163. We take account of those points. However, in our view the factors identified  
E in the judgment at paragraphs 188 and 189, even after discounting the point about  
primary reliance on the representations in Russia and the securities being in Russia,  
are of considerable significance. On the material that is before us, taking all those  
factors into account we have concluded that the centre of gravity of these torts lies  
in Russia. Therefore, for present purposes, we have decided that a comparison of  
F the significance of the section 11(2)(c) factors, assuming that they would lead to the  
applicable law being English, with the significance of the other factors connecting the  
torts with Russia, leads to the conclusion that it is substantially more appropriate for  
the applicable law for determining the issues concerning the torts to be that of Russia.

**G Was the judge wrong to conclude that VTB had failed to demonstrate that  
England was ‘clearly or distinctly the appropriate forum’ to determine these  
disputes for the ends of justice and in the interests of all the parties?**

164. We have already commented that the judge may have erred in his  
interpretation of the test adumbrated in the Spiliada case. Instead of asking first  
H whether England was the ‘natural forum’ and then, even if it is not, asking whether  
England is nevertheless the appropriate forum for other reasons, there is only one  
overall question to be answered: has VTB established that England is clearly or  
distinctly the appropriate forum?

165. In our view the judge was correct to conclude that VTB has failed to do so.  
The steps leading to our conclusions are as follows: first, we will assume (based on

488

VTB Capital v Nutritek International  
(Lloyd LJ)

[2012] 2 CLC

our discussion above) that the fact that VTB has sustained its loss resulting from the torts in England raises a prima facie case that England is the appropriate forum in which to try the disputes. Secondly, however, we have to take account of all the other factors identified by both sides in order to determine whether VTB has satisfied the court that England is clearly or distinctly the appropriate forum.

166. Thirdly, in that regard, we have concluded, on the basis of the material presently before us, that the applicable law of the torts is Russian law. That cannot be a concluded view. Wherever a trial takes place, it can be challenged. But that point works both ways. Even if we had concluded that the applicable law of the torts was English law, this would not have been a factor that would weigh heavily in making England the appropriate forum, precisely because if the defendants wished to allege and plead that the applicable law was Russian law, both sides would have had to prepare for a trial on that basis. If the case were to be heard in England, both sides would have to prepare expert evidence on Russian law; and, doubtless, the obverse would be so if the case were to be heard in Russia. This is not a case, such as we think Lord Goff of Chieveley contemplated in *Spiliada* at 481G, where the law of the contract is a known certainty. In this case the applicable law of the torts remains very much in issue. Moreover, there was no serious challenge to the judge's view (at paragraph 194) that the key issues in the case are likely to be factual rather than legal.

167. Fourthly, we have to give due weight to all the other factors (apart from those where we have found the judge erred) which the judge took into account and which have not been challenged on appeal. These are set out at paragraphs 188 and 189 of the judgment and, as we have indicated in relation to the applicable law point, we think that these indicate that the centre of gravity of these disputes is in Russia, not England. Fifthly, VTB has not challenged the judge's conclusion that VTB had failed to show that there was a real risk that it would not obtain substantial justice in Russia for any of the reasons it advanced before him.

168. Accordingly, the judge was correct to set aside Chief Master Winegarten's order granting VTB permission to serve the proceedings on Nutritek, Marcap BVI and Mr Malofeev out of the jurisdiction.

### The WFO

169. Since we have concluded that the judge was right not to allow VTB to amend its Particulars of Claim to make a claim in contract against Marcap BVI, Marcap Moscow and Mr Malofeev, and that he was right to hold that the order granting permission to serve the proceedings on Nutritek, Marcap BVI and Mr Malofeev out of the jurisdiction should be set aside, the question of continuing the WFO does not arise for decision, any more than it did before the judge.

170. The point was fully argued before us, both as to whether VTB's case as put to the judge justified the grant of such an injunction and as to whether the grant was

CA

VTB Capital v Nutritek International  
(Lloyd LJ)

489

A vitiated by any material non-disclosure. In addition, in case this court found itself in a position to exercise afresh the discretion as to whether or not to grant such an order, Mr Milligan, on behalf of Mr Malofeev, relied on additional factors as being relevant to such exercise.

B 171. We have considered fully the arguments put before us on this aspect of the case. Most of them are fact-specific, and do not raise any issue of more general relevance. In those circumstances it is not necessary or appropriate for us to deal at all with most of the arguments either way, as we would have done if it had arisen for decision. The only point on which we propose to say anything is one on which some authority was cited to the judge and more was cited to us, which might possibly be  
C of wider relevance.

D 172. If the question had arisen, it would have been on the footing that VTB has a seriously arguable case for saying that Mr Malofeev had been engaged in a major fraud against VTB, by which VTB was persuaded to lend RAP \$220 million to fund what was represented as a sale of assets worth substantially more than that amount, whereas in fact, first, the assets were worth a great deal less, and secondly the transaction was not a true sale, and moreover a substantial part of the proceeds of the loan (it can be assumed) disappeared into the complex web of corporate entities in various jurisdictions, including several offshore, for the benefit of Mr Malofeev, and maybe for that of others involved. Furthermore, not only was the use of that web of  
E corporate entities a significant part of the means whereby the fraud was committed, by concealing the true ownership of RAP, but it would also make it difficult for VTB to enforce any judgment that it was able to obtain. All of that is made out, but VTB has failed to establish that it should be allowed to bring proceedings on that basis against Mr Malofeev (and the other defendants) in this jurisdiction.

F 173. It seems to us that these propositions would have provided a strong starting point for a case in favour of the grant of a WFO. It could be inferred that a wealthy individual who uses such methods to defraud a bank in this way and on this scale might readily resort to similar methods to render his major assets proof against  
G enforcement in response to proceedings being taken against him, at any rate if he had reason to fear that the proceedings might be pursued effectively.

H 174. The judge attached little, if any, weight to those basic elements of the situation, as regards the application for the WFO, for particular reasons to do with the evidence and the presentation of the case, to which we need not refer. In addition to discounting, for those reasons, the factors to which we have referred at paragraph [172] above, the judge observed at paragraph 233 that it was common for international businessmen to use offshore vehicles for their operations, particularly for tax reasons, and that this may make it difficult to enforce a judgment, but that claimants such as VTB 'have to take defendants such as Mr Malofeev as they find them', the use of offshore companies not being sufficient evidence of a risk of dissipation. It seems to us that, while that may be a fair comment as regards international businessmen generally, the

490

VTB Capital v Nutritek International  
(Lloyd LJ)

[2012] 2 CLC

factor of a good arguable case as to fraud against the person in question, and the use of a web of offshore companies in connection with the fraud, could properly provide a basis for taking this into account in favour of the grant of an injunction.

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175. Given that there is (as the judge held) a good arguable case against Mr Malofeev on an allegation of fraudulent misrepresentation used to procure a loan of \$220 million against wholly inadequate (and itself misrepresented) security, on the part of a businessman with international connections and assets, using offshore companies in many parts of the world, it might not be difficult to suppose that, if Mr Malofeev thought he was at risk of having his assets seized to answer a judgment against him, he would dispose of those assets, or move them into a situation in which it would be difficult or impossible for the claimant to reach them.

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176. As regards the significance of evidence of dishonesty, the judge referred at paragraph 229 to what he called a salutary warning by Peter Gibson LJ in *Thane Investments Ltd v Tomlinson* [2003] EWCA Civ 1272, from which he quoted from paragraph 28. The relevant passage is as follows:

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‘Mr Blackett-Ord submitted that it has now become the practice for parties to bring ex parte applications seeking a freezing order by pointing to some dishonesty, and that, he says, is sufficient to enable this court to make a freezing order. I have to say that, if that has become the practice, then the practice should be reconsidered. It is appropriate in each case for the court to scrutinise with care whether what is alleged to have been the dishonesty of the person against whom the order is sought in itself really justifies the inference that that person has assets which he is likely to dissipate unless restricted.’

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177. We agree with Peter Gibson LJ that the court should be careful in its treatment of evidence of dishonesty. However, where (as here) the dishonesty alleged is at the heart of the claim against the relevant defendant, the court may well find itself able to draw the inference that the making out, to the necessary standard, of that case against the defendant also establishes sufficiently the risk of dissipation of assets. This is supported by two earlier Court of Appeal decisions, not cited in *Thane Investments*. These are *Norwich Union v Eden* (25 January 1996 unreported) and *Grupo Torras SA v Al-Sabah* (21 March 1997 unreported). Both of them were cited by Flaux J in his judgment in *Madoff Securities International Ltd v Raven* [2011] EWHC 3102 (Comm). Those decisions are not inconsistent with what Peter Gibson LJ said in *Thane Investments v Tomlinson*, but they put it into context, and their context is a good deal closer to that of the present case. We will quote from paragraph 163 to the beginning of paragraph 167 of Flaux J’s judgment.

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‘163. In this context, and entirely properly, Mr Weekes referred me to the decision of the Court of Appeal in *Thane Investments v Tomlinson* [2003] EWCA Civ 1272 where Peter Gibson LJ at [28] deprecates the tendency to infer a risk of dissipation from the fact that allegations of dishonesty are made against

CA

VTB Capital v Nutritek International  
(Lloyd LJ)

491

A the defendant. However, Mr Weekes submitted that *Thane Investments* was a case which must be approached with caution, as it was an ex tempore judgment given where the defendant was unrepresented, so that the case was not perhaps as fully argued as it might have been. In particular, two earlier relevant decisions of the Court of Appeal do not appear to have been cited to the Court of Appeal.

B 164. The first is *Norwich Union v Eden* (25 January 1996, unreported) a decision of a two man Court of Appeal (Hirst and Phillips LJ). The main judgment was given by Phillips LJ who said:

C “It seems to me that when the court considers whether there is a good arguable case it is at that stage that it considers whether the likelihood of a judgment in favour of the plaintiff is sufficient to justify the grant of Mareva relief. If it is so satisfied, the question then arises: if such a judgment is given, what is the risk that there will be no assets there to satisfy it? If the judgment in question being considered is a judgment in which allegations of fraud are made, then it seems to me that it is open to the court to conclude from that fact alone that there is sufficient risk of dissipation of assets to justify the grant of relief. For myself it does not seem to me that there would be any prospect of persuading this court that the learned Judge had erred in principle in so concluding.”

E 165. The other decision is that in *Grupo Torras SA v Al-Sabah* (21 March 1997) where Saville LJ said:

F “Mr Etherton also criticised the judge for failing, as he put it, properly to address himself to the question whether there was a real risk of dissipation of assets, and simply concluded that such a risk existed because this was a fraud case. In this context Mr Etherton pointed out that Mr Dawson had lived and worked as an investment adviser in Switzerland for a long time and that his assets included a very valuable house in Geneva, so that it was hardly likely that he would set about making them judgment proof. Mr Etherton also drew attention to the fact that the litigation had begun years ago and long before Mr Dawson was joined to it, yet there was no suggestion that he has yet made any attempt to dissipate assets.

H These are certainly points that can be made on behalf of Mr Dawson, but again I am not persuaded that the judge simply failed to take them into account. What is clear from the judgment is that the judge took the view that there was a good arguable case that Mr Dawson was knowingly implicated in the fraud; and that the nature of the allegations was such that there was a strong fear of dissipation. Since it is part of Mr Dawson’s own case that he was expert in the sort of intricate, sophisticated and international financial transactions which feature in this case, and since the plaintiffs had established a good arguable case that Mr Dawson had used his expertise for dishonest purposes, I am not in the least surprised that the judge reached the conclusion he did. In short I remain wholly

unpersuaded that the judge so erred in his assessment of the risk of dissipation that it would be right for this court to interfere.” A

166. Mr Weekes relied upon that case in support of a submission that, like the defendant in that case, Mrs Kohn is experienced in sophisticated international financial transactions. He submitted that in the light of those earlier authorities, the way in which *Thane Investments* should be read is correctly set out by Patten J in *Jarvis Field Press v Chelton* [2003] EWHC 2674 (Ch), where having cited the relevant passage from the judgment of Peter Gibson LJ, the learned judge says at [10]: B

“The relevance of that passage, of course, is to the submission made by Mr Lord, on behalf of the claimants on this application, that I should infer from the apparent dishonesty of Mrs Chelton, together with the recent change of circumstances, a real likelihood and risk of dissipation. I have no difficulty in accepting the general principle, emphasised by Peter Gibson LJ, that a mere unfocused finding of dishonesty is not, in itself, sufficient to ground an application for a freezing order. It is necessary to have regard to the particular respondents to the application and to ask oneself whether, in the light of the dishonest conduct which is asserted and against them, there is a real risk of dissipation. As Peter Gibson LJ made clear in the passage I have already quoted, the court has to scrutinise with care whether what is alleged to have been dishonesty justifies the inference. That is not, therefore, a judgment to the effect that a finding of dishonesty (or, in this case, an allegation of dishonesty) is insufficient to found the necessary inference. It is merely a welcome reminder that in order to draw that inference it is necessary to have regard to the particular allegations of dishonesty and to consider them with some care.” C D E

167. I agree with that analysis of the approach which the court should adopt when considering whether to grant a freezing injunction, in a case where there are allegations of fraud or deliberate misconduct against a defendant.’ F

178. We agree with those observations by Flaux J. On that basis it seems to us that it would have been right for the judge to take into account a finding of a good arguable case that Mr Malofeev had been engaged in a major fraud, and that he operated a complex web of companies in a number of jurisdictions, which enabled him to commit the fraud and would make it difficult for any judgment to be enforced. We would regard such factors as capable of providing powerful support for the case of a risk of dissipation. G H

179. As it is, however, the question of continuing the WFO beyond the decision on this appeal does not arise, and we say no more about how we would have regarded the various points argued before us, or what our final decision would have been on this point, if we had held otherwise on the issue of service out of the jurisdiction as regards the tort claims.

CA

VTB Capital v Nutritek International  
(Appendix 1)

493

A

**Final conclusion and disposition**

B

180. For the reasons set out above, we consider that the judge was right to refuse VTB’s application to amend to introduce a claim in contract against Marcap BVI, Marcap Moscow and Mr Malofeev, and that he was also right to set aside the order permitting service of the proceedings, as originally formulated in tort only, out of the jurisdiction. We therefore dismiss VTB’s appeals.

*(Appeals dismissed)*

C

APPENDIX ONE: THE FACILITY AGREEMENT

**Relevant provisions**

D

1. DEFINITIONS AND INTERPRETATION

E

1.1 Definitions

In this Agreement:

F

...

‘Acquisition Agreement’ means the sale and purchase agreements to be entered into relating to the sale and purchase of the Target Shares ...

G

...

‘Buyer’s Account’ shall mean the blocked bank account in the name of the Company with the London officer of the Lender with account number 1001632020.

H

...

‘Fee Letter’ means the letter dated on or about the date of this Agreement between the Lender and the Company in respect of the arrangement fee.

I

...

‘Obligor’ means each of the Company, the Guarantors and the Production Companies.

...

‘Participant’ means [VTB Moscow] in its capacity as participant under the Participation Agreement.

**494**

**VTB Capital v Nutritek International**  
(Appendix 1)

**[2012] 2 CLC**

*'Participation Agreement'* means the Terms and Conditions of the funded participation agreement dated or on about the date hereof between the Lender as grantor and the Participant ... A

*'Party'* means a Party to this Agreement.  
... B

*'Pledged Shares'* means the Production Company Shares, the Company Participatory Interest, the Target Shares and the Migifa Shares.

... C  
*'Production Companies'* means [the Dairy Companies].

... D  
*'Repeating Representations'* means each of the representations set out in Clause 18 (Representations) other than Clauses 18.9 (No Filing or Stamp Taxes) and 18.29 (Sales Contracts).

... E  
*'Seller'* means [Nutritek].

*'Seller's Acquisition Account'* means the account at the offices of the Lender with account number 1001622020.  
... F

*'Target'* means [Newblade].  
... G

*'Target Shares'* means 49,001 shares (being 100% of the issued and outstanding shares) in the Target purchased by the Company pursuant to the Acquisition Agreement

... H  
*'Tranche A Commitment'* means two hundred eight million seven hundred thousand Dollars (\$208,700,000).

*'Tranche B Commitment'* means twenty-one million three hundred thousand Dollars (\$21,300,000).

CA

**VTB Capital v Nutritek International**  
(Appendix 1)

**495**

A ...

1.3 *Contracts (Rights of Third Parties) Act 1999*

A person who is not a Party has no right under the Contracts (Rights of Third Parties) Act 1999 to enforce or enjoy the benefit of any term of this Agreement.

B

...

2. *THE FACILITY*

C

2.1 *The Facility*

Subject to the terms of this Agreement, the Lender makes available to the Company:

D

2.1.1 a US Dollar term loan facility in an aggregate amount equal to the Tranche A Commitment ('*Tranche A*'); and

2.1.2 a US Dollar term loan facility in an aggregate amount equal to the Tranche B Commitment ('*Tranche B*'),

together, the '*Facility*'.

E

...

3. *PURPOSE*

F

3.1 *Purpose*

The Company shall apply all amounts borrowed by it:

G

3.1.1 under Tranche A, towards partial payment of the purchase price for the Target Shares under the Acquisition Agreement, payment of the Acquisition Costs, (other than periodic fees), payment of financing and other transactional costs (including legal fees) incurred in connection with the Finance Documents, or for the general corporate purposes of the company; and

3.1.2 under Tranche B, towards the general corporate purposes of the Company.

H

3.2 *Direction to Pay*

3.2.1 The Company directs the Lender to deposit into the Buyer's Account (and such monies shall be thereafter immediately transferred into the Seller's Acquisition Account in accordance with the irrevocable instructions referred to in Schedule 2, Part 1 Clause 4.17) on the date of first Utilisation of Tranche A, part of the proceeds of the

496

VTB Capital v Nutritek International  
(Appendix 1)

[2012] 2 CLC

first Utilisation of Tranche A equal to the purchase price (howsoever defined) under the Acquisition Agreement to be paid by the Company less the Reserved Amount. A

...

4. CONDITIONS OF UTILISATION B

4.1 Initial Conditions Precedent

4.1.1 The company may not deliver a Utilisation Request in respect of Tranche A unless the Lender has received all of the documents and other evidence listed in Part 1 of Schedule 2 (*Conditions Precedent*) in form and substance satisfactory to the Lender (acting reasonably). The Lender shall notify the Company promptly upon being so satisfied. The first drawdown of Tranche A shall comply with Clause 3.2 above. C

...

4.2 Further conditions precedent D

Subject to Clause 4.1 (*Initial Conditions Precedent*), the Lender will only be required to comply with Clause 5.3 (*Lender's Funding*), if on the date of the Utilisation Request and on the proposed Utilisation Date: E

4.2.1 no Default is continuing or would result from the proposed Loan;

4.2.2 the Repeating Representations to be made by each Obligor are true in all material respects; and F

4.2.3 the Participant has credited the Receiving Account of the Lender with the funding for that Loan in accordance with the terms of the Participation Agreement.

...

11. FEES G

11.1 Arrangement Fee

The Company shall pay to the Lender an arrangement fee in the amount and manner specified in the Fee Letter. H

...

18. REPRESENTATIONS, UNDERTAKINGS AND EVENTS OF DEFAULT

CA

**VTB Capital v Nutritek International**  
(Appendix 1)

**497**

A ...

18.11 *No Misleading Information*

Save as disclosed in writing to the Lender prior to the date of this Agreement:

B

18.11.1 any factual information (including in relation to the Acquisition and the Group) provided to the Lender was true and accurate in all material respects as at the date it was provided;

C

18.11.2 any financial projection or forecast (including in relation to the Acquisition and the Group) provided to the Lender has been prepared on the basis of recent historical information and on the basis of reasonable assumptions and was fair (as at the date it was provided) and arrived at after careful consideration;

D

18.11.3 the expressions of opinion or intention provided by or on behalf of an Obligor to the Lender were made after careful consideration and (as at the date of the relevant report or document containing the expression of opinion or intention) were fair and based on reasonable grounds; and

E

18.11.4 no event or circumstance has occurred or arisen and no information has been omitted from the information provided to the Lender pursuant to paragraphs 18.11.1 to 18.11.3 above and no information has been given or withheld that results in the information, opinions, intentions, forecasts or projections contained in the information provided to the Lender pursuant to paragraphs 18.11.1 to 18.11.3 being untrue or misleading in any material respect.

F

...

34. *GOVERNING LAW*

This Agreement is governed by English law.

G

35. *ENFORCEMENT*

35.1 *Jurisdiction of English Courts*

H

35.1.1 Subject to Clause 35.3 (Arbitration) below, the courts of England have nonexclusive jurisdiction to settle any dispute arising out of or in connection with this Agreement (including a Dispute regarding the existence, validity or termination of this Agreement) (a 'Dispute').

35.1.2 The Parties agree that the courts of England are the most appropriate and convenient courts to settle Disputes and accordingly no Party will argue to the contrary.

498

VTB Capital v Nutritek International  
(Appendix 1)

[2012] 2 CLC

35.1.3 This Clause 35.1 is for the benefit of the Lender only. As a result, the Lender shall not be prevented from taking proceedings relating to a Dispute in any other courts with jurisdiction. To the extent allowed by law, the Lender may take concurrent proceedings in any number of jurisdictions. A

...

B

35.3 *Arbitration*

In addition to Clause 35.1 (*Jurisdiction of English Courts*) above, the Lender shall have the right to refer any dispute which may arise out of or in connection with this Agreement to final and binding arbitration in London, England, pursuant to the arbitration rules of LCIA (the '*LCIA Rules*'). The language of the arbitration proceedings shall be English. Such arbitration shall be conducted in accordance with LCIA Rules. The seat or legal place of arbitration shall be deemed to be England, and accordingly the substantive laws of England shall be applicable for the purposes of the arbitration. The procedural law for any reference to arbitration shall be English law. ... C

...

D

**Schedule 2**

*Conditions Precedent*

E

*Part I*

*Conditions Precedent to Utilisation of Tranche A*

F

The Lender shall have received (in form and substance satisfactory to the Lender) each of the following:

...

G

*2. Finance Documents*

The following original Finance Documents each duly executed by each of the parties to it:

2.1.1 this Agreement; H

2.1.2 the Participation Agreement (and confirmation thereto);

2.1.3 the Transaction Security Documents;

CA

**VTB Capital v Nutritek International**  
(Appendix 2)

**499**

- A 2.1.4 the Hedging Documents;
- 2.1.5 the Production Company Guarantees (other than MK Penzensky);
- 2.1.6 the Fee Letter; and
- B 2.1.7 an Accession Letter from the Target.

3. *Transaction Security*

- C 3.1 A financial report of an independent valuer acceptable to the Lender regarding the determination of the market value of the Pledged Shares (other than the shares in Molkombinat and the participatory interests in Aktiv).
- ...

APPENDIX TWO

D

**The SPA and ISA – summaries**

*The SPA*

- E The purchase price under the SPA was US\$250 million less the ‘Indebtedness’ as defined in clause 3.2 and determined under Annex 1 of the SPA. It was to be paid in two instalments: on the Closing Date, US\$50 million less the ‘Indebtedness’ was to be paid by RAP to Nutritek, whereupon the shares in Newblade were to be transferred to RAP (clause 3.3.2); and within two days thereafter, a further US\$200 million (less US\$5 million which was to be retained by RAP pending performance by one of the
- F Nutritek group companies of a particular obligation (clause 19.6)) was to be paid (clause 3.3.5).

- G The SPA is governed by English law (clause 17.1) and provides that any dispute arising out of or in connection with it shall be referred to arbitration under LCIA rules (clause 18.1).

*The ISA*

- H The ISA takes the form of a Confirmation supplemental to an International Swap and Derivative Association Master Agreement between VTB and RAP dated 23 November 2007. The purpose of the ISA was to hedge against an increase in the interest paid by RAP pursuant to the Facility Agreement which was to be calculated by reference to, amongst other matters, LIBOR. The dates and spreads under the Facility Agreement and the ISA were matched. The ISA benefited from the same security as the Facility Agreement.

500

VTB Capital v Nutritek International  
(Appendix 3)

[2012] 2 CLC

The ISA is governed by English law and provides that any dispute arising out of or in connection with it shall be referred to arbitration under the LCIA rules (Part 5 (g)).

A

APPENDIX THREE: THE PARTICIPATION AGREEMENT

**Relevant provisions**

B

1. *APPLICABILITY AND INTERPRETATION*

...

1.2 *Interpretation*

C

In these Terms and Conditions words and expressions shall (unless otherwise expressly defined in these Terms and Conditions) have the meaning given to them in the Facility Agreement and:

...

D

'*Enforcement Proceeds*' means, following an Enforcement Event, all receipts and recoveries by the Lender (or by any person which are properly paid over to the Lender):

E

(a) pursuant to, upon enforcement of or in connection with the Transaction Security; and

(b) without prejudice to subclause (a) above, in respect of all representations, warranties, covenants, guarantees, indemnities and other contractual rights of the Lender made or granted in or pursuant to any Finance Document.

F

...

2. *PARTICIPANT'S PAYMENT OBLIGATIONS*

G

2.1 *Sums Due Under the Relevant Finance Documents*

If at any time on or after the date of the Confirmation a sum falls due from the Grantor under the Relevant Finance Documents and the sum is, in the Grantor's reasonable opinion, attributable in whole or in part to any Loan or Participated Tranche, then the Participant shall pay to the Grantor amount equal to such sum.

H

2.2 *Payment of sums due*

The Participant shall make each payment required under Clause 2.1 (*Sums Due Under the Relevant Finance Documents*) in the currency and funds and in the place and time

CA

**VTB Capital v Nutritek International**  
(Appendix 3)

**501**

A at which the Grantor is required to make the payment under the Relevant Finance Documents.

3. *PAYMENTS*

B 3.1 *Receipts*

The Grantor is entitled to receive, recover and retain all principal, interest and other money payable under the Relevant Finance Documents in relation to each Participated Tranche.

C 3.2 *Payments*

Subject to compliance by the Participant with its payment obligations under the Participation, on and after the date of the Confirmation the Grantor shall, upon applying any amount actually received by it in respect of any Loan or Commitment (whether by way of actual receipt, the exercise of any right of set-off or otherwise), pay to the Participant:

D

(a) if that amount is applied in respect of the principal of a Loan, an amount equal to the amount so applied by the Grantor;

E ...

4. *PAYMENTS ADMINISTRATION*

4.1 *Place*

F

All payments or deposits by either Party to, or with, the other under the Participation shall be made to the Receiving Account of that other Party. Each Party may designate a different account as its Receiving Account for payment by giving the other not less than five Business Days notice before the due date for payment.

G ...

4.5 *Failure to remit*

The Grantor shall not be:

H ...

(b) liable to remit to the Participant any amount greater than the amount it received from any Obligor in respect of any Participated Tranche or Loan.

6. STATUS OF PARTICIPATION

A

6.1 Status of Participation

(a) The Grantor does not transfer or assign any rights or obligations under the Relevant Finance Documents and, subject to Clause 6.3 (*Assignment Following Event of Default*) the Participant will have no proprietary interest in the benefit of the Relevant Finance Documents or in any monies received by the Grantor under or in relation to the Relevant Finance Documents.

B

(b) The relationship between the Grantor and the Participant is that of debtor and creditor with the right of the Participant to received monies from the Grantor restricted to the extent of an amount equal to the relevant portion of any monies received by the Grantor from any Obligor.

C

(c) The Participant shall not be subrogated to or substituted in respect of the Grantor's claims by virtue of any payment under the Participation and the Participant shall have no direct contractual relationship with or rights against any Obligor.

D

(d) Nothing in the Participation constitutes the Grantor as agent, fiduciary or trustee for the Participant.

...

E

6.3 Assignment Following Event of Default

At any time following an Event of Default and while such Event of Default is continuing, the Participant may (at its election and in its sole discretion):

F

(a) require the Grantor to assign and/or novate all of its rights and interest in the Facility Agreement and other Relevant Finance Documents to the Participant; and/or

(b) instruct the Grantor to procure that all amounts payable by the Obligors to the Grantor under the Relevant Finance Documents be paid by such Obligors directly to the Participant, at such account as the Participant may inform the Grantor,

G

and the Grantor shall so comply.

6.4 Enforcement Event

H

Notwithstanding any other provision of these Terms and Conditions the Parties hereby agree that, subject to Clause 6.3 (*Assignment Following Event of Default*) above, following the occurrence of an Early Termination Date, the Grantor shall apply all Enforcement Proceeds in the following manner:

CA

VTB Capital v Nutritek International  
(Appendix 3)

503

A (a) first, in payment of costs, charges, expenses and liabilities incurred by on or behalf of the Grantor and any receiver, attorney or agent in connection with exercising its powers of enforcement under the Finance Documents and the remuneration of every receiver, attorney or agent under or in connection with the Finance Documents;

B (b) second in *pro rata* payment of:

(i) amounts due to the Participant under the Participation; and

(ii) amounts due under the Hedging Documents;

C ...

### 9.2 *No obligation to support losses*

D (a) The Grantor notifies the Participant and the Participant acknowledges that the Grantor shall have no obligation to repurchase or reacquire all or any part of the Participation from the Participant or to support any losses directly or indirectly sustained or incurred by the Participant for any reason whatsoever, including the non-performance by any Obligor under the Relevant Finance Documents of its obligations thereunder (other than any loss caused by the gross negligence or wilful default of the Grantor in performing its obligations under the Participation).

E (b) Any rescheduling or renegotiation of Participation shall be for the account of, and the responsibility of, the Participant, who will be subject to the rescheduled or renegotiated terms.

F ...

## 16. GOVERNING LAW AND JURISDICTION

### 16.1 *Governing Law*

G These Terms and Conditions and the Participation are governed by English law.

### 16.2 *Jurisdiction*

The parties submit to the non-exclusive jurisdiction of the English courts.

H ...

### 16.4 *Convenient Forum*

Save as provided below, the Parties agree that the courts of England are the most appropriate and convenient courts to determine and settle any dispute arising relation

504

VTB Capital v Nutritek International  
(Appendix 3)

[2012] 2 CLC

to the Agreement (including any question as to its existence, validity or termination) (a 'Dispute') between them and accordingly no party shall raise any arguments based on forum non convenienc

A

...

16.7 Arbitration

B

Notwithstanding the submission by the Parties to the jurisdiction of the English courts in Clause 16.2 (*Jurisdiction*), either Party refer any Dispute to be finally resolved by arbitration under the Rules of the London Court of International Arbitration in London, England. There will be 3 arbitrators, one of whom will be nominated by each of the claimant and the defendant, and the third to be agreed by the 2 arbitrators so appointed and in default thereof shall be appointed by the President of the London Court of International Arbitration. If there is more than one claimant or defendant they will jointly nominate one arbitrator. The arbitration will be conducted in English and any judgment rendered shall be final and binding on the Parties.

C

D

E

F

G

H

TERRITORY OF THE VIRGIN ISLANDS

IN THE COURT OF APPEAL

HCVAP 2010/035

BETWEEN:

JSC BTA BANK

Appellant

and

[1] FIDELITY CORPORATE SERVICES LIMITED  
[2] COMMONWEALTH TRUST LIMITED  
[3] AMS TRUSTEES LIMITED  
[4] TRIDENT TRUST CO (BVI) LIMITED  
[5] COVERDALE TRUST SERVICES LIMITED  
[6] MORGAN & MORGAN TRUST CORPORATION LTD  
[7] MOSSACK FONSECA & CO (BVI) LIMITED

Respondents

Before:

The Hon. Mde. Janice George-Creque

Justice of Appeal

The Hon. Mr. Davidson Kelvin Baptiste

Justice of Appeal

The Hon. Mr. Ian Donaldson Mitchell, CBE, QC

Justice of Appeal [Ag.]

Appearances:

Mr. Philip Marshall, QC, Mr. Mark J. Forte

and Ms. Tameka Davis with him for the appellant

Mr. Paul Webster, QC, Ms. Nadine Whyte with him for the 5<sup>th</sup> respondent

Mr. John Carrington, Mr. Patrick Thompson with him for the 6<sup>th</sup> respondent

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2011: January 12;  
February 21.

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*Civil Appeal – Commercial Law – disclosure of information – whether the disclosure sought is a necessary and proportionate response in all circumstances – inherent jurisdiction of the court – Norwich Pharmacal – equitable jurisdiction of the court to preserve a potential trust fund – whether an innocent party can be said to have facilitated the wrongdoing to the extent an order for discovery maybe made against him – elements of jurisdiction – necessity – the exercise of discretion – requirement of involvement or participation – whether it has to be satisfied that the*

*party is more than a bystander or witness – rights of third parties – application to adduce further evidence – costs*

In 2009 the Government of Kazakhstan took action against one of the largest banks in Kazakhstan for the Regulation and Supervision of Financial Organisations which concluded that the Bank had negative equity and therefore was insolvent. The Bank has been restructuring debt of over US\$11 billion under the supervision of the Almaty Financial Court. Any recoveries made by the Bank and other proceedings will partly go to meet the claims of creditors.

Abyazov through nominee companies owned the majority of the shares in and controlled the Bank and was also the Chairman of the Board of Directors. He and Khaksylyk (his close associate) have since been dismissed and have both fled to the United Kingdom. Various criminal prosecutions have been filed against the two and others in Kazakhstan. Civil proceedings have been ensued in the Commercial Court in the United Kingdom and the Bank has obtained freezing relief against them as well. The proceedings in the Territory of the Virgin Islands have been brought in support of one the United Kingdom proceedings which concerns misappropriation of over US\$1 billion which was extracted from the Bank in late 2008 under bogus loans allegedly created for fictitious transactions.

The Bank claims that this was facilitated through the use of various companies incorporated in the Territory of the Virgin Islands and the Seychelles. The Bank further alleges that this scheme was perpetrated by and for the benefit of Mr. Abyazov using the companies as his vehicles and by Mr. Zharinbetov as his assistant in order to implement the scheme. The Bank made proprietary claims in respect of the sums advanced and claims for compensation against the Bank officers for breach of duty either in relation to the perpetration of the fraud or for failing to disclose and/or for approving what are described as “related party” transactions.

Mr. Abyazov and Mr. Zharimbetov deny any involvement in the claims alleged against them and state that the companies and documents appeared to have been genuine.

The Bank subsequently filed an application for **Norwich Pharmacal** and ancillary relief in the form of information and documents in their custody, possession or control against the seven discovery defendants/respondents. They claim that the respondents are likely to be able to provide information to the Bank to assist the process of recovery of the Bank’s assets. They incorporated the companies, maintained them in good standing and allowed them to use bank accounts. The trial judge dismissed the application and held that there was no evidence that the discovery defendants were involved in, or participated in or facilitated those acts, acts of which, for all the evidence showed, they were entirely ignorant. The Bank now appeals the order of the trial judge in which he dismissed the application for disclosure of information and in addition there is an application to adduce further evidence.

**Held:** granting the application to admit further evidence, allowing the appeal and granting the reliefs sought. Awarding the 5<sup>th</sup> and 6<sup>th</sup> respondents their costs in the court below and awarding the 6<sup>th</sup> respondent costs in this court to be assessed if not agreed.

1. That the relief sought in this case is necessary and proportionate in all circumstances to permit the bank its undoubted right to proceed both in law and in equity against those who set up the companies and those that are presently in possession of the defrauded funds.

**Campaign Against Arms Trade v BAE Systems PLC** [2007] EWHC 330 (QB) applied.

2. That the respondents, by virtue of their role in providing registered agent services to the companies, a role which is voluntary, cannot on any view be considered as mere onlookers. The companies that they formed and maintained facilitated, although innocently, the commission of the fraud and as such were involved in the fraud perpetuated against the bank. This renders the respondent under a duty to disclose information through **Norwich Pharmacal** type proceedings which may assist the bank as the injured party in discovering the true wrongdoers.

**Norwich Pharmacal Co v Commissioners of Customs & Excise** [1974] AC 133, **Ashworth Hospital Authority v MGN Ltd** [2002] 4 All ER 193, **Banker's Trust Co v Shapira** [1980] 1 WLR 1274 applied.

3. That the further evidence sought to be introduced by the appellant which comprises the defence of the 2<sup>nd</sup> defendant in the English Proceedings becomes relevant. It is clear that both individual defendants in the English proceedings have taken the position of lack of any knowledge or control over or having any relationship with these entities and thus it may reasonably be expected that no information will be forthcoming from them as to who are the instructing or controlling minds behind these entities. The respondents by virtue of the services they render coupled with the due diligence duties they are obliged to perform in their capacity as registered agents would be expected to have such information and in all probability information pertaining to banking mandates and resolutions passed by these entities for operating bank accounts in their possession.
4. That all of the respondents are entitled to be paid by the bank their reasonable costs of providing discovery as the court recognises the fact that innocent third parties become embroiled in proceedings through no fault on their part.

## JUDGMENT

- [1] **MITCHELL, J.A. [AG.]:** This is an appeal by JSC BTA Bank against an order of Bannister J dated 8<sup>th</sup> November 2010, in which he dismissed the application of the Bank for disclosure of information (a) pursuant to the inherent jurisdiction of the court applying the principles established in **Norwich Pharmacal Co v Commissioners of Customs &**

Excise<sup>1</sup>; and (b) pursuant to the equitable jurisdiction of the court to preserve a potential trust fund applying the principles established in **Bankers Trust Co v Shapira**<sup>2</sup>. In addition to the appeal there is an application to adduce further evidence.

### The Background

- [2] The Bank is one of the largest banks in Kazakhstan. In 2009 the Government of Kazakhstan took action in the wake of the worldwide financial crisis and the findings of a random inspection report<sup>3</sup> by the Agency of the Republic of Kazakhstan for the Regulation and Supervision of Financial Markets and Financial Organisations which concluded, among other things, that the Bank had negative equity, and thus was insolvent. The Bank has been restructuring debt of over US\$11 billion under the supervision of the Almaty Financial Court. Any recoveries made by the Bank in these and other proceedings will partly go to meet the claims of creditors.
- [3] Until 2<sup>nd</sup> February 2009, Mukhtar Ablyazov through nominee companies owned the majority of the shares in and controlled the Bank. He was also the Chairman of the Board of Directors. He has since been dismissed and fled to the United Kingdom (UK). Zhaksylyk Zharimbetov is a close associate of Mr Ablyazov. He was the First Deputy Chairman of the Management Board and also the Chairman of the Credit Committee. He also fled to the UK.
- [4] Various criminal prosecutions have been opened against Mr. Ablyazov, Mr. Zharimbetov and others in Kazakhstan. The Bank has also commenced several sets of civil proceedings in the Commercial Court of the Queen's Bench Division of the High Court in the UK and has obtained freezing relief against Mr. Ablyazov and Mr. Zharimbetov in support of its claims.

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<sup>1</sup> [1974] AC 133.

<sup>2</sup> [1980] 1 WLR 1274.

<sup>3</sup> Dated 22<sup>nd</sup> January 2009.

- [5] The present proceedings in the Territory of the Virgin Islands have been brought in aid of one of these sets of UK proceedings. These UK proceedings<sup>4</sup> concern, as alleged by the Bank, a scheme of misappropriation by which over US\$1 billion was extracted from the Bank in late 2008 under bogus loans purportedly created for fictitious transactions.
- [6] The scheme was effected allegedly through the use of various companies incorporated in the Territory of the Virgin Islands as well as the Seychelles which acted as (a) supposed borrowers and who sought financing from the Bank and (b) as supposed intermediaries for the purported supply of oil drilling and other equipment who were the direct recipients of the Bank's advances. The Bank's case is that the scheme was in fact perpetrated by and for the benefit of Mr. Ablyazov using the companies as his vehicles and by Mr. Zharimbetov as his assistant in order to implement the scheme.
- [7] The Bank has made proprietary claims in respect of the sums advanced and claims for compensation against the Bank officers for breach of duty either in relation to the perpetration of the fraud or for failing to disclose and/or for approving what are described as "related party" transactions.
- [8] In his defence in the UK proceedings Mr. Ablyazov has denied any involvement in the loans to the borrowers and the other arrangements described above. He also claims that the documents and companies appeared to have been genuine. Mr. Zharimbetov also claims in the UK proceedings that the various arrangements appeared to have been genuine commercial transactions<sup>5</sup>. The evidence in the UK proceedings reveals that no equipment whatsoever has been received by the borrowers, the money loaned by the Bank was advanced almost immediately by the intermediaries to various off-shore companies without the provision of security and in circumstances in which it was commonly understood that the loans would not be in fact repayable such that the value of these loans as receivables is said to be nil. It is said that the artificial arrangements were a

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<sup>4</sup>JSC BTA Bank v Ablyazov and others.

<sup>5</sup>In his defence served in the UK proceedings on 5<sup>th</sup> December 2010 and which is the subject matter of an application before this court to admit additional evidence.

device apparently intended to conceal the making of advances to persons who could not otherwise receive loans under regulations governing the Bank's lending.

[9] Nine (9) Territory of the Virgin Islands companies ("BVI companies"), of which the respondents are or were registered agents, received funds totalling US\$1,031,263.00 or a portion thereof alleged to have been misappropriated from the Bank. The Bank claims that the respondents are likely to be able to provide information to the Bank to assist it to identify the ultimate recipients of the payments or their proceeds and thus assist the process of recovery of the Bank's assets. They incorporated the companies, maintained them in good standing and allowed them to use bank accounts. The funds passed into the accounts of the nine (9) BVI companies at the bank in Latvia. There is no action against the nine (9) BVI companies but the intention is to proceed against the person behind the formation of the companies, which, save for one, are now defunct. Mr. Abyazov and Mr. Zharimbetov have filed defences to the legal proceedings in the UK. They deny knowledge of the fraud or of the persons behind the nine (9) companies. It is clear they will not be supplying information about the present location of the Bank's funds.

[10] The Bank filed an application for **Norwich Pharmacal** and ancillary relief in the form of information and documents in their custody, possession or control against the seven discovery defendants/respondents. On 8<sup>th</sup> November 2010 Bannister J. in a considered decision concluded that while each case must turn on its own facts he could not accept that merely by providing incorporation or registered agent services in the present case any of the discovery defendants became involved in, or participated in or facilitated the wrongdoing complained of. He concluded that there was no evidence that the discovery defendants were involved in, or participated in or facilitated those acts, acts of which, for all the evidence showed, they were entirely ignorant. Only if it could be shown by credible evidence that an incorporation agent, for example, knew or had reason to believe that a company supplied by it to a client had been purchased in order to be used as a vehicle for a particular fraud might it be possible to show that by providing the company the agent was involved in the fraud. He held that the Bank had failed to pass this threshold test and dismissed the application. He also decided that the Bank had to establish necessity as a

prerequisite to the grant of **Norwich Pharmacal** relief. It is against these decisions that the Bank appeals.

### The law

- [11] It is a principle of the common law that the court will not permit a litigant to rope into its proceedings an innocent bystander or witness. The citizen is entitled to his privacy and has a right not to be involved in legal proceedings between two disputants without his consent save in answer to a subpoena for him to come as a witness or to produce the documents to the court. There is a plethora of cases from the UK, the Eastern Caribbean and the common law world describing the circumstances in which the court will change its stance and allow me to be joined as a 'discovery defendant' in order to oblige me to disclose what I know concerning a tort action between two other parties.
- [12] The starting point is the **Norwich Pharmacal** case cited above. There the appellants were the owners of a patent for a chemical compound. The patent was being infringed by illicit importations manufactured abroad. In order to obtain the names and addresses of the importers the appellants brought actions against the Commissioners of Customs and Excise alleging infringement of the patent and seeking orders for the disclosure of the relevant information. The Commissioners claimed privilege against production of the relevant documents. The High Court ordered discovery, but the Court of Appeal reversed that decision. Lord Denning held that no independent action for discovery lies against a party against whom no reasonable cause of action can be alleged, or who is in the position of a mere witness. It would be intolerant if an innocent person – without any interest in a case – were to be subjected to an action simply to get papers or information out of him. The only permissible course is to issue a subpoena for him to come as a witness or to produce the documents to the court. The appellants appealed to the House of Lords. There it was held that where a person, albeit innocently and without incurring any personal liability, became involved in the tortious acts of others he came under a duty to assist one injured by those acts by giving him full information.

[13] Lord Reid in the leading judgment in the House of Lords ruled<sup>6</sup>:

"... if through no fault of his own a person gets mixed up in the tortious acts of others so as to facilitate their wrong-doing he may incur no personal liability but he comes under a duty to assist the person who has been wronged by giving him full information and disclosing the identity of the wrongdoers. I do not think that it matters whether he became so mixed up by voluntary action on his part or because it was his duty to do what he did. It may be that if this causes him expense the person seeking the information ought to reimburse him. But justice requires that he should co-operate in righting the wrong if he unwittingly facilitated its perpetration."

[14] As Viscount Dilhorne put it in his decision in the same case<sup>7</sup>:

"Someone involved in the transaction is not a mere witness. If he could be sued, even though there be no intention of suing him, he is not a mere witness. ... Are the respondents to be regarded as involved in this case? I think the answer is yes. They were not, it is true, involved of their own volition. They were involved in the performance of their statutory duty. The [chemical compound] was in Customs' charge until cleared and the Commissioners could control its movement until cleared. ... I cannot see how it can be said that they were not involved in the importation of this chemical. ... So for these reasons in my opinion the answer to the first question I formulated, can the respondents be ordered to disclose the names of the importers? is in the affirmative. As to the second question, should they be ordered to do so? I think that the answer is also yes, unless in consequence of their special position the answer to the third question [are the respondents prohibited from disclosing the information?] is in the negative. Subject to the public interest in protecting the confidentiality of information given to Customs, in my opinion it is clearly in the public interest and right for the protection of patent holders, where the validity of the patent is accepted and the infringement of it not disputed, that they should be able to obtain by discovery the names and addresses of the wrongdoers from someone involved but not a party to the wrongdoing."

[15] It was the view of Lord Cross of Chelsea that<sup>8</sup>:

"... in any case in which there was the least doubt as to whether disclosure should be made the person to whom the request was made would be fully justified in saying that he would only make it under an order of the court. Then the court would have to decide whether in all the circumstances it was right to make an order. In so deciding it would no doubt consider such matters as the strength of the applicant's case against the unknown alleged wrongdoer, the relation

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<sup>6</sup> (ibidem) page 175B.

<sup>7</sup> (ibidem) page 188B.

<sup>8</sup> (ibidem) page 199F.

subsisting between the alleged wrongdoer and the respondent, whether the information could be obtained from another source, and whether the giving of the information would put the respondent to trouble which could not be compensated by the payment of all expenses by the applicant. The full costs of the respondent of the application and any expense incurred in providing the information should have to be borne by the applicant.”

[16] And, as it was put by Lord Kilbrandon<sup>9</sup>:

“In my opinion, accordingly, the respondents, in consequence of the relationship in which they stand, arising out of their statutory functions, to the goods imported, can properly be ordered by the court to disclose to the appellants the names of persons whom the appellants bona fide believe to be infringing these rights, this being their only practicable source of information as to whom they should sue, subject to any special right of exception which the respondents may qualify in respect of their position as a department of state. It has to be conceded that there is no direct precedent for the granting of such an application in the precise circumstances of this case, but such an exercise of the power of the court seems to be well within broad principles authoritatively laid down. The exercise will always be subject to judicial discretion, and it may well be that the reason for the limitation in practice on what may be a wider power to order discovery, to any case in which the defendant has been ‘mixed up with the transaction’, to use Lord Romilly’s words, or ‘stands in some relation’ to the goods, ... is that that is the way in which judicial discretion ought to be exercised.”

[17] Each of the Lords had a different expression to describe the circumstances in which an innocent party can be said to have facilitated the wrongdoing to the extent that an order for discovery may be made against him. Lord Reid described it as “getting mixed up” in the tortious acts; Viscount Dilhorn as “involved in the transaction”; Lord Cross as being the “relation subsisting between the alleged wrongdoer and the respondent”; and Lord Kilbrandon as “a consequence of the relationship in which they stand”, “mixed up with the transaction”, and “stand in some relation” to the goods. Whichever phrase is used, it is clear that there need be no necessity for any tortious liability to apply to the discovery defendant. He must simply not be a “mere witness” or a “mere bystander”.

[18] There are two threshold requirements for the jurisdiction of the court to come into being. First, there must have been a wrong. It is common ground that a wrong has been

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<sup>9</sup> (ibidem) page 205H.

committed against the Bank, and this is not in dispute. Second, the respondent to an application for disclosure must have “become mixed up” in it. That is the basis of the jurisdiction. A further principle to apply, after the threshold requirements have been satisfied, is the one of necessity.

[19] This approach is supported by a large number of cases and textbook writers. One of the more recent cases provided to us is the decision of King J in the UK High Court in **Campaign Against Arms Trade v BAE Systems PLC**<sup>10</sup>. The applicant was a long established association engaged in research into and campaigning against the international arms trade. The respondent was a well known major arms manufacturer based in the UK. The applicant association sought **Norwich Pharmacal** relief against the respondent. The applicant was seeking to discover the source of a leak to the respondent of an email sent by one of its members to the applicant's steering committee. The email contained privileged legal advice which the applicant association had received from its solicitors on tactics and costs in relation to the proposed review proceedings which the applicant intended to initiate against the government and in respect of which the respondent was an interested party, with an interest adverse to that of the applicant. By the review proceedings the applicant sought to challenge the decision of the Serious Fraud Office to discontinue its investigation into alleged corruption and bribery on the part of the respondent in the securing of a number of arms supply contracts from the Government of Saudi Arabia. The purpose of the email was to inform the committee of the advice given and to seek instructions to proceed.

[20] Under the heading “The exercise of the discretion: necessity” King J pointed out<sup>11</sup> that even if this requirement that the respondent must be more than a mere bystander is satisfied, this is not the end of the matter. It is only a threshold requirement to the exercise of what is a discretionary jurisdiction. Its satisfaction merely “triggers” the jurisdiction. The fact there is involvement enables the court to consider whether it is appropriate to make the order sought. The jurisdiction is an exceptional one which is only to be exercised by

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<sup>10</sup>[2007] EWHC 330 (QB).

<sup>11</sup>(*ibidem*) at paragraph 15.

the court when it is satisfied that it is necessary it should be exercised. The disclosure sought has to be a necessary and proportionate response in all the circumstances. This necessity requirement will however vary in its impact according to the circumstances in which the application is being made. Where, for example, (but not the case here) the disclosure sought would involve the disclosure of a journalist's sources of information, the court will have to have regard to the protection that might be given to those sources by any applicable statute which might, for example, require that the disclosure be necessary in the interests of justice or national security or for the prevention of disorder or crime. It is clear therefore that the "necessity" factor comes into play only as a requirement in the exercise of the judicial discretion, after the threshold requirements have been satisfied.

[21] The House of Lords decision in **Ashworth Hospital Authority v MGN Ltd**<sup>12</sup> was referred to by both parties. The defendant's newspaper had published verbatim extracts of the medical records of a patient<sup>13</sup> at a security hospital administered by the claimant. The source of the information was probably an employee of the claimant. As such, his contract of employment would have contained a confidentiality clause. The source had supplied the information to an intermediary who in turn had supplied it to one of the respondent's journalists. While the journalist did not know the name of the source, he did know the name of the intermediary. Production of the name of the intermediary would likely lead to the name of the source. The publisher contended that it could not be ordered to give disclosure since it was not itself a tortfeasor and in any case the disclosure jurisdiction was limited to cases where such disclosure was required in order to enable the claimant to bring proceedings against the wrongdoer. Alternatively, the publisher contended that the order for disclosure was neither proportionate nor necessary.

[22] Lord Woolf points out<sup>14</sup> in this case that, while the requirement of involvement or participation on the part of the party from whom discovery is sought is not a stringent requirement, it is still a significant one. It distinguishes that party from a mere onlooker or

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<sup>12</sup> [2002] 4 All ER 193, [2002] UKHL 29.

<sup>13</sup> Ian Brady, the notorious Moors Murderer.

<sup>14</sup> (*ibidem*) at paragraph 35.

witness. The need for involvement (the reference to participation can be dispensed with because it adds nothing to the requirement of involvement) is a significant requirement because it ensures that the mere onlooker cannot be subjected to the requirement to give disclosure. Such a requirement is an intrusion upon a third party to the wrongdoing and the need for involvement provides justification for this intrusion.

[23] Lord Woolf indicates<sup>15</sup> that the requirement for involvement is not the only protection available to the third party. There is the more general protection which derives from the fact that this is a discretionary jurisdiction which enables the court to be astute to avoid a third party who has become involved innocently in wrongdoing by another, from being subjected to a requirement to give disclosure unless this is established to be a necessary and proportionate response in all the circumstances. The need for involvement can therefore be described as a threshold requirement. The fact that there is involvement enables a court to consider whether it is appropriate to make the order which is sought. In exercising its discretion the court will take into account the fact that innocent third parties can be indemnified for their costs while at the same time recognising that this does not mean there is no inconvenience to third parties as a result of becoming embroiled in proceedings through no fault on their part.

[24] In **Bankers Trust** previously cited, two men presented the plaintiff bank in New York two cheques, each for a half a million dollars purportedly drawn on a bank in Saudi Arabia and made payable to one of the men. The bank paid over the million dollars and on instructions from the two men credited \$600,000.00 and later \$108,203.00 to accounts of the two men at the London branch of the third defendant bank. The bank in Saudi Arabia later informed the plaintiff bank that the cheques were obvious forgeries. The plaintiff bank reimbursed the bank in Saudi Arabia in the sum of \$1,000,000.00 and issued a writ in London in an action to trace and recover the moneys. It asked for injunctions to prevent any dealings with the funds in the defendant bank. They obtained a Mareva injunction and sought an interlocutory order that the defendant bank should disclose and permit the

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<sup>15</sup> (ibidem) at paragraph 36.

plaintiff bank to inspect and take copies of all correspondence between the two men and the defendant bank relating to any account in either of the two men's names as well as all cheques, debit vouchers, transfer applications and orders and internal memoranda relating to the accounts. The application for the interlocutory order was refused. They appealed.

[25] It was held in the Court of Appeal allowing the appeal and granting the order sought against the defendant bank that though the court would not lightly use its powers to order disclosure of full information touching the confidential relationship of banker and customer, such an order was justified even at the early interlocutory stage of an action where the plaintiffs sought to trace funds which in equity belonged to them and of which there was strong evidence that they had been fraudulently deprived and delay might result in dissipation of the funds before the action came to trial. In the new and developing jurisdiction where neutral and innocent persons were under a duty to assist plaintiffs who were the victims of wrongdoing, the court would not hesitate to make strong orders to ascertain the whereabouts and prevent the disposal of such property.

[26] There were several other authorities which were presented to us by the parties, and which have been very helpful in arriving at an understanding of the principles involved. These included:

- (1) **Dufour and others v Helenair Corporation Ltd and others** (1996) 52 WIR 188
- (2) **Totalise plc v The Motley Fool Ltd** [2001] EWCA Civ 1897
- (3) **Aoot Kalmneft v Denton Wilde Sapte** [2002] 1 Lloyds Law Reports 417
- (4) **President of the State of Equatorial Guinea v Royal Bank of Scotland International** [2006] UKPC 7
- (5) **Oxus Gold PLC v Maples Finance BVI Ltd** [unreported decision of Hariprashad-Charles of 9 November 2006 in claim BVIHCV2006/0213]
- (6) **Morgan & Morgan Trust Co Ltd v Fiona Trust** [unreported Court of Appeal decision from the BVI in Civil Appeal No 3/2006]
- (7) **MacDoel Investments Ltd v Federal Republic of Brazil** [2007] JLR 201

- (8) **Danone Asia Pte Ltd v SB Chow & Co CPA** [unreported decision from Hong Kong dated 5 November 2008]
- (9) **Regina (Mohamed) v Secretary of State for Foreign and Commonwealth Affairs** [2008] EWHC 2048 (Admin), [2009] 1 WLR 2579
- (10) **Al-Rushaid Petroleum Investment Co v TSJ Engineering Consulting Co Ltd** [unreported decision of Hariprashad-Charles of 20 April 2010 in claim BVIHCV(COM) 37/2010]
- (11) **Hollander** – Documentary Evidence (Sweet & Maxwell, 10<sup>th</sup> ed, 2009)

However, in my view no useful purpose will be served in further analysis of the authorities on the various issues. The principles that apply in an application of this sort are well settled and susceptible to no doubt.

#### **Application of the law to the facts**

- [27] Applying the law to the facts in this case, I am satisfied that the respondents by virtue of their very role in providing registered agent services to the companies, a role which is voluntary, cannot on any view be considered as mere onlookers. The companies that they formed are said to have been mere vehicles created for the purpose of defrauding the Bank. The respondents, by incorporating and maintaining those vehicles thereby facilitated, albeit innocently, the commission of the fraud and as such were involved in the fraud perpetrated against the Bank. This renders the respondents under a duty to disclose information through **Norwich Pharmacal** type proceedings which may assist the Bank as the injured party in discovering the true wrongdoers. An order for discovery against them would permit the Bank to discover not only who had been the person or persons giving the incorporation and bank account instructions, but would provide the necessary protection to the respondents against any charge that might be brought against them that they had been in breach of their duty of confidentiality. Registered agents and registered office service providers who are used by others to create and maintain for them corporate vehicles for the purpose of effecting fraud must expect that in due course the victims will come to them

seeking discovery of the names and addresses and other information and documents that will enable the perpetrators to be discovered and the misappropriated assets traced.

### **Necessity**

[28] The necessity for making such an order against an innocent third party, though not a threshold requirement for grounding the exercise of the **Norwich Pharmacal** jurisdiction is nonetheless a factor which will weigh heavily in the exercise of the discretion to grant such relief. The trial judge considered that it was not necessary to order the respondents to make disclosure because the bank knew the identities of the nine (9) BVI companies by whom it had been wronged, and also knew the identities of the persons who had already been made defendants in the English proceedings, and who were described as the masterminds behind the "Scheme of Appropriation" and that once the primary defendants had been identified (and sued) the existence of possible additional defendants would emerge in the course of the proceedings. In this regard the further evidence sought to be introduced by the appellant which comprises the defence of the second defendant in the English Proceedings becomes relevant. As for the introduction of this evidence on appeal, I am satisfied that the tests as set out in the leading case of **Ladd v Marshall**<sup>16</sup> have been met. It is now clear that both individual defendants in the English proceedings have taken the position of lack of any knowledge or control over or indeed of having any relationship with these entities of the Territory of the Virgin Islands and thus it may reasonably be expected that no information will be forthcoming from them as to who are or were the instructing or controlling minds behind these entities. The respondents, by virtue of the services they render coupled with the due diligence duties they are obliged to perform in their capacity as Registered Agents would be expected to have such information and in all probability, information pertaining to banking mandates and resolutions passed by these entities for operating bank accounts in their possession. I can see no sound reason for first sending the Bank off to the Latvian Bank when there is little information as to the manner in which bank accounts were set up in Latvia. The information gleaned from the

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<sup>16</sup> [1954] 1 W.L.R. 1489.

Registered Agents may very well lead to the need for disclosure relief also being sought in Latvia.

- [29] Adopting the thinking of King J. above, I am satisfied that the relief sought in this case is necessary and proportionate in all the circumstances to permit the Bank its undoubted right to proceed both in law and in equity against those who set up the Companies and those that are presently in possession of the defrauded funds.

### **Conclusion**

- [30] I would grant the application to admit further evidence. I would allow the appeal and grant the reliefs sought. Based on reasoning of Lord Cross above, the 5<sup>th</sup> and 6<sup>th</sup> respondents are entitled to their costs in the court below and the 6<sup>th</sup> respondent to its costs in this court, to be assessed if not agreed. All of the respondents are entitled to be paid by the Bank their reasonable costs of providing discovery.

**Ian Donaldson Mitchell, CBE, QC**  
Justice of Appeal [Ag.]

I concur.

**Janice George-Creque**  
Justice of Appeal

I concur.

**Davidson Kelvin Baptiste**  
Justice of Appeal

[2013] 2 AC

VTB Capital plc v Nutritek International Corpn (SC(E))

A Supreme Court

**VTB Capital plc v Nutritek International Corpn and others**

[2013] UKSC 5

B 2012 Nov 12, 13, 14; Lord Neuberger of Abbotsbury PSC, Lord Mance,  
2013 Feb 6 Lord Clarke of Stone-cum-Ebony,  
Lord Wilson, Lord Reed JJSC

C *Company — Corporate personality — Piercing corporate veil — Claimant induced to enter loan agreement with company by representations made by third parties — Company controlled by third parties — Claimant alleging representations dishonest — Whether appropriate to pierce corporate veil — Whether third parties liable with company for breach of agreement*

C *Practice — Claim form — Service out of jurisdiction — Application to set aside permission to serve out of jurisdiction — Action in tort by English claimant against Russian defendants arising from failure to repay loan — Torts allegedly committed in England and governed by English law — Whether English court clearly appropriate forum for trial of action — Whether service out of jurisdiction to be permitted — CPR r 6.36, Practice Direction 6B, para 3.1(9)(a)*

D The claimant bank, which was incorporated, registered and regulated in England, was the subsidiary of a Russian state-owned bank based in Moscow. Following detailed negotiations and credit analyses conducted principally through the Russian bank, the claimant entered into a facility agreement in London with a Russian company, RAP, for a loan to enable RAP to purchase six Russian dairy companies and associated enterprises from the first defendant, a company incorporated in the British Virgin Islands with operations in Russia, and controlled through the second and third defendants, companies incorporated in the British Virgin Islands and Russia respectively, and the fourth defendant, an international businessman living in Russia. The facility agreement, and an accompanying interest rate swap agreement, provided for English law to be the governing law and for the English courts to have non-exclusive jurisdiction, or, at the claimant's option, for arbitration to be based in London. RAP defaulted on the loan after making three payments of interest. The claimant brought an action for damages in deceit and conspiracy, alleging that it had been induced to enter the facility agreement by the misrepresentations of the first defendant, acting in concert with the other defendants for which they were jointly and severably liable; that the fourth defendant had at all times been the controller and principal beneficial owner of the three defendant companies and of RAP and that he had approached the claimant and the Russian bank to initiate and promote the acquisition scheme. The misrepresentations alleged were that RAP and the first defendant were not in common control so that the sale of the dairy companies to RAP was a genuine arm's length transaction and that the stated value of the dairy companies was greatly in excess of their true worth. On the claimant's application under CPR r 6.36<sup>1</sup> and paragraph 3.1(9)(a) of Practice Direction 6B supplementing CPR Pt 6, the master granted it permission to serve the proceedings out of the jurisdiction and service was effected on the first, second and fourth defendants. When the defendants applied to set service aside, the claimant sought to amend its particulars of claim to plead an additional claim in contract that they were to be held liable for breach of the agreements on the basis that, as entities

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<sup>1</sup> CPR r 6.36: "the claimant may serve a claim form out of the jurisdiction with the permission of the court if any of the grounds set out in paragraph 3.1 of Practice Direction 6B apply."

Practice Direction 6B supplementing CPR Pt 6, para 3.1(9): "A claim is made in tort where (a) damage was sustained within the jurisdiction . . ."

behind the borrowing, the corporate veil of RAP could be pierced. The judge, having adopted a two-stage test on the question of the appropriate forum for trial of the claims, concluded that Russian law was the proper law and that Russia was the appropriate forum, and accordingly set aside service and refused the claimant's application to amend. On the appeal, the Court of Appeal held that the judge had erred in his adoption of a two-stage test in respect of the forum issue but, having re-exercised the discretion, concluded that, despite his error, the judge had ultimately reached the right decision as to the proper law and the appropriate forum and dismissed the appeal.

On the claimant's appeal—

*Held*, (1) that permission to serve out of the jurisdiction should only be granted where the court was satisfied that England was the proper place in which to bring the claim; that the onus lay on the claimant to establish that the courts of that jurisdiction were clearly the appropriate forum for trial of the action; that where a judge had made an evaluative judgment as to whether England was the appropriate forum an appellate court should refrain from interfering with the decision unless satisfied that a significant error had been made; and that (per Lord Neuberger of Abbotsbury PSC, Lord Mance, Lord Clarke of Stone-cum-Ebony and Lord Wilson JJSC) since the judge's erroneous adoption of a two-stage test had not affected his ultimate conclusion, that error was insignificant and did not justify an appellate court re-exercising the discretion whether to permit service out of the jurisdiction (post, paras 12, 13, 18, 44, 68, 80, 96–99, 156, 164, 190, 229–230).

(2) Dismissing the appeal in respect of permission to serve out of the jurisdiction (Lord Clarke of Stone-cum-Ebony and Lord Reed JJSC dissenting), that although the fact that the governing law of the alleged torts was English law was in general a positive factor in favour of trial in England, that factor had less force where the issues were factual rather than legal; that the place of commission of the torts was a relevant starting point, rather than a presumption, in determining the appropriate forum for a tort claim and would, viewed in isolation, normally establish a prima facie basis for being treated as the appropriate jurisdiction; but that, in the context of an international transaction, its significance might be overshadowed by countervailing factors; that, although the judge and the Court of Appeal had both been in error in holding that the governing law was Russian rather than English, that error had not been decisive to the court's conclusion and did not justify intervention by an appellate court; that the jurisdiction clauses in the agreements in favour of the English courts was not a strong factor in support of an English forum; that, although the alleged torts had been committed in England under English law, the fundamental focus was on Russia and the Russian witnesses; that, since the transaction had been introduced, pursued and approved predominantly in Moscow, and since the bulk of the evidence on both sides would come from Russian witnesses, the Russian connection was of such strength that the claimant could not discharge the onus of establishing that England was clearly the appropriate forum for trial; and that, accordingly, permission to serve out of the jurisdiction had correctly been set aside (post, paras 7–10, 45–51, 54–55, 62, 65–66, 68–71, 74, 98, 100–101, 105, 111, 113, 149, 151, 153–154, 156).

*Cordoba Shipping Co Ltd v National State Bank, Elizabeth, New Jersey (The Albaforth)* [1984] 2 Lloyd's Rep 91, CA considered.

(3) Dismissing the appeal in respect of permission to amend the particulars of claim, that (per Lord Neuberger of Abbotsbury PSC, Lord Mance, Lord Wilson and Lord Reed JJSC) it would be contrary to authority and principle to extend such jurisdiction as the court might have to pierce a company's corporate veil in such a way that, as sought by the claimant's proposed amendment, a person in control of the company would be liable as if he were a co-contracting party with the company to a contract to which he was not a party and to which none of the parties had intended that he should be; that, in any event, such an extension was unnecessary in order to enable the claimant to seek redress from the fourth defendant; and that it was not

- A appropriate in the circumstances to pierce RAP's corporate veil and the proposed amendment had rightly been refused (post, paras 72, 131-143, 145-148, 151, 158, 238, 243).  
*Antonio Gramsci Shipping Corpn v Stepanovs* [2012] 1 All ER (Comm) 293 disapproved.  
Per Lord Neuberger of Abbotsbury PSC, Lord Mance, Lord Clarke of Stonecum-Ebony and Lord Reed JJSC. (i) Judges hearing applications for service out of the jurisdiction or for a stay should invoke their management powers to ensure that the evidence and argument are kept within proportionate bounds and do not get out of hand. The essentially relevant factors should generally be capable of being identified relatively simply and uncontroversially (post, paras 73, 83, 89, 228, 240).
- B (ii) A defendant challenging the jurisdiction of the court is entitled to put the claimant to proof of his case, but if he is wholly reticent about his case he can have no complaint if the court does not take into account what points he may make or evidence he may call at any trial; he should therefore indicate his case in general terms, shortly and concisely (post, paras 36, 39, 73, 90-91, 228, 240).
- C *Quaere*. Whether, absent statutory authority, the court can pierce the veil of incorporation in any circumstances (post, paras 72, 130, 158, 238).  
Decision of the Court of Appeal [2012] EWCA Civ 808; [2012] 2 Lloyd's Rep 313 affirmed on different grounds.
- The following cases are referred to in the judgments:
- D *Adams v Cape Industries plc* [1990] Ch 433; [1990] 2 WLR 657; [1991] 1 All ER 929, CA  
*Alliance Bank JSC v Aquanta Corpn* [2011] EWHC 3281 (Comm); [2012] 1 Lloyd's Rep 181; [2012] EWCA Civ 1588; [2013] 1 All ER (Comm) 819; [2013] 1 Lloyd's Rep 175, CA  
*Antonio Gramsci Shipping Corpn v Stepanovs* [2011] EWHC 333 (Comm); [2011] Bus LR D117; [2012] 1 All ER (Comm) 293; [2011] 1 Lloyd's Rep 647
- E *Atlas Maritime Co SA v Avalon Maritime Ltd (No 1)* [1991] 4 All ER 769; [1991] 1 Lloyd's Rep 563, CA  
*Barcelona Traction, Light and Power Co Ltd (Second Phase), Case concerning (Belgium v Spain)* [1970] ICJ Rep 3  
*Ben Hashem v Al Shayif* [2008] EWHC 2380 (Fam); [2009] 1 FLR 115  
*Berezovsky v Michaels* [2000] 1 WLR 1004; [2000] 2 All ER 986, HL(E)  
*Cherney v Deripaska (No 2)* [2009] EWCA Civ 849; [2010] 2 All ER (Comm) 456, CA
- F *Company, In re A* [1985] BCLC 333, CA  
*Continental Transfert Technique Ltd v Federal Government of Nigeria* [2009] EWHC 2898 (Comm)  
*Cordoba Shipping Co Ltd v National State Bank, Elizabeth, New Jersey (The Albaforth)* [1984] 2 Lloyd's Rep 91, CA  
*Credit Suisse First Boston (Europe) Ltd v MLC (Bermuda) Ltd* [1999] 1 All ER (Comm) 237
- G *Daimler Co Ltd v Continental Tyre and Rubber Co (Great Britain) Ltd* [1916] 2 AC 307, HL(E)  
*Darby, In re; Ex p Brougham* [1911] 1 KB 95  
*Diamond v Bank of London and Montreal Ltd* [1979] QB 333; [1979] 2 WLR 228; [1979] 1 All ER 561, CA  
*Distillers Co (Biochemicals) Ltd v Thompson* [1971] AC 458; [1971] 2 WLR 441; [1971] 1 All ER 694, PC
- H *Dornoch Ltd v Mauritius Union Assurance Co Ltd* [2005] EWHC 1887 (Comm); [2006] Lloyd's Rep IR 127; [2006] EWCA Civ 389; [2006] 2 All ER (Comm) 385; [2006] 2 Lloyd's Rep 475, CA  
*Fiona Trust & Holding Corpn v Privalov* [2010] EWHC 3199 (Comm)  
*Friis v Colburn* [2009] EWHC 903 (Ch)

340

VTB Capital plc v Nutritek International Corpn (SC(E))

[2013] 2 AC

- Gencor ACP Ltd v Dalby* [2000] 2 BCLC 734 A  
*Gilford Motor Co Ltd v Horne* [1933] Ch 935, CA  
*Global Partners Fund Ltd v Babcock & Brown Ltd* [2010] NSWCA 196; 79 ACSR 383  
*Goss v Chilcott* [1996] AC 788; [1996] 3 WLR 180; [1997] 2 All ER 110, PC  
*H (Restrained Order: Realisable Property), In re* [1996] 2 All ER 391, CA  
*Jones v Lipman* [1962] 1 WLR 832; [1962] 1 All ER 442  
*Kensington International Ltd v Republic of the Congo* [2005] EWHC 2684 (Comm); [2006] 2 BCLC 296 B  
*Kroch v Rossell et Cie Société des Personnes à Responsabilité Limitée* [1937] 1 All ER 725, CA  
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*Lubbe v Cape plc* [2000] 1 WLR 1545; [2000] 4 All ER 268, HL(E)  
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*Pakistan v Zadari* [2006] EWHC 2411 (Comm); [2006] 2 CLC 667  
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*Roerig v Valiant Trawlers Ltd* [2002] EWCA Civ 21; [2002] 1 WLR 2304; [2002] 1 All ER 961; [2002] 1 Lloyd's Rep 681, CA  
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*Schapira v Ahronson* [1999] EMLR 735, CA  
*Sim v Robinow* (1892) 19 R 665, Ct of Sess  
*Smith v Hancock* [1894] 2 Ch 377, CA  
*Smith v Hughes* (1871) LR 6 QB 597  
*Snook v London and West Riding Investments Ltd* [1967] 2 QB 786; [1967] 2 WLR 1020; [1967] 1 All ER 518, CA G  
*Spijadi Maritime Corpn v Cansulex Ltd (The Spijadi)* [1987] AC 460; [1986] 3 WLR 972; [1986] 3 All ER 843, HL(E)  
*Tjaskemolen (now Visvliet), The* [1997] 2 Lloyd's Rep 465  
*Trafigura Beheer BV v Kookmin Bank Co* [2006] EWHC 1450 (Comm); [2006] 2 All ER (Comm) 1008; [2006] 2 Lloyd's Rep 455  
*Trustor AB v Smallbone (No 2)* [2001] 1 WLR 1177; [2001] 3 All ER 987  
*Welsh Development Agency v Export Finance Co Ltd* [1992] BCLC 148, CA H  
*Wood Preservation Ltd v Prior* [1969] 1 WLR 1077; [1969] 1 All ER 364, CA  
*Woolfson v Strathclyde Regional Council* 1978 SC (HL) 90; 1978 SLT 159, HL(Sc)  
*Yukong Line Ltd of Korea v Rendsburg Investments Corpn of Liberia (No 2)* [1998] 1 WLR 294; [1998] 4 All ER 82

[2013] 2 AC

VTB Capital plc v Nutritek International Corpn (SC(E))

- A The following additional cases were cited in argument:
- AIG Capital Partners Inc v Republic of Kazakhstan (National Bank of Kazakhstan intervening)* [2005] EWHC 2239 (Comm); [2006] 1 WLR 1420; [2006] 1 All ER 284; [2006] 1 All ER (Comm) 1; [2006] 1 Lloyd's Rep 45
- Agnew v Lansförsäkringsbolagens AB* [1996] 4 All ER 978
- Allcard v Skinner* (1887) 36 Ch D 145, CA
- B *Bugle Press Ltd, In re* [1961] Ch 270; [1960] 3 WLR 956; [1960] 3 All ER 791, CA
- Caltex Singapore Pte Ltd v BP Shipping Ltd* [1996] 1 Lloyd's Rep 286
- DHN Food Distributors Ltd v Tower Hamlets London Borough Council* [1976] 1 WLR 852; [1976] 3 All ER 462, CA
- Dadourian Group International Inc v Simms* [2006] EWHC 2973 (Ch)
- Dimbleby & Sons Ltd v National Union of Journalists* [1984] 1 WLR 427; [1984] ICR 386; [1984] 1 All ER 751, HL(E)
- C *Forum Craftsman, The* [1985] 1 Lloyd's Rep 291, CA
- Hubbard v Woodfield* (1913) 57 SJ 729
- ISC Technologies Ltd v Guerin* [1992] 2 Lloyd's Rep 430
- Jennings v Crown Prosecution Service* [2008] UKHL 29; [2008] AC 1046; [2008] 2 WLR 1148; [2008] 4 All ER 113, HL(E)
- Keighley Maxsted & Co v Durant* [1901] AC 240, HL(E)
- King v Lewis* [2004] EWCA Civ 1329; [2005] EMLR 45, CA
- D *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349; [1998] 3 WLR 1095; [1998] 4 All ER 513, HL(E)
- Lennon v Scottish Daily Record and Sunday Mail Ltd* [2004] EWHC 359 (QB); [2004] EMLR 332
- Linsen International Ltd v Humpuss Sea Transport Pte Ltd* [2011] EWHC 2339 (Comm); [2012] Bus LR 1649
- Linsen International Ltd v Humpuss Sea Transport Pte Ltd* [2011] EWCA Civ 1042, CA
- E *Littlewoods Mail Order Stores Ltd v McGregor* [1969] 1 WLR 1241; [1969] 3 All ER 855, CA
- Lloyds Bank Ltd v Chartered Bank of India, Australia and Cbnia* [1929] 1 KB 40, CA
- Markel International Insurance Co Ltd v La Republica Cia Argentina de Seguros* [2004] EWHC 1826 (Comm); [2005] Lloyd's Rep IR 90
- Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500; [1995] 3 WLR 413; [1995] 3 All ER 918, PC
- F *Peng Yan, The* [2009] 1 HKLRD 144
- Prest v Prest* [2012] EWCA Civ 1395; [2013] 2 AC 415; [2013] 2 WLR 557; [2013] 1 All ER 795, CA
- R v Grainger* [2008] EWCA Crim 2506, CA
- R v K* [2005] EWCA Crim 619; [2006] BCC 362, CA
- R v Seager* [2009] EWCA Crim 1303; [2010] 1 WLR 815, CA
- G *Rayner (JH) (Mincing Lane) Ltd v Department of Trade and Industry* [1989] Ch 72; [1988] 3 WLR 1033; [1988] 3 All ER 257, CA
- Reddaway v Banham* [1896] AC 199, HL(E)
- Revenue and Customs Comrs v Total Network SL* [2008] UKHL 19; [2008] AC 1174; [2008] 2 WLR 711; [2008] 2 All ER 413, HL(E)
- Rickshaw Investments Ltd v Nicolai Baron von Uexkull* [2006] SGCA 39; [2007] 1 Sing LR 377
- H *Samrose Properties Ltd v Gibbard* [1958] 1 WLR 235; [1958] 1 All ER 502, CA
- Shogun Finance Ltd v Hudson* [2003] UKHL 62; [2004] 1 AC 919; [2003] 3 WLR 1371; [2004] 1 All ER 215; [2004] 1 All ER (Comm) 332; [2004] 1 Lloyd's Rep 532, HL(E)
- Siu Yin Kwan v Eastern Insurance Co Ltd* [1994] 2 AC 199; [1994] 2 WLR 370; [1994] 1 All ER 213, PC

342

VTB Capital plc v Nutritek International Corpn (SC(E))

[2013] 2 AC

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[1987] AC 24; [1986] 3 WLR 398; [1986] 3 All ER 487, HL(E)  
*TSB Private Bank International SA v Chabra* [1992] 1 WLR 231; [1992] 2 All ER  
245  
*Trade Indemnity plc v Försäkringsaktiebolaget Njord* [1995] 1 All ER 796  
*Tunstall v Steigmann* [1962] 2 QB 593; [1962] 2 WLR 1045; [1962] 2 All ER 417,  
CA  
*Wallersteiner v Moir* [1974] 1 WLR 991; [1974] 3 All ER 217, CA B  
*Xin Yang, The* [1996] 2 Lloyd's Rep 217  
*Yenidje Tobacco Co Ltd, In re* [1916] 2 Ch 426, CA

### APPEAL from the Court of Appeal

By a claim form issued on 23 December 2010, the claimant, VTB Capital  
plc, claimed damages in deceit and conspiracy against the defendants,  
Nutritek International Corpn, Marshall Capital Holdings Ltd, Marshall C  
Capital LLC and Konstantin Malofeev. By his order dated 11 May  
2011 Chief Master Winegarten granted the claimant permission, pursuant to  
CPR r 6.36 and paragraph 3.1(9)(a) of Practice Direction 6B supplementing  
CPR Pt 6, to serve the claim form and particulars of claim on the defendants  
out of the jurisdiction. Service was not effected on the third defendant. On  
25 July and 28 September 2011 the first, second and fourth defendants D  
applied to set aside the master's order. On 5 August 2011 Roth J granted the  
claimant's application, made without notice, for a worldwide freezing order  
against the fourth defendant up to the sum of US\$200m and on  
14 September 2011 Vos J continued the order. On 18 October 2011 the  
claimant applied to amend its particulars of claim to add a claim in contract  
against the second to fourth defendants. On 18 October 2011 the fourth  
defendant applied for the discharge of the freezing order and on 19 October E  
2011 the claimant applied for the continuance of the order. By his order  
dated 29 November 2011 Arnold J [2011] EWHC 3107 (Ch) refused the  
claimant permission to amend the particulars of claim and set aside the  
master's order for permission to serve out of the jurisdiction, but continued  
the freezing order until the hearing of an appeal to preserve the status quo.  
The judge granted permission to appeal in respect of the claimant's F  
application to amend the claim.

On 5 December 2011 and 19 January 2012, the Court of Appeal granted  
permission to appeal on the issues relating to service out of the jurisdiction  
and the freezing order. The claimant appealed. By orders dated 22 June  
2012, the Court of Appeal (Lloyd, Rimer and Aikens LJ) [2012] 2 Lloyd's  
Rep 313 dismissed the appeal but stayed its order to enable the claimant to  
apply to the Supreme Court, and continued the freezing order on terms until G  
determination by the Supreme Court of any permission application.

On 26 July 2012 the Supreme Court (Lord Phillips of Worth  
Matravers PSC, Lord Mance and Lord Dyson JJSC) granted permission to  
appeal and directed that a temporary freezing order remain in force until the  
determination of the appeal by the Supreme Court. The claimant appealed.  
The issues for the Supreme Court on the appeal, as stated in the statement of  
facts and issues agreed by the parties, were, inter alia, (1) whether there was H  
a presumption that England was the appropriate forum for establishing that  
a tort had substantially taken place in the jurisdiction of the English court;  
(2) if so, what was the nature of the presumption, its strength and effect;  
(3) whether the Court of Appeal ought to have found that English law

- A governed the claims in tort and whether it had erred in its understanding of sections 11 and 12 of the Private International Law (Miscellaneous Provisions) Act 1995; (4) whether the Court of Appeal had erred by holding, if it had found that English law applied to the tort claims, that the choice of law for the tort claims would not weigh heavily in making England the appropriate forum for determining the issues between the parties; and
- B (5) whether the Court of Appeal had been correct to hold that there was such a principle as piercing the corporate veil in English law and, if so, whether the principle was engaged in the present case so that the claimant should be allowed to claim in contract under, inter alia, the facility agreement as against the second, third and fourth defendants on the basis that they were to be treated as parties to the agreements and/or otherwise subject to the obligations of a contracting party, and to remedies against them to enforce the terms of the agreements.
- C

The facts are stated in the judgments of Lord Mance and Lord Clarke of Stone-cum-Ebony JJSC.

*Mark Howard QC, Paul McGrath QC, Iain Pester and Tony Singla* (instructed by *Herbert Smith Freehills LLP*) for the claimant.

- D The conclusion that the place where the tort was in substance committed was the natural forum can only be displaced by the strongest factors pointing away from it. If a defendant has committed a wrong in England, there is a strong presumption that he ought to answer for it in England. That is particularly so in a case of fraud, having regard to the need to deter fraud and to ensure that its victims in this jurisdiction have the proper opportunity for obtaining restitution. The presumption is that the defendant ought to
- E answer for his wrongs in the place where he committed the actions constituting the tortious conduct. Incidental factors taking place elsewhere, which amount to a background narrative to the commission of the tort, do not displace the central factor of the place of commission. That factor cannot readily be displaced by peripheral issues, such as administrative convenience: see *Cordoba Shipping Co Ltd v National State Bank, Elizabeth, New Jersey (The Albaforth)* [1984] 2 Lloyd's Rep 91, 94, 96;
- F *Distillers Co (Biochemicals) Ltd v Thompson* [1971] AC 458, 467-468; *Berezovsky v Michaels* [2000] 1 WLR 1004, 1014; *Kroch v Rossell et Cie Société des Personnes à Responsabilité Limitée* [1937] 1 All ER 725; *Metall und Rohstoff AG v Donaldson Lufkin & Jenrette Inc* [1990] 1 QB 391, 484, 488-489; *Diamond v Bank of London and Montreal Ltd* [1979] QB 333; *The Forum Craftsman* [1985] 1 Lloyd's Rep 291, 297; *ISC Technologies Ltd v Guerin* [1992] 2 Lloyd's Rep 430, 435; *Global Partners Fund Ltd v Babcock & Brown Ltd* (2010) 79 ACSR 383; *Lennon v Scottish Daily Record and Sunday Mail Ltd* [2004] EMLR 332, para 36(ii) and Adrian Briggs, "The subtle variety of jurisdiction agreements" [2012] LMCLQ 364, 370. *Caltex Singapore Pte Ltd v BP Shipping Ltd* [1996] 1 Lloyd's Rep 286 and *The Xin Yang* [1996] 2 Lloyd's Rep 217 are in point. The presumption is not inconsistent with *Spiliada Maritime Corpn v Cansulex Ltd (The Spiliada)* [1987] AC 460. The Court of Appeal was wrong to reject the existence of that presumption.
- H

The presumption is not only important as a matter of justice, that the wrongdoer should be answerable in the place where the wrong was committed, but also to give greater certainty to enable a prospective litigant

344

VTB Capital plc v Nutritek International Corpn (SC(E))  
Argument

[2013] 2 AC

to bring his claim and expect that, the jurisdiction having been assessed, it will be maintained. With regard to economic torts where the acts are committed across international boundaries, the presumption operates when the substance of the alleged tort took place in the jurisdiction. It does not depend on all the elements of the tort doing so. In respect of a claim for inducing a breach of contract, the alleged acts of inducement could have taken place anywhere, but the intended damage could have happened only in England and so the place of damage was treated as the key element giving rise to the presumption: see the *Metall und Rohstoff* case [1990] 1 QB 391. There is good reason for the presumption: the jurisdiction in which events take place should be able to exercise jurisdiction over them and rule on questions of liability arising from them. The victim of a tort committed in England ought to be able to bring his claim in England and expect that the English court will adjudicate on it.

The substance of the torts was committed in England, since the key elements of the receipt of the representations, reliance and loss, all occurred in England. That gives rise to a strong presumption that it was manifestly just to try the case in England. Since there were no substantial factors which were as important individually or in their total as the fact that the torts were committed in England, the facts do not displace the presumption in favour of England being the natural forum: *Spiliada Maritime Corpn v Cansulex Ltd* [1987] AC 460, 477, 480.

On the question as to the proper law of the torts, section 11(1)(c) of the Private International Law (Miscellaneous Provisions) Act 1995 requires examination of the claimant's pleaded case to determine the significant elements of the torts: see *Dornoch Ltd v Mauritius Union Assurance Co Ltd* [2006] Lloyd's Rep IR 127; [2006] 2 Lloyd's Rep 475 and *Morin v Bonhams & Brooks Ltd* [2004] 1 All ER (Comm) 880. On the facts alleged, despite some geographical links outside the United Kingdom, the significant elements of the torts of deceit and conspiracy, and in particular the relevant reliance for the purposes of the claim, occurred in England and no significant elements occurred outside England which could have led to the conclusion that English law might not apply. The Court of Appeal was right to conclude that under that provision the applicable law of the torts was English law. It correctly emphasised that the place where the misrepresentations were received and acted upon and the loss suffered were of central importance in identifying the proper law and the appropriate forum. However it was then wrong to say that its conclusion was tentative; there was no basis for its finding that the arguments as to the location of the torts were "evenly" and "very evenly balanced." It should have found that the test under section 11(2)(c) was satisfied and that English law applied.

In those circumstances the Court of Appeal should only have disapplied that choice of law under section 12 if it was "substantially more appropriate" for the law to be that of another country. That can only be done where something significantly tips the balance, but the general rule is not dislodged easily: see *Roerig v Valiant Trawlers Ltd* [2002] 1 WLR 2304, 2310; *R (Al-Jedda) v Secretary of State for Defence* [2007] QB 621, paras 103-104 and *Dicey, Morris & Collins, The Conflict of Laws*, 15th ed (2012), para 35-147. In the present case, the Court of Appeal should not have found that "the centre of gravity" of the torts was in Russia. Just as the

A most significant events constituting the torts occurred in England with the consequence that they were likely to give rise to litigation, so the immediate recipient of the moneys procured by the fraud (RAP) was likely to be the primary defendant. Such litigation would be subject to English law and the English court's jurisdiction under the facility agreement in clauses 34 and 35 to which RAP was a contracting party as well as a party to the torts of deceit and conspiracy. That strongly suggested that the joint tortfeasors with RAP who had induced the facility agreement should be subject to the same law as RAP, namely English law. That factor is so powerful that there could be no question of English law being disapplied. A further highly material factor, demonstrating why it was not substantially more appropriate to apply Russian law, is that, on the basis that a fraud was committed, the defendants procured the entry into a suite of agreements subject to English law as the instrument of the fraud. In consequence English law was the proper law of the torts under section 11 of the 1995 Act; there was no basis to disapply section 11 since the section 12 test was not satisfied. If, by contrast, Russian law was the proper law, it should be disapplied under section 12.

A properly incorporated company is a legal person separate from its corporators and controllers, with its own rights and liabilities (see *Salomon v A Salomon & Co Ltd* [1897] AC 22) and the principle of separate corporate personality is a privilege intended to encourage investment in business by presenting a shield, protecting shareholders and those controlling the company from the potential open-ended liabilities it incurred in carrying on business. But in defined circumstances particular fraudulent conduct is not to be afforded the shelter of the principle and acceptance of the doctrine of lifting or piercing the corporate veil supports and strengthens its proper application: see *The Tjaskemolen (now Visuliet)* [1997] 2 Lloyd's Rep 465; *Atlas Maritime Co SA v Avalon Maritime Ltd (No 1)* [1991] 4 All ER 769; *Ben Hashem v Al Shayif* [2009] 1 FLR 115; *Kensington International Ltd v Republic of the Congo* [2006] 2 BCLC 296; *R v Grainger* [2008] EWCA Crim 2506; *In re H (Restraint Order: Realisable Property)* [1996] 2 All ER 391; *Jennings v Crown Prosecution Service* [2008] AC 1046; *Snook v London and West Riding Investments Ltd* [1967] 2 QB 786; *Gower & Davies, Principles of Modern Company Law*, 9th ed (2012), pp 208–212; *Palmer's Company Law* (looseleaf ed), vol 1, paras 2.1533–2.1544 and *Farrar's Company Law*, 4th ed (1998), pp 69–78.

It is inaccurate to describe the process of lifting the corporate veil as ignoring the separate status of the company. That status remains untouched. Thus, remedies typically are granted against the puppeteer and the puppet company. What is lifted is the protection from liability afforded to those operating behind the veil so that a puppeteer is no longer entitled to the protection afforded in respect of conduct carried out through the use of the corporate entity. Lifting the veil does not involve any finding that the company was a sham in the sense of not being validly incorporated. If the term “sham” applies at all it is more appropriately used in respect of the impugned transaction. When the veil is lifted, it is only for the limited purpose of remedying the particular wrong: see the *Ben Hashem* case and *Dadourian Group International Inc v Simms* [2006] EWHC 2973 (Ch). But the remedy is available despite alternatives also being so: see *Gilford Motor Co Ltd v Horne* [1933] Ch 935.

346

VTB Capital plc v Nutritek International Corpn (SC(E))  
Argument

[2013] 2 AC

In the present case, since the Court of Appeal found the facts relied on by the claimant to be at least arguable, the corporate veil of RAP should be lifted to expose, in particular, the second to fourth defendants (the “contract defendants”) to enforcement of the claimant’s claims under the terms of the facility agreement. Only if the corporate veil were to be lifted, and the extent and nature of the fraudulent conduct exposed, would it be possible to determine the appropriate legal response. Then RAP’s conduct, in carrying out the fraud by entering the facility agreement with the claimant, will be identified as also having been effected by the contract defendants and they will be treated as having entered into the contract with the claimant and will be bound by its terms. The abuse would be not merely the company’s entering into a fraudulently induced contract with a counter-party, but the puppeteer’s abuse of the company’s corporate structure to disguise its own involvement and thereby perpetrate a fraud through the mechanism of the contract: see *Antonio Gramsci Shipping Corpn v Stepanovs* [2011] Bus LR D117; *Alliance Bank JSC v Aquanta Corpn* [2012] 1 Lloyd’s Rep 181; *Linsen International Ltd v Humpuss Sea Transport Pte Ltd* [2012] Bus LR 1649 and *Kensington International Ltd v Republic of the Congo* [2006] 2 BCLC 296. Contrast *Yukong Line Ltd of Korea v Rendsberg Investments Corpn of Liberia (No 2)* [1998] 1 WLR 294.

The claimant accordingly seeks to amend its pleaded case to assert that the contract defendants should be treated as being jointly and severally liable with RAP for the claimed breaches of the contractual arrangements. On the basis that contractual relief is available as against those defendants, as parties to the facility agreement, they can sue and be sued on its terms; any independent attempt to bring a claim by them under the agreement would have to overcome the policy against reliance on one’s own wrongdoing to support a claim and, as regards being sued, the defences which would otherwise be available to RAP would also be available to them in any contract claim made by the claimant.

The Court of Appeal correctly accepted that, in principle, the doctrine of lifting or piercing the corporate veil exists and that it operates where a company is fraudulently used as a device or façade to conceal the involvement of the puppeteer so as to avoid personal liability. However, it was wrong to reject the claimant’s claim on the grounds that such relief would be (i) an unwarranted restriction on the availability of potential relief arising on the lifting of the veil and run counter to the policy aims on which the doctrine was based, and (ii) inconsistent with its interpretation of the leading case law: see *Woolfson v Strathclyde Regional Council* 1978 SC (HL) 90; *Adams v Cape Industries plc* [1990] Ch 433; *In re Bugle Press Ltd* [1961] Ch 270; *Linsen International Ltd v Humpuss Sea Transport Pte Ltd* [2011] EWCA Civ 1042; *Prest v Prest* [2013] 2 AC 415; *Trustor AB v Smallbone (No 2)* [2001] 1 WLR 1177; *Ben Hashem v Al Shayif* [2009] 1 FLR 115; *Gilford Motor Co Ltd v Horne* [1933] Ch 935; *Jones v Lipman* [1962] 1 WLR 832; *In re Darby, Ex p Brougham* [1911] 1 KB 95; *Gencor ACP Ltd v Dalby* [2000] 2 BCLC 734; *Kensington International Ltd v Republic of the Congo* [2006] 2 BCLC 296; *Snook v London and West Riding Investments Ltd* [1967] 2 QB 786 and *R v Seager* [2010] 1 WLR 815. [Reference was made to *South Carolina Insurance Co v Assurantie Maatschappij “De Zeven Provinciën” NV* [1987] AC 24.]

A The importance of avoiding pre-conceived restrictions on the relief available on lifting the veil is evident given that fraudulent conduct is involved. Fraud is notoriously difficult to define (see *Allcard v Skinner* (1887) 36 Ch D 145) and infinite in variety (see *Reddaway v Banham* [1896] AC 199) because it is not a freestanding activity: rather it is the manner in which otherwise legitimate commercial activity is carried out. The response must accordingly remain flexible. Accordingly the veil can be lifted and relief imposed irrespective of whether the original obligations, which existed before the veil is lifted, vest in the puppet or the puppeteer. In the present case, unlike the factual bases of many authorities referred to by the Court of Appeal, those obligations vest in the puppet company, RAP, and the consequence of lifting the veil is to impose those obligations on the contract defendants. Although only *Antonio Gramsci Shipping Corpn v Stepanovs* [2011] Bus LR D117 and *Kensington International Ltd v Republic of the Congo* [2006] 2 BCLC 296 are directly in point, other authorities, despite certain differences, if properly understood, support the claimant's position: see *Trustor AB v Smallbone (No 2)* [2001] 1 WLR 1177; *Gilford Motor Co Ltd v Horne* [1933] Ch 935; *Jones v Lipman* [1962] 1 WLR 832; *In re Darby, Ex p Brougham* [1911] 1 KB 95; *Gencor ACP Ltd v Dalby* [2000] 2 BCLC 734 and *Ben Hashem v Al Shayif* [2009] 1 FLR 115.

D The Court of Appeal erred in rejecting the relevance to be derived from the analogy with the law relating to undisclosed principals: see *Siu Yin Kwan v Eastern Insurance Co Ltd* [1999] 2 AC 199; *Keighley Maxsted & Co v Durant* [1901] AC 240, 261-262; *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1989] Ch 72, 189 and *Bowstead & Reynolds on Agency*, 19th ed (2010), para 8-071.

E If the appeal is upheld on the question of piercing the corporate veil, England will be the appropriate forum for the resolution of the proceedings because the defendants are parties to contracts containing English jurisdiction clauses and the claims fall within the scope of those clauses; alternatively, the fact that the claims will be before the English court in relation to the contractual issues will be a compelling factor rendering the English court forum *conveniens* in relation to the tortious claims.

F Since the judge discharged the worldwide freezing order, his order should be set aside if the claimant wins. The only fair and just approach is to preserve the position as it was before the Court of Appeal. The matter could then go back to the Court of Appeal or to the High Court, or the order could be continued to trial or further order. If the claimant loses, obviously, the order would be discharged.

G *Michael Lazarus and Christopher Burdin* (instructed by S J Berwin LLP) for the second defendant.

The fourth defendant's submissions, post, pp 351-353, is adopted on all forum and related issues.

H The claimant's case on the proposed amendment to bring a claim in contract is based on the assumption that there is a principle in English law known as "lifting the corporate veil" which can be engaged whenever certain facts are established. However the law knows no such principle and the courts below were correct to refuse any such amendment. At most, the phrase "lifting the corporate veil" is a label applied to various different ways in which the court will give relief in certain factual situations despite the

348

VTB Capital plc v Nutritek International Corpn (SC(E))  
Argument

[2013] 2 AC

involvement of a company. The phrase is more apt to describe the outcomes of such cases than any part of the reasoning by which they were reached; but the phrase is misleading because it suggests that the outcome might be different on identical facts provided only that no company was involved and it may mask the court's real process of reasoning. In only a small number of cases it has led the court to decide the case on the basis that on proof of certain facts it is appropriate to "lift the corporate veil" and grant relief.

The existence of such a principle would be contrary to the Companies Act as interpreted in *Salomon v A Salomon & Co Ltd* [1897] AC 22. It would produce arbitrary and unprincipled distinctions between the rights and obligations of legal and natural persons. The proposition that a duly incorporated company has the same rights and obligations as a natural person is enshrined in the definition of "person" in Schedule 1 to the Interpretation Act 1978. *Salomon's* case establishes that a company must be treated like any other independent person with its own rights and liabilities appropriate to itself. No principle entitles the court to lift the veil of personality of an individual person to make another liable instead of or in addition to him. Equally it is impossible for it to do so in relation to a duly incorporated company on otherwise identical facts.

Leaving aside cases where the separate personality of a company is overridden by statute, the court can only disregard the involvement of a company in a transaction or other activity where it could disregard the equivalent involvement of an individual. When the cases on lifting the corporate veil are considered, the question is whether the outcome would be any different if, in place of the wrongdoer's corporate creature, there was a human puppet? The answer is obviously "No": and it follows that the outcome cannot be based on any special principle that applies only to companies. The court is no more lifting the veil of incorporation than it could lift the veil of human personality.

It is important to distinguish cases where legal personality is abrogated or overridden by statute from cases at common law, including equity, where the court has decided that it is appropriate to lift the corporate veil: see *Dimbleby & Sons Ltd v National Union of Journalists* [1984] 1 WLR 427, 435. Cases involving statutes are straightforward exercises in statutory interpretation which turn on the construction of the particular provision in question and therefore provide no juridical basis for a freestanding principle of lifting the corporate veil as a matter of common law. The question, which may be the same in relation to a contract, is whether, properly construed the relevant provision wholly or partly abrogates the separate legal personality of a company: see *Wood Preservation Ltd v Prior* [1969] 1 WLR 1077.

Where the relevant rule is one of common law, including equity, the general law applied to the facts may produce a result which appears to disregard the separation between the legal personality of a company and that of another, whether a company or an individual. But the result ought to be the same whether the relevant legal person is a company or an individual. Any distinction would be contrary to *Salomon v A Salomon & Co Ltd* [1897] AC 22 and so contrary to the Companies Act. The only justification for lifting the veil in such cases is that the relevant rule of law is sufficiently flexible to enable the court to grant a remedy that prevents the defendant obtaining an advantage by utilising the separate legal personality conferred on a company by its incorporation. Whether the relevant rule of law enables

A the court to grant the remedy is again a question of construction of the rule: see *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500.

When properly analysed, the cases show no support for the existence of a freestanding principle of lifting the corporate veil: see *In re Darby; Ex p Brougham* [1911] 1 KB 95; *Gilford Motor Co Ltd v Horne* [1933] Ch 935; *Jones v Lipman* [1962] 1 WLR 832; *Smith v Hancock* [1894] 2 Ch 377; *Hubbard v Woodfield* (1913) 57 SJ 729; *Tunstall v Steigmann* [1962] 2 QB 593; *Woolfson v Strathclyde Regional Council* 1978 SC (HL) 90; *Daimler Co Ltd v Continental Tyre and Rubber Co (Great Britain) Ltd* [1916] 2 AC 307; *TSB Private Bank International SA v Chabra* [1992] 1 WLR 231; *Merchandise Transport Ltd v British Transport Commission* [1962] 2 QB 173; *Linsen International Ltd v Humpuss Sea Transport Pte Ltd* [2012] Bus LR 1649, paras 143–152; *In re Yenidje Tobacco Co Ltd* [1916] 2 Ch 426; *Samrose Properties Ltd v Gibbard* [1958] 1 WLR 235; *Wood Preservation Ltd v Prior* [1969] 1 WLR 1077; *Littlewoods Mail Order Stores Ltd v McGregor* [1969] 1 WLR 1241; *Wallersteiner v Moir* [1974] 1 WLR 991; *In re A Company* [1985] BCLC 333; *Gencor ACP Ltd v Dalby* [2000] 2 BCLC 734; *Trustor AB v Smallbone (No 2)* [2001] 1 WLR 1177; *Kensington International Ltd v Republic of the Congo* [2006] 2 BCLC 296; *DHN Food Distributors Ltd v Tower Hamlets London Borough Council* [1976] 1 WLR 852; *Adams v Cape Industries plc* [1990] Ch 433; *Snook v London and West Riding Investments Ltd* [1967] 2 QB 786; *R v K* [2006] BCC 362 and *Goss v Chilcott* [1996] AC 788. Contrast *Yukong Line Ltd of Korea v Rendsberg Investments Corpn of Liberia (No 2)* [1998] 1 WLR 294. [Reference was made to *South Carolina Insurance Co v Assurantie Maatschappij “De Zeven Provinciën” NV* [1987] AC 24.]

Some cases which are suggested as the juridical basis for such a principle are, on analysis, not so. Rather, they exemplify the court’s particular construction of the relevant rule to determine whether liability attached to one legal or natural person in addition to or in substitution of another and are in any event explicable on grounds other than a supposed principle of lifting the corporate veil. The few cases supporting the existence of the principle and actually applying it are not soundly based in authority: see *Gencor ACP Ltd v Dalby* [2000] 2 BCLC 734; *Trustor AB v Smallbone (No 2)* [2001] 1 WLR 1177 and *Kensington International Ltd v Republic of the Congo* [2006] 2 BCLC 296. They misunderstand the previous decisions on which they rely and which, properly understood, do not support such a principle: see *Tunstall v Steigmann* [1962] 2 QB 593; *Woolfson v Strathclyde Regional Council* 1978 SC (HL) 90 and *Daimler Co Ltd v Continental Tyre and Rubber Co (Great Britain) Ltd* [1916] 2 AC 307. Further, they overlook the distinction between statutory and non-statutory cases: see the *Gencor* case and *In re H (Restraint Order: Realisable Property)* [1996] 2 All ER 391. None of the subsequent cases that analyse lifting the corporate veil purports to develop the law: they apply principles said to have been laid down in those cases: see *Ben Hashem v Al Shayif* [2009] 1 FLR 115.

H The claimant’s proposed claim in contract, based on the supposed principle of lifting the corporate veil, is not supported by any authority prior to *Antonio Gramsci Shipping Corpn v Stepanovs* [2011] Bus LR D117; [2012] 1 All ER (Comm) 293, and that case itself is not supported by any prior authority. The cases relied on in the *Gramsci* case do not support it: see

350

VTB Capital plc v Nutritek International Corpn (SC(E))  
Argument

[2013] 2 AC

*Gilford Motor Co Ltd v Horne* [1933] Ch 935; *Jones v Lipman* [1962] 1 WLR 832 and *Dadourian Group International Inc v Simms* [2006] EWHC 2973 (Ch). Other cases, relied on by the claimant, in particular, *Gencor ACP Ltd v Dalby* [2000] 2 BCLC 734; *Trustor AB v Smallbone (No 2)* [2001] 1 WLR 1177 and *Kensington International Ltd v Republic of the Congo* [2006] 2 BCLC 296, do not assist: see *Linsen International Ltd v Humpuss Transportasi Kimia* [2011] EWCA Civ 1042 at [136]; *Continental Transfert Technique Ltd v Federal Government of Nigeria* [2009] EWHC 2898 (Comm) at [29] and *AIG Capital Partners Inc v Republic of Kazakhstan (National Bank of Kazakhstan intervening)* [2006] 1 WLR 1420, paras 27–29. The *Gramsci* case was rightly overruled by the Court of Appeal.

To impose contractual liability on the defendants conflicts with the unchallenged decision in *Salomon v A Salomon & Co Ltd* [1897] AC 22 and with the fundamental principles of the law of contract. The claimant cannot make the defendants liable under the facility agreement under the objective principle of contract formation: see *Smith v Hughes* (1871) LR 6 QB 597. The claimant’s attempt to introduce additional parties to the facility agreement in contradiction of its terms conflicts with the parol evidence rule: see *Shogun Finance Ltd v Hudson* [2004] 1 AC 919, para 49. The imposition of contractual liability on the defendants on the ground of their involvement in fraud would impermissibly confuse contract and tort. Making them liable in contract would impose a liability whose juridical basis was the consent of the parties and the promise to perform, though the claimant and defendants never consented to contract with each other and the defendants never promised to perform. In effect the claimant would make the fraudsters the deemed guarantors of the performance of contracts they had fraudulently induced. If the claimant can pursue a claim against the defendants in contract, its claim would increase from a claim for damages in tort to a claim for moneys due under the facility agreement. The doctrine of undisclosed principal is judicially recognised as being anomalous and it does not assist in the present case: see *Welsh Development Agency v Export Finance Co Ltd* [1992] BCLC 148, 173; *OBG Ltd v Allan* [2008] AC 1, paras 103–106; *Lloyds Bank Ltd v Chartered Bank of India, Australia and China* [1929] 1 KB 40 and *Bowstead & Reynolds on Agency*, 19th ed, para 8-071.

There is no justification in policy or principle for the touchstone of liability alleged by the claimant, namely that the alleged fraudsters have concealed their involvement in the fraud by using the company to make the contract. The claimant cannot rely on the contention that as a matter of law, on the occurrence of particular facts, the court has power to deem a person to be an additional party to the contract when, under ordinary contractual principles, he would not be a party. It would not represent a legitimate judicial development of the common law, but would amount to impermissible judicial law-making: see *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349, 378. [Reference was made to *The Tjaskemolen (now Visvliet)* [1997] 2 Lloyd’s Rep 465, 469 and *TSB Private Bank International SA v Chabra* [1992] 1 WLR 231, 237, 238.]

*Mark Hapgood QC, Stephen Rubin QC and James McClelland* (instructed by *SJ Berwin LLP*) for the fourth defendant.

The second defendant’s argument on lifting the corporate veil is adopted.

A The Court of Appeal did not err in law in declining to hold that the commission of a tort within the jurisdiction creates a presumption, as opposed to a prima facie position, in favour of England being the appropriate forum. The concept of a formal “presumption” is not supported by authority and decision-making is not assisted by it. The approach, which is flexible, has been to treat the place of the tort as the starting point, but no more, in what, ultimately, is a multi-factorial analysis: see *Cordoba Shipping Co Ltd v National State Bank, Elizabeth, New Jersey (The Albaforth)* [1984] 2 Lloyd’s Rep 91, 94, 96; *Berezovsky v Michaels* [2000] 1 WLR 1004, 1014, 1031, paras 140–145; *Distillers Co (Biochemicals) Ltd v Thompson* [1971] AC 458, 463, 467–468; *The Forum Craftsman* [1985] 1 Lloyd’s Rep 291; *Metall und Rohstoff AG v Donaldson Lufkin & Jenrette Inc* [1990] 1 QB 391, 484, 488–489; *Caltex Singapore Pte Ltd v BH Shipping Ltd* [1996] 1 Lloyd’s Rep 286; *The Xin Yang* [1996] 2 Lloyd’s Rep 217; *Trade Indemnity plc v Försäkringsaktiebolaget Njord* [1995] 1 All ER 796; *Markel International Insurance Co Ltd v La Republica Cia Argentina de Seguros* [2005] Lloyd’s Rep IR 90, paras 29–30; *King v Lewis* [2005] EMLR 45, paras 24, 26–27; *Rickshaw Investments Ltd v Nicolai Baron von Uexkull* [2007] 1 Sing LR 377 and *The Peng Yan* [2009] 1 HKLRD 144, paras 25, 28.

D The fundamental question is: where can the case most suitably be tried in the interests of all the parties and for the ends of justice? The fact that a tort has been committed and/or loss has been suffered in a particular jurisdiction is a connecting factor of some weight pointing towards that jurisdiction being the natural forum and should be brought into account as part of a wider examination of where the case can be most suitably tried: see *Spiliada Maritime Corpn v Cansulex Ltd* [1987] AC 460. But the weight properly to be attributed to those considerations in any given case will depend on the particular circumstances and the other connecting factors.

E Since the test in the *Spiliada* case specifically requires the court to consider whether the parties can obtain substantial justice in another jurisdiction and, if not, to make service out available on that ground, the claimant’s policy concerns, that the victim of fraud should have a proper opportunity of obtaining restitution, are anticipated and addressed by the common law rules on jurisdiction. In any event the claimant confuses the considerations applicable to criminal and private law. The requirement to hold fraudsters to account is the language of the criminal law, where crimes are wrongs against the state and must accordingly be answered within its domestic courts. Torts are not crimes, but civil wrongs for which victims may seek redress. English law does not require them to bring the claim in the domestic jurisdiction. If an alternative forum exists, subject to that forum’s own jurisdictional rules, they may bring it there.

F In the present case, policy considerations point against the claim being brought here. There is a strong public policy against encouraging courts to permit claims to proceed on the strength of an inflexible presumption when they have little connection here.

G If the claimant’s argument on the presumption issue is rejected, there is no basis for reopening the Court of Appeal’s evaluation of the forum issue. If its argument succeeds, the appeal should still be dismissed since whichever test the Court of Appeal adopted, whether a presumption or a prima facie test, the court still had to weigh the significance of the connecting factors.

352

VTB Capital plc v Nutritek International Corpn (SC(E))  
Argument

[2013] 2 AC

A  
A presumption could only be provisional, as a rebuttable presumption of fact: see *Dennis, The Law of Evidence*, 4th ed (2010), para 12.25; *Phipson on Evidence*, 17th ed (2009), para 6-17 and *Cross & Tapper on Evidence*, 12th ed (2010), p 13. Its effect is merely to identify that a conclusion may be drawn once the basic facts are established. It does not predetermine that conclusion and does not prevent the court from considering the wider countervailing considerations. Since there was no misdirection by the Court of Appeal in weighing the factors, there is no basis for revisiting its decision. B

C  
The question whether the Court of Appeal misdirected itself on the presumption issue has no bearing on its analysis of section 11(2)(c) of the Private International Law (Miscellaneous Provisions) Act 1995, identifying where the significant events occurred, rather than the weight to be attached to the geographical connection. There is accordingly no basis for the Supreme Court to revisit the issue.

D  
E  
F  
G  
With regard to the tort of deceit, the Court of Appeal was entitled to consider that the most significant factual elements were reliance and loss and to decide the section 11(2)(c) point in the claimant's favour. There were, however, significant factual elements which occurred in Russia: the representations were made there in respect of facts which took place there and the "deceitful mind" was ex hypothesi in Russia. It was therefore quite proper for the Court of Appeal to conclude that the matter was balanced. The deceit claim against the second to fourth defendants is advanced solely on the basis of liability as joint tortfeasors acting pursuant to a common design. Since the courts below found that the relevant combination between the defendants occurred in Russia, the extent to which the deceit claim is predicated on the joint tortfeasorship provides a significant element which necessarily occurred, if anywhere, in Russia: see *Revenue and Customs Comrs v Total Network SL* [2008] AC 1174. Similarly the courts below found that the conspiracy, if any, must have been hatched in Russia. Even if the claimant's assertion that it was "carried out" in England were correct, it fails to address the relevant requirement in section 11(2)(c) as to where the events actually happened. But the Court of Appeal was therefore entitled to comment that, with regard to conspiracy, the section 11(2)(c) test was very evenly balanced. That was generous to the claimant, since, in fact, the balance fell in the opposite direction. The Court of Appeal's disapplication of the general rule under section 12 was based on strong, if not overwhelming, factual considerations and, were it necessary to revisit that assessment, the Supreme Court should take into account the same considerations and reach the same result.

H  
The proper law is one of many matters relevant to determining whether England is clearly or distinctly the appropriate forum and it should not be given too great a prominence in arguments over forum. The common law rules of forum conveniens consist of simple and well established propositions which are intended to be sufficiently flexible to accommodate the wide variety of disputes coming before the court. When considering whether to grant or set aside service, the court must consider the circumstances as a whole. The fundamental question is to identify the forum in which the case can be suitably tried in the interests of all the parties and for the ends of justice: see *Spiliada Maritime Corpn v Cansulex Ltd* [1987] AC 460, 480 and *Sim v Robinow* (1892) 19 R 665. The centre of gravity lies

[2013] 2 AC

VTB Capital plc v Nutritek International Corpn (SC(E))  
Argument

A overwhelmingly with Russia and the applicable law, while of modest weight, tips the scales still further in that direction.

It is also necessary to focus on any future trial of the claims. Having regard to the key issues of fact which will arise and that virtually all the witnesses of fact will come from Russia, the case for concluding that England is not clearly or distinctly the appropriate forum is overwhelming:  
B see *Markel International Insurance Co Ltd v La Republica Cia Argentina de Seguros* [2005] Lloyd's Rep IR 90 and *Trade Indemnity plc v Försäkringsaktiebolaget Njord* [1995] 1 All ER 796. [Reference was made to *Agnew v Lansförsäkringsbolagens AB* [1996] 4 All ER 978.]

*Rubin QC* following.

C If the claimant's appeal fails, the worldwide freezing order against the fourth defendant should be discharged immediately. Even if the claimant's appeal is successful the freezing order should be discharged. Quite apart from the facts that there are no risks of dissipation and that, in obtaining the order without notice, the claimant has been guilty of serious non-disclosure, it was discharged long ago by the judge on jurisdictional grounds as well as on the merits. Its continuance, on a holding basis, pending the appeal to the Court of Appeal, and the temporary order made by the Supreme Court, has  
D been protracted and is wrong. Any suggestion for its further continuance is unsustainable. It has been an oppressive restraint on the fourth defendant's economic activities which continues to cause him considerable prejudice. It is repugnant to justice that an order with its draconian effect should stay in operation for so long when the judge has held that it should not have been  
E made in the first place, and no other court has concluded otherwise. The fairness and utility of a salutary jurisdiction risks being brought into disrepute.

*Howard QC* replied.

The court took time for consideration.

6 February 2013. The following judgments were handed down.

F

LORD MANCE JSC

### *Introduction*

1 The appellant, VTB Capital plc ("VTB"), is incorporated and registered, and authorised and regulated as a bank, in England. It is  
G majority-owned by JSC VTB Bank ("VTB Moscow"), a state-owned bank based in Moscow. The first, second and fourth respondents are, respectively, Nutritek International Corpn ("Nutritek"), Marshall Capital Holdings Ltd ("Marcap BVI"), both British Virgin Islands companies, and Mr Konstantin Malofeev, a Russian businessman resident in Moscow said to be the ultimate owner and controller of both, as well as of the third respondent, Marshall  
H Capital LLC ("Marcap Moscow"), a Russian company which has not been served.

2 The present case arises from a facility agreement dated 23 November 2007 ("the facility agreement") entered into between VTB and a Russian company, Russagroprom LLC ("RAP"), under which VTB advanced some US\$225,050,000 to RAP. The advance was primarily to enable RAP to buy

354

VTB Capital plc v Nutritek International Corpn (SC(E))  
Lord Mance JSC

[2013] 2 AC

six Russian dairy companies and three associated companies (“the dairy companies”) from Nutritek. After making three interest payments (and no payments of capital), RAP defaulted on the loan in November 2008. VTB believes the security provided for the loan to be worth only in the region of US\$32m to US\$40m. A

3 VTB’s case is that it was induced in London to enter into the facility agreement, and an accompanying interest rate swap agreement, by misrepresentations made by Nutritek, for which the other respondents are jointly and severally liable. The misrepresentations alleged are, first, that RAP and Nutritek were not under common control, and second, that the value of the dairy companies was much greater than they were in fact worth. VTB’s case is that the misrepresentations were fraudulent. B

4 In order to bring proceedings in tort in England against any of the respondents, VTB required permission to effect service on them out of the jurisdiction. Permission was obtained from Master Winegarten on 11 May 2011. The first, second and fourth respondents were served, and applied to set aside the service. In response, VTB applied for leave to amend its particulars of claim to add a contractual claim, seeking to hold the respondents liable for breach of the facility agreement and interest rate swap, on the basis that RAP’s corporate veil could in the circumstances be pierced and the respondents held liable as persons behind the borrowing. The respondents’ application to set aside succeeded and VTB’s application to amend failed before Arnold J [2011] EWHC 3107 (Ch), and the Court of Appeal upheld his decision on both points, albeit by reasoning in some respects different. C D

5 As to service out, it is common ground, in the light of the decisions below, that VTB has a serious issue to be tried in tort against each of the respondents, and a good arguable case that its tort claims fall within paragraph 3.1(9)(a) of Practice Direction 6B Supplementing CPR Pt 6, on the basis that they led to VTB sustaining damage within the jurisdiction. But both courts below held that VTB failed to show that England was clearly or distinctly the appropriate forum for resolution of VTB’s tort claims. As to piercing the corporate veil, both courts have held that, although such a principle exists, no basis exists in the present circumstances for applying it to hold the respondents liable on a facility agreement or interest rate swap, into which they are alleged to have induced VTB to enter by deceit. E F

6 VTB now appeals by permission of the Supreme Court on both points, which I will consider in turn.

*Appropriate forum—the basis of the claims* G

7 Both the alleged misrepresentations on which VTB relies originated in Russia, but they reached VTB in London (very probably via VTB Moscow), and were relied upon by VTB there when it gave formal agreement to the facility agreement and interest rate swap there. Further, VTB sustained its loss by disbursing money in and from London, although, as will appear, it was in fact covered by VTB Moscow against any loss which it might otherwise make on the loan. In these circumstances, I address the question of the appropriate forum on the basis that, contrary to the conclusion of the judge and Court of Appeal, the law governing the alleged tort of deceit is English rather than Russian law. In summary, this is because England is the place where the events constituting the tort occurred, within the meaning of H

A section 11(1) of the Private International Law (Miscellaneous Provisions) Act 1995 and the respondents have not shown under section 12 that the significance of the factors connecting the tort with Russia is such that it is substantially more appropriate for Russian rather than English law to apply to determine the issues arising in this case. Whether the same applies to the alleged tort of conspiracy was not the focus of detailed submissions on this appeal and appears to me more doubtful. The conspiracy was to commit the  
B deceit, but since both are based on a common design allegedly formed in Russia, that is a point that cuts both ways. I am however content to proceed on the basis that the conspiracy was, like the deceit, governed by English law, since ultimately in my view it makes no difference to the result.

8 It is relevant in the light of the above to examine the pleaded basis for the allegations of deceit and conspiracy. Each of these alleged torts depends  
C upon an allegation that the first respondent, Nutritek, made false representations as part of a common design and conspiracy with the other respondents to defraud VTB: amended particulars of claim, para 27(f)(g). They “acted in concert pursuant to a common design”: amended particulars of claim, para 67(a). The nominal owner of Nutritek was the second respondent, Marcap BVI. Marcap BVI through another company owned and controlled Marshall Capital LLC (“Marcap Moscow”), and it is pleaded  
D that “Marcap through Marcap BVI had de facto control of and beneficially owned in part Nutritek” (amended particulars of claim, para 68(a); see also para 55) and that “The whole transaction under which VTB was defrauded was co-ordinated by Marcap”: para 68(d). “Marcap” is defined as “the Marshall Capital group of companies”: para 3. These pleaded formulations no doubt point to the reality that the affairs of Nutritek were controlled in  
E Moscow, by Marcap Moscow through Marcap BVI, and, consistently with this, Marcap Moscow’s offices and personnel feature prominently in the history of the transaction: see e.g. amended particulars of claim, paras 30 and 69 and para 19 below.

9 It follows that, even though the tort of deceit was itself committed in England, the alleged tortious responsibility of all the respondents depends  
F upon its being established that they were party to a common design. On the facts of this case, it is also clear that any common design is alleged to have been and must have been formed in Russia. That is where Mr Malofeev and Marcap Moscow are based and it is “Marcap” who co-ordinated the transaction under which the fraud allegedly occurred and through Mr Malofeev as Marcap BVI’s agent that the Court of Appeal held that there was a good arguable case against Marcap BVI: see judgment, para 127. As  
G to Nutritek that was, like Marcap BVI, a British Virgin Islands company, but it was principally owned by two Russian companies (see amended particulars of claim, para 2(a)), it was managed in Russia, no doubt through Marcap Moscow, and the approach relating to the proposed sale and facility agreement was made on its behalf to VTB Moscow by Mr Malofeev. The principal witnesses from all three respondents who have been served in relation to the alleged torts will come from Russia.

H 10 The conclusion that the alleged tort of deceit is governed by English law is very relevant to the question of the appropriate forum, and I am prepared to assume that the alleged tort of conspiracy is also governed by English law. However, assuming English law to govern both alleged torts, no one suggests that this is decisive of the appropriate forum. For reasons

356

VTB Capital plc v Nutritek International Corpn (SC(E))  
Lord Mance JSC

[2013] 2 AC

I have already indicated, the common design on which VTB’s tortious claims depend is thoroughly Russian. A

*The legal principles regarding appropriate forum*

11 The appeal was originally presented to the Supreme Court as raising a significant issue regarding the nature and extent of the relevance of the governing law and the way in which this should be expressed. The suggestion was that a conclusion that the tort was committed in England gave rise to a “strong presumption” in favour of an English forum. It was submitted that the Court of Appeal had unjustifiably diluted this. It appears clear that it was only before the Court of Appeal that the suggestion was evidently first advanced. The judge’s judgment makes no reference at all to the line of authority represented by *Cordoba Shipping Co Ltd v National State Bank, Elizabeth, New Jersey (The Albaforth)* [1984] 2 Lloyd’s Rep 91, to which so much significance is now attached. VYB’s skeleton argument before the Court of Appeal raises the point, but does not in any way criticise the judge for not mentioning it—again indicating that the different counsel representing VTB at that stage had not relied upon it. B C

12 The locus classicus in relation to issues of appropriate forum at common law is *Spiliada Maritime Corpn v Cansulex Ltd (The Spiliada)* [1987] AC 460, where Lord Goff of Chieveley gave the leading speech. He identified as the underlying aim in all cases of disputed forum, “to identify the forum in which the case can be suitably tried for the interests of all the parties and for the ends of justice”: p 480G. But he also identified the important distinction in the starting point and onus of proof between cases where permission is required to serve proceedings out of the jurisdiction and situations where service is possible without permission: p 480G–H. The present case falls into the former category. In cases within that category, permission was not to be granted under the former rules of court “unless it shall be made sufficiently to appear to the court that the case is a proper one for service out” (RSC Ord 11, r 4(2)), and, as Lord Goff noted, the jurisdiction being exercised “may be ‘exorbitant’”: p 481A–D. On this basis, Lord Goff concluded, at p 481E, that: “The effect is, not merely that the burden of proof rests on the plaintiff to persuade the court that England is the appropriate forum for the trial of the action, but that he has to show that this is clearly so.” E F

13 Lord Goff went on to explain that caution was necessary in respect of the word “exorbitant”—caution that explains his statement that the jurisdiction to serve out “may” be exorbitant. He noted, at pp 481–482, that the circumstances in which permission to serve out may be granted G

“are of great variety, ranging from cases where, one would have thought, the discretion would normally be exercised in favour of granting leave (e.g, where the relief sought is an injunction ordering the defendant to do or refrain from doing something within the jurisdiction) to cases where the grant of leave is far more problematical. In addition, the importance to be attached to any particular ground invoked by the plaintiff may vary from case to case. For example, the fact that English law is the putative proper law of the contract may be of very great importance . . . or it may be of little importance as seen in the context of the whole case. In these circumstances, it is, in my judgment, necessary to H

A include both the residence or place of business of the defendant and the relevant ground invoked by the plaintiff as factors to be considered by the court when deciding whether to exercise its discretion to grant leave; but, in so doing, the court should give to such factors the weight which, in all the circumstances of the case, it considers to be appropriate.”

B The modern rules reflect more precisely Lord Goff’s statement of general principle, in providing that permission is not to be given unless the court is “satisfied that England and Wales is the proper place in which to bring the claim”: CPR r 6.37(3).

C 14 In the present case, VTB relies upon words of Robert Goff LJ in an earlier Court of Appeal case: *Cordoba Shipping Co Ltd v National State Bank, Elizabeth, New Jersey (The Albatroth)* [1984] 2 Lloyd’s Rep 91, and the acceptance of that case as consistent with *The Spiliada* by the House of Lords in the later case *Berezovsky v Michaels* [2000] 1 WLR 1004. In *The Albatroth* [1984] 2 Lloyd’s Rep 91, 96 Robert Goff LJ deduced from earlier case law that:

D “where it is held that a court has jurisdiction on the basis that an alleged tort has been committed within the jurisdiction of the court, the test which has been satisfied in order to reach that conclusion is one founded on the basis that the court, so having jurisdiction, is the most appropriate court to try the claim, where it is manifestly just and reasonable that the defendant should answer for his wrongdoing. This being so, it must usually be difficult in any particular case to resist the conclusion that a court which has jurisdiction on that basis must also be the natural forum for the trial of the action. If the substance of an alleged tort is committed within a certain jurisdiction, it is not easy to imagine what other facts could displace the conclusion that the courts of that jurisdiction are the natural forum. Certainly, in the present case, I can see no factors which could displace that conclusion.”

E 15 In *Berezovsky v Michaels* [2000] 1 WLR 1004 a challenge to the consistency of this approach with *The Spiliada* was rejected by Lord Steyn in a speech with which the other two members of the majority agreed: speaking of a line of authority in which the approach taken in *The Albatroth* had been followed, he said, at p 1014:

G “The express or implied supposition in all these decided cases is that the substance of the tort arose within the jurisdiction. In other words the test of substantiality as required by *Kroch v Rossell* [1937] 1 All ER 725 was in each case satisfied. Counsel for Forbes argued that a prima facie rule that the appropriate jurisdiction is where the tort was committed is inconsistent with *The Spiliada* [1987] AC 460. He said that *The Spiliada* admits of no presumptions. The context of the two lines of authority must be borne in mind. In *The Spiliada* the House examined the relevant questions at a high level of generality. The leading judgment of Lord Goff of Chieveley is an essay in synthesis: he explored and explained the coherence of legal principles and provided guidance. Lord Goff of Chieveley did not attempt to examine exhaustively the classes of cases which may arise in practice, notably he did not consider the practical problems associated with libels which cross national borders. On the other hand, the line of authority of which *The Albatroth* is an example

358

VTB Capital plc v Nutritek International Corpn (SC(E))  
Lord Mance JSC

[2013] 2 AC

was concerned with practical problems at a much lower level of A  
generality. Those decisions were concerned with the bread and butter  
issue of the weight of evidence. There is therefore no conflict. Counsel  
accepted that he could not object to a proposition that the place where in  
substance the tort arises is a weighty factor pointing to that jurisdiction  
being the appropriate one. This illustrates the weakness of the argument.  
The distinction between a prima facie position and treating the same B  
factor as a weighty circumstance pointing in the same direction is a rather  
fine one. For my part the *Albaforth* line of authority is well established,  
tried and tested, and unobjectionable in principle.”

16 *Kroch v Rossell et Cie Société des Personnes à Responsabilité Limitée*  
[1937] 1 All ER 725 was a case in which a foreigner describing himself as  
“a gentlemen of no occupation” claimed that he had been libelled in *Le Soir*,  
a publication with a daily circulation in Paris of about a million and a half,  
and in London of well under 50. He failed to establish any English  
reputation or connection, save temporary presence here to start the  
proceedings. Not surprisingly, the Court of Appeal thought that any breach  
here was technical and of no substance. It described the principles governing  
permission as requiring an examination of the circumstances to identify  
where the action should be better tried, in terms which foreshadowed Lord  
Goff’s approach in *The Spiliada*. D

17 *Berezovsky v Michaels* was concerned with an alleged libel of a  
Russian businessman in a magazine with sales of 785,000 in the USA, 1,900  
in England and 13 in Russia. But, in contrast with the position in *Kroch v*  
*Rossell*, the claimant had significant connections with and reputation to  
protect in England. On the basis that the English tort was a separate one, for  
the pursuit of which England was prima facie the appropriate forum on the  
approach taken in *The Albaforth*, the majority in the House upheld the  
Court of Appeal’s conclusion that England was the appropriate forum for its  
pursuit. E

18 *The Albaforth* line of authority is no doubt a useful rule of thumb or  
a prima facie starting point, which may in many cases also prove to give a  
final answer on the question whether jurisdiction should appropriately be  
exercised. But the variety of circumstances is infinite, and the *Albaforth*  
principle cannot obviate the need to have regard to all of them in any  
particular case. The ultimate over-arching principle is that stated in *The*  
*Spiliada*, and, if a court is not satisfied at the end of the day that England is  
clearly the appropriate forum, then permission to serve out must be refused  
or set aside. G

#### *The history of the transaction*

19 In the present case, there are two elements of the deceit by which  
VTB claims that it was deceived into entering into the facility agreement: the  
first goes to the ownership of the buyers, RAP; the second goes to the  
financial position of the dairy enterprises being sold to RAP. A large part of  
the evidence on these aspects by which VTB obtained permission to serve out  
of the jurisdiction on 11 May 2011 consisted of statements from  
Mr Konstantin Tulupov and Mr Vadim Muraviev, both of Moscow. There  
was further evidence in support of the application for permission to serve H

A out, all from other Russian witnesses: see Arnold J's judgment [2011] EWHC 3107 at [191], quoted in para 41 below.

B 20 Mr Tulupov was until October 2008 employed at VTB Moscow as a director within the Investment Business Acquisition and Leverage Finance Team in Moscow. Mr Muraviev had no personal involvement in events but was when he made his statement in April 2011 the Head of the Division of Distressed Debt Settlement at VTB Moscow and made his statement on the basis of a series of interviews had on 1 February 2011 with various staff members of VTB, namely Colin Magee, VTB's then general counsel, Julia Ferris, director at VTB's legal counsel department, Peter Yates, VTB's head of credit portfolio management and administration and Martin Pasek, managing director of structuring at VTB.

C 21 Mr Tulupov explains that he was the project manager in respect of the facility agreement between VTB and RAP, a transaction that "was both high risk but offered potentially significant benefits for VTB and VTB Moscow": para 8. As such he would attend meetings with and obtain information from potential borrowers, draft proposed terms of any loan to submit to VTB Moscow's credit committee, liaise with VTB where it was to be the lender of record, deal with any matters raised by VTB Moscow's credit committee, have the conduct of matters arising after any loan was made, D although where VTB was the lender of record "the performance of the loan was also monitored by it" and in all these matters report to his managing director, Mr Konstantin Ryzhkov, and at times also to his superior, one of two senior vice presidents, Mr Vassily Kirpichev and Mr Alexander Yastrib, who in turn reported to the deputy president, Mr Levin. During the course of the present transaction, Mr Ryzhkov also became head of the investment E business acquisition and leverage finance team of VTB in London (according to Mr Muraviev from 1 September 2007).

F 22 Mr Tulupov in para 8 deals with the two bases of the present claim. He states that the value of the shareholding and cash flow of the dairy companies was of considerable importance to VTB and VTB Moscow, since it represented the only real security of value, and for this reason they wanted an independent valuation and relied upon that provided by Ernst & Young dated September 2007. As to the alleged representation regarding ownership of RAP, he said:

G "G. Whilst it was entirely a matter for the credit committee of VTB Moscow, if VTB Moscow had known that the proposal for the sale by Nutritek was to a company under common control, it is likely VTB Moscow would have approached the proposal differently. In particular, I believe that it is likely to have viewed the proposal as one seeking asset finance rather than acquisition finance. Amongst one of the many additional matters that would have been considered (and to which I will briefly refer later in this statement) would be the provision of additional security;

H "H. Given that it was disclosed to VTB Moscow at the outset that Nutritek was controlled by Marcap, which I understood was a family of funds controlled by Mr Konstantin Malofeev . . . then Marcap was the obvious target to provide that security. This was particularly the case, when it was known to VTB Moscow that Nutritek urgently needed to raise funds to pay certain credit linked notes ('CLN') and that some of the

360

VTB Capital plc v Nutritek International Corpn (SC(E))  
Lord Mance JSC

[2013] 2 AC

moneys raised by the sale of the dairy companies were being used to pay them. It would have been noteworthy if Marcap refused to provide security for the risk that VTB and VTB Moscow were taking.” A

23 Mr Tulupov proceeds at some length to set out the history of the transaction, starting with a meeting in Moscow where the proposed transaction was explained to Mr Ryzhkov and Mr Tulupov by Mr Malofeev and a Mr Provotorov, following which Mr Tulupov on about 18 July 2007 engaged Mr Johnston of Dewey & LeBoeuf, London to draw up finance documentation for a loan to an unknown borrower who Mr Malofeev and Mr Provotorov said they had in mind to approach to buy the dairy companies. VTB’s director, Ms Bragina, responsible for investment business acquisition and leverage finance at VTB, was copied into the e-mail and a party to the conference call by which Mr Tulupov instructed Mr Johnston. A subsequent inquiry by Mr Johnston of Mr Tulupov as to the identity of any borrower led to the answer, that “the potential purchaser is controlled by a group of individuals with whom, Marcap assures, you can’t have any conflict of interest”. Mr Johnson described this as evasive and said that VTB would need to do a KYC (know your customer) clearance on the borrower. B C

24 Arnold J’s judgment records, at para 14, that Mr Tulupov had a further meeting with Mr Provotorov and Mr Leonov in Moscow in late July, after which he e-mailed them with two versions of a term sheet, copying in Mr Malofeev, Mr Ryzhkov and Ms Bragina. D

25 A third Moscow meeting involving Mr Tulupov, Mr Malofeev, accompanied by Mr Provotorov and probably also by Mr Yuri Leonov, took place at Marcap Moscow’s offices in early October, when Mr Malofeev identified RAP as the potential buyer and borrower. But, according to Mr Tulupov, nothing was said to suggest that the sale would be to anything other than an independent third party, and that it would have been apparent to Mr Malofeev and his colleagues that what was being discussed was acquisition finance, rather than a balance sheet loan. A third term sheet was e-mailed by Mr Tulupov to the previous recipients, but not on this occasion copied to Ms Bragina. It identified VTB as the lender and recorded that additional commission was to be earned through a derivative tied to the shares and there was to be an interest rate swap to hedge interest and currency risks. E F

26 VTB was commonly lender of record on such transactions, because it could offer more sophisticated lending structures and because English law offers greater protection in the event of default, but in such cases VTB Moscow would lend the relevant moneys to VTB, as here, under a 100% participation agreement, although, in addition VTB was in this case itself involved in providing the interest rate swap agreement. In these circumstances, from an early stage, Mr Tulupov also worked with his counterpart at VTB, Ms Bragina, copying her into e-mails. G

27 Mr Tulupov’s role was thereafter to obtain, check and distribute the information required by the various departments of VTB Moscow, to obtain their reports and opinions, to draw these together in a “deal description” and “draft credit committee decision”, to have these documents signed and approved by Mr Ryzhkov and then submitted to the credit committee of VTB Moscow, after approval by which H

“the decision would still need to be reviewed by both the managing board of VTB Moscow given the size of the loan and VTB as both the

A lender of record and the party entering into the interest rate swap agreement”: para 34.

In performing his role, Mr Tulupov liaised principally with Mr Leonov, but also with Mr Provotorov and Ms Tyurina and in relation to Nutritek with Mr Skuratov, all in Moscow. One of the documents obtained in this process was the Ernst & Young report of 2007 on the dairy companies.

B 28 A draft deal description and draft credit committee decision were prepared with the assistance of Dewey & LeBoeuf for VTB/VTB Moscow and of Clifford Chance for RAP and were then signed off by Mr Yastrib, Mr Ryzhkov and Mr Tulupov, before being reviewed and approved on 31 October 2007 at a meeting of VTB Moscow’s credit committee, attended by Mr Novikov, Mr Yu, Mr Belov, Mr Kuzmenko, Mr Yastrib, Mr Shipilov, C Mr Krasnoselsky and Mrs Bozhaeva. The approval recorded that the committee had, after taking “into consideration a good financial situation of the borrower” classified the debt as “quality category 1”.

D 29 The approval was subject to conditions. These included the provision of “a report for the assessment of the market value of the shares and stakes”, a reference to the Ernst & Young report already provided, a further copy of which was provided by RAP and Mr Leonov on 7 November 2007 (and circulated by Mr Tulupov to Ms Bragina and Mr Magee, albeit in Russian, on 12 November). They also included further approval of the proposal by VTB Moscow’s management board and VTB. Mr Tulupov recites that these approvals were obtained, the former by a formal board resolution, and that he was not involved in the latter, although he says that it was apparent from his discussions with Mr Ryzhkov and Ms Bragina that E “they relied upon the false representations when approving the loan”.

F 30 This refers to the Ernst & Young report of 2007, but it can hardly refer to any representation relating to the ownership of RAP, since Mr Tulupov goes on to say that, “once approval to the credit line had been obtained from VTB and VTB Moscow”, steps were taken to implement the conditions precedent which “clearly included confirming the beneficial ownership of RAP as is apparent from the e-mails of 6 and 8 November” which are exhibited to his statement. None of the conditions precedent is, however, explicitly directed to obtaining such confirmation (even though one of them required the provision to VTB and VTB Moscow of the decisions of the authorised management bodies of RAP approving the acquisition).

G 31 As to the e-mails to which Mr Tulupov refers, these are from Ms Bragina, reporting to various colleagues in VTB (including Mr Yates) and copying to Mr Ryzhkov and Mr Tulupov, information that RAP’s beneficiary and 90% shareholder (with the other 10% being owned by “his management team”) was a Mr Vladimir Alginin, and giving some details of his recent business career. These e-mails are also relied upon by Mr Tulupov as an example of the involvement of Ms Bragina, who has left VTB and whose whereabouts cannot now apparently be ascertained. However, it H seems clear that all they show is that Ms Bragina was passing on internally information which she had herself received from another unidentified source. VTB’s very unspecific plea is that this was “information provided to VTB and VTB Moscow by the management of Nutritek”: amended particulars of claim, para 51. There is no indication that Ms Bragina had any direct contact

362

VTB Capital plc v Nutritek International Corpn (SC(E))  
Lord Mance JSC

[2013] 2 AC

with the management of Nutritek, and the substantial likelihood must be that any information which reached her came from VTB Moscow. A

32 VTB Moscow's management board approved the transaction on 13 November, and an application was signed by Ms Bragina and Mr Thunem on behalf of VTB for credit facilities. The application recorded that RAP had approached VTB Moscow for the debt financing of its proposed acquisition of the dairy companies, and that under the proposed structure VTB was to act as lender of record, but VTB Moscow was to "fully fund the transaction and fully undertake the credit risk under the transaction" in accordance with the participation agreement. It also recorded that the market value of the dairy company shares had been determined by Ernst & Young. On 19 November a similar application was signed off by Ms Wooi, Mr Yates and Mr Manning on behalf of VTB in respect of the interest rate swap. It however recorded the structure risk as "potentially high, but acceptable", on the basis that the transaction was considered unsecured, and the security package (RAP's shares in the dairy companies) of little tangible value, the financial risk as high, on the basis that, according to the historical balance sheets, the price being paid for the companies appeared to be significantly above the book value of the assets. As to ownership risk, it recorded that no formal information could be found confirming that Mr Alginin was RAP's beneficial owner "as IB [investment banking] have advised", that they were requesting formal proof as a condition precedent to drawdown, and to make the ownership risk medium. There is no indication that this point was followed up, even in relation to the interest rate swap, and it is not part of VTB's case in respect of the loan that it relied upon any later representation regarding RAP's ownership or Mr Alginin. B C D

33 Mr Tulupov continued to be the means by which the transaction was progressed, and sent VTB's mandate letter, updated term sheet and fee letter to RAP for signature on 16 November. On 23 November 2007, the facility agreement was completed, being signed for VTB by Mr Ryzhkov as "managing director, head of acquisition and leveraged finance" and by Ms Bragina as "director, acquisition and leveraged finance". The interest rate swap agreement was completed on 28 November, being signed for VTB by Mr Ryzhkov as "managing director" and by Mr Steve Humphries as "senior manager operations". The 100% funded participation agreement between VTB and VTB Moscow was completed on the same date. Mr Thunem, then head of global markets at, but no longer with, VTB and Mr Ianovski signed for VTB. Under it, VTB's liability to repay any sum funded by VTB Moscow was limited to any amount that it received from RAP (or any other obligor under the loan facility). All these agreements were subject to English law, and included provisions recognising England as an appropriate forum in the event of any dispute. E F G

34 Mr Muraviev's second-hand account of the history in his statement is understandably shorter. But, having spoken to Mr Yates, because both Ms Bragina and Mr Thunem had left, he understood that:

"A. Once the decision had been taken by VTB Moscow to enter into the participation agreement, there was no need for the matter to be decided by the credit committee of [VTB]; H

"B. Instead, it was sufficient for the loan to proceed if the proposed transaction had been approved by Mr Ryzhkov, given his senior position

[2013] 2 AC

VTB Capital plc v Nutritek International Corpn (SC(E))  
Lord Mance JSC

A within both [VTB] and JSC VTB, and the ACF [advance credit facility] dated 13 November 2007 was signed off by the appropriate authorised signatories;

“C. Mr Ryzhkov approved the transaction and indeed he signed the facility agreement together with Ms Bragina on behalf of [VTB]; . . .

B “H. Notwithstanding the position taken by credit risk in the ACF dated 15 November 2007 that ‘credit risk consider this transaction as unsecured as the security package has little tangible value’, in granting the loan and approving the ISA, [VTB] did rely heavily on the representations that had been made as to:

“(i) the past financial performance of the dairy companies and the forecast performance;

C “(ii) the 2007 E & Y 2007 valuation of the dairy companies based upon those figures, and

“(iii) The SPA representing a commercial transaction between two separate entities, namely RAP and Nutritek. It was entirely unaware that they were under the common control of Marshall Capital Group of Companies and believed them to be under separate control based on the information that had been provided by Nutritek.”

D 35 Mr Muraviev concluded by saying, at para 111:

“Having spoken to Mr Yates, Colin Magee, Julia Ferris and Martin Pasek I am informed that and believe that if [VTB] had known that RAP and Nutritek were under the common control of Marshall BVI or that the representations identified above and contained in the 2007 E & Y valuation were false then it would not have entered into the facility agreement or the ISA or permitted the draw down of the Tranche A moneys.”

*The issues*

F 36 Numerous judicial statements establish that it is incumbent on a defendant challenging the jurisdiction “so far as possible to identify the issues concerned and to state as clearly as possible how they arise or may arise in the proceedings”: see e.g. *Limit (No 3) Ltd v PDV Insurance Co* [2005] 2 All ER (Comm) 347, 366, para 72, per Clarke LJ; *Dicey, Morris & Collins, The Conflict of Laws*, 15th ed (2012), para 11-143.

C 37 In the present case, the basic issues were in my view established by the evidence and submissions adduced below. The respondents deny that false representations were made, deny that they were party to any that were made, deny that any reliance was placed on any that were made and, for good measure, rely upon the participation agreement as showing that VTB, as opposed to VTB Moscow, did not suffer any loss. The last point was strongly argued in the courts below, as showing that VTB had no good arguable case in respect of which it could properly seek permission to serve out of the jurisdiction, but the Supreme Court refused permission to re-argue the point before it. The case must therefore be considered on the basis that the claim is properly arguable, but that this defence is among those that the respondents will advance to it. It is however essentially a point of law, in relation to which there is no reason to think that the answer would be any different in Russia to here.

364

VTB Capital plc v Nutritek International Corpn (SC(E))  
Lord Mance JSC

[2013] 2 AC

38 All the points mentioned in the previous paragraph were treated as issues in the courts below. In relation to one respondent, Marcap BVI, Arnold J concluded that there was no serious issue to be tried. But in relation to Nutritek and Mr Malofeev he concluded that VTB had a real prospect of establishing deceit, despite issues argued before him as to the incurring of any loss, the making of any false representations and reliance. The Court of Appeal considered that, even in respect of Marcap BVI, a serious issue to be tried existed, while setting aside service on all three respondents on the ground that England was not the appropriate forum.

39 A suggestion that the respondents should have advanced a positive case to support their denial of any involvement in the alleged deceit appears to me to go too far. Even where jurisdiction is established, a defendant is entitled to deny involvement in or liability for an alleged deceit, without advancing a positive explanation as to why he was not party to an alleged lie or conspiracy or as to how assets acquired proved, without any prior knowledge on his part, to be worth so much less than independent accountants had valued them as being. Further, no suggestion or objection appears to have been made below to the case being argued, as it was, on the basis that all the issues were properly raised by the respondents' general denials. On the other hand, there may be particular points, in relation to which, in the absence of any positive case from a defendant's side, it is not possible to conclude that any evidence will be called by the defence. That may in turn preclude bringing into account the convenience or otherwise of adducing in England or Russia any such evidence from the defence side as might be supposed to exist on such points, had any positive case been raised on them.

40 It is also clear, from such material as the court has before it in relation to the issue regarding the worldwide freezing order, that VTB has been given a considerable understanding by Mr Malofeev himself of the nature of his case regarding the discrepancy between the position indicated by the Ernst & Young report of 2007 and the position as it materialised not very long after the completion of the transaction. Mr Michaelson, partner at SJ Berwin acting for Mr Malofeev recorded in his tenth statement of 18 October 2011 (paras 38–42) that Nutrinvestholding (Nutritek's parent) had at Mr Malofeev's instance instructed Ernst & Young to prepare a further report dated 26 February 2010, to determine precisely what accounting practices and transactions were taking place within the Nutritek business and that the report does not implicate Mr Malofeev. Mr Michaelson went on to refer to "the obvious inconsistency between Mr Malofeev commissioning the report and at the same time being responsible for any wrongdoing identified": para 43.

#### *The judgments below*

41 Arnold J addressed the question of the appropriate forum [2011] EWHC 3107 at [186]–[195]:

"186. *Stage I.* The factors that may be taken into account in determining which is the natural forum for the action include: (a) the personal connections which the parties have to the countries in question; (b) the factual connections which the events relevant to the claim have

A with those countries; (c) factors affecting convenience or expense such as the location of the witnesses or documents; and (d) the applicable law.

B “187. Counsel for VTB submitted that England was the natural forum because (i) VTB is English, (ii) the misrepresentations were relied upon in England, (iii) the money was lent and the loss sustained in England, (iv) the facility agreement, ISA, the participation agreement and the SPA contain English law and English jurisdiction or arbitration clauses and (v) the applicable law is English law. I do not consider that any of these factors points strongly to England being the natural forum in the present case. So far as (i) is concerned, VTB is controlled by VTB Moscow. As to (ii), as explained above, it seems to me that VTB’s reliance was wholly secondary to that of VTB Moscow. In relation to factor (iii), the loss was sustained because Russian assets provided inadequate security. As to C (iv) and (v), the English law clauses are immaterial once it is concluded, as I have, that the law applicable to the tort is Russian law. The English jurisdiction and arbitration clauses are a pointer to England, but not a strong one given that the claim is a tort claim not a contract claim.

D “188. Counsel for the defendants submitted that the following factors pointed to Russia being the natural forum. First, the connections of the parties to Russia. VTB is controlled by VTB Moscow, which is Russian. Furthermore, the litigation is being managed by VTBDC, which is also Russian. MarCap Moscow and Mr Malofeev are Russian. It is common ground that Nutritek was managed from Russia, and VTB’s case is that Mr Malofeev controls both Nutritek and MarCap BVI. Furthermore, it is VTB’s case that Mr Malofeev orchestrated the fraud, primarily through MarCap Moscow.

E “189. Secondly, the connections of the events constituting the torts to Russia. The transaction was introduced to VTB Moscow at meetings between Russian individuals in Russia. The negotiations mainly took place in Russia. The misrepresentations were made and mainly received in Russia. The more important misrepresentation concerned the performance of the dairy companies, which are Russian companies. The F 2007 E & Y valuation was a valuation by Ernst & Young’s Moscow office and was based on information provided by Nutritek’s Russian management. The misrepresentations were primarily relied upon by VTB Moscow acting through its credit committee and management board in Russia. It was VTB Moscow and VTBDC which primarily dealt with RAP’s default and enforcing the security. The secured assets were in G Russia. The discovery of the fraud took place in Russia. Although the loss was sustained by VTB in England, as discussed above the ultimate economic impact is in Russia.

H “190. Thirdly, most of the witnesses are Russian and many of the documents are in Russian and located in Russia. So far as the witnesses are concerned, there are a considerable number of relevant Russian witnesses from VTB Moscow, VTBDC, Ernst & Young, Nutritek (Mr Skuratov and the managers of the dairy companies), MarCap Moscow (Mr Leonov, Mr Provotorov, Ms Tyurina and Mr Popov as well as Mr Malofeev) and RAP (Ms Kremneva and Mr Pankov). Other potential Russian witnesses include Mr Sazhinov and Mr Alginin. By contrast, there are relatively few material witnesses from VTB. The two most important ones appear to be Ms Bragina and Mr Ryzhkov. Both

have left VTB (as has Mr Thunem). It appears that Mr Ryzhkov is in Russia, while VTB's evidence is that Ms Bragina is 'believed to be' in England. Although Mr Ryzhkov has been contacted about the matter, it does not appear that Ms Bragina had been.

"191. As counsel for the defendants pointed out, it is striking that all of VTB's witness statements in support of its application for permission to serve out, other than one from its solicitor, were made by Russian witnesses. In addition to the statements of Mr Tulupov and Mr Chernenko, these consisted of: (i) a statement made by Andrey Puchkov, deputy chairman of VTB Moscow, which among other matters dealt with VTB Moscow's reliance on the misrepresentations alleged, Mr Puchkov having been present at the management board meeting on 13 November 2007 at which the transaction was approved; (ii) a statement made by Vadim Muraviev, head of the division of distressed debt settlements at VTB Moscow, who gave evidence as to VTB's reliance on the misrepresentations alleged based on interviews with four English employees of VTB including Mr Magee and Mr Pasek; and (iii) a statement made by Denis Zemlyakov, general director of VTBDC, who gave evidence concerning RAP's default and the enforcement of the security.

"192. In addition, VTB relied on two draft statements from Alexander Buryan and Irina Leonova, who were employed by RAP as vice-president and chief accountant. Furthermore, since then a number of statements have been made by Arthur Klaos of VTBDC, in the most recent of which Mr Klaos relays information provided to him by (among others) Mr Ryzhkov and Alexander Yastrib (at the time senior vice president of VTB Moscow and now a board member of the Bank of Moscow).

"193. While the four VTB employees interviewed by Mr Muraviev are evidently material witnesses to VTB's claim (although Mr Magee and Mr Yates appear to have had more involvement in the transaction than Mr Pasek or the fourth employee Julia Ferris), it is clear that they are of secondary importance compared to Ms Bragina and Mr Ryzhkov, let alone Mr Tulupov and his colleagues in Moscow. If the claim is tried in England, witnesses located in Russia will not be compellable except by means of letters rogatory. Even if they are prepared to give evidence voluntarily, they may not be prepared to come in person, necessitating evidence being given by video link. Even if they are prepared to come in person, they are likely to require interpreters. As for the documents, many of these have required or will require translation. It is true that the agreements are mainly in English, and that these are important documents, but these and other documents in English form a relatively small proportion of the relevant documents even at this stage of the proceedings.

"194. Fourthly, counsel for the defendants submitted that the applicable law was not a strong factor in favour of England even if it was English law. It is clear from the expert evidence before the court (as to which, see below) that the Russian courts can receive expert evidence as to English law. Furthermore, the key issues in the case are likely to be factual rather than legal. In the event, of course, I have concluded that the applicable law is Russian law, which supports the conclusion that Russia is the natural forum.

A “195. In my judgment, taking all the factors considered above into account, the natural forum is Russia.”

42 The Court of Appeal, before which reliance was, for the first time, placed on the suggested presumption arising from *The Albaforth* [1984] 2 Lloyd’s Rep 91 (see para 14 above)—dealt with the issue of appropriate forum as follows [2012] 2 Lloyd’s Rep 313, paras 164–168:

B “164. We have already commented that the judge may have erred in his interpretation of the test adumbrated in *The Spiliada*. Instead of asking first whether England was the ‘natural forum’ and then, even if it is not, asking whether England is nevertheless the appropriate forum for other reasons, there is only one overall question to be answered: has VTB established that England is clearly or distinctly the appropriate forum?

C “165. In our view the judge was correct to conclude that VTB has failed to do so. The steps leading to our conclusions are as follows: first, we will assume (based on our discussion above) that the fact that VTB has sustained its loss resulting from the torts in England raises a prima facie case that England is the appropriate forum in which to try the disputes. Secondly, however, we have to take account of all the other factors identified by both sides in order to determine whether VTB has satisfied the court that England is clearly or distinctly the appropriate forum.

D “166. Thirdly, in that regard, we have concluded, on the basis of the material presently before us, that the applicable law of the torts is Russian law. That cannot be a concluded view. Wherever a trial takes place, it can be challenged. But that point works both ways. Even if we had concluded that the applicable law of the torts was English law, this would not have been a factor that would weigh heavily in making England the appropriate forum, precisely because if the defendants wished to allege and plead that the applicable law was Russian law, both sides would have had to prepare for a trial on that basis. If the case were to be heard in England, both sides would have to prepare expert evidence on Russian law; and, doubtless, the obverse would be so if the case were to be heard in Russia. This is not a case, such as we think Lord Goff of Chieveley contemplated in *The Spiliada* at p 481G, where the law of the contract is a known certainty. In this case the applicable law of the torts remains very much in issue. Moreover, there was no serious challenge to the judge’s view (at para 194) that the key issues in the case are likely to be factual rather than legal.

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G “167. Fourthly, we have to give due weight to all the other factors (apart from those where we have found the judge erred) which the judge took into account and which have not been challenged on appeal. These are set out at paras 188 and 189 of the judgment and, as we have indicated in relation to the applicable law point, we think that these indicate that the centre of gravity of these disputes is in Russia, not England. Fifthly, VTB has not challenged the judge’s conclusion that VTB had failed to show that there was a real risk that it would not obtain substantial justice in Russia for any of the reasons it advanced before him.

H “168. Accordingly, the judge was correct to set aside Chief Master Winegarten’s order granting VTB permission to serve the proceedings on Nutritek, Marcap BVI and Mr Malofeev out of the jurisdiction.”

368

VTB Capital plc v Nutritek International Corpn (SC(E))  
Lord Mance JSC

[2013] 2 AC

*The factors relevant to the appropriate forum*

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43 I turn therefore to consider the appropriate forum and the relevant factors. The first question is whether there is any basis for regarding the judge's or the Court of Appeal's conclusion as flawed in any way which would require this court as a second appellate court to revisit the exercise of the discretion to give permission for service out of the jurisdiction. The second question, if there is any such basis, is what conclusion this court should reach on the issue as to the appropriate forum.

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44 The Court of Appeal re-exercised the discretion, because it believed that Arnold J had erred in his interpretation of Lord Goff's speech in *The Spiliada*. It said that he had adopted a two-stage approach instead of recognising that, in a service out case, there was a single burden on a claimant to show that England was clearly or distinctly the appropriate forum: paras 128–131, 164; and see *The Spiliada* [1987] AC 460, 481D–E. But the two-part approach was the one which Lord Goff identified as appropriate in cases where service is effected within the jurisdiction, so that the claimant starts with the advantage of having achieved a legitimate basis for jurisdiction without leave, and it is for the defendant to show that some other country is the appropriate forum: see *The Spiliada*, p 476F. Any error therefore favoured VTB as claimant. Any error, if error there was, does not in any event impact on the force and weight of the judge's analysis in the paragraphs quoted above. Further, the way the judge answered his two-part test shows that he could not conceivably have come to any conclusion other than that the claimant had failed to show (clearly or at all) that England was the appropriate forum. He expressed his conclusion, at stage 1 of the two-part test which he (wrongly) adopted, as being that Russia was the natural forum (para 195) before going on at stage 2 to reject any suggestion that substantial justice could not be obtained in Russia: para 196 to the conclusion at para 222. Once one concludes that Russia is the natural forum, where there is no risk that substantial justice cannot be obtained, it is really impossible to conclude that England is clearly the appropriate forum. The Court of Appeal itself held that the judge was correct to conclude that VTB had failed to establish that England was clearly or distinctly the appropriate forum: para 165. However, it itself fell into error in my view in its treatment of the governing law.

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*(a) Governing law*

45 The Court of Appeal was wrong to regard Russian law as governing the alleged torts, but it acknowledged that possibility and it dealt with the alternative, that English law governed them. However, in relation to this alternative, it was in my opinion also wrong to approach the matter on the basis that it made no difference which law governed, because each side would have in any event to prepare evidence on both legal systems in whichever country the case was tried.

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46 The governing law, which is here English, is in general terms a positive factor in favour of trial in England, because it is generally preferable, other things being equal, that a case should be tried in the country whose law applies. However, that factor is of particular force if issues of law are likely to be important and if there is evidence of relevant differences in the legal principles or rules applicable to such issues in the two

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A countries in contention as the appropriate forum. Neither of these considerations here applies.

47 VTB's claims are for deceit and for conspiracy. The conspiracy alleged is to obtain finance by the deceit. Accepting that the governing law of both alleged torts is, to English legal eyes, English, there is nothing to show that Russian law would reach any different conclusion. Parties are able to plead and rely on English law in Russian courts. But, even if there were reason to think that a Russian court would regard Russian law as governing the alleged torts, there is nothing to suggest that Russian law does not recognise and impose tortious liability for deceit, and for conspiracy to commit a deceit, on bases for material purposes equivalent to those which would be recognised under English law. It is unlikely that it does not, and no evidence has been adduced that it does not. It would have been for VTB to adduce evidence on all these points, if it could, in support of its case that England was the appropriate forum.

48 Although Arnold J wrongly concluded Russian law governed the alleged torts, he also considered the exercise of his discretion on an opposite basis, namely that English law applied, and, as I understand him, accepted the submission that this would not be a strong factor in favour of England, as well as saying that it was clear that the Russian courts could if necessary hear evidence of English law: see judgment, para 194, quoted above. His judgment therefore addresses the position on a correct hypothesis.

49 Even if, contrary to my view, the judge's conclusion as to the appropriate forum was limited by an assumption that Russian law governed the alleged torts, I cannot conceive, in the light of what he said in para 194, that it would have made any difference to his conclusion if he had concluded that English law governed. The key issues in this litigation will on the face of it be factual not legal.

*(b) Place of commission of tort*

50 For reasons already given, I proceed on the basis that this was London in relation to the claim in deceit, and that the conspiracy, being to commit the same deceit, should be regarded as effectively ancillary. But I also note that, Mr Ryzhkov as managing director of VTB's acquisition department was the first signatory of the facility agreement for VTB, and he was based in Moscow. It may well be that his signature was sent or collected electronically from Moscow. Even if that were so, he is in Russia, and on any view an important potential witness.

51 The place of commission is a relevant starting point when considering the appropriate forum for a tort claim. References to a presumption are in my view unhelpful. The preferable analysis is that, viewed by itself and in isolation, the place of commission will normally establish a prima facie basis for treating that place as the appropriate jurisdiction. But, especially in the context of an international transaction like the present, it is likely to be over-simplistic to view the place of commission in isolation or by itself, when considering where the appropriate forum for the resolution of any dispute is. The significance attaching to the place of commission may be dwarfed by other countervailing factors.

52 Here the common design on which the respondents' tortious responsibility is based was formed in Russia. Further, both the alleged representations emanated from Russia, in the form of the Ernst & Young

370

VTB Capital plc v Nutritek International Corpn (SC(E))  
Lord Mance JSC

[2013] 2 AC

2007 report and the information that Mr Alginin was the effective beneficial owner of RAP. The history of the transaction which I have set out indicates that the transaction was introduced, pursued and approved predominantly in Moscow. It is difficult to avoid the conclusion that VTB was effectively following suit on decisions taken there. Further, significant aspects of the facts which are said to have rendered the representations untrue existed in Russia: particularly, the dairy companies' businesses and financial positions, but also, presumably, the factual control which Mr Malofeev is said to have exercised directly or through Marcap Moscow over RAP.

53 VTB, as a London based bank, must have had to go through some formal decision-making processes, or it would not have been party to the facility agreement at all. However, it did not need to put the loan proposal through its own credit committee, once it had been through VTB Moscow's credit committee: para 34 above. Further, the main documents emanating from VTB, the two credit applications of 13 and 15 November, date from well after the matter was approved by VTB Moscow's credit committee on 31 October and are contemporaneous with the approval of 13 November by VTB Moscow's management board. Finally, no formal record of any decision-making or approval by VTB itself exists, save in the form of Mr Ryzhkov's and Ms Bragina's signatures on the facility agreement. All this is however unsurprising when the transaction was effectively negotiated and decided upon in Moscow, and the funding and credit risk in respect of the loan was being fully assumed by VTB Moscow.

54 Arnold J was not referred to *The Albaforth* [1984] 2 Lloyd's Rep 91, but in my view his approach in paras 186–195, cited above, was consistent with the proper application of the overriding principles of *The Spiliada* [1987] AC 460 by which he correctly directed himself. It is true that at an earlier point in his judgment, when determining the governing law of the alleged torts to be Russian, he wrongly identified Russia as their place of commission: paras 134–135. But, as I have already said, in para 187 he also considered the exercise of the discretion to serve out on the opposite hypothesis, namely that English law governed the torts. Had he had cited to him *The Albaforth*, I do not see how it could or should, in the light of the other factors that he correctly identified, have led him to any different result than that to which he in fact came. It is clear that in his view the other factors pointed very powerfully towards Russia as the natural forum for resolution of the issues.

55 Further, the Court of Appeal, before which *The Albaforth* was relied upon, did not regard it decisive in the circumstances of this case: para 166 et seq. It erred in treating Russian law as governing the alleged torts, but went on largely to eliminate the significance of this error by treating it as irrelevant which law governed. It should have treated English law as governing the torts and have recognised this as one factor generally tending to favour English jurisdiction. But, for reasons explained in paras 46–49 above, it was in this case a factor of very little if any real potency. Had the Court of Appeal approached the potential relevance of the governing law on a correct basis, it is in my view clear that it would in this case also have made no difference to its ultimate conclusion.

56 The Supreme Court is, in these circumstances, being asked to re-exercise the discretion exercised at two stages below in the light of points

[2013] 2 AC 371  
VTB Capital plc v Nutritek International Corpn (SC(E))  
Lord Mance JSC

A made about their reasoning of no real significance, which it is clear would not have altered the decision in either court.

*(c) The factual focus*

B 57 VTB's case is that deceitful representations emanated from the respondents in Russia, but were communicated to VTB, and relied upon by VTB, in London where VTB also suffered its loss. This analysis is important when considering where the tort was committed and what law governs it. But a wider view is necessary when considering the appropriate forum. The respondents' denials of any liability raise as issues whether the representations were inaccurate, whether, if so, any or all of the respondents knew of their inaccuracy and whether they joined together by "common design" to make the alleged representations and what impact any inaccuracy of such representations had.

C 58 Taking the Ernst & Young 2007 report, the factual focus will be on the dairy companies and on the respondents' understanding of their affairs and financial position, matters which are clearly likely to be more appropriately examined in Russia, where the companies, their records and any relevant company witnesses are. Ernst & Young examined the companies through their Moscow office, and the same is probably true of D VTB's expert accountants, Deloitte. It is clear (para 40 above) that Mr Malofeev's case is that he was as unaware as Ernst & Young of the financial inaccuracy of their report. Secondly, relevance may attach to the impact which the Ernst & Young report had on those to whom it was first presented in Moscow.

E 59 As to the ownership of RAP, the plan, which VTB has produced showing Mr Malofeev's alleged connection with and/or control of RAP, shows an international picture. On many aspects of the plan, evidence about the alleged corporate and personal links could be adduced as easily in England as in Russia. But any evidence from Mr Malofeev, who is said to have been in control of a web of interlinking companies as shown on the plan, would more conveniently be heard in Russia. The judge noted, however, the respondents did not adduce before him any positive case F challenging VTB's contention that Mr Malofeev ultimately controlled RAP as well as Nutritek. That does not mean that this is not in issue. But it does mean that, in the absence of any positive challenge, the convenience or otherwise of Mr Malofeev giving evidence on it in England or Russia can be put on one side.

G 60 On the other hand, the issue relating to reliance is one on which VTB will clearly have to adduce the relevant evidence from its side. Again, it is likely that the relevant evidence will come in large measure from Russia and Russian witnesses. The informality of the alleged representation regarding RAP's ownership and regarding Mr Alginin, and the apparent failures to follow it up by obtaining more formal confirmation, is striking. It is likely to lead to questions as to how much, if any, weight was placed upon any such representation by VTB or VTB Moscow.

H 61 Ms Bragina cannot now be located and is not shown to have remained in England, and the representations said to be evidenced by her two e-mails in November 2007 seem, as already stated, likely to have come to her via VTB Moscow: see amended particulars of claim, para 51 and para 31 above, by a process which is obscure. The impact or lack of impact

372

VTB Capital plc v Nutritek International Corpn (SC(E))  
Lord Mance JSC

[2013] 2 AC

which it had on those to whom it was first presented in Moscow is thus likely to be a very relevant subject of examination in the litigation, on the basis that the substantial decision-making process took place in Moscow, with VTB following in very large measure suit. A

*(d) Witnesses*

62 This is a factor at the core of the question of appropriate forum. It was covered fully and helpfully by Arnold J in the course of considering the “natural forum” in paras 188–195 of his judgment, set out in full above. In summary, it is clear that the issues and evidence will be focused overwhelmingly on matters which happened in and concern Russia, and that the oral and documentary evidence, on both factual and expert matters, is likewise likely to be overwhelmingly Russian and to be found in Russia, where it could be heard in Russian without translators. B C

*(e) Aim of the alleged torts*

63 The alleged torts were designed to induce VTB to enter into a facility agreement with RAP which was subject to English law and an agreement (for the benefit of VTB only) that the courts of England should have non-exclusive jurisdiction and be the most appropriate and convenient forum: clause 35.1. The purpose of the facility agreement was in turn to fund RAP’s purchase of the dairy companies from the first respondent, Nutritek International Corpn. D

64 I am inclined to agree with Arnold J [2011] EWHC 3107 at [187] that the fact that the facility agreement was subject to English law is not relevant. He discounted it because of his view, erroneous on the basis on which I approach the case, that the tort claims were subject to Russian law. But, in my view, even though the tort claims are subject to English law, it bears scarcely—if at all—on the appropriateness of the forum for their resolution that they were designed to induce another English law contract. No issue arises about the interpretation of the facility agreement. E

65 On the other hand, the fact that the alleged torts were designed to induce the making of a loan facility agreement, under which England was accepted as the most appropriate and convenient forum is a potentially relevant factor. It links with and reinforces the fact that, if there was any such deceit and/or conspiracy as alleged, the same were directed at VTB in London. But it is a factor which Arnold J did take into account: para 187. He saw it as “a pointer to England, but not a strong one given that the claim is a tort claim not a contract claim”. I agree with this balanced view. But, even if it understates the significance of the pointer, it does so only slightly and not in a way which can, in my view, possibly justify this court in interfering with the judge’s conclusion. F G

66 There is certainly general attraction in a conclusion that persons committing deceit should answer in the jurisdiction which is not merely that where their deceitfulness manifested itself, but also a jurisdiction agreed to be appropriate under the contract which they are by such deceit inducing. But that formulation, by omitting the word “allegedly”, begs the question where the issue whether any such deceit occurred and induced the loan should most appropriately be determined. All that has been established at this stage is that there is a serious issue to be tried—in other words, that VTB H

A has a reasonable prospect of success—in respect of VTB’s tort claims. The question where such claims are appropriately to be tried has to be answered in the light of all the circumstances, including the nature of the issues to be tried and the evidence which would be involved. The alleged torts were committed in England under English law, but the fundamental matters in dispute—whether there was any such deceit, whether the respondents were party to it, and what, if any, impact any falsely made representations had on VTB are, as I have shown, heavily focused in this case on Russia and Russian witnesses.

(f) *Fair trial?*

C 67 There is, as the Court of Appeal mentioned in para 167, no suggestion that this matter could not or would not receive a fair and proper trial in Moscow.

*Conclusions*

D 68 On the issues relating to the appropriate forum which the courts below addressed, the reasoning of Arnold J and the Court of Appeal was, subject to differences which I have identified, largely concurrent. The Court of Appeal erred in its approach to the significance of the law governing the alleged torts, but Arnold J, although he erred in regarding the governing law as Russian, also, as I read para 194 of his judgment, expressed his view as to the appropriate exercise of his discretion on the assumed opposite basis, that English law applied. For reasons which I have set out in paras 54 and 55 above, neither Arnold J’s error as to the governing law of the alleged torts, nor the Court of Appeal’s failure to recognise the potential significance of the governing law of such torts, can have been decisive in relation to the concurrent conclusions which they both reached.

F 69 In short, Arnold J’s analysis and exercise of his discretion cannot in my view be faulted in any substantial respect, and I see no basis on which this court would be justified in setting aside his exercise of his discretion and re-exercising the discretion for ourselves, still less in arriving at a different conclusion from his. The case is one in which an appellate court should refrain from interfering, unless satisfied that the judge made a significant error of principle, or a significant error in the considerations taken or not taken into account.

H 70 However, if it were incumbent on us to re-exercise the discretion regarding service out, I would myself arrive at the same conclusion as the judge and the Court of Appeal. Once again in summary, the major part of the factual subject matter involves Russia, and it is clear that the great bulk of evidence on both sides will have to come from Russian witnesses. The location in law of the alleged torts is of much diminished relevance, on examination of their circumstances and place in which they are said to have originated, the process by which they are said to have reached and impacted on VTB and the evidence which would be involved in undertaking such examination. The fact that any deceit was intended to induce an English law contract which provided for English jurisdiction is relevant, but cannot determine the appropriate forum in which to decide whether there was in fact any such deceit or conspiracy.

374

VTB Capital plc v Nutritek International Corpn (SC(E))  
Lord Mance JSC

[2013] 2 AC

71 In my opinion, the Russian connection is of such strength and importance in this case that, despite the existence of some factors favouring England, VTB is quite unable to discharge the onus on it of showing that England is clearly or distinctly the appropriate forum for determination of the issues in this case. A

*The proposed contractual claim based on piercing the corporate veil* B

72 I agree with Lord Neuberger of Abbotsbury PSC's judgment on this aspect and would accordingly uphold the Court of Appeal's decision to refuse VTB permission to amend to raise a contractual claim based on piercing the corporate veil and treating the defendants liable for breach of the facility agreement and/or associated interest rate swap.

*The freezing order* C

73 Like Lord Wilson JSC (paras 159–160), I am concerned that a freezing order should have been in force for some 14 months despite concurrent decisions below concluding that jurisdiction should not be exercised and, at least in the view of the judge, that, irrespective of whether jurisdiction should be exercised, the freezing order originally granted should not be continued. On any view, this position reinforces Lord Neuberger PSC's comments in paras 81–93 with which I would associate myself. D

*Conclusion*

74 I would in the light of my above conclusions dismiss this appeal on both the issues of jurisdiction and amendment and order that the freezing order be discharged. E

**LORD NEUBERGER OF ABBOTSBURY PSC**

*Introductory*

75 This appeal raises two main questions which arise out of a claim brought in the High Court by VTB Capital plc (“VTB”) against (i) Nutritek International Corpn (“Nutritek”), (ii) Marshall Capital Holdings Ltd, (iii) Marshall Capital LLC, and (iv) Konstantin Malofeev (together “the defendants”), based on the torts of deceit and conspiracy. The first main question is whether the permission granted ex parte to VTB to serve the proceedings out of the jurisdiction on the defendants should be set aside. The second main question is whether VTB should be allowed to raise an additional claim, by way of amendment to its statement of case, based on piercing the corporate veil. C

76 Arnold J [2011] EWHC 3107 (Ch) and the Court of Appeal [2012] 2 Lloyd's Rep 313 each concluded that the answer to the first question was yes, and to the second question was no. VTB appeals against both conclusions. The first question turns on whether the English court is the appropriate forum for the hearing of VTB's claim. The second question turns on whether VTB has an arguable case on piercing the corporate veil. H

77 The background facts have been fully set out in paras 165–180 of Lord Clarke of Stone-cum-Ebony JSC's judgment, in paras 19–40 of Lord

A Mance JSC’s judgment (as well as in paras 9–37 in the judgment of Lloyd LJ in the Court of Appeal, and in paras 4–56 of Arnold J’s judgment).

78 I shall discuss both questions on the basis that they arise between VTB and Mr Malofeev, because (subject to the point that Marcap Capital LLC has not been served), it appears to be common ground that (i) the position of the other three defendants in relation to the first question is no different from his, (ii) the position of Marshall Capital Holdings Ltd and Marshall Capital LLC (together “Marcap”) in relation to the second question is no different from his.

*The first question: the appropriate forum: three general points*

79 In very summary terms: (i) VTB’s substantive case is that it was induced by deceitful misrepresentations, for which the defendants were responsible, to enter into certain agreements (“the agreements”) with various parties, in particular Russagropom LLC (“RAP”), under which VTB agreed to lend, and thereafter did lend, money to RAP; (ii) VTB obtained permission ex parte to effect service of proceedings, claiming damages for deceit and conspiracy, on the defendants out of the jurisdiction, and the defendants then applied to set aside service on the ground that Russia, rather than England, was the appropriate forum for the issues to be determined.

80 In a case such as this, permission to serve out of the jurisdiction should only be granted if the court is satisfied that England and Wales is “the proper place in which to bring the claim”: see CPR r 6.37(3). It was common ground that this means that VTB could only succeed on the first question if it was able to establish that, in the words of Lord Goff of Chieveley in *Spiliada Maritime Corpn v Cansulex Ltd (The Spiliada)* [1987] AC 460, 481, the courts of England and Wales (hereafter “England”) are “clearly” “the appropriate forum for the trial of the action”.

81 When a court is called upon to decide whether an action should proceed in this, as opposed to another, jurisdiction, it is being asked to decide a procedural issue at a very early stage. Where, as is now the position in this case, it is common ground that the parties would have a fair trial in the competing jurisdiction, the exercise will normally involve the court weighing up a number of different factors, and deciding where the balance lies. Whilst the same considerations will not always apply to applications for permission to serve out and applications for stays of proceedings, the argument on this appeal has highlighted three general points in relation to each type of exercise.

82 The first point is that hearings concerning the issue of appropriate forum should not involve masses of documents, long witness statements, detailed analysis of the issues, and long argument. It is self-defeating if, in order to determine whether an action should proceed to trial in this jurisdiction, the parties prepare for and conduct a hearing which approaches the putative trial itself, in terms of effort, time and cost. There is also a real danger that, if the hearing is an expensive and time-consuming exercise, it will be used by a richer party to wear down a poorer party, or by a party with a weak case to prevent, or at least to discourage, a party with a strong case from enforcing its rights.

83 Quite apart from this, it is simply disproportionate for parties to incur costs, often running to hundreds of thousands of pounds each, and to spend many days in court, on such a hearing. The essentially relevant factors

376

VTB Capital plc v Nutritek International Corpn (SC(E))  
Lord Neuberger of Abbotsbury PSC

[2013] 2 AC

should, in the main at any rate, be capable of being identified relatively simply and, in many respects, uncontroversially. There is little point in going into much detail: when determining such applications, the court can only form preliminary views on most of the relevant legal issues and cannot be anything like certain about which issues and what evidence will eventuate if the matter proceeds to trial. A

84 This concern is not new. In *Cherney v Deripaska (No 2)* [2010] 2 All ER (Comm) 456, paras 6, 7, Waller LJ said that whilst he “appreciate[d] that litigants do often feel strongly about the place where cases should be tried . . . disputes as to forum should not become state trials”. He also lamented the “mountain of material” the court faced in that case, and suggested that it “would have been better for both parties and better use of court time if they had expended their money and their energy on fighting the merits of the claim”. B

85 In *Friis v Colburn* [2009] EWHC 903 (Ch) at [3] and [5], having set aside an order for service out of the jurisdiction, Peter Smith J referred to the fact that the claimants’ costs schedule was £215,280.50, following a hearing which, he said, had been “strung out by unrealistic stances and unnecessarily prolonged and complicated submissions which seem[ed] to achieve nothing other than create fogs of irrelevancy”. C

86 In that connection, the present case is striking, as Arnold J explained [2011] EWHC 3107 at [3]. The hearing before him lasted six days, after two days’ pre-reading. He was faced with more than 27 bundles of documents, written evidence, and exhibits, and 14 bundles of authorities. One of the witnesses had made twelve witness statements, and further materials were added on a daily basis. (The hearing was not limited to the application to set aside permission to serve out: it included an application to amend, and applications to continue and to discharge a freezing order; however, no more than half the material and time can have been devoted to those aspects.) D

87 Since the hearing of this appeal, the Court of Appeal has given judgment in *Alliance Bank JSC v Aquanta Corpn* [2013] 1 All ER (Comm) 819, a case involving similar issues to those in this appeal. At para 4 of Tomlinson LJ’s judgment in that case, he referred to the fact that the first instance hearing of the application to set aside permission to serve out, on the grounds that England was an inappropriate forum (as well as raising some other points), lasted 11 days, and the hearing in the Court of Appeal appears to have lasted four days. E

88 In *The Spiliada* [1987] AC 460, 465, Lord Templeman expressed the hope that in a dispute over jurisdiction, F

“the judge will be allowed to study the evidence and refresh his memory of [the principles] in the quiet of his room without expense to the parties; that he will not be referred to other decisions on other facts; and that submissions will be measured in hours and not days.” G

That was a rather optimistic aspiration, not least when one bears in mind the understandable desire of lawyers to do, and to be seen by their clients to be doing, everything they can to advance their clients’ case, especially where the dispute over jurisdiction may well be determinative of the outcome. H

89 However, particularly with the benefit of procedural reforms, which have been introduced, or are in the process of being introduced, following reports from Lord Woolf and Jackson LJ, the judiciary is now encouraged to

[2013] 2 AC

VTB Capital plc v Nutritek International Corpn (SC(E))  
Lord Neuberger of Abbotsbury PSC

A exercise far greater case management powers than 25 years ago. Accordingly, judges should invoke those powers to ensure that the evidence and argument on service out and stay applications are kept within proportionate bounds and do not get out of hand.

B 90 The second point is, in a sense, a sub-set of the first point, and concerns the extent to which a defendant who is challenging the jurisdiction of the English court should identify the nature of his case. In my view, the position is reasonably clear. As a matter of principle, a defendant is entitled to keep his powder dry: he can simply put the claimant to proof of its case. In general at least, that is true at any point of the proceedings. The mere fact that the defendant is challenging jurisdiction does not somehow impose a duty on him to specify his case. The onus is on the claimant to satisfy the court that there is a serious issue to be tried on the merits of the claim, and not on the defendant to satisfy the court that he has a real prospect of successfully defending it.

C 91 However, if the defendant chooses to say nothing, then it would be quite appropriate for the court to proceed on the basis that there is no more (and no less) to the proceedings than will be involved in the claimant making, or trying to make, out its case. Of course, in many instances, the defendant will be able to say that, although he has not submitted a draft statement of case, or produced a witness statement, setting out the details of his case, its nature is clear from correspondence, common sense, or even submissions. Consistent with my observations on the first point, I would not want to encourage a defendant to go into great detail as to his case in a long document with many exhibits, but if he is wholly reticent about his case, he can have no complaint if the court does not take into account what points he may make, or evidence he may call, at any trial. I agree with Lord Clarke JSC that a defendant could exhibit draft points of defence, but in many cases, it may be disproportionate to expect him to incur the costs of doing so before it has been decided whether the claim is to proceed at all.

D E 92 The third point was expressed by Lord Bingham of Cornhill in *Lubbe v Cape plc* [2000] 1 WLR 1545, 1556. He said, in the context of an application for a stay of proceedings on grounds of forum non conveniens, that

F “This is a field in which differing conclusions can be reached by different tribunals without either being susceptible to legal challenge. The jurisdiction to stay is liable to be perverted if parties litigate the issue at different levels of the judicial hierarchy in the hope of persuading a higher court to strike a different balance in the factors pointing for and against a foreign forum.”

G Precisely the same applies in many cases involving permission to serve out.

H 93 As Mr Mark Hapgood QC, who appeared for Mr Malofeev, said, appellate courts should be vigilant in discouraging appellants from arguing the merits of an evaluative interlocutory decision reached by a judge, who had to balance the various factors relevant to the appropriate forum, when the complaint is, in reality, that the balance should have been struck differently.

94 Lord Templeman in *The Spiliada* [1987] AC 460, 465 said that the determination of the appropriate forum is “pre-eminently a matter for the trial judge”, because “commercial court judges are very experienced in these

378

VTB Capital plc v Nutritek International Corpn (SC(E))  
Lord Neuberger of Abbotsbury PSC

[2013] 2 AC

matters”, and “an appeal should be rare and the appellate court should be slow to interfere”. This case was in the Chancery Division, whose judges entertain such issues less commonly than their commercial court colleagues, but their experience and expertise are such that the same conclusion applies. As Tomlinson LJ said [2013] 1 All ER (Comm) 819, para 117 of his judgment in *Alliance Bank*, an appellate court “should hesitate long before interfering with the judge’s assessment” on such an issue.

*The first question: the appropriate forum: the instant appeal*

95 Lord Mance and Lord Clarke JSC have each fully considered the first question in their respective judgments, and have come to different conclusions. Given that the first question is so fact-specific, and is the subject of two full judgments in this court (not to mention two full judgments below), it would not be appropriate for me to go into the facts and issues canvassed between the parties.

96 Lord Mance JSC in paras 41 and 42 of his judgment has set out the passages in the judgments of Arnold J and the Court of Appeal respectively, which contain the centrally relevant reasoning of those tribunals on the first question which we have to decide. At least on the face of it, those passages each involve a classical interlocutory weighing up exercise with which an appellate court should be slow to interfere. Of course, that does not detract from the point that the Court of Appeal will consider any argument that the judge took into account any irrelevant or mistaken material, or omitted some relevant material, which could well have influenced the conclusion reached, or that the case is one of those even more unusual cases where the judge’s conclusion was one that no reasonable judge could have reached.

97 It is worth emphasising that, as Lord Wilson JSC says, the exercise carried out by the judge and by the Court of Appeal on the first question was not the exercise of a discretion but an evaluative, or a balancing, exercise, with which, as Lord Goff said in *The Spiliada* at p 465, an “appellate court should be slow to interfere” (also reflected in Lord Bingham’s observation in *Lubbe* quoted in para 92 above).

98 In my view, there are no good grounds upon which this court should interfere with the decision of the Court of Appeal on the first question, and I also consider that there were no good grounds upon which the Court of Appeal could have interfered with the decision of Arnold J on that question. In that connection, there are one or two points worth mentioning.

99 First, were the Court of Appeal correct to hold that Arnold J went wrong in a way which justified them reconsidering his conclusion? In my view, they were right to say in paras 131 and 129 of their judgment that he should have asked himself the single question identified in para 80 above, whereas he approached the issue through two slightly different questions. However, I am unconvinced that this represented an error of significance. The nub of Arnold J’s reasoning, quoted by Lord Mance JSC in para 41 above, shows, to my mind, that the judge ultimately adopted the right approach to the question which he had to resolve.

100 Secondly, there is the governing law. For the reasons given by Lord Clarke and Lord Mance JSC, I agree that the law governing the alleged tort of deceit is English law. As for the alleged tort of conspiracy, this is less clear, because the conspiracy to commit the deceit was based on a common design allegedly formed in Russia. However, like Lord Mance JSC, I am content to

A proceed on the basis that English law applies. In connection with the relevant governing law, therefore, it is clear that Arnold J and the Court of Appeal went wrong in holding that Russian law was the governing law.

B 101 It seems to me, however, that that error cannot, at least of itself, justify this court interfering with the Court of Appeal's decision, or, indeed, with Arnold J's decision, on the first question. That is because the Court of Appeal said in terms in para 166 of its judgment that it would have reached the same decision even if the law governing the deceit and conspiracy claims was English law, and Arnold J in his judgment appears to me to have taken the same view at his para 194.

C 102 Thirdly, there is an argument based on the jurisdiction clauses contained in the agreements, which VTB contends it entered into as a result of the alleged deceptions and conspiracy. Clause 35 of the facility agreement ("clause 35") provided, in clause 35.1, that "the courts of England have nonexclusive jurisdiction to settle any dispute arising out of or in connection with this agreement", that no party would argue that "the courts of England [were not] the most appropriate and convenient courts to settle" such disputes, but that clause 35.1 was "for the benefit of [VTB] only". Clause 35.3 entitled VTB "to refer any dispute which may arise out of or in connection with this agreement to final and binding arbitration in London". D The accompanying related agreements also contained jurisdiction clauses in favour of the English courts, and although their terms were not identical to clause 35, the differences are not significant for present purposes, so I shall confine my remarks to clause 35.

E 103 On behalf of VTB, Mr Mark Howard QC argued that the fact that the defendants had procured, by fraudulent misrepresentations, the entry of VTB into a contract containing a provision such as clause 35, was "a powerful pointer to England being the proper place to bring [a] claim" that it was induced by deceit to do so, particularly as the individual alleged to be responsible for the deceit was also involved in negotiating the contract.

F 104 At the end of para 187 of his judgment, Arnold J described clause 35 as "a pointer to England, but not a strong one given that the claim is a tort claim not a contract claim". The Court of Appeal did not in terms address this point, as the approval in their para 167 of Arnold J's balancing exercise only refers to his paras 188 and 189. However, by expressly agreeing with his approach, it seems unlikely that they did not take into account the point which he made at the end of his para 187.

G 105 In my view, Arnold J was right in his view that clause 35 was a factor in favour of VTB's case on the first question, but he was also right to say that it was not a particularly strong factor. As Rix J said in relation to a similar point in *Credit Suisse First Boston (Europe) Ltd v MLC (Bermuda) Ltd* [1999] 1 All ER (Comm) 237, 252, it would be "far-fetched" to suggest that a provision such as clause 35 could be invoked by VTB to require a claim it brings solely against non-parties to be heard in London, even if the claim relates to the agreement containing the clause. However, that is not a reason for concluding that clause 35 cannot be a factor, or, to use Arnold J's H word, a pointer, in connection with the first question.

106 There may well be circumstances in which such a factor is a powerful one. An example is to be found in the decision of the New South Wales Court of Appeal in *Global Partners Fund Ltd v Babcock & Brown Ltd*

380

VTB Capital plc v Nutritek International Corpn (SC(E))  
Lord Neuberger of Abbotsbury PSC

[2013] 2 AC

(2010) 79 ACSR 383: see especially at paras 71–80. I do not consider that that decision helps VTB: for a number of reasons, it was a very different case. A

107 In this case, it is true that, at least on the unchallenged evidence on behalf of VTB, Mr Malofeev was involved, and may have been instrumental in, negotiating the agreements in question, and he can therefore be said to have approved, or at least have had knowledge of, their terms, including clause 35. It is also true, again on VTB’s case, that Mr Malofeev can be said to have encouraged VTB to enter into those agreements, which include clause 35. To that extent, it can come as no surprise to him that VTB wish to litigate a claim which, at least on its case, arises out of those agreements, in London. B

108 However, clause 35 is not an exclusive jurisdiction provision: it merely gives VTB what is in effect an option to sue the other parties to the agreements in England in respect of any claim arising out of or in connection with those agreements. The present proceedings do not involve VTB suing any party to the agreements, although it may be that they could fairly be said to include any claim arising under the agreements. The fact that RAP was content to be sued under the agreements in England does not mean that Mr Malofeev would have been content to have been sued in tort here. The fact that VTB apparently wanted to have the right to sue RAP here does not mean that it would have wanted to have the same right against Mr Malofeev (e.g RAP may have been believed to have assets here). C D

109 I accept that it would be different if VTB had a claim under the agreements against RAP to which its claim against Mr Malofeev was somehow connected. There is obvious force in Mr Hapgood’s point that, if Mr Malofeev is to be treated as having had notice of clause 35 and its implications, it goes no further than helping VTB in suing him in this jurisdiction in proceedings which include a claim brought under the agreements against one or more of the parties to the agreements. However, I do not consider that the fact there are no such claims destroys VTB’s reliance on clause 35 of any validity, but it severely weakens it. E

110 I acknowledge the authority of Professor Briggs and the force of his views, as described by Lord Clarke JSC at paras 221 and 222. However, I do not accept that Mr Malofeev “engineered” VTB entering into clause 35. There is no evidence that he even knew of its existence, and, anyway, it is plain from its terms that the clause was wanted by VTB and is purely for its benefit. In so far as it is said that Mr Malofeev “engineered” VTB entering into the agreement which happened to include clause 35, it seems to me unsafe to proceed on the assumption that Mr Malofeev was guilty of deceit: that would be the central substantive issue in these proceedings. F G

111 What I do accept is that the existence of the clause in an agreement, in which Mr Malofeev was in some respects involved (to use a neutral word) in negotiating, renders it hard for him to contend that England is an inappropriate forum for the proceedings which are connected with the agreement, but I do not see it going much further than that on its own. To hold otherwise would, I think, involve effectively treating Mr Malofeev as bound by the clause. H

112 Finally, is this a case where the conclusion reached below on the first question was outside the ambit of permissible decisions as canvassed by Lord Bingham in *Lubbe* and quoted in para 92 above? In my view, it is not. While there is a powerful case for saying that England is the appropriate

A forum, as Lord Clarke JSC’s judgment shows, I think that it is also clear there is a powerful argument to the contrary, as is demonstrated by Lord Mance JSC’s judgment (supported by the reasoning of Arnold J and the Court of Appeal).

B 113 It is unnecessary to spend time on what is a hypothetical question, namely what decision I would have reached on this issue if I had been the appropriate decision-maker. It is sufficient for me to conclude, as I do, essentially for the reasons given more fully by Lord Mance and Lord Wilson JJSC, that Arnold J and the Court of Appeal each reached a conclusion on the first question which (i) they were respectively entitled to reach on the basis of applying the relevant principles to the facts of this case, and (ii) was not vitiated by any error, because, to the extent that there was any error, it did not invalidate the conclusion, both because the error would not have caused them to change their conclusions and because that would have been a reasonable view to take.

*The second issue: piercing the corporate veil: VTB’s case*

D 114 VTB seeks to amend its pleaded case to contend that Mr Malofeev and Marcap should be treated as being jointly and severally liable with RAP for breaches of two of the agreements, namely the facility agreement and the associated ISA (“the two agreements”) and/or otherwise subject to remedies to enforce the two agreements.

E 115 On the documents, the parties to the two agreements were (i) RAP, (ii) “the original guarantors”, namely, Migifa, owner of all the shares in RAP, and Brentville, owner of all the shares in Migifa, and (iii) VTB. It is (unsurprisingly) therefore common ground that Mr Malofeev was not party to either of the two agreements. However, VTB’s contention is that it is entitled to “pierce the veil of incorporation” of RAP, as a result of which Mr Malofeev (and Marcap) should be held liable under the two agreements together with RAP and/or otherwise subject to remedies to enforce the two agreements.

F 116 According to VTB’s proposed amended particulars of claim, as expanded in the written and oral argument before us, its case on this issue may be summarised as follows: (i) Mr Malofeev controlled RAP and Nutritek; (ii) RAP was specifically formed for the purpose of entering into the two agreements, which it duly did and thereby obtained the benefit of the loans of over US\$225,050,000 made available to RAP by VTB thereunder; (iii) The two agreements appeared to involve, and were misrepresented to VTB to involve, a loan to RAP to enable it to purchase the shares in certain dairy companies owned by Nutritek, whereas their true purpose, as G Mr Malofeev knew, was to transfer those shares between the two companies at an inflated price; (iv) In particular, Mr Malofeev was responsible for inducing VTB to enter into the two agreements by virtue of Nutritek’s misrepresentations as to the control, trading performance, and value of the dairy companies, and, in particular, representing that they were not controlled by Mr Malofeev or Marcap; (v) Mr Malofeev accordingly H improperly used RAP “as the corporate vehicle to enter into” the two agreements, “and obtain[ed] thereby” the loans, which “involved the fraudulent misuse of the company structure”; (vi) In particular, Mr Malofeev used RAP’s “separate legal status to disguise the ownership and control ultimately exercised over RAP by [Mr Malofeev and Marcap]”, which disguise duly misled VTB into believing that there was a genuine

382

VTB Capital plc v Nutritek International Corpn (SC(E))  
Lord Neuberger of Abbotsbury PSC

[2013] 2 AC

arm’s length transaction at a genuinely negotiated price; (vii) In these circumstances, “the corporate veil of RAP should be lifted, exposing . . . Mr Malofeev . . . as the puppeteer . . . behind it to remedies to enforce the terms of the [two agreements]”, so that Mr Malofeev is “jointly and severally liable with RAP” under the two agreements “in respect of VTB’s losses”. A

117 For Mr Malofeev, it was contended that this line of argument is bound to fail on two alternative grounds. The first is that we should hold that, whatever has been said about it in previous cases, the court cannot in fact pierce the corporate veil, and that the cases which suggest it can are wrong, although the decisions in those cases may often be justified on another basis. The second argument is that, even if the court can in principle pierce the veil, it cannot do so in this case, because VTB’s argument represents an illegitimate and unprincipled extension of the circumstances in which the veil can be pierced. B  
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*The second issue: piercing the corporate veil: the principle of piercing the veil*

118 I turn first to consider the argument that there are no circumstances in which the court should pierce, or lift, the corporate veil. The terms “piercing” and “lifting” appear throughout the authorities, sometimes interchangeably. As Toulson J observed in *Yukong Line Ltd of Korea v Rendsburg Investments Corpn of Liberia (No 2)* [1998] 1 WLR 294, 305, “it may not matter what language is used as long as the principle is clear; but there lies the rub”. Staughton LJ in *Atlas Maritime Co SA v Avalon Maritime Ltd (No 1)* [1991] 4 All ER 769, 779G, expressly separated the two, on the basis that “pierc[ing] . . . is reserve[d] for treating the rights or liabilities or activities of a company as the rights or liabilities or activities of its shareholders”, whereas “lift[ing] . . . [is] to have regard to the shareholding in a company for some legal purpose”. In *Ben Hashem v Al Shayif* [2009] 1 FLR 115, a case which included a claim that a company was no more than one man’s alter ego, Munby J said, at para 150, that “in this context the expressions are synonymous”. D  
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119 For present purposes, I shall use the phrase “piercing” in preference to “lifting”. It is the more familiar expression and it is the expression which all counsel have used. It is unnecessary to decide whether, in truth, there is a difference in this context between “piercing” and “lifting” the corporate veil. F

120 We were referred to a number of cases where courts have either granted relief on the basis of piercing the corporate veil, or where courts have proceeded on the assumption, or concluded, that there is power to do so. The only case in that connection in the House of Lords, or Supreme Court, to which we were referred, was *Woolfson v Strathclyde Regional Council* 1978 SC (HL) 90, a case where, on the facts, the House of Lords had no difficulty in rejecting an argument that the corporate veil could be pierced. At 1978 SC (HL) 90, 96, Lord Keith of Kinkel suggested that the court could only take such a course “where special circumstances exist indicating that [the involvement of the company] is a mere façade concealing the true facts”. G

121 There is obvious attraction in the proposition that the court can pierce the veil of incorporation on appropriate facts, in order to achieve a just result. However, the spirited and sustained attack mounted against the proposition by Mr Michael Lazarus, who appeared for Marshall Capital Holdings Ltd, is worthy of serious consideration. The brief discussion of the H

A principle in *Woolfsong* does not justify the contention that it was somehow affirmed or approved by the House: Lord Keith’s remarks were obiter, and the power of the court to pierce the corporate veil does not appear to have been in issue in that case. The most that can be said about *Woolfsong* from the perspective of VTB is that the House was prepared to assume that the power existed.

B 122 The starting point for the argument that the principle does not exist is the well known decision in *Salomon v A Salomon & Co Ltd* [1897] AC 22. There is great force in the argument that that case represented an early attempt to pierce the veil of incorporation, and it failed, pursuant to a unanimous decision of the House of Lords, not on the facts, but as a matter of principle. Thus, at pp 30–31, Lord Halsbury LC said that a “legally incorporated” company

C “must be treated like any other independent person with its rights and liabilities appropriate to itself . . . whatever may have been the ideas or schemes of those who brought it into existence.”

He added that it was “impossible to say at the same time that there is a company and there is not”.

D 123 The notion that there is no principled basis upon which it can be said that one can pierce the veil of incorporation receives some support from the fact that the precise nature, basis and meaning of the principle are all somewhat obscure, as are the precise nature of circumstances in which the principle can apply. Clarke J in *The Tjaskemolen* [1997] 2 Lloyd’s Rep 465, 471 rightly said that “the cases have not worked out what is meant by ‘piercing the corporate veil’. It may not always mean the same thing” (and to the same effect, see *Palmer’s Company Law* (looseleaf ed), para 2.1533). E Munby J in *Ben Hashem’s* case [2009] 1 FLR 115, seems to have seen the principle as a remedial one, whereas Sir Andrew Morritt V-C in *Trustor AB v Smallbone (No 2)* [2001] 1 WLR 1177 appears to have treated the principle as triggered by the finding of a “façade”.

F 124 The “façade” mentioned by Lord Keith is often regarded as something of a touchstone in the cases—e g per Munby J in *Ben Hashem’s* case, para 164, and per Sir Andrew Morritt V-C in *Trustor*, para 23. Words such as “façade”, and other expressions found in the cases, such as “the true facts”, “sham”, “mask”, “cloak”, “device”, or “puppet” may be useful metaphors. However, such pejorative expressions are often dangerous, as they risk assisting moral indignation to triumph over legal principle, and, while they may enable the court to arrive at a result which seems fair in the case in question, they can also risk causing confusion and uncertainty in the law. G The difficulty which Diplock LJ expressed in *Snook v London and West Riding Investments Ltd* [1967] 2 QB 786, 802, as to the precise meaning of “sham” in connection with contracts, may be equally applicable to an expression such as “façade”.

H 125 Mr Lazarus argued that in all, or at least almost all, the cases where the principle was actually applied, it was either common ground that the principle existed (*Gilford Motor Co Ltd v Horne* [1933] Ch 935, *In re H (Restraint Order: Realisable Property)* [1996] 2 All ER 391, and *Trustor*) and/or the result achieved by piercing the veil of incorporation could have been achieved by a less controversial route—for instance, through the law of agency (*In re Darby; Ex p Brougham* [1911] 1 KB 95, *Gilford*, and *Jones v*

384

VTB Capital plc v Nutritek International Corpn (SC(E))  
Lord Neuberger of Abbotsbury PSC

[2013] 2 AC

*Lipman* [1962] 1 WLR 832), through statutory interpretation (*Daimler Co Ltd v Continental Tyre and Rubber Co (Great Britain) Ltd* [1916] 2 AC 307, *Merchandise Transport Ltd v British Transport Commission* [1962] 2 QB 173, *Wood Preservation Ltd v Prior* [1969] 1 WLR 1077 and *In re A Company* [1985] BCLC 333), or on the basis that, as stated by Lord Goff in *Goss v Chilcott* [1996] AC 788, 798, money due to an individual which he directs to his company is treated as received by him: *Gencor ACP Ltd v Dalby* [2000] 2 BCLC 734, and the *Trustor* case [2001] 1 WLR 1177. A B

126 In summary, therefore, the case for Mr Malofeev is that piercing the corporate veil is contrary to high authority, inconsistent with principle, and unnecessary to achieve justice.

127 I see the force of this argument, but there are points the other way. I am not convinced that all the cases where the court has pierced the veil can be explained on the basis advanced by Mr Lazarus. Further, as Mr Howard said, the fact is that those cases were decided on the basis of piercing the veil. More generally, it may be right for the law to permit the veil to be pierced in certain circumstances in order to defeat injustice. In addition, there are other cases, notably *Adams v Cape Industries plc* [1990] Ch 433, where the principle was held to exist (albeit that they include obiter observations and are anyway not binding in this court). It is also difficult to explain the first instance decision in *Kensington International Ltd v Republic of the Congo* [2006] 2 BCLC 296 on any basis other than the principle (but I am not at all sure that the case was rightly decided: see *Continental Transfert Technique Ltd v Federal Government of Nigeria* [2009] EWHC 2898 (Comm) at [27]–[29]. Further, the existence of the principle is accepted by all the leading textbooks: see *Palmer’s Company Law* (looseleaf ed), para 2.1533, *Gore-Browne on Companies* (looseleaf ed), paras 7[3]–7[6], *Gower & Davies on Principles of Modern Company Law*, 9th ed (2012), paras 8-5–8-14, and *Farrar’s Company Law*, 4th ed (1998), pp 69–78. C D E

128 In answer to the contention that the approach of the courts to the issue of piercing the veil is unprincipled, there is real force, at least on the face of it, in the fact that it cannot be invoked merely where there has been impropriety. As Munby J put it in *Ben Hashem’s* case [2009] 1 FLR 115, paras 163–164, F

“it is necessary to show both control of the company by the wrongdoer(s) and impropriety, that is, (mis)use of the company by them as a device or façade to conceal their wrongdoing . . . at the time of the relevant transaction(s).”

129 In its recent decision in *La Générale des Carrières et des Mines v FG Hemisphere Associates LLC* [2013] 1 All ER 409, para 24, the Judicial Committee of the Privy Council, in a judgment given by Lord Mance JSC, was prepared to assume that the appellant was right in contending that it was open to a court in this jurisdiction to pierce the corporate veil, but it is to be noted that this was not challenged by the respondent. In para 27, reference was made to *Case concerning Barcelona Traction, Light and Power Co Ltd (Second Phase) (Belgium v Spain)* [1970] ICJ 3, in which, it was said, G H

“the International Court of Justice referred (para 56) to municipal law practice to lift the corporate veil . . . ‘for instance, to prevent the misuse

[2013] 2 AC

VTB Capital plc v Nutritek International Corpn (SC(E))  
Lord Neuberger of Abbotsbury PSC

A of the privileges of legal personality, as in certain cases of fraud or malfeasance, to protect third persons such as a creditor or purchaser, or to prevent the evasion of legal requirements or of obligations’.”

However, at para 27, Lord Mance JSC pointed out that the *Barcelona Traction* case concerned “international legal considerations, indicating that there may not always be a precise equation between factors relevant to the

B lifting of the corporate veil under domestic and international law”.

130 In my view, it is unnecessary and inappropriate to resolve the issue of whether we should decide that, unless any statute relied on in the particular case expressly or impliedly provides otherwise, the court cannot pierce the veil of incorporation. It is unnecessary, because the second argument raised on behalf of Mr Malofeev, to which I shall shortly turn, persuades me that VTB cannot succeed on this issue. It is inappropriate

C because this is an interlocutory appeal, and it would therefore be wrong (absent special circumstances) to decide an issue of such general importance if it is unnecessary to do so.

*The second issue: piercing the corporate veil: why it cannot succeed in this case*

D 131 I therefore approach this question in the same way as the Court of Appeal, namely by considering whether, assuming in VTB’s favour that the court can pierce the veil of incorporation on appropriate facts, the basis on which VTB seeks to pierce the veil can be justified in the present case. I do so on the basis that this issue is to be resolved by reference to English law. It seems to me, however, that there may be a choice of law question to be

E addressed in cases which concern the piercing of the veil of a foreign incorporated company. That question is whether the proper law governing the piercing of the corporate veil is the *lex incorporationis*, the *lex fori*, or some other law (for example, the *lex contractus*, where the issue concerns who is considered to be party to a contract entered into by the company in question). The ultimate conclusion may be that there is no room for a single choice of law rule to govern the issue: see Chee Ho Tham “Piercing the corporate veil: searching for appropriate choice of law rules” [2007] LMCLQ 22, 27. However, given that it has been common ground throughout these proceedings that the issue is to be resolved pursuant to English law, it is inappropriate to say more about this issue.

F 132 In so far as VTB invokes the principle of piercing the veil of incorporation, its case involves what, at best for its point of view, may be characterised as an extension to the circumstances where it has traditionally

G been held that the corporate veil can be pierced. It is an extension because it would lead to the person controlling the company being held liable as if he had been a co-contracting party with the company concerned to a contract where the company was a party and he was not. In other words, unlike virtually all the cases where the court has pierced the corporate veil, VTB is claiming that Mr Malofeev should be treated as if he were, or had been, a

H co-contracting party with RAP under the two agreements, even though neither Mr Malofeev nor any of the contracting parties (including VTB) intended Mr Malofeev to be a party.

133 The notion that the principle can be extended to such a case receives no support from any case save for a very recent decision of

386

VTB Capital plc v Nutritek International Corpn (SC(E))  
Lord Neuberger of Abbotsbury PSC

[2013] 2 AC

Burton J, *Antonio Gramsci Shipping Corpn v Stepanovs* [2011] 1 Lloyd's Rep 647 (which he followed in his later decision in *Alliance Bank JSC v Aquanta Corpn* [2012] 1 Lloyd's Rep 181, which was considered by the Court of Appeal [2013] 1 All ER (Comm) 819). None of the other decisions relied on by VTB in this connection is, on analysis, of assistance to its case. A

134 In the *Gilford* case [1933] Ch 935, Mr Horne had undertaken not to compete with his former employer, and a company, in which only he and his wife were shareholders, and which he formed after leaving his employment, was enjoined from competing. He effectively broke his undertaking by trading through the company, in the same way as if it had been carrying on the competing business through his wife—as indeed had happened in *Smith v Hancock* [1894] 2 Ch 377, 385, a case relied on by the Court of Appeal in *Gilford*. Thus, the decision in *Gilford* had nothing to do with the fact that a company was involved, and therefore, as a matter of logic, the decision cannot have been based on piercing the corporate veil—a point made by Toulson J in the *Yukong Line* case [1998] 1 WLR 294, 308, and rightly accepted by Arnold J and the Court of Appeal in this case. B C

135 The same point (as was said in the *Yukong Line* case) applies to *Jones v Lipman* [1962] 1 WLR 832, which I do not find an entirely easy case. After agreeing to sell a property to a purchaser, the vendor sold the same property to a company owned by him and his wife, and the purchaser obtained an order for specific performance against the company. On the judge's reasoning, it would have equally been entitled to do so if, instead of the company, the property had been transferred to the vendor's wife. Another view of *Jones* is that the sale by the vendor to the company was treated as a sham transaction. D

136 In both *Gencor* [2000] 2 BCLC 734 and *Trustor* [2001] 1 WLR 1177, the court pierced the corporate veil in order to impose liability on a company, effectively owned and controlled by the wrongdoer, for money which he had misappropriated from the claimant and diverted to the company. There was no question of the wrongdoer being treated as contractually liable under a contract to which the company, rather than he, was a party. Even the doubtful decision in the *Kensington* case [2006] 2 BCLC 296 did not involve going so far as to hold that the person sheltering behind the veil was liable as if he was a contracting party under a contract entered into by the company. E F

137 The fact that there has been no case (until the *Gramsci* case [2011] 1 Lloyd's Rep 647) where the power to pierce the corporate veil has been extended in the way for which VTB contends in these proceedings does not necessarily mean that VTB's case, in so far as it is based on piercing the veil, must fail. However, given that the principle is subject to the criticisms discussed above, it seems to me that strong justification would be required before the court would be prepared to extend it. Once one subjects the proposed extension to analysis, I consider that it is plain that it cannot be sustained: far from there being a strong case for the proposed extension, there is an overwhelming case against it. G

138 First, it is not suggested by VTB that any of the other contracting parties under the two agreements is not liable. Indeed, as mentioned above, VTB's proposed pleaded case is that Mr Malofeev is "jointly and severally liable with RAP". Even accepting that the court can pierce the corporate veil in some circumstances, the notion of such joint and several liability is H

[2013] 2 AC

VTB Capital plc v Nutritek International Corpn (SC(E))  
Lord Neuberger of Abbotsbury PSC

A inconsistent with the reasoning and decision in *Salomon*. A company should be treated as being a person by the law in the same way as a human being. The fact that a company can only act or think through humans does not call that point into question: it just means that the law of agency will always potentially be in play, but, it will, at least normally, be the company which is the principal, not an agent. On VTB's case, if the agency analogy is relevant, the company, as the contracting party, is the quasi-agent, not the quasi-principal.

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139 Subject to some other rule (such as that of undisclosed principal), where B and C are the contracting parties and A is not, there is simply no justification for holding A responsible for B's contractual liabilities to C simply because A controls B and has made misrepresentations about B to induce C to enter into the contract. This could not be said to result in unfairness to C: the law provides redress for C against A, in the form of a cause of action in negligent or fraudulent misrepresentation.

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140 In any event, it would be wrong to hold that Mr Malofeev should be treated as if he was a party to an agreement, in circumstances where (i) at the time the agreement was entered into, none of the actual parties to the agreement intended to contract with him, and he did not intend to contract with them, and (ii) thereafter, Mr Malofeev never conducted himself as if, or led any other party to believe, he was liable under the agreement. That that is the right approach seems to me to follow from one of the most fundamental principles on which contractual liabilities and rights are based, namely what an objective reasonable observer would believe was the effect of what the parties to the contract, or alleged contract, communicated to each other by words and actions, as assessed in their context: see e.g. *Smith v Hughes* (1871) LR 6 QB 597, 607.

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141 In his argument, Mr Howard relied by analogy with the law relating to undisclosed principals. In my view, the analogy tells against VTB's argument. The existence of the undisclosed principal rule has long been regarded as an anomaly, as discussed in *Bowstead & Reynolds on Agency*, 19th ed (2010), para 8-070, and as observed by Dillon LJ in *Welsh Development Agency v Export Finance Co Ltd* [1992] BCLC 148, 173. As the Court of Appeal said in this case at para 89, it would be inappropriate to extend an anomaly—save where it would be unjust and unprincipled not to do so. To adapt what Lord Hoffmann said in *OBG Ltd v Allan* [2008] AC 1, paras 103, 106, “an anomaly created by the judges to solve a particular problem” is “an insecure base” on which to justify an extension to a principle, especially when that principle can itself be said to be anomalous.

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142 Quite apart from this, it seems to me that the facts relied on by VTB to justify piercing the veil of incorporation in this case do not involve RAP being used as “a façade concealing the true facts”. In my view, if the corporate veil is to be pierced, “the true facts” must mean that, in reality, it is the person behind the company, rather than the company, which is the relevant actor or recipient (as the case may be). Here, on VTB's case, “the true facts” relate to the control, trading performance, and value of the dairy companies (if one considers the specific allegations against Mr Malofeev), or to the genuineness of the nature of the underlying arrangement (which involves a transfer of assets between companies in common ownership). Neither of these features can be said to involve RAP being used as a “façade to conceal the true facts”.

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388

VTB Capital plc v Nutritek International Corpn (SC(E))  
Lord Neuberger of Abbotsbury PSC

[2013] 2 AC

143 It was suggested, however, by Mr Howard that the case against Mr Malofeev involves him “abusing the corporate structure”, and that that is sufficient to justify piercing the corporate veil. However, in my view, abuse of the corporate structure (whatever that expression means) adds nothing to the debate, at least in this case. It may be another way of describing use of the company as a façade to conceal the true facts (in which case it adds nothing to Lord Keith’s characterisation in *Woolfson* 1978 SC (HL) 90), or it may be an additional requirement before the corporate veil will be pierced: otherwise, it seems to me that it would be an illegitimate extension of the circumstances in which the veil can be pierced. A B

144 It is true that in many civil law systems, abuse of rights is a well recognised concept, and it may be appropriate for a domestic court to apply such a principle in relation to some areas of EU law. However, it was not suggested to us that it should be applied as a new or separate ground in domestic law for treating Mr Malofeev as contractually liable to VTB, or that it would assist VTB in this case. C

145 Accordingly, in agreement with the Court of Appeal and for substantially the same reasons, I consider that VTB’s contention represents an extension to the circumstances in which the court will pierce the corporate veil, and on analysis it is an extension which is contrary to authority and contrary to principle. D

146 The proposed extension is all the more difficult to justify given that it is not needed to enable VTB to seek redress from Mr Malofeev. It is clear that, if VTB establishes that it was induced to enter into the agreements by the fraudulent statements which he is alleged to have made, then Mr Malofeev will be liable to compensate VTB. The measure of damages may be different, but that is not a particularly attractive reason for extending the principle in a new and unprincipled way. And I am not at all attracted by the notion that the principle should be invoked simply to enable VTB to justify the proceedings being heard in this jurisdiction, if they otherwise could not be. That would be precious close to its application being permitted to pull itself up by its own bootstraps. E

147 It follows from this analysis that I doubt that the decision in *Gramsci* [2011] 1 Lloyd’s Rep 647 can be justified, at least on the basis of piercing the corporate veil. In agreement with the Court of Appeal and Arnold J, I think that the reasoning in that case involved a misinterpretation of the basis of the decisions in *Gilford* [1933] Ch 935 and *Jones* [1962] 1 WLR 832. It seems to me that the conclusion in *Gramsci* was driven by an understandable desire to ensure that an individual who appears to have been the moving spirit behind a dishonourable (or worse) transaction, action, or receipt, should not be able to avoid liability by relying on the fact that the transaction, action, or receipt was effected through the medium (but not the agency) of a company. But that is not, on any view, enough to justify piercing the corporate veil for the purpose of holding the individual liable for the transaction, action, or receipt, especially where the action is entering into a contract. F G H

148 For these reasons, I agree with the Court of Appeal in concluding that, assuming that there is jurisdiction to pierce the corporate veil on appropriate facts, VTB’s proposed pleaded case does not give rise to arguable grounds for contending that this jurisdiction could be invoked in

[2013] 2 AC

VTB Capital plc v Nutritek International Corpn (SC(E))  
Lord Neuberger of Abbotsbury PSC

- A the present case. I would therefore refuse VTB permission to amend its pleaded case to raise such a claim.

*Conclusion*

149 I would therefore dismiss VTB's appeal on both main issues.

- B 150 I have referred to the issues I have been discussing as the main issues, because there is another series of issues relating to a freezing order which VTB obtained. Following its discharge by Arnold J, VTB wishes this freezing order to be reinstated. There is also a temporary freezing order, which VTB obtained pending the determination of this appeal. In the light of the fact that this appeal is being dismissed, it seems to me clear that the discharged freezing order must remain discharged and the temporary freezing order must now be discharged as well. I should add that I agree with what Lord Wilson JSC says about the freezing orders.
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**LORD WILSON JSC**

151 I agree with Lord Mance JSC and Lord Neuberger of Abbotsbury PSC that the appeal should be dismissed.

- D 152 As their judgments, and, on the other hand, those of Lord Clarke of Stone-cum-Ebony and Lord Reed JJSC, well demonstrate, the rival arguments in relation to forum are evenly balanced.

- E 153 VTB has three main points: (a) The location of the alleged torts in England. It is worthwhile to remember, however, that, in one sense, the bringing of the transactions into England was pure chance. In July 2007 VTB Moscow informed Mr Malofeev and MarCap that the proposed lender would be either itself or VTB; and in October 2007 it informed them that it would be VTB. They had no objection; but the placement of the lending into the hands of its English subsidiary was effected entirely at the election of, and for the convenience of, VTB Moscow. (b) The English jurisdiction clause in the facility agreement and indeed also in the interest rate swap agreement. If Mr Malofeev controlled the borrowing party to the agreements, namely RAP, and so can be considered responsible for its contractual concession that VTB should have the right to demand that disputes arising out of them be resolved in the courts of England, he can hardly complain if allegations of his and his companies' fraudulent inducement of VTB to enter into them are also resolved here. But two riders fall to be attached. The first is whether the court can at this stage proceed on the basis that Mr Malofeev controlled RAP. The court must not for this purpose assume what VTB needs to prove; yet the fact is that, while not admitting control of RAP, Mr Malofeev has, to date, not actively challenged it. The second is that the test to be applied pursuant to the decision in *The Spiliada* [1987] AC 460, mandates a much wider inquiry than into whether Mr Malofeev would have no ground for complaint about the continuation of the proceedings in England. (c) The government by English law of VTB's claims in tort, as held unanimously by this court and as explained in judgments above with which I agree. A spectre of considerable practical inconvenience is raised around the receipt by a Russian judge of evidence of English law and around his application of it to such facts as he were to find. On the other hand the legal framework of VTB's case does not appear to be complex or controversial and Arnold J was entitled to conclude [2011]
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390  
VTB Capital plc v Nutritek International Corpn (SC(E)) [2013] 2 AC  
Lord Wilson JSC

EWHC 3107 (Ch) that the key issues in the case were likely to be factual rather than legal. A

154 Although, therefore, I discern a practical element in the third of VTB’s main points, I have no doubt that, over all, considerations of practicality militate strongly in favour of a Russian forum. The apparently relevant witnesses are Russian, speak Russian and seem almost entirely to be resident in Russia and so beyond the reach of an English witness summons; and the relevant documentation, in particular relating to both the actual and the represented profitability of the dairy companies, was written in Russian. B

155 On the one hand, therefore, there are VTB’s points, which primarily go to theory, to policy and, yes, perhaps to a limited extent to justice. On the other hand there are the defendants’ points, which primarily go to practicality.

156 The forum issue required Arnold J not (in my view) to exercise a discretion but, rather, to reach an evaluative judgment upon whether, in the light of these and the many other points pressed upon him by each side, England was clearly the more appropriate forum. “The appellate court should be slow to interfere” (Lord Goff in *The Spiliada* [1987] AC 460, 465); and I agree with Lord Mance JSC at para 68 and with Lord Neuberger PSC at para 98 that the errors which the Court of Appeal identified in the judgment of Arnold J (in particular his adoption of the two-part test apt to an application for stay) were, on analysis, of materiality insufficient to justify a re-evaluation of its own. Furthermore, notwithstanding its own error about the governing law of the torts, alongside which, however, one must weigh its assertion that an English governing law would not have led it to a different conclusion, I agree with Lord Neuberger PSC’s alternative conclusion at para 96 that there are no grounds for interfering with the Court of Appeal’s own evaluative conclusion. C D E

157 To be honest, a disposal of the forum part of the appeal on the above basis is, in the light of this court’s intended function in the resolution of controversial and important issues of law, a banal disposal; and, in retrospect, a question arises whether it is appropriate for there to have been a massive second appeal to this court on the forum issue. In its notice of appeal VTB identified the requisite issue of general public importance relative to the issue in one sentence: “the appellant says that if a defendant has committed a wrong in England, there is a presumption, and a strong one, that he ought to answer for that wrong in England.” But, while he was careful not entirely to abandon his preference for the language of presumption, Mr Howard conceded, early in his opening address, that it was irrelevant whether such was a presumptive position, a starting point or a prima facie conclusion; a little later in his address, he added that the issue was not really about a label, such as that of presumption, but about approach; and he scarcely pressed the difficult suggestion that there was anything in the jurisprudence—even in *The Albaforth* [1984] 2 Lloyd’s Rep 91—to raise a formal, legal presumption that the forum should follow the location of the tort. I am doubtful whether the committee would have granted permission to appeal on the forum issue if it had realised that VTB’s case would develop into little more than an invitation to re-evaluate all the relevant factors for and against the English forum. F G H

158 VTB’s application for permission to amend its particulars of claim so as to include claims against Mr Malofeev and the two MarCap companies

A as additional parties to the facility and interest rate swap agreements logically falls for consideration before that of the forum issue. For, had it been granted, the jurisdiction clauses in the agreements would have been directly in play. VTB frankly concedes that its primary purpose in making the proposed claims in contract was, by reference to such clauses, to establish the English jurisdiction pursuant to article 23(1) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001 L12, p 1) (“the Judgments Regulation”); and that its secondary purpose was thereby to be enabled to claim more substantial sums, particularly by way of interest, than would be payable as damages in tort. In the event, however, for the reasons given by Lord Neuberger PSC in paras 126–143, the Court of Appeal was right to dismiss VTB’s appeal against the refusal of Arnold J to permit the amendment: for there was no good arguable case that the three specified defendants could be unveiled as additional parties to the agreements with VTB. In that this court welcomes blue sky thinking, I do not criticise Mr Lazarus for his over-arching attempt to persuade it that English law recognises no principle that the corporate veil may ever be lifted. In my view, however, and notwithstanding the difficulty of being able to define within one sentence the circumstances in which the law will—perhaps—lift the corporate veil, such was a highly ambitious submission. But this is not the place at which to embark on an attempted subjection of it to critical examination.

D 159 In that, by a majority, VTB’s appeal is to be dismissed, the worldwide freezing order against Mr Malofeev must fall to be discharged. But the continuation of the order to date represents a highly unsatisfactory state of affairs. The order was first made, without notice, in August 2011 and was continued, on notice, in September 2011. On 29 November 2011, in the light of his conclusion in favour of the Russian forum, Arnold J declined further to continue the order, save for one week in order to enable VTB to approach the Court of Appeal. But importantly, as Lord Clarke JSC has explained in para 163, Arnold J also ruled that, even had he allowed the English proceedings to continue by declining to set aside the order for service out of the jurisdiction, it would have been wrong, for each of two reasons, for the freezing order to continue. VTB, to whom Arnold J had granted permission to appeal against his refusal to permit the amendment, secured permission from the Court of Appeal also to appeal against his decision in relation to forum and his independent refusal to continue the freezing order; and, on a holding basis, the court continued that order until determination of the appeal. In the light of its dismissal of VTB’s appeal in relation to forum, the Court of Appeal concluded that there was no basis on which the freezing order could continue in any event; and, although it expressed doubts about the first reason given by Arnold J for his independent refusal to continue the freezing order, it did not address his second reason and made no order on that part of VTB’s appeal. It continued the freezing order for ten days only in order to enable VTB to approach this court, which further continued it until its determination of this appeal.

H 160 In the light of this court’s dismissal, by a majority, of the appeal in relation to forum, it can now be seen that Mr Malofeev has continued to be subject to a worldwide freezing order for some 14 months beyond the time when it was proper for such an order to have continued. For in November

392

VTB Capital plc v Nutritek International Corpn (SC(E))  
Lord Wilson JSC

[2013] 2 AC

2011 Arnold J rightly decided that the proceedings should take place in Russia; and the freezing order should then have expired. It was extended only because of the pendency of two successive appeals which can now be seen both to have failed. Such a state of affairs is bad enough. But what makes it worse is that, as I have explained, Arnold J also ruled as long ago as November 2011 that, irrespective of its dependence on the continuation of the English proceedings, the freezing order should not be continued; and his ruling has not been set aside by the Court of Appeal. In retrospect the Court of Appeal should have determined VTB's appeal against that ruling. Had it, for example, dismissed its appeal, this court would be unlikely to have permitted it to appeal against the dismissal and so the freezing order would no doubt at last have come to an end. One cannot quarrel with the logic behind the conventional continuation of a freezing order pending an appeal against a refusal to make an order upon which its continued existence depends. But what turns out to have been the protracted wrongful continuation of the freezing order is another indication of the inappropriateness of a further appeal to this court in circumstances such as the present. The degree of economic inhibition caused to a person in the position of Mr Malofeev by a worldwide freezing order made in England remains to be seen. At first sight, however, he is entitled to complain that it was an oppressive restraint on his economic activities. Whether he is correct to say that it has caused considerable prejudice to him will no doubt be the subject of inquiry in his application, already issued but so far stayed, for VTB to be ordered to compensate him for his losses pursuant to its cross-undertaking attached to the freezing order.

LORD CLARKE OF STONE-CUM-EBONY JSC (dissenting)

*Introduction*

161 In this action the appellant claimant, VTB Capital plc ("VTB"), which was formerly called VTB Bank Europe plc, sought and obtained permission to serve proceedings out of the jurisdiction on the defendant respondents on the ground that the defendants had committed the torts of deceit and conspiracy in England. Save for the third defendant, which has not been served with the proceedings, the defendants applied to have that permission set aside on the ground that VTB had failed to show that England was in all the circumstances clearly and distinctly the appropriate forum to determine the dispute. That application succeeded before Arnold J ("the judge") [2011] EWHC 3107 (Ch). VTB's appeal to the Court of Appeal failed [2012] 2 Lloyd's Rep 313. The Supreme Court subsequently gave permission to appeal on that issue, which has (not entirely correctly) been described in argument as the jurisdiction issue. That is the first issue in this appeal.

162 The second issue arises out of an application made by VTB to amend its particulars of claim to add a claim for breach of contract. Its case involves a consideration of the principles relevant to what is sometimes called piercing the corporate veil. Both the judge and the Court of Appeal refused that application. Although both courts accepted that it is possible in some circumstances to pierce the corporate veil, they both held that VTB had no arguable case that this is such a case. Under this head the defendants seek to uphold the decision of the Court of Appeal, not only on the particular facts, but also on the basis that there are no circumstances in which the court can pierce the corporate veil.

A 163 The third issue arises out of a worldwide freezing order (“WFO”) granted to VTB against Mr Malofeev on 5 August 2011 by Roth J. Mr Malofeev applied to discharge the order on the grounds (a) that there was no risk of dissipation of assets and (b) that there had been material non-disclosure before Roth J. Arnold J subsequently declared that the WFO should be discharged on the ground that the court had refused to exercise jurisdiction over the claim. He also said that he would in any event have discharged and refused to re-grant the WFO on the grounds relied upon by B Mr Malofeev. The WFO was however renewed pending an appeal to the Court of Appeal and subsequently to this court.

### *Jurisdiction*

#### *Service out of the jurisdiction—the principles*

C 164 The relevant principles are not in dispute. They have been stated and restated many times. They were correctly stated in the Court of Appeal in this case by Lloyd LJ, with whom Rimer and Aikens LJJ agreed, at paras 98–101. Lloyd LJ put them thus in paras 99–100:

D “99. . . . The three basic principles were recently restated by Lord Collins of Mapesbury in giving the advice of the Privy Council in *AK Investment CJSC v Kyrgyz Mobile Tel Ltd* [2012] 1 WLR 1804, paras 71, 81 and 88. They can be summarised as follows: first, the claimant must satisfy the court that, in relation to the foreign defendant to be served with the proceedings, there is a serious issue to be tried on the merits of the claim, i.e. a substantial question of fact or law or both. This means that there has to be a real, as opposed to a fanciful, prospect of success on the claim. E Secondly, the claimant must satisfy the court that there is a good arguable case that the claim against the foreign defendant falls within one or more of the classes of case for which leave to serve out of the jurisdiction may be given. These are now set out in paragraph 3.1 of Practice Direction 6B. ‘Good arguable case’ in this context means that the claimant has a much better argument than the foreign defendant. Further, where a question of law arises in connection with a dispute about service out of the jurisdiction and that question of law goes to the existence of the jurisdiction (e.g. whether a claim falls within one of the classes set out in paragraph 3.1 of Practice Direction 6B), then the court will normally decide the question of law, as opposed to seeing whether there is a good arguable case on that issue of law. F

G “100. Thirdly, the claimant must satisfy the court that in all the circumstances England is clearly or distinctly the appropriate forum for the trial of the dispute and that in all the circumstances the court ought to exercise its discretion to permit service of the proceedings out of the jurisdiction. This requirement is reflected in rule 6.37(3) of the CPR, which provides that ‘The court will not give permission [to serve a claim form out of the jurisdiction on any of the grounds set out in paragraph 3.1 of Practice Direction 6B] unless satisfied that England and Wales is the proper place in which to bring the claim.’” H

### *The facts*

165 The underlying facts and issues under this head are set out in the agreed statement of facts and issues (“the SFI”), from which I can take the salient events.

394

VTB Capital plc v Nutritek International Corpn (SC(E))  
Lord Clarke of Stone-cum-Ebony JSC

[2013] 2 AC

166 VTB's case is that the key step in the fraud was VTB's advancing a sum of US\$195,000,000 in London to the account of a borrower in London, which was in turn paid to a seller of a business to its account in London, all done subject to a loan agreement and other related agreements governed by English law and containing English jurisdiction clauses. VTB claims that it has suffered a loss in excess of US\$185,000,000. A

167 The judge and the Court of Appeal both held that VTB has a good arguable case that its claims are claims in tort within paragraph 3.1(9)(a) of Practice Direction 6B supplementing CPR Pt 6, on the ground that damage was sustained within the jurisdiction and that VTB has a good arguable case in tort against Mr Malofeev. However they held that permission to serve out of the jurisdiction should be set aside because VTB has failed to show that England was clearly or distinctly the appropriate forum to determine the disputes. The first issue in this appeal is whether they were entitled so to hold. B C

168 VTB's case on the facts may be summarised in this way. VTB is a bank incorporated and registered in England. It is a member of the London Stock Exchange, and it is authorised and regulated by the Financial Services Authority for the conduct of investment business in the United Kingdom. It is majority owned by JSC VTB Bank ("VTB Moscow"), which is a state-owned bank. It is one of three strategic business arms of the VTB Group, the others being the corporate and retail businesses. It entered into a facility agreement, dated 23 November 2007 ("the facility agreement"), with a Russian company, Russagroprom LLC ("RAP"). Pursuant to the facility agreement, sums totalling US\$225,050,000 were advanced to RAP, primarily to enable RAP to buy six Russian dairy companies and three associated companies ("the dairy companies") from the first respondent ("Nutritek"), a company registered in the British Virgin Islands ("BVI"). After making three interest payments (and no payments of capital), RAP defaulted on the loan in November 2008. VTB's case is that the value of the security provided for the loan was no more than a figure in the region of US\$32m to US\$40m. D E

169 VTB's case is that it was induced in London to enter into the facility agreement and an accompanying interest rate swap agreement, by misrepresentations made by Nutritek, for which the other defendants are jointly and severally liable. The two alleged misrepresentations were: first, that RAP and Nutritek were not under common control, and second, that the value of the dairy companies was much greater than their true worth. It is VTB's case that the misrepresentations were fraudulent. The ostensible primary purpose of the facility agreement was to fund the acquisition of the dairy companies from Nutritek by RAP. RAP entered into a Share Purchase Agreement ("SPA") with Nutritek dated 27 November 2007, whereby RAP purchased shares in a newly incorporated BVI company, Newblade Ltd ("Newblade"), which in turn owned the dairy companies. F G

170 VTB put before the judge a structure chart, setting out in a diagram the complex web of offshore companies through which, on VTB's case, Mr Malofeev ultimately controlled each of Nutritek, the second respondent ("Marcap BVI"), the third defendant ("Marcap Moscow"), and RAP. Marcap Moscow has not been served with the proceedings, and has not taken part in any of the hearings to date. Mr Malofeev is an international businessman who resides in Moscow. The Court of Appeal found that there H

A was a good arguable case that Mr Malofeev “operated a complex web of companies in a number of jurisdictions”. It is VTB’s case that he was at all material times the controller and a principal beneficial owner of the BVI companies, Nutritek and Marcap BVI, as well as Marcap Moscow and RAP. RAP was incorporated in Russia on 21 May 2007 as a special purpose vehicle. In November 2007 its immediate parent company was Migifa Holdings Ltd (“Migifa”), a company incorporated in Cyprus. Migifa’s parent company was Brentville Ltd (“Brentville”), a company incorporated in the BVI. It is VTB’s case that RAP was ultimately owned and controlled by Mr Malofeev, through a web of offshore companies. As the judge found at para 59, “this has not been the subject of challenge” by Mr Malofeev, who has advanced no positive case on the issue of the ultimate ownership and control of RAP. See also the Court of Appeal, at para 34.

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C 171 It is VTB’s case that, in July 2007 in Moscow, Mr Malofeev personally introduced the VTB Group to the scheme, whereby Nutritek sold its interests in the dairy companies to RAP under the SPA. He stated that a decision had been taken to sell Nutritek’s interest in the dairy business and that a purchaser had been identified. He said that a purchaser would have to find banking facilities in order to make the purchase. Mr Tulupov of VTB Moscow was the project manager in respect of the proposed transaction, where his role included liaising with VTB in respect of the project. At an early stage, it was contemplated that either VTB Moscow or VTB would become the lender in connection with the intended transaction. On 18 July 2007, he instructed the London office of Dewey LeBoeuf, Greene & Macrae (“DLGM”) in relation to the proposed transaction. On the next day, a conference call took place between representatives of VTB Moscow, VTB (Marina Bragina, in London) and Marcap Moscow (Mr Alexander Provotorov and Mr Yuri Leonov).

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E 172 It is apparent from a draft term sheet of 8 October 2007 that by early October that year, the proposed structure of the transaction was that the lender was to be VTB (funded by a participation agreement with VTB Moscow) and the borrower was to be RAP. It is VTB’s case that, from about this time it was VTB which was to be the particular target for the fraud. The loan amount was to be in excess of US\$220m towards an acquisition cost of US\$250m. Work started to prepare the documentation for the transaction. The facility agreement was to be governed by English law and VTB was to be the lender in the transaction. Mr Tulupov explains in his statement that the attraction of the lender being VTB was that (i) VTB in the London market was able to provide more sophisticated lending structures than VTB Moscow (owing to internal Russian banking requirements) and (ii) English law offered more protection in the case of default.

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G 173 On 31 October 2007, VTB Moscow’s credit committee approved the proposed transaction. It is VTB’s case that, separately from this, and in connection specifically with the ability of VTB to decide to enter into the facility agreement, VTB, as an FSA regulated entity, had its own processes and procedures before lending moneys. The key figures at VTB in this process included (1) Konstantin Ryzhkov, who was VTB’s Head of Acquisition and Leverage Finance from 1 September 2007 to 27 October 2008 and who was also a managing director at VTB Moscow, (2) Marina Bragina, who held the equivalent post in VTB to that held by Mr Tulupov in VTB Moscow, (3) Steve Thunem, Head of Debt Capital Markets, (4) Juliet

396

VTB Capital plc v Nutritek International Corpn (SC(E))  
Lord Clarke of Stone-cum-Ebony JSC

[2013] 2 AC

Wooi, a credit risk analyst, (5) Peter Yates, Head of Credit Risk, (6) Peter A  
Manning, Chief Risk Officer, as per Board Approved Delegated Credit  
Approval Authorities and (7) K Ianovski, Head of Structured Finance and  
Syndication.

174 As regards the ownership of RAP, VTB relies upon two e-mails B  
dated 6 and 8 November 2007 by Ms Bragina of VTB to others within VTB  
and VTB Moscow which recorded information from Nutritek or from  
Marcap Moscow. The first e-mail states that RAP was incorporated on  
21 May 2007 (in error written as 2002) as an SPV for a Nutritek dairy  
division acquisition and further states that RAP “has no other operations”  
and that RAP’s beneficiary is a Mr Vladimir Alginin. The second e-mail was  
in response to a list of questions put to Ms Bragina previously. The key  
passage states as follows, in the form of the question followed by the answer:  
“Confirm that [RAP] is 100% owned by Alginin. As per the info just received C  
from Nutritek management, Mr Alginin has a 90% share [RAP], the  
remaining 10% share belongs to the management team.”

175 As to the dairy companies, there was a valuation report produced  
by the Moscow office of Ernst & Young Valuation LLC (“E & Y”), valuing  
the dairy companies at US\$366m. This report, which is dated 5 September  
2007 and is in Russian, was received by Mr Tulupov on 8 November 2007 D  
and was discussed in several conversations with Ms Bragina and  
Mr Ryzhkov. Based on Mr Tulupov’s evidence, VTB’s case is that it  
attached considerable importance to the report, as did VTB Moscow. By a  
document headed “Application for credit facilities”, dated 13 November  
2007, VTB approved the proposed transaction. It was signed on  
16 November 2007 by Ms Bragina and Mr Thunem, both of VTB.

176 VTB took the decision to enter into a separate interest swap E  
agreement (“the ISA”), by a further application for credit facilities, dated  
15 November 2007, and signed by Juliet Wooi, Mr Yates and Mr Manning  
on 19 November 2007. Further particulars relating to VTB’s case as to  
reliance on the information provided by Nutritek concerning the ostensibly  
arm’s length relationship between Nutritek and RAP, and concerning the  
value of the dairy companies, are found in the witness statement of  
Mr Muraviev. The transaction was completed over the period 23 to F  
28 November 2007, during which period a number of agreements were  
entered into by the various parties.

177 The principal agreements entered into as part of the overall  
transaction were thus as follows: the facility agreement, between VTB and  
RAP, the SPA between RAP, Nutritek and Newblade dated 27 November  
2007, the ISA between VTB and RAP dated 28 November 2007 and the G  
participation agreement between VTB and VTB Moscow dated  
28 November 2007 (“the participation agreement”). The key provisions of  
the facility agreement are set out by the Court of Appeal at appendix 1 of its  
judgment. They included that its governing law is English law (clause 34)  
and that the courts of England and Wales have non-exclusive jurisdiction to  
settle any dispute arising out of, or in connection with the facility agreement,  
or, at VTB’s option, arbitration in London: clauses 35.1.1 and 35.3. It was H  
further expressly agreed in clause 35.1.2 that the courts of England and  
Wales were the most appropriate convenient courts to settle such disputes  
and that no party would argue otherwise: clause 35.1.2. The other  
agreements referred to above also contain both a choice of law clause in

[2013] 2 AC

VTB Capital plc v Nutritek International Corpn (SC(E))  
Lord Clarke of Stone-cum-Ebony JSC

A favour of English law, and a jurisdiction agreement in favour of the courts of England and Wales.

178 As stated above, both the judge and the Court of Appeal held that VTB had a good arguable case that it entered into the facility agreement in reliance on the two misrepresentations, the first relating to the representation that RAP and Nutritek were not under common control, and the second as to the value of the dairy companies.

B 179 On 28 November 2007, RAP's account with VTB in London was credited with US\$208,700,000. This sum represented the "Tranche A" payment under the facility agreement. On the same day, US\$195,000,000 of those moneys were transferred to Nutritek's account with VTB in London, at RAP's direction. The moneys were thereafter removed from Nutritek's account, so that by 7 December 2007 no funds remained in Nutritek's account with VTB in London. Some of the moneys were transferred to various creditors of Nutritek, while at least US\$62m went to a Nutritek bank account in Switzerland. VTB says that it does not know where the funds went after that, and none of the respondents has put forward evidence as to where the funds went thereafter. As noted by the judge at para 54, some further moneys lent by VTB as part of Tranche B under the facility agreement were utilised to pay interest due under it. This involved the use of another BVI company Madinter Associates Ltd ("Madinter"), which enabled interest to be paid in respect of the principal loan until but not including the payment due in November 2008, since when no payment of interest or principal due under the facility agreement has been made.

D 180 VTB sent a first notice of default from its London office to RAP on 15 December 2008 and a second notice of default on 14 January 2009. From August 2009, VTB began to enforce its security. In due course, VTB took control over Newblade, Migifa and eventually RAP. VTB currently estimates the value of the assets of the dairy companies as less than US\$40m, and probably no more than US\$32m.

#### *VTB's claims*

F 181 VTB's claims are concisely described by the judge at paras 57-63. It says that it was induced to enter into the facility agreement and the ISA, and to advance sums totalling US\$225,050,000 to RAP, by two fraudulent misrepresentations. First, it claims that (together with VTB Moscow) it relied on representations made primarily by Nutritek to the effect that the SPA was a sale between companies that were under separate control. It contends that these representations were false and must have been known by Nutritek to be false when made. VTB knew at the time that Mr Malofeev through MarCap Moscow had de facto control of Nutritek. As the judge put it, what it says it did not know at the time, but has since discovered, is that Mr Malofeev through MarCap BVI also controlled RAP. Thus RAP and Nutritek were under common control at the date of the facility agreement and of the SPA and it was not therefore a commercial transaction carried on at arm's length. The judge held at para 59 that it was not necessary to go into detail concerning the basis of VTB's contention that Mr Malofeev ultimately controlled RAP as well as Nutritek, since it had not been the subject of challenge before him.

H 182 Secondly, VTB claims that both it and VTB Moscow relied upon the 2007 E & Y valuation of the dairy companies and that that valuation

398

VTB Capital plc v Nutritek International Corpn (SC(E))  
Lord Clarke of Stone-cum-Ebony JSC

[2013] 2 AC

was based on false financial figures and unsupportable forecasts provided to E & Y by Nutritek. In this regard, VTB relies upon an opinion obtained from Deloitte LLP dated 11 April 2011, which analysed the figures provided by Nutritek to E & Y and compared them with the financial information provided by the dairy companies from their own accounting records, which represents the true trading position, as well as information from other sources. It is said that it is apparent from Deloitte's opinion that Nutritek very substantially overstated the true performance figures for the dairy companies. It is VTB's case that the extent of the overstatement is such that it could only have been deliberate.

183 The judge summarised the position in paras 61 and 62. The false representations are alleged to have been made principally by Nutritek. It is VTB's case that they were made pursuant to a conspiracy between a number of persons including MarCap BVI, MarCap Moscow and Mr Malofeev. Given the significant role they played in introducing the business opportunity to VTB and the conduct of the negotiations, VTB says that Mr Malofeev and MarCap Moscow were the prime movers in the conspiracy to deceive VTB.

184 In this part of the case VTB pleaded causes of action against the defendants in deceit and unlawful means conspiracy, the unlawful means being the fraudulent misrepresentations. In deceit, VTB's case against MarCap BVI, MarCap Moscow and Mr Malofeev is that they are jointly liable with Nutritek on the basis that the misrepresentations were made pursuant to a common design between them.

185 As stated in his judgment at para 144, before the judge the defendants accepted that, if English law is the applicable law, VTB has established that VTB has a real prospect of success in its claims for deceit and conspiracy and thus that there is a serious issue to be tried save in three specific respects as follows. The first, the no loss point, was that VTB had no real prospect of establishing that it had suffered loss as a result. The judge discussed the no loss point in considerable detail between paras 145 and 169. He rejected the defendants' case. The defendants reargued the no loss point in the Court of Appeal, again on the basis of English law. They again failed, for the reasons given in the judgment of the Court of Appeal at paras 107-121.

186 The second point was that VTB has no real prospect of establishing either that Marcap BVI was jointly liable in deceit or that it participated in the alleged conspiracy. The judge considered that submission between paras 170 and 176 and accepted it. However, the Court of Appeal held that he was wrong to do so for the reasons they gave at paras 122-127.

187 The third point was that VTB has no real prospect of establishing either that Mr Malofeev is jointly liable in respect of the deceit alleged or that he participated in the alleged conspiracy. The judge rejected that submission between paras 177 and 183. He therefore concluded that there was a serious issue to be tried between VTB and Mr Malofeev. The defendants did not reargue this point in the Court of Appeal.

188 In this court the defendants did not seek to reopen these issues. It follows that, if English law is the relevant law, VTB has a real prospect of succeeding against the defendants on the merits.

189 As summarised thus far, the position is that, at any rate on the basis that English law is the applicable law, VTB has established the first and

[2013] 2 AC

VTB Capital plc v Nutritek International Corpn (SC(E))  
Lord Clarke of Stone-cum-Ebony JSC

- A second of the principles set out in para 164 above. There is a serious issue to be tried on the merits in the case of each of VTB's claims in tort and VTB has a good arguable case that it sustained damage within the jurisdiction within the meaning of paragraph 3.1(9)(a) of Practice Direction 6B, which is the relevant provision by reason of CPR r 6.36. It follows that the remaining question is whether the third principle is satisfied. I will consider that question under the heading *forum conveniens*.

*Forum conveniens*

- C 190 As stated above, the question is whether VTB has satisfied the court that England is clearly or distinctly the appropriate forum for the trial of the dispute and that in all the circumstances the court ought to exercise its discretion to permit service of the proceedings out of the jurisdiction on the basis that England is the proper place in which to bring the claim. As the Court of Appeal noted at para 101, on the basis of Lord Goff's classic speech in *Spiliada Maritime Corpn v Cansulex Ltd (The Spiliada)* [1987] AC 460, 475-484, the underlying principle is that, the task of the court is to identify the forum in which the case can be suitably tried for the interests of all the parties and for the ends of justice: *Sim v Robinow* (1892) 19 R 665, 668.

- D 191 Only two fora have been canvassed in this case; they are England and Russia. Both the judge and the Court of Appeal held that VTB had failed to discharge the onus of proof and that the centre of gravity of the case was Russia and not England. I recognise of course that this is an interlocutory appeal, that a comparison between England and Russia involves a number of different considerations and that, in these circumstances, an appellate court should not interfere with a decision of a lower court unless satisfied that it has erred in principle. However, as appears below, it is my view that the Court of Appeal did make a number of errors of principle, which entitles, indeed requires, this court to reach its own independent conclusions.

- F 192 There are a number of points that seem to me to be relevant on this part of the case. First, it appears to me that it is important for the court to know what issues are likely to arise at the trial of the action on the merits. Only when the issues are identified will it be possible to compare the two jurisdictions. This principle is now stated in *Dicey, Morris & Collins, The Conflict of Laws*, 15th ed (2012), para 11-143, in which, having stated the general principles much as above, the editors say that, in practice, the defendant should identify the issues which are appropriate to be tried in the foreign court. In the footnote to that sentence the editors referred to *Limit (No 3) Ltd v PDV Insurance Co* [2005] 2 All ER (Comm) 347, para 73 and *Sawyer v Atari Interactive Inc* [2006] IL Pr 129, para 54. See also *Pakistan v Zadari* [2006] 2 CLC 667, para 138 and *Novus Aviation Ltd v Onur Air Tasimacilik AS* [2009] 1 Lloyd's Rep 576. Lawrence Collins J or Lawrence Collins LJ is the author of the relevant passage in each of those cases except the *Limit (No 3)* case, in which I admit to being the author.

- H 193 I adhere to the view I expressed in that case, now supported by *Dicey*. As Eder J put it in *Mujur Bakat Sdn Bhd v Uni.Asia General Insurance Bhd* [2011] Lloyd's Rep IR 465, para 9:

“in considering whether or not England is the most appropriate forum, it is necessary to have in mind the overall shape of any trial and, in

400

VTB Capital plc v Nutritek International Corpn (SC(E))  
Lord Clarke of Stone-cum-Ebony JSC

[2013] 2 AC

particular what are, or what are at least likely to be, the issues between A  
the parties and which will ultimately be required to be determined at any  
trial. These were originally set out in two letters . . .”

I stress that I do not mean that a defendant must set out his evidence in great  
detail, whether of foreign law or of fact. The purpose of the exercise is  
simply to state what the issues of fact are likely to be, so that the court can  
gauge whether England is clearly or distinctly the appropriate forum for the  
trial of the issues. This is of some importance in this case because no  
evidence was put before the court on the merits of the claims by or on behalf  
of Mr Malofeev. Moreover, Mr Hapgood submitted to the court in the  
course of the argument that Mr Malofeev was perfectly entitled to say and  
he does say to VTB, “You are accusing me of being a swindler, you get on  
and prove it.” Mr Hapgood added that the matter proceeded in both courts C  
below on the clear understanding that VTB will have to prove its case. As he  
put it, they will have to prove all five ingredients of a claim for fraudulent  
misrepresentation and a sixth ingredient in the case of conspiracy. It appears  
from what Mr Hapgood said that, at any rate at present, he has no positive  
case. It is of course true that a defendant in the position of Mr Malofeev is  
not bound to advance a positive case but, in the absence of a positive case,  
the focus of the court can only be on the ingredients of the claim. It should  
not speculate about the nature of any positive case that might be advanced in  
the future. D

194 It was suggested in the course of the argument that the defendants  
could not plead a case or put forward a positive case because of the risk that  
they would submit to the jurisdiction. There is, in my opinion, no such risk. E  
There is no reason why defendants should not put in a draft defence or  
evidence on the express basis that they are doing so without prejudice to  
their case on jurisdiction. I note in passing that it is the duty of the parties  
under CPR r 1.3 to help the court to further the overriding objective, which  
is to deal with cases justly.

195 The second point is the question whether English law is the  
applicable law. It is common ground that the applicable law falls to be  
determined by the provisions of the Private International Law  
(Miscellaneous Provisions) Act 1995 and not by the European Parliament  
and Council Regulation (EC) No 864/2007 on the law applicable to  
non-contractual regulations, known as the Rome II Regulation. This is  
because the claims relate to damage which occurred after 20 August 2007  
and before 11 January 2009. G

196 Sections 11 and 12 of the 1995 Act provide, so far as relevant, as  
follows:

“11 *Choice of applicable law: the general rule*

“(1) The general rule is that the applicable law is the law of the country  
in which the events constituting the tort or delict in question occur. H

“(2) Where elements of those events occur in different countries, the  
applicable law under the general rule is to be taken as being— . . . (c) . . .  
the law of the country in which the most significant element or elements  
of those events occurred.”

A “12 *Choice of applicable law: displacement of general rule*  
“(1) If it appears, in all the circumstances, from a comparison of—  
(a) the significance of the factors which connect a tort or delict with the country whose law would be the applicable law under the general rule; and (b) the significance of any factors connecting the tort or delict with another country, that it is substantially more appropriate for the applicable law for determining the issues arising in the case, or any of those issues, to be the law of the other country, the general rule is displaced and the applicable law for determining those issues or that issue (as the case may be) is the law of that other country.

B  
“(2) The factors that may be taken into account as connecting a tort or delict with a country for the purposes of this section include, in particular, factors relating to the parties, to any of the events which constitute the tort or delict in question or to any of the circumstances or consequences of those events.”

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197 The judge discussed the question of applicable law between paras 119 and 143 and concluded that the applicable law was Russian law. He did so by reference to both section 11(2)(c) and section 12. In para 158, the Court of Appeal expressed the tentative conclusion that, under section 11(2)(c), the applicable law was English law but also said that they were not convinced that VTB had “by far the better of the argument”. They held however that, under section 12, it was substantially more appropriate for the applicable law for determining the issues concerned to be that of Russia. VTB says that both the judge and the Court of Appeal were wrong and that the applicable law is English law.

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198 The question under section 11(2)(c) is in which country did the events constituting the tort occur. In para 148, the Court of Appeal set out six principles as reflecting the correct approach to section 11(2)(c) as follows:

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“(1) Section 11 of the 1995 Act sets out the general rule for ascertaining the applicable law of a tort. It adopts a geographical approach to that question. (2) Where the elements of the events constituting the tort or delict occur in different countries and the cause of action relates to something other than personal injury or damage to property, then section 11(2)(c) requires an analysis of all the elements of the events constituting the tort in question. (3) In carrying out that exercise, it is the English law constituents of the tort that matter. (4) The analysis requires examination of the ‘intrinsic nature’ of the elements of the events constituting the tort. It does not, at this stage, involve an examination of the nature or closeness of any tie between the element and the country where that element was involved or took place. This latter exercise is only relevant if section 12 is invoked. (5) Once the different elements of the events and the country in which they occurred have been identified, the court has to make a ‘value judgment’ regarding the ‘significance’ of each of those ‘elements’. ‘Significance’ means the significance of the element in relation to the tort in question, rather than trying to judge which involves the most elaborate factual investigation. (6) Under section 11(2)(c), (i.e. in relation to causes of action other than in respect of personal injury or damage to property where the elements of the events constituting the tort occur in different countries) the applicable

402

VTB Capital plc v Nutritek International Corpn (SC(E))  
Lord Clarke of Stone-cum-Ebony JSC

[2013] 2 AC

law of the tort in question will be that of the country where the significance of one element or several elements of events outweighs or outweigh the significance of any element or elements found in any other country.” A

199 Those principles were derived from four cases: *Morin v Bonhams & Brooks Ltd* [2004] 1 Lloyd’s Rep 702 (CA); *Dornoch Ltd v Mauritius Union Assurance Co Ltd* [2006] Lloyd’s Rep IR 127 (Aikens J); [2006] 2 Lloyd’s Rep 475 (CA); *Trafigura Beheer BV v Kookmin Bank Co* [2006] 2 Lloyd’s Rep 455 (Aikens J); and *Fiona Trust & Holding Corpn v Privalov* [2010] EWHC 3199 (Comm) (Andrew Smith J). In this court those propositions were rightly accepted as correct. The Court of Appeal added at para 150, in relation both to section 11(2)(c) and to section 12, that two further and important points emerged from *Dornoch*. The first was that, if, as here, the exercise is being carried out at an interlocutory stage as part of an overall exercise to determine whether the English court should have jurisdiction to determine the claim in tort in question, the court cannot finally determine the applicable law of the tort. The second was that it is “quintessentially” for the judge to make an assessment of the significance of the elements of the events constituting the tort for the purposes of section 11(2)(c) and that the Court of Appeal would not interfere with that assessment unless it was satisfied that the judge made such an error in his assessment as to require the Court of Appeal to make its own assessment. It referred to the judgment of Tuckey LJ at paras 46 and 47, with which Sir Mark Potter P and May LJ agreed. B C D

200 The Court of Appeal held at paras 154–157 that the judge had made such an error in the case of section 11(2)(c) and reached a different conclusion. In my opinion, if the principles set out above are applied, the Court of Appeal was entitled to interfere with the conclusion reached by the judge. As Mance LJ put it in *Morin* at para 21, section 11 directs attention to the “intrinsic nature of the element(s) of the tort”. The Court of Appeal said at para 157 that they judged that the most important elements of the facts constituting the tort of deceit are, by their intrinsic nature, the reliance on the misrepresentations by VTB and the loss suffered by VTB. I agree. E F

201 The events constituting the tort of deceit are indeed the making of the misrepresentations which were known to be untrue, reliance on the misrepresentations and the loss sustained as a result. All those occurred in England. The misrepresentations were made to VTB in England, VTB relied upon them in England and incurred its loss in England. In my opinion that is plain. It is true in the case of both misrepresentations: even though the dairy representations were initially made in Russia, the critical representations which induced VTB to enter into the facility agreement were made in London and relied upon in London. As to the alleged conspiracy, the essence of the case is that the representations were made as part of a common design. To my mind, it does not matter for the purposes of section 11(2)(c) because the essence of VTB’s case remains based upon the representations made to it in London and relied upon in London by VTB entering into the facility agreement, together with the loss sustained in London. G H

202 In *Dornoch* [2006] Lloyd’s Rep IR 127 Aikens J was concerned with alleged misrepresentations in a proposal form. The proposal form was completed in Mauritius and given to brokers in Mauritius and then sent to

A London, where it was presented to reinsurers. Aikens J held that the representation contained in the proposal form was made in Mauritius and London. The presentation to the reinsurers was made and relied upon in London. Aikens J held at para 106 that the intention that the reinsurers should rely upon the proposal form continued to operate in London and the reliance, which he regarded as the most significant element, took place in London. The position is the same here. The reliance by entering into the facility agreement took place in London. Para 107 is also of some assistance. B Aikens J said:

C “The antecedent facts concerning the true situation in MCB are important, but it is what is done with those facts that really matters so far as the tort of fraudulent misrepresentation or deceit is concerned. In short, it is (on the assumptions I have made) MCB’s decision not to tell the facts as they are and to continue to mislead that matters most, not the true facts themselves.”

In these circumstances there was in my opinion no room for a tentative conclusion that English law is the applicable law under the general rule set out in section 11. It is plainly the applicable law under the general rule.

D 203 I turn to section 12. At para 149, the Court of Appeal identified these further four principles:

E “(7) The exercise to be conducted under section 12 is carried out after the court has determined the significance of the factors which connect a tort or delict to the country whose law would therefore be the applicable law under the general rule. (8) At this stage there has to be a comparison between the significance of those factors with the significance of any factors connecting the tort or delict with any other country. The question is whether, on that comparison, it is ‘substantially more appropriate’ for the applicable law to be the law of the other country so as to displace the applicable law as determined under the ‘general rule’. (9) The factors which may be taken into account as connecting a tort or delict with a country other than that determined as being the country of the applicable law under the general rule are potentially much wider than the ‘elements of the events constituting the tort’ in section 11. They can include factors relating to the parties’ connections with another country, the connections with another country of any of the events which constitute the tort or delict in question or the connection with another country of any of the circumstances or consequences of those events which constitute the tort or delict. (10) In particular the factors can include (a) a pre-existing relationship of the parties, whether contractual or otherwise; (b) any applicable law expressly or impliedly chosen by the parties to apply to that relationship, and (c) whether the pre-existing relationship is connected with the events which constitute the relevant tort or delict.”

H 204 In every case to which the 1995 Act applies in which the court has considered the general rule under section 11, the court must consider whether the general rule is displaced under section 12. There is an illuminating discussion of the general approach in *Dicey, Morris & Collins, The Conflict of Laws*, 15th ed, para 35-148. The editors say that the application of the displacement rule in section 12 first requires, taking account of all the circumstances, a comparison of the significance of the

404

VTB Capital plc v Nutritek International Corpn (SC(E))  
Lord Clarke of Stone-cum-Ebony JSC

[2013] 2 AC

factors which connect the tort with the country the law of which would be applicable under the general rule (in this case English law) and the significance of any factors connecting the tort with another country (here Russia). The word tort is italicised in the text in *Dicey*. The editors say that secondly, it then has to be asked, in the light of the comparison, whether it is “substantially more appropriate for the applicable law for determining the issues arising in the case, or any of those issues,” to be the law of that other country. A B

205 The editors note that the general rule has been displaced on very few occasions. They further observe that, although section 12 applies in all cases to which section 11 applies, it would seem that the case for displacement is likely to be most difficult to establish in the case of section 11(2)(c) because the application of that provision itself requires the court to identify the country in which the most significant element or elements of the tort are located. Importantly they stress the use of the word “substantially”, which they describe as the key word, and conclude that the general rule should not be dislodged easily, lest it be emasculated. The party seeking to displace the law which applies under section 11 must show a clear preponderance of factors declared relevant by section 12(2) which point to the law of the other country. C D

206 That approach is borne out by the cases. The idea that “substantially” was the key word was derived from the judgment of Waller LJ in *Roerig v Valiant Trawlers Ltd* [2002] 1 WLR 2304, at para 12(v). The principles were considered in more detail by Brooke LJ in *R (Al-Jedda) v Secretary of State for Defence* [2007] QB 621, at paras 103 and 104, where he noted that the 1995 Act derived from a report of the Law Commission, from which he quoted. He added that Lord Wilberforce, who was a member of the House of Lords Committee which considered the Bill, had expressed the view that it would be a “very rare case” in which the general rule under section 11 would be displaced: “Prima facie there has to be a strong case.” E

207 In para 163, the Court of Appeal concluded that, if the applicable law was English law under the general rule in section 11(2)(c), the factors relied upon by the judge in his paras 188 and 189 led them to the conclusion that English law was displaced by Russian law by section 12. In paras 188 and 189, the judge had said: F

“188. Counsel for the defendants submitted that the following factors pointed to Russia being the natural forum. First, the connections of the parties to Russia. VTB is controlled by VTB Moscow, which is Russian. Furthermore, the litigation is being managed by VTBDC, which is also Russian. MarCap Moscow and Mr Malofeev are Russian. It is common ground that Nutritek was managed from Russia, and VTB’s case is that Mr Malofeev controls both Nutritek and MarCap BVI. Furthermore, it is VTB’s case that Mr Malofeev orchestrated the fraud, primarily through MarCap Moscow. G

“189. Secondly, the connections of the events constituting the torts to Russia. The transaction was introduced to VTB Moscow at meetings between Russian individuals in Russia. The negotiations mainly took place in Russia. The misrepresentations were made and mainly received in Russia. The more important misrepresentation concerned the H

[2013] 2 AC

VTB Capital plc v Nutritek International Corpn (SC(E))  
Lord Clarke of Stone-cum-Ebony JSC

A performance of the dairy companies, which are Russian companies. The  
2007 E & Y valuation was a valuation by Ernst & Young’s Moscow office  
and was based on information provided by Nutritek’s Russian  
management. The misrepresentations were primarily relied upon by VTB  
Moscow acting through its credit committee and management board in  
Russia. It was VTB Moscow and VTBDK which primarily dealt with  
B RAP’s default and enforcing the security. The secured assets were in  
Russia. The discovery of the fraud took place in Russia. Although the  
loss was sustained by VTB in England, as discussed above the ultimate  
economic impact is in Russia.”

208 The Court of Appeal recognised in para 163 that they had  
concluded at para 154 that the judge did not appear to have taken account of  
C the fact that the representations were passed on to or confirmed to VTB in  
London, that VTB had its own procedures that had to be completed  
satisfactorily before it could enter into the facility agreement and that,  
although there was an “economic impact” on VTB Moscow, VTB suffered  
loss as soon as the transfer of funds by it to RAP was made in London.  
Notwithstanding those conclusions, the Court of Appeal reached these  
conclusions at para 163:

D “in our view the factors identified in the judgment at paras 188 and  
189, even after discounting the point about primary reliance on the  
representations in Russia and the securities being in Russia, are of  
considerable significance. On the material that is before us, taking all  
those factors into account we have concluded that the centre of gravity of  
these torts lies in Russia. Therefore, for present purposes, we have  
E decided that a comparison of the significance of the section 11(2)(c)  
factors, assuming that they would lead to the applicable law being  
English, with the significance of the other factors connecting the torts  
with Russia, leads to the conclusion that it is substantially more  
appropriate for the applicable law for determining the issues concerning  
the torts to be that of Russia.”

F 209 It seems to me that in that paragraph the Court of Appeal did not  
pay sufficient regard to the fact that in his paras 188 and 189 the judge was  
not considering section 12 of the 1995 Act but the broader question of  
forum conveniens. Further, the Court of Appeal focused, not upon the  
particular tort or torts but upon much wider considerations. As *Dicey*  
observes, section 12(1) expressly focuses upon the particular torts. Here the  
G tort or torts as a result of which VTB suffered loss in London were  
committed as a result of VTB entering into a contract or contracts in London  
in reliance upon representations made to it in London. I entirely accept that  
some of the other considerations were capable of being relevant under  
section 12(2), but I can see no basis upon which it can properly be held that  
the general rule, under which English law was plainly the applicable law,  
should be displaced by Russian law on the basis that it is “substantially more  
H appropriate for the applicable law for determining the issues” to be the law  
of Russia. In short, the claimant here is an English entity which was induced  
to enter into the facility agreement in England and suffered loss in England  
when it discharged its obligations under it. The position would no doubt  
have been entirely different if the claimant had been VTB Moscow.

406

VTB Capital plc v Nutritek International Corpn (SC(E))  
Lord Clarke of Stone-cum-Ebony JSC

[2013] 2 AC

210 For these reasons, I would hold that the Court of Appeal erred in principle in concluding that the applicable law was Russian law, that under the general rule in section 11(2)(c) of the 1995 Act the applicable law was English law and that the general rule was not displaced in favour of Russian law by section 12.

211 I turn to consider what significance the conclusions that (a) the torts were committed in England and (b) the applicable law is English law have on the question whether England is “the proper place in which to bring the claim”. As stated above, this involves asking whether England is clearly or distinctly the appropriate forum for the trial of the dispute or (which amounts to the same thing) the forum in which the case can be most suitably tried for the interests of all the parties and for the ends of justice.

212 In my opinion neither consideration is conclusive but, together with the terms of the facility agreement, they afford strong grounds for concluding that the answer to those questions is in the affirmative. It was submitted by Mr Howard on behalf of VTB that there is a presumption that that is the case where, in a tort case, the tort is committed within the jurisdiction. In my opinion, that is to put it too high. It is undoubtedly a relevant factor but how strong a factor will depend upon the circumstances. It is true that courts have sometimes used the expression presumption. On the other hand they sometimes talk in terms of a prima facie case. Yet other expressions have been used. For example, in *Distillers Co (Biochemicals) Ltd v Thompson* [1971] AC 458 the alleged tort was a negligent failure to warn a pregnant woman of the dangers of taking a drug which contained thalidomide. The tort was committed in New South Wales, where the plaintiff had bought the drug. In the Privy Council, Lord Pearson said, at p 468, that it was “manifestly just and reasonable that a defendant should have to answer for his wrongdoing in the country where he did the wrong”. As in all the cases, the particular phrase chosen depended upon all the circumstances of the case.

213 In *The Albaforth* [1984] 2 Lloyd’s Rep 91, which was much discussed in the course of the argument, the claim was for damages for negligent misrepresentation contained in a telex received and acted upon in England. Ackner LJ said that the jurisdiction in which a tort has been committed is prima facie the natural forum for the determination of the dispute. The other member of the Court of Appeal was Robert Goff LJ. It is of some significance in the present case that he quoted with approval a statement by Lord Denning MR in *Diamond v Bank of London and Montreal Ltd* [1979] QB 333, 346 to the effect that the tort of negligent misrepresentation was committed at the place where the representation was received and acted upon. Robert Goff LJ did not then use the expression “prima facie forum” but said at p 96 that the cases showed that, where the jurisdiction of the court is based on the fact that the tort was committed within the jurisdiction, that court, “having jurisdiction, is the most appropriate court to try the claim, where it is manifestly just and reasonable that the defendant should answer for his wrongdoing”. He added that, that being so, it was not easy to see what other facts could displace the conclusion that the courts of that jurisdiction are the natural forum. That is to my mind so even if significant parts of the evidence derive from elsewhere.

214 *Berezovsky v Michaels* [2000] 1 WLR 1004 was a libel case in which an internationally disseminated libel had been published in England.

[2013] 2 AC

VTB Capital plc v Nutritek International Corpn (SC(E))  
Lord Clarke of Stone-cum-Ebony JSC

A Lord Steyn, giving the principal judgment for the majority in the House of Lords, who were himself, Lord Nolan and Lord Hobhouse of Woodborough, quoted (at p 1013) the two passages from *The Albaforth* set out above and referred to *Distillers Co (Biochemicals) Ltd v Thompson* [1971] AC 458, 468E, per Lord Pearson, *Metall und Rohstoff AG v Donaldson Lufkin & Jenrette Inc* [1990] 1 QB 391 in the Court of Appeal (subsequently overruled in *Lonrho plc v Fayed* [1992] 1 AC 448 on other aspects of the case) and *Schapira v Abronson* [1999] EMLR 735. Lord Steyn added that the implied supposition in these cases was that the substance of the tort arose within the jurisdiction. He added, at p 1014:

C “Counsel accepted that he could not object to a proposition that the place where in substance the tort arises is a weighty factor pointing to that jurisdiction being the appropriate one. This illustrates the weakness of the argument. The distinction between a prima facie position and treating the same factor as a weighty circumstance pointing in the same direction is a rather fine one. For my part the *Albaforth* line of authority is well established, tried and tested, and unobjectionable in principle. I would hold that Hirst LJ correctly relied on these decisions.”

D 215 The Court of Appeal considered this issue at paras 140–144. They expressly referred to the statements of principle in *The Albaforth*, noting that neither Ackner nor Robert Goff LJ referred to a presumption. They then referred to the statements of Lord Steyn in *Berezovsky v Michaels* noted above, adding that, although Lord Hope dissented (as did Lord Hoffmann), he agreed with the reasons given by Lord Steyn for accepting that Hirst LJ was right to rely on the *Albaforth* line of authority. They further noted that E Lord Hope said at p 103 that he would reject the argument that the application of the *Spiliada* test did not admit of the application in that case of the principle that the jurisdiction in which the tort is committed is prima facie the natural forum for the dispute.

F 216 The Court of Appeal concluded at para 144 that the most that could be extracted from the House of Lords decision in *Berezovsky* was that, where a tort is committed within the jurisdiction, that jurisdiction is prima facie the natural forum for the resolution of claims arising from it. However they added two points to which they attached importance. The first was that it had not been stated that this principle applies where the loss is sustained in the jurisdiction but other elements of the tort occur elsewhere. The second was that the statements made in the *Berezovsky* case can only describe, at best, a prima facie position, and that they cannot detract from the overall test which has to be applied, namely that permission to serve out of the jurisdiction will only be granted if the claimant demonstrates that England is clearly or distinctly the appropriate forum for the resolution of the dispute. They concluded that there is no presumption in favour of England being either the natural or the appropriate forum in this case.

H 217 I agree with the Court of Appeal that the cases do not go so far as to say that there is such a presumption but they do recognise that it is likely to be a strong or weighty factor: see further paras 231–232 below. While it is true that the principle in *The Albaforth* has not been expressly stated to apply where the loss is sustained in the jurisdiction but other elements of the tort occur elsewhere, the application of the principle in that very case was in respect of the tort of negligent misrepresentation which was held to be

408

VTB Capital plc v Nutritek International Corpn (SC(E))  
Lord Clarke of Stone-cum-Ebony JSC

[2013] 2 AC

committed in England as the place where the representation was received and acted upon. The same is true of the alleged fraudulent representations here. A

218 The second factor which seems to me to be of *real* significance is that, for the reasons set out above, the applicable law under the 1995 Act is English law. It is not in dispute that it is a potentially relevant factor. The correct approach was, as ever, encapsulated by Lord Goff in *The Spiliada* [1987] AC 460, 481: B

“the importance to be attached to any particular ground [of RSC Ord 11, r 1(1)] invoked by the plaintiff may vary from case to case. For example, the fact that English law is the putative proper law of the contract may be of very great importance (as in *BP Exploration Co (Libya) Ltd v Hunt* [1976] 1 WLR 788, where, in my opinion, Kerr J rightly granted leave to serve proceedings on the defendant out of the jurisdiction); or it may be of little importance as seen in the context of the whole case.” C

See also *Dicey, Morris & Collins, The Conflict of Laws*, 15th ed, para 12-034.

219 The significance of the conclusion that English law is the applicable law is that it is generally appropriate for a claim in tort governed by English law to be adjudicated upon by an English court. The same would of course be true mutatis mutandis if the claim in tort were governed by Russian law. In that case the natural court to determine liability would be a Russian court. It was no doubt for that reason that the defendants have throughout persisted in arguing that the applicable law is Russian law. In the instant case, it is not clear what, if any, role Russian law might play at a trial. It seems most unlikely to play a role if the action proceeds in England. Although I recognise that it would be open to the defendants to reopen the issue of applicable law for determination at trial, it is difficult to imagine circumstances in which they would have a real prospect of persuading a judge to reach a different conclusion from that arrived at in this court. If the action proceeds in Russia it is possible that Russian law will play a role because the defendants have reserved their right to rely upon Russian law but, since they have given no indication as to the nature of the case they might wish to run, it is not possible to express a view as to its possible effect on a trial in Russia. In these circumstances it seems to me that, given that VTB has shown that the applicable law of the tort is English law and that the defendants have asserted no positive case to the contrary even if the action were to proceed in Russia, this is a strong factor in favour of England as the natural forum. D E F G

220 A further important factor is, as I see it, the fact that the facility agreement which, on VTB’s case, it was induced to enter into, contained, not only clause 34, which provided that the agreement was governed by English law, but also clause 35.1, which provided that the courts of England had non-exclusive jurisdiction to settle any dispute arising out of the agreement, that the English courts were the most appropriate and convenient to settle the disputes, that no party would argue to the contrary and that the clause was for the benefit of VTB alone. Clause 35.3 also gave VTB the right to refer a dispute to arbitration in London. H

221 The fact that those clauses were included in the agreement which, on VTB’s case, it was fraudulently induced to enter into, seems to me to be a

A strong pointer to the conclusion that the natural forum for the resolution of the dispute is England. If VTB had not enforced its security by acquiring RAP, it would have been able to sue RAP in England and to add the present defendants as necessary or proper parties to the action against RAP. I appreciate that the defendants are not parties to the facility agreement and that it is therefore said that these clauses are irrelevant. However, VTB's submission derives support from Professor Briggs's recent article entitled "The subtle variety of jurisdiction agreements" [2012] LMCLQ 364, in which he discusses the Court of Appeal decision in the present case, at pp 370–371:

C "In *VTB Capital plc v Nutritek International Corpn* . . . it appears to have been accepted without substantial argument that if the hidden person were not a party to the substantive contract containing the jurisdiction clause he could not be affected by a jurisdiction agreement contained in that contract. This conclusion, with respect, should not be accepted without further reflection. For even if the lifting of the veil does not allow a contractual claim, otherwise lying against the company, to be made against the veiled person, there may be other bases for seeking to establish his personal liability. Fraud will be the most likely one . . . That being so, the question becomes whether the jurisdiction clause in the company's contract may be utilised to establish or sustain jurisdiction against the alleged fraudster. This is a question which requires more of an answer than a simple assertion that a jurisdiction agreement is only ever effective in relation to a contracting party. For one thing, the jurisdiction clause is separable from the substantive contract, and the absence of a contractual claim against the fraudulent defendant need not entail the irrelevance of a jurisdiction agreement which he engineered. For another . . . even if he is not *contractually* bound to the jurisdiction, it should not be challenging to contend that the court which he signed his company up to, in circumstances of fraud, is also the proper place in which to assert any available claim of substantive liability against him."

F 222 I agree with Professor Briggs. In particular I agree with him that it is significant that where a person fraudulently engineers a contract, not only subject to English law but also subject to an English jurisdiction clause, the proper (or natural) place in which to assert a claim for substantive liability against him, whether in contract or tort, is England. The same would of course be true mutatis mutandis if the agreed law and jurisdiction were that of another state.

H 223 Mr Howard's submission on behalf of VTB is that the principal grounds for concluding that England is the natural forum for this action are therefore these. Although a significant number of preliminary events occurred in Russia, the critical ingredients of all the torts took place in England. In particular, the representations were made to VTB in England, where they were intended to be relied upon because it was VTB that was intended to enter into the facility agreement, which was governed by English law and contained an English jurisdiction clause. VTB did enter into the agreement and, pursuant to its terms large sums of money were drawn down and, as the judge and the Court of Appeal held, VTB suffered its loss in England. As explained above, it is substantially for these reasons that English law is the law applicable to the torts. In these circumstances,

410

VTB Capital plc v Nutritek International Corpn (SC(E))  
Lord Clarke of Stone-cum-Ebony JSC

[2013] 2 AC

England is clearly or distinctly the appropriate forum for the trial of the dispute. I would accept those submissions. A

224 The judge and the Court of Appeal rejected that approach on the basis that the centre of gravity of the torts lies in Russia. They did so on the basis of the evidence that there was considerable activity in Moscow before VTB was chosen as the lender. It is said that all the evidence referable to that period would be in Russia. There is some force in that but the difficulty facing the respondents is that they have not identified what classes of evidence they might wish to adduce about what. It is therefore appropriate, as counsel for the respondents himself indicated, to approach the case on the basis that VTB will be put to proof of its claims. B

225 The nature of VTB's claims is summarised in paras 181–184 above. VTB hopes to be able to call Ms Bragina and others from VTB, although it is right to say that Ms Bragina has left VTB and it is no longer in contact with her. There is some documentary evidence available in London and Moscow. I see no difficulty in any of the VTB witnesses who are now in Moscow or elsewhere coming to London to give evidence. The evidence will no doubt focus on the alleged representations. As to the allegation that it was represented that Nutritek and RAP were not under common control, there is evidence in the e-mails referred to in para 174 above. It is not known whether it is said on behalf of the defendants that no such representations were made or, if they were made, by whom they were made (and with whose knowledge and on whose behalf) and whether they were true. Since the defendants have not indicated the nature of their case, it is not known what evidence they might wish to adduce on this part of the case. For example, it is not known whether Mr Malofeev accepts that he controlled both Nutritek and RAP as alleged, although (as stated at para 170 above), the judge found that the allegation that RAP was ultimately owned and controlled by Mr Malofeev through a web of offshore companies had not been the subject of challenge by him. Mr Malofeev is an international business man who is said to control a series of offshore companies. There is no evidence that either he or any other witness could not readily come to London. It may equally be said that there is no reason why any witness could not go to Moscow. C D E F

226 So, on the first alleged misrepresentation, there seems to me to be no reason to depart from the view expressed earlier, namely that the natural forum for the resolution of the issues is England. The same is true of the second alleged representation. The issues may essentially be whether the facts relating to the dairy companies were fairly given to E & Y in Moscow. Much of the information is no doubt in Russian and, if detailed evidence is required, it may be in Russia. However, Deloitte LLP in London have made a report in English on which VTB relies dated 11 April 2011, which analysed the figures provided by Nutritek to E & Y and compared them with the financial information provided by the dairy companies from their own accounting records, which represent the true trading position, as well as information from other sources. It is said that it is apparent from Deloitte's opinion that Nutritek very substantially overstated the true performance figures for the dairy companies. It is VTB's case that the extent of the overstatement is such that it could only have been deliberate. It seems likely to me that any issues under this head could be determined in England or Russia. G H

- A 227 In all the circumstances, given that VTB is the claimant and not VTB Moscow, I do not agree with the Court of Appeal that the centre of gravity of the torts is in Russia. I would hold that VTB has shown that England is clearly or distinctly the appropriate forum for the reasons summarised in para 223 above. I would therefore allow the appeal on the forum non conveniens point.
- B 228 I would only add this in the light of the judgments of Lord Mance JSC and Lord Neuberger of Abbotsbury PSC which I have seen since I prepared my own draft. Subject to the general point that one of the underlying principles of the CPR is that the parties should co-operate with each other and the court in order that cases are resolved justly, which must surely include the necessity for each party to put his cards on the table, I do not disagree with the general points made by Lord Neuberger PSC in the early parts of his judgment. None of the points I have made above is inconsistent with them. Thus, as I see it, even if the burden of proof is on the claimant, the defendant must indicate, at least in general terms what positive case he wishes to advance at a future trial, whether in England or elsewhere. This should be done shortly and concisely. In the instant case no attempt was made to do it at all.
- C 229 I entirely agree with Lord Neuberger PSC that, where a judge has made no error of principle and the only challenge that can be advanced against his or her decision depends upon persuading an appellate court to balance the various factors differently, an appellate court should not interfere unless the balance struck by the judge can be shown to be plainly wrong. The question is whether this is such a case or whether this is a case in which, as VTB says, both the judge and the Court of Appeal made errors of principle and that, permission to appeal to this court having been granted, it becomes its responsibility to strike the balance. In my opinion, this case is in the second category.
- D 230 As to the position before the judge, the Court of Appeal held that he had wrongly approached the question as a two-stage question. However I agree with Lord Mance JSC and Lord Neuberger PSC that, even if he did, he ultimately posed the correct question. The position as to choice of law is different. The judge erred in law in concluding that Russian law was the applicable law by reference to both section 11(2)(c) and section 12 of the 1995 Act. The Court of Appeal correctly held that he was wrong under section 11(2)(c) but it too was wrong in so far as it held that the applicable law was Russian law under section 12. In my opinion, as discussed in paras 195–210 above, those were errors of principle. Moreover, as explained in para 219, they were significant errors, as evidenced by the importance attached to the applicable law point by both sides. Both sides naturally took the view that whichever was the applicable law provided a strong pointer to the forum conveniens. As Lord Mance JSC puts it at para 46, it is generally preferable, other things being equal, that a case should be tried in the country whose law applies.
- E 231 There are to my mind two other important respects in which the courts below failed to apply the correct principles. They are the correct approach to the significance of, first, the place where the tort was committed and, secondly, the fact that the facility agreement contained an English jurisdiction clause. As to the first, it is only fair to the judge to note that VTB did not refer to *The Albaforth* [1984] 2 Lloyd's Rep 91 or the other cases
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412

VTB Capital plc v Nutritek International Corpn (SC(E))  
Lord Clarke of Stone-cum-Ebony JSC

[2013] 2 AC

following it which I have discussed in paras 212–217 above. Although there is reference in the cases to the proposition that the place of the tort is prima facie the natural forum and although of course (as ever) all depends upon the circumstances, in the passage quoted from *The Albaforth* at para 213 above, Robert Goff LJ expressed the view that, where the jurisdiction of the court was based on the fact that the tort was committed within the jurisdiction, that court was the most appropriate court to try the claim on the basis that it was manifestly just and reasonable that the defendant should answer there for his wrongdoing. Robert Goff LJ there echoed (at p 96) the expression used by Lord Pearson in the *Distillers* case [1971] AC 458, 468: see para 212 above. Finally, as I read the speech of Lord Steyn in *Berezovsky* [2000] 1 WLR 1004 (quoted at para 214 above), the majority of the House of Lords approved the proposition that there is no real distinction between treating the place of the tort as a prima facie pointer and treating it as a weighty factor. A

232 It is in my opinion a weighty factor here, where the alleged representations (if made) were deliberate acts which were committed within the jurisdiction, which were intended to be relied upon within the jurisdiction, which were in fact relied upon within the jurisdiction and which caused VTB to sustain loss within the jurisdiction. I stress again that this is a claim by VTB and not by VTB Moscow and VTB is not suing upon a tort committed in Moscow. B

233 Albeit for understandable reasons, this point was not considered by the judge. It follows, as I see it, that he did not take it into account, even in the alternative, in carrying out the balancing exercise. In the Court of Appeal the effect of the authorities was in my judgment down played. It is not to my mind a fair conclusion based on the authorities that the statements made in *Berezovsky* can “only describe, at best, a prima facie position”, at any rate unless one keeps well in mind the reasoning of Lord Goff and Lord Pearson referred to above. Although it is fair to say that the Court of Appeal did refer to the passage from the speech of Lord Steyn in *Berezovsky* quoted above, there is no hint that they treated this consideration as a weighty factor. For the reasons I have given they should have done so. C

234 The second respect in which in my opinion the courts below erred in principle relates to the relevance of the English jurisdiction agreement in the facility agreement. The judge merely said in para 187 that the English jurisdiction and arbitration clauses are a pointer to England but not a strong one, given that the claim is a tort claim not a contract claim. He does not explain why the fact that the claim is a tort claim leads to the conclusion that the pointer to England is not a strong one. He does not address the force of the submissions made on behalf of VTB. For the reasons given in paras 220–212 above, this is in my opinion a strong factor, on the basis that, as Professor Briggs observed, where a person fraudulently engineers a contract, not only subject to English law but also subject to an English jurisdiction clause, the proper (or natural) place in which to assert a claim for substantive liability against him, whether in contract or tort, is England. D

235 The Court of Appeal did not expressly address this point. Lord Neuberger PSC says that they must have agreed with the judge. That may be so but, given that the judge gave no reasons for his view, it seems to me to be of little assistance to the respondents. With respect to him, Lord Neuberger PSC does not as I see it address this way of putting the case, E

[2013] 2 AC

VTB Capital plc v Nutritek International Corpn (SC(E))  
Lord Clarke of Stone-cum-Ebony JSC

A which is much narrower than that addressed by Lord Neuberger PSC in paras 105 and 106. In so far as he does address the point, I strongly prefer the opinion of Professor Briggs.

B 236 In all the circumstances I remain of the view that both the judge and the Court of Appeal erred in principle in more than one respect, that it is now for this court to reach its own conclusion on the question whether England is clearly or distinctly the appropriate forum for the trial of the dispute or (which amounts to the same thing) the forum in which the case can be most suitably tried for the interests of all the parties and for the ends of justice. For the reasons I have given, my conclusion is that it is.

C 237 In so far as it is suggested by Lord Neuberger PSC and Lord Wilson JSC that this approach is to assume what VTB has to prove, namely that Mr Malofeev was guilty of deceit, I respectfully disagree. The approach I favour does not assume that VTB will succeed but is based upon the fact that it has been held that VTB has at least a good arguable case on each of these factors: (1) the tort alleged was committed in England; (2) English law is the applicable law under the 1995 Act; (3) the respondents made fraudulent representations which induced VTB to enter into the facility agreement which is not only subject to English law but also subject to an English jurisdiction clause; and (4) the loss sustained as a result of lending money in England pursuant to the facility agreement was incurred in England. In all these circumstances England is clearly and distinctly the proper (or natural) place in which to assert a claim for damages for fraudulent representation against the respondents. I recognise that, as pointed out by Lord Mance JSC there are many factors which connect the underlying dispute with Russia but many of them are evidential and, indeed, many of them treat the claim as if it were a claim by VTB Moscow or the VTB Group, which it is not. As Lord Wilson JSC observes, the defendant's points primarily go to practicality, but it seems to me that a trial could perfectly well take place in England or Russia but that England is the natural forum for the reasons I have given. In all the circumstances I would allow the appeal on the forum non conveniens point.

F *Piercing the corporate veil*

G 238 I agree with Lord Neuberger PSC that this is not a case in which it would be appropriate to pierce the corporate veil on the facts. I would however wish to reserve for future decision the question what is the true scope of the circumstances in which it is permissible to pierce the corporate veil. That includes the question whether *Antonio Gramsci Shipping Corpn v Stepanovs* [2011] 1 Lloyd's Rep 647 was correctly decided.

*The WFO*

H 239 Since the appeal is to be dismissed, I agree with Lord Neuberger PSC that the discharged freezing order should remain discharged and that the temporary WFO should be discharged as well.

LORD REED JSC (dissenting)

240 In relation to the first question in this appeal, namely whether the permission granted ex parte to VTB to serve the proceedings out of the jurisdiction should be set aside, I have reached the same conclusion as Lord

414

VTB Capital plc v Nutritek International Corpn (SC(E))  
Lord Reed JSC

[2013] 2 AC

Clarke of Stone-cum-Ebony JSC. I do not question the general points made by Lord Neuberger of Abbotsbury PSC at paras 79–93 of his judgment. Nevertheless, it appears to me that the courts below erred in law in their approach to this question. In particular, as explained by Lord Clarke JSC, they erred (i) in concluding that the applicable law was Russian law rather than English law and (ii) in failing to attach appropriate weight to the fact that the alleged tort was committed in England, in accordance with the line of authority including *The Albaforth* [1984] 2 Lloyd’s Rep 91 and *Berezovsky v Michaels* [2000] 1 WLR 1004.

241 These errors, particularly when considered cumulatively, appear to me to have been material. I recognise that the Court of Appeal stated (para 166) that, even if it had concluded that the applicable law was English law, this would not have been a factor that would weigh heavily, “precisely because if the defendants wished to allege and plead that the applicable law was Russian law, both sides would have had to prepare for a trial on that basis”. The fact of the matter is however that the defendants have not pleaded, or indicated any intention to plead, that the applicable law is Russian law. Since the approach of the courts below was flawed in principle, it appears to me that this court has no alternative but to reconsider the question on a proper basis.

242 Having done so, I have reached the same conclusion as Lord Clarke JSC, essentially for the reasons stated at paras 223–227 of his judgment.

243 In relation to the second question, namely whether VTB should be allowed to amend its statement of case so as to add a claim of damages for breach of contract, based upon “piercing the corporate veil”, I agree that permission should be refused, for the reasons given by Lord Neuberger PSC.

244 Since the appeal is being dismissed, I also agree that the discharged freezing order should remain discharged, and that the temporary freezing order should also be discharged.

*Appeal dismissed.*  
*Temporary freezing order discharged.*

DIANA PROCTER, Barrister

MRS JUSTICE ROSE  
Approved Judgment

Pennyfeathers Ltd v Pennyfeathers Property Company Ltd

Neutral Citation Number: [2013] EWHC 3530 (Ch)

Case No: HC11C03068

**IN THE HIGH COURT OF JUSTICE**  
**CHANCERY DIVISION**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 19/11/2013

**Before :**

**MRS JUSTICE ROSE**

**Between :**

**(1) PENNYFEATHERS LTD**  
**(2) JOHN ROBERT STEER**  
**(3) ROBERT IRWIN TAYLOR**

**Claimants**

**- and -**

**(1) PENNYFEATHERS PROPERTY**  
**COMPANY LTD**  
**(2) PAUL ATTWELL**  
**(3) RAE BOWDERY**  
**(4) TRIMOUNT RESIDENTIAL**  
**ISLE OF WIGHT LTD**

**Defendants**

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PATRICK LAWRENCE Q.C. and MICHAEL RYAN (instructed by FIELD FISHER  
WATERHOUSE LLP) for the CLAIMANTS  
ROBERT LEVY Q.C. and NEIL MCLARNON (instructed by GROSVENOR LAW) for the  
DEFENDANTS

Hearing dates: 8, 9, 10, 11, 14, 16, 17, 18 & 22 OCTOBER 2013  
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**Judgment**

**Mrs Justice Rose:**

1. This claim arises out of the proposed development of a large plot of land on the Isle of Wight, to the southeast of Ryde. The land is known as Prestwood Grange Farm and Bartletts Green Farm ('the Farm') and comprises 76 acres. The First Claimant (Pennyfeathers UK) was set up by the Second and Third Claimants (Mr Steer and Mr Taylor) to exploit the opportunity to develop the Farm. The Claimants allege that the Second and Third Defendants (Mr Bowdery and Mr Attwell), at a time when they were directors of Pennyfeathers UK, acted in breach of their fiduciary duties towards

Pennyfeathers UK by causing their company the First Defendant ('Pennyfeathers Jersey'):

- i) to contract with the owner of the Farm on terms which were in their own interests and contrary to the best interests of Pennyfeathers UK; and
  - ii) to enter into options over land surrounding the Farm when those options should have been acquired by them on behalf of Pennyfeathers UK.
2. In 2001 the Farm was owned by Mr Ian McDowall and had in the past been used as a dairy farm. Before 2001, there had been some friction between Mr McDowall and local residents; an action group was formed, the Local Government Ombudsman had become involved and the Council of the Isle of Wight was considering what to do. A local estate agent mentioned the Farm to Mr Steer as having potential for development. Mr Steer contacted Mr Taylor with whom he had been friends for many years and who had more experience in land development. The two men visited the Farm in January 2002 and met Mr McDowall. In 2002 Mr McDowall granted Mr Steer and Mr Taylor an option over the Farm and an application for planning permission was made in April 2003. That application was unsuccessful. Despite this setback, Mr Steer and Mr Taylor continued with the plans for developing the Farm. On 13 April 2005 Mr Taylor and Mr Steer entered into a new option agreement with Mr McDowall ('the 2005 Option'). The 2005 Option was a substantial document covering 52 pages of terms. The relevant clauses for our purposes (referring to Mr McDowall as the Seller and Mr Steer and Mr Taylor as the Buyer) were as follows:
- i) By Clause 2.1, the Seller granted to the Buyer the option of purchasing the Farm or any part of it at any time between 13 April 2005 and 10 August 2010 at a price calculated as  $(A - B - C) \times 80$  per cent, where A was the open market value of the area to be developed, B was the costs of development and C was 50 per cent of the professional fees.
  - ii) By Clause 3.1 the Buyer had to use reasonable endeavours to obtain planning permission for the Farm as soon as possible.
  - iii) By Clause 4.1 the Seller was prevented from making any planning application himself or allowing anyone other than the Buyer from making a planning application in respect of the Farm.
  - iv) By Clause 4.2 and 4.3 the Seller had to provide all reasonable assistance and support to the Buyer as requested by them and was prevented from doing anything that delayed, hindered or prejudiced them in the performance of their obligations under the agreement.
  - v) By Clause 13.1 the Seller undertook not to deal with or dispose of the Farm other than subject to the agreement and to require anyone to whom he transferred the Farm to enter into a deed covenanting to observe and perform his obligations under the agreement. The Seller was also prohibited from granting a new lease, tenancy, licence or easement affecting the Farm without the prior written consent of the Buyer.
  - vi) Clause 16 provided:

‘16.1 The Buyer may (subject to the Buyer having obtained the prior written approval of the Seller which approval shall not be unreasonably withheld or delayed) either assign the Buyer’s interest under this Agreement or

16.2 Execute a Declaration of Trust in favour of any company or individual of no less financial strength than the Buyer at the date of the Agreement

16.3 It shall be a condition precedent to any Assignment or Declaration of Trust that each assignee or Beneficiary (as the case may be) shall have delivered to the Seller’s Solicitors a deed (to be prepared by the Buyer’s Solicitors) containing covenants by the assignee or Beneficiary (as the case may be) in favour of the Seller to observe and perform the obligations on the part of the Buyer contained in this Agreement’

3. In late 2005/early 2006 Mr Steer and Mr Taylor realised that the project was too large for them to finance themselves. They approached Mr Attwell whom they had both known for many years and who was interested in becoming involved in the project. Mr Attwell in turn introduced them to Mr Bowdery who had experience in the construction industry and was said to have access to funding. Mr Taylor also brought in a business colleague of his, Derek Donnellan, who used to work for Bank of Ireland. Mr Donnellan’s role was to sort out the business structure and to handle more formal matters as well as contributing more generally to ideas for developing the Farm. He was better able than Mr Taylor and Mr Steer to draw up legal documents and draft letters and minutes of meetings in appropriate language. Mr Donnellan operated through his company Market Distribution Solutions Ltd (‘MDS’). Mr Donnellan incorporated Pennyfeathers UK in June 2006 as the vehicle which would take forward the Farm project. Pennyfeathers UK had an authorised share capital of 1000 ordinary shares of which Mr Taylor and Mr Steer had 480 shares each and Mr Donnellan held 40 shares.
4. Mr Attwell and Mr Bowdery have worked together on developments in the past. Mr Bowdery already had a company called Trimount Residential Ltd which he had used as a vehicle and at the end of November 2006, he and Mr Attwell set up a new company Trimount Residential (Isle of Wight) Ltd, the Fourth Defendant (‘Trimount’). The five men met in June 2006 to discuss how Pennyfeathers UK would operate and to appoint officers of the company. On 10 January 2007 a Shareholders Agreement was concluded relating to Pennyfeathers UK. The parties to the agreement were Mr Taylor and Mr Steer personally, MDS (effectively Mr Donnellan) and Trimount. Broadly, the scheme that the Shareholders Agreement put in place was that Trimount would straight away buy 96 shares in total from Mr Taylor and Mr Steer at the price of £1,041.67 per share, thereby making an initial investment into Pennyfeathers UK of £100,000. Thereafter, Trimount had the right to buy a further 384 shares for the same price so that, if they exercised that right in full, in effect Mr Bowdery and Mr Attwell would own 48 per cent, Mr Steer and Mr Taylor would own 48 per cent together and Mr Donnellan would own 4 per cent. Trimount would ‘buy’ these shares by meeting the on-going expenses incurred by Pennyfeathers UK as the preparation of the planning application went forward, earning one share for every £1,041.67 it spent, up to a total of 480 shares. The shares

Trimount earned would be transferred to it by Mr Taylor and Mr Steer in equal measure. Pennyfeathers UK's profits were to be distributed by way of dividend in proportion to the shareholdings in the company. The Shareholders Agreement also provided that Mr Taylor and Mr Steer would assign the 2005 Option to Pennyfeathers UK. In January 2007 Mr Attwell and Mr Bowdery were both appointed directors of Pennyfeathers UK. Mr Taylor and Mr Steer became directors in April 2007. Mr Donnellan was initially a director and company secretary as from June 2006 but resigned in June 2007. He became a director again in 2009. He, Mr Taylor and Mr Steer are still directors of Pennyfeathers UK.

5. Mr Bowdery and Mr Attwell took the project to Mr Basil Body, a wealthy investor who they thought would be interested in financing the deal. Mr Body was indeed interested and he then became involved in the discussions. He operates through a company called Kilnsea Developments Ltd.
6. The plan envisaged by the Shareholders Agreement was not in fact implemented. The 2005 Farm Option was never assigned to Pennyfeathers UK by Mr Taylor and Mr Steer. Why this did not happen is a matter of dispute between the parties. By the end of 2007 it was decided that Mr Bowdery and Mr Attwell would buy Mr Taylor, Mr Steer and MDS' shares in the project and take it forward by themselves. The proposal was that Mr Taylor and Mr Steer would receive a sum of money up front on conclusion of the buy-out agreement and then substantially more money if and when planning permission was obtained and the Farm sold on to developers. Mr Taylor and Mr Steer would pay MDS its share out of the monies paid to them. In return all three would transfer or cancel their shares in Pennyfeathers UK and Mr Taylor and Mr Steer would resign as directors. One of the main issues in this case is whether that proposed buy-out was ever the subject of a binding contract between the parties. The Claimants say that no agreement was ever concluded; that accordingly the terms of the Shareholders Agreement still operated and that the fiduciary duties owed by Mr Bowdery and Mr Attwell to Pennyfeathers UK continued in effect. Mr Bowdery and Mr Attwell say that a binding buy-out agreement was concluded at a meeting on 27 December 2007 held at Gunwharf Quays hotel in Portsmouth ('the Gunwharf Quays meeting'). This, they say, superseded the Shareholders Agreement and entitled Mr Bowdery and Mr Attwell thereafter to pursue the development of the Farm for their own benefit, free of any duty to act in the best interest of Pennyfeathers UK.
7. It is common ground that in anticipation of acquiring complete control of Pennyfeathers UK, (whether or not after a binding buy-out agreement was concluded) Mr Bowdery and Mr Attwell set up Pennyfeathers Jersey in March 2008. It is also common ground that Mr Taylor and Mr Steer agreed that after 27 December 2007, Mr Bowdery and Mr Attwell should meet Mr McDowall and negotiate directly with him for a new agreement for the purchase of the Farm.
8. On 4 April 2008, Pennyfeathers Jersey entered into a contract with Mr McDowall for the conditional purchase of the Farm ('the 2008 Purchase'). Under the 2008 Purchase, Pennyfeathers Jersey agreed to pay £16 million for the Farm. The sale would be completed within 6 months after the Farm was 'allocated' by the Council, a step that indicates that the land is considered by the Council suitable for development. Importantly for our purposes, under clause 18 of the 2008 Purchase, Mr McDowall promised not to renew, amend or extend the 2005 Option without the consent of Pennyfeathers Jersey.

9. Mr Bowdery also started to approach people who owned smaller parcels of surrounding land which would be incorporated into the development. In the course of 2008 and 2009 Pennyfeathers Jersey entered into a number of option agreements over that land ('the Surrounding Land Options'). There is a dispute over whether Mr Taylor and Mr Steer knew about and consented to the acquisition of the Surrounding Land Options. There is also a dispute about the nature of the relationship between Pennyfeathers Jersey, Mr Bowdery and Mr Attwell.
10. By the middle of 2009 the relationship between Mr Bowdery and Mr Attwell on the one hand and Mr Taylor, Mr Steer and Mr Donnellan on the other had broken down. Mr Bowdery and Mr Attwell resigned as directors of Pennyfeathers UK on 28 August 2009.
11. Since that time, an application for planning permission has been submitted to the Council by Pennyfeathers Jersey, Mr Bowdery and Mr Attwell are optimistic that the application will ultimately be granted. The proposed development will comprise the construction of about 1000 residential units, commercial space of about 3,000 square metres and the construction of two sports pitches. Mr Hepburn, who is the planning consultant who has been acting and is still acting as adviser to the project, described the development as a 'once in a lifetime' opportunity.

#### **The pleaded case and the Defence**

12. The Particulars of Claim were lodged on 8 March 2012. They alleged that Mr Bowdery and Mr Attwell owed fiduciary duties as directors to Pennyfeathers UK and also that the five men were 'joint venturers' in the project and owed each other fiduciary duties. It was alleged that Mr Attwell and Mr Bowdery are in breach of those duties by unlawfully diverting the opportunity to enjoy the fruits of the development of the Farm from Pennyfeathers UK to Pennyfeathers Jersey. It is also alleged that Mr Bowdery and Mr Attwell acted in bad faith towards the Claimants because they intended to exclude Mr Taylor and Mr Steer from the project and to avoid paying them for their interest in Pennyfeathers UK. As a result, the Claimants say, the benefit of the 2008 Purchase and the Surrounding Land Options are held by Pennyfeathers Jersey on constructive trust for Pennyfeathers UK and Pennyfeathers Jersey is liable to account to Pennyfeathers UK on the grounds of knowing receipt and dishonest assistance.
13. The original Defence on behalf of all four Defendants was served in May 2012. It alleged that Mr Taylor, Mr Steer, MDS and Trimount were parties to a joint venture arising in January 2007 but that by the end of 2007 they were agreed that Mr Bowdery and Mr Attwell should be free to exploit the development opportunity for their own benefit. The Defence alleged that the parties attempted to agree the terms under which Mr Bowdery and Mr Attwell would buy Mr Taylor, Mr Steer and MDS' interests but that 'that proved unsuccessful despite persistent efforts on the part of Mr Bowdery and Mr Attwell'. It was alleged that the negotiating position of Mr Taylor and Mr Steer 'lacked constancy', that they asked for different amounts of money and 'blew hot and cold over finalising a deal'.
14. In May 2013 the Defendants applied to amend their Defence and add a Counterclaim, following the instruction of new solicitors and counsel in late March 2013. The proposed new pleading contained some major changes in the facts alleged. Most

important was that the Amended Defence alleged that there had been a binding buy-out agreement concluded between all the parties at the Gunwharf Quays meeting on 27 December 2007. Thus, all the references in the original Defence to seeking and failing to agree terms for the buy-out were struck through and replaced with assertions that binding terms were agreed at that meeting. The passages in the original Defence which described the negotiations after that meeting were recast as unsuccessful attempts by Mr Taylor and Mr Steer to vary the agreed contract to achieve more favourable terms for themselves.

15. Such a change of position clearly called for some explanation. In support of the application to amend, Mr Bowdery provided a witness statement. He set out at length his recollection of the events leading up to the Gunwharf Quays meeting, the meeting itself and the discussions thereafter. He concluded:

“38. The underlying commercial relationship between Trimount, Mr Steer, Mr Taylor and MDS came to an end at the end on 27 December 2007 by reason of the agreement of that date. Mr Attwell and I have no obligation to have regard to the interests of Mr Taylor and Mr Steer thereafter. Mr Attwell and I intended to act in good faith towards Mr Steer and Mr Taylor in seeking to agree further and subsequent terms of settlement with them thereafter. However, in the event, by reason of what I consider to be Messrs Steer’s and Taylor’s inconsistency, vacillation and temporising, no variation of the agreement of 27 December 2007 was ever agreed. That we were not able so to agree does not attenuate or otherwise affect the simple enforceability of the 27 December 2007 Agreement. We seek to do, in these proceedings, just that.”

16. Mr Bowdery then describes his ‘misgivings’ about the advice they were receiving from their solicitors at that time, Munday’s LLP, and their decision to instruct new solicitors.

“44. Without waiving privilege, I have to say that as a result of the advice that we have received from Maitland Hudson & Co LLP and leading counsel, we now consider that the Defence that was prepared on our behalf by Munday’s LLP simply does not reflect fully our account of the facts underlying the dispute and, in particular, what the Defendants believed at all times to be an enforceable agreement as I set out above. I consider that I have to be particularly frank on this point but do not think I can go further than this without waiving privilege. ...

45. It is my earnest belief that Mr Attwell and I, at all times, have considered the agreement to have been made and to be enforceable and also believe that we had made this clear to our former solicitors. This appears not to be reflected in the Defence as presently drafted. I understand this now but did not understand it previously.

...

47. It has always been my understanding and that, I believe, of Mr Attwell, that an enforceable agreement was entered in to by myself, Mr Attwell, Mr Taylor, and Mr Steer at the conclusion of a meeting that took place on 27 December 2007. For the reasons that I set out above, it was abundantly clear to all parties to the Shareholders Agreement concluded on 27 December 2007 that by reason of the agreement made on 27 December 2007, Mr Attwell and I were free to exploit the development opportunity in respect of the land at and around Prestwood Grange Farm for our own benefit and had no obligation to have regard to the interests of Mr Taylor and Mr Steer thereafter.”

17. Mr Attwell also made a witness statement in which he said that he has always regarded the deal that was agreed on 27 December 2007 between himself, Mr Bowdery, Mr Steer and Mr Taylor as binding.
18. The application to amend was opposed by the Claimants at a hearing on 18 July 2013. At that hearing, the Defendants referred to the instructions they said they had given to Mundays and to counsel then advising them (Michael Davie QC). They asserted that those instructions had made clear to their lawyers that they believed that they had reached a concluded agreement but that the lawyers had mistakenly or inappropriately failed to plead the case in accordance with these instructions. Permission to amend was granted by an order dated 23 July 2013. Unsurprisingly, the Claimants immediately sought disclosure of Mundays’ file on the basis that privilege had been waived. Disclosure was ordered and at the trial before me, Mr Bowdery and Mr Attwell were cross-examined extensively on the correspondence between them and their legal advisers, including the notes of a consultation with Mr Davie in March 2012. I refer to some of those documents later in this judgment.
19. From those documents it is clear that there is no substance whatever in Mr Bowdery’s and Mr Attwell’s assertion that they told their lawyers that they believed that a binding contract had been entered into at the Gunwharf Quays meeting and that Mundays and/or Mr Davie had disregarded those instructions. On the contrary, the question of whether an agreement had been concluded at any point during the long negotiations was carefully considered and the advice given was that there had not. There is no evidence of Mr Bowdery or Mr Attwell expressing dissent or unhappiness with that stance, either in faxes or emails coming from them or in Mundays’ attendance notes of meetings or conversations with them. Mundays were meticulous in recording the instructions they received and in stressing to Mr Bowdery and Mr Attwell that they must check all draft pleadings sent to them and indicate if they disagreed with anything. If, as he claimed, Mr Bowdery had consistently said in discussions with Mundays that he believed that a concluded buy-out contract had been reached, I have no doubt that the case would have been pleaded on that basis or, if Mundays had advised that such a pleading was untenable on the evidence, there would have been a clear record documenting the instructions received and the advice given.

#### **The witnesses**

20. For the Claimants, the main witness was Mr Taylor. He worked briefly in the construction industry in the 1970s and then started a successful flooring business. He

has had some experience in residential property developments although nothing on the scale of the proposed development of the Farm. I found Mr Taylor generally to be an honest and helpful witness although there were a few minor aspects of his evidence that I consider were implausible. In particular I do not accept that he believed that the proposal being discussed at the Gunwharf Quays meeting involved paying him and Mr Steer a total of £7 million – that is £3.5 million each rather than shared between them. The main attack on his credibility concerned the documents generated by the discussion he and Mr Steer had with some potential purchasers of the Farm, in particular the Williams Pears Group in Autumn 2007. It was put to him in cross-examination that those documents evidence an intention on his and Mr Steer's part effectively to do what they now accuse Mr Attwell and Mr Bowdery of doing, namely going behind the other directors' backs and concluding their own deal with William Pears Group rather than acting for the benefit of Pennyfeathers UK. The draft documents that were produced at the time appear to envisage that Mr Taylor and Mr Steer would receive £3 million personally under the deal or that part of the consideration paid by William Pears Group to Mr McDowall for the land would in fact go to Mr Taylor and Mr Steer and that this should be kept confidential. Mr Taylor was adamant that he always intended to tell Mr Bowdery and Attwell about the proposal put forward by William Pears and that they would have been fully informed about the terms of any such deal if discussions had progressed. Indeed, his evidence was that he did tell them about the Williams Pears Group's interest in taking on the project in early December 2007 and it was that discussion which prompted Mr Bowdery and Mr Attwell to say that they wanted Trimount to buy out Mr Taylor and Mr Steer's shares in Pennyfeathers UK instead.

21. There are some aspects of the William Pears Group documents that are troubling and Mr Lawrence QC appearing for the Claimants acknowledged that some of the wording was 'less than happy'. However, it is difficult to see how it could be alleged that Mr Taylor and Mr Steer hoped successfully to enter into a deal with William Pears Group for the transfer of their shares and keep the terms of the agreement – including any payment to themselves -- secret from Trimount. The Shareholders Agreement provided that if any shareholder wanted to sell his shares, he had to offer them first to the company at the price of £1,041.67 each and then, if the company did not want them, the shares had to be offered to the other shareholders. If the shares were not bought by the other shareholders, then they could be sold to third parties, subject to the approval of the Board. It is unlikely that the William Pears Group would have been content to pay Mr Taylor and Mr Steer substantial sums for their shares without checking whether the terms of any Shareholder Agreement governing Pennyfeathers UK were likely to create problems. Any covert dealings would very rapidly have come to light and would risk defeating the goal of agreeing terms. Further, it appears that the solicitors Messengers, Mr Curry (the land agent working with Mr McDowall) and Mr Hepburn, the planning consultant knew about the discussions with William Pears Group; this supports the Claimants' contention that there was nothing surreptitious about their dealings. I am satisfied that therefore that there was nothing underhand in Mr Taylor's or Mr Steer's dealings with the William Pears Group and that they do not evidence any bad faith on his or Mr Steer's part.
22. Mr Steer also gave evidence. He is a plumber by trade and has known Mr Taylor for 40 years. He was candid about his lack of experience in building development and about his limitations so far as writing or understanding complex documents is

concerned. He also said that he had been in a poor financial position in 2007 and had been eager to sell out his interest in the project at an early stage, even though he realised that he would get less for that interest than if he would if he were able to wait until the project was further along. As far as his credibility is concerned, he was cross-examined by Mr Levy QC about a witness statement he had provided in proceedings in Southampton County Court in April 2011. In those proceedings, Mr Steer successfully contested a statutory demand made in respect of debts he was said to owe to Mr Body's company Kilnsea Developments Ltd. Mr Steer's evidence at the trial before me was that in October 2006 Mr Bowdery had lent him £10,000 repayable in six months time. Mr Bowdery had done this, Mr Steer said, 'out of the generosity of his heart' because Mr Bowdery saw that he was in trouble. Later, in about November 2008, Mr Body lent him a further £20,000 and Mr Steer used £8,000 of that loan to repay part of the loan from Mr Bowdery. This loan from Mr Body was supposed to be repaid once the first instalment of the monies under the proposed buy-out agreement became payable to Mr Steer. Hence Mr Steer said in his witness statement contesting the demand in 2011, the monies were not due because the first instalment under the buy-out had not been paid.

23. Mr Levy put to Mr Steer that there were two aspects of that 2011 witness statement which were untruthful or inconsistent with the evidence he was giving in these proceedings. The first was that he said that both the £10,000 loan from Mr Bowdery and the £20,000 loan from Mr Body were linked to the need to tide him over until the monies from the buy-out deal were forthcoming. This was untrue because the date of the £10,000 loan was not May 2008 as he said in that witness statement but October 2006 – long before the buy-out idea had been discussed. The second aspect of the witness statement that is problematic for Mr Steer was that Mr Steer disputed both debts on the grounds that they were linked to the monies he said were due to him on completion of the deal relating to the development but that Pennyfeathers Jersey had failed to complete on the deal and that failure was the subject of legal proceedings. Mr Levy put to Mr Steer that this statement was inconsistent with Mr Steer's current case that there was no concluded buy-out agreement.
24. As to this second point, the wording of the 2011 witness statement is ambiguous as to whether there was a binding contract for the payment of the sums from which the loan was going to be repaid or whether there was simply an expectation that such a deal would be concluded and the loan repaid then. As to the first point, Mr Steer accepted in cross-examination that the witness statement was wrong to elide the two loans together; the date of the first loan was wrong and that loan had not been made with the intention that it be paid off from Mr Steer's share in the buy-out deal; it was completely separate from that. However, I note that it appears that the demand for payment that Mr Steer was responding to referred to the two loans having been made in 2008. The letter from Mr Body's solicitors of 9 February 2011 making a formal demand for repayment of the alleged debt said that they were instructed on behalf of Mr Body in connection with two loans made in 2008, one of £10,000 and the second of £20,000. The demand did not, for some unknown reason, therefore set out the true situation but incorrectly referred to both loans as being made by Mr Body in 2008. In those circumstances, Mr Steer is not entirely at fault in eliding the two together. One might also question how appropriate it was for Mr Body to commence bankruptcy proceedings against Mr Steer shortly after a substantial letter of claim in accordance with the pre-action protocol had been sent on behalf of Mr Steer to those acting for

the Defendants in these proceedings. Therefore, although it is, of course, of the utmost importance that those seeking to set aside statutory demands for debt ensure that the evidence they give disputing the debt is entirely accurate, in the particular circumstances of this case I do not consider that the witness statement substantially undermines Mr Steer's credibility as a witness in these proceedings.

25. Mr Donnellan gave evidence for the Claimants. I found him to be an honest and straightforward witness and I accept his evidence. He saw his role as being the draftsman of significant documents such as meeting minutes and letters although he is not legally qualified and did not purport to give professional advice. I accept that he assisted Mr Taylor and Mr Steer conscientiously and that the minutes and notes he produced were accurate to the best of his recollection. Mr Andrew Wilson who was a solicitor with GCL Solicitors LLP gave evidence about various matters including the fact that no one during the course of negotiations between 2008 and 2010 had proceeded on the basis that there had been a binding agreement concluded at the Gunwharf Quays meeting. I accept his evidence as truthful. Mr Adrian Bates was also called to give evidence about the genesis of other companies formed by Mr Taylor or Mr Steer bearing the Pennyfeathers name and about his involvement in the discussions with the William Pears Group.
26. For the Defendants, Mr Bowdery was the main witness. I found him to be an unreliable witness and I reject much of his evidence as deliberately untruthful. My assessment is based on a number of matters. For reasons that I will describe later in this judgment, the contention that there was a binding agreement arrived at during the Gunwharf Quays meeting is unsustainable. No one could have thought that the manuscript note made by Mr Attwell was intended to be legally binding. I do not believe that Mr Bowdery ever thought so, either then or now. His evidence, both in support of the application to amend the Defence and at the trial before me, to the effect that he has steadfastly held that belief from 27 December 2007 to the present is therefore manifestly untrue. His attempt to blame his legal advisers for failing to record or adhere to his instructions was shown to be unfounded when Munday's files were disclosed. There were other instances where his evidence at this trial contradicted what he is recorded as having said to Mr Davie QC in conference. When challenged on these, his response was that the solicitor taking the note inexplicably wrote down what was said incorrectly and that he, equally inexplicably, failed later to point this out.
27. Another attempt to explain away his conduct by blaming inaccurate note-taking arises in respect of what was said at a meeting of the parties on 15 January 2009, once relations between the parties had become hostile and suspicious. It was accepted by the Claimants that this meeting had been stormy. One of the items raised by Mr Donnellan at the meeting was the identity of Pennyfeathers Jersey. Mr Donnellan had become aware that Pennyfeathers Jersey was approaching landowners surrounding the Farm to negotiate options to purchase their land. Mr Donnellan's note records the following exchange:

“DD asked RB if he was in anyway associated with the Jersey Company and if so what was that association? He did not understand how this company could be involved unless Rae/Paul involved. DD asked for disclosure

RB stated that he categorically did not know who the Jersey Company was?

DD asked who the surrounding Option Agreements were assigned to.

RB stated that these were now owned by the Jersey Company.

DD asked how could that be if RB, PA were not involved, how could they have known and therefore negotiated option agreements? Any Option Agreements should have been negotiated for the benefit of all shareholders and must feature as a part of any deal. RB PA would not have known about these additional Options unless this was disclosed to them.

RB stated that GCL on behalf of the Company had submitted one draft Option to a surrounding land owner and were in process of drafting another. Terms had been agreed. Now it seems these options had been transferred to another Company without consultation or disclosure. Why?

DD repeated his question to RB, asking how a 3<sup>rd</sup> party who seemingly RB and PA had no knowledge of could be involved.

RB stated that he dealt with someone called Celine, That's all he knew. He got cheques from her for work he did for the company. He did not know who the Directors or Shareholders of the Company were."

28. Mr Bowdery accepted in cross-examination that if he had denied being involved in Pennyfeathers Jersey that would have been a complete lie. His answer was that Mr Donnellan's note was not accurate and he had not said the words attributed to him. He said that the meeting had been a shouting match and that questions had been directed at him but before he had a chance to answer, the question was answered by Mr Donnellan for him. He therefore denied that he had told the others at the meeting that he had no connection with Pennyfeathers Jersey other than having some contact with someone called Celine.
29. However, a few days after the meeting, on 27 January 2009 there was a conversation between Mr Julian Harvey of Munday's and Mr Wilson who was acting for the Claimants. Mr Wilson made an attendance note which reads:

"AW spoke to Julian @ Munday's

Their client not involved with Pennyfeathers Jersey, can't/won't get copies of the option agreements for surrounding land.

Pennyfeathers Jersey aren't instructing Munday's

Deal on the table to do clients need to stop falling out."

30. Mr Bowdery agreed in cross-examination that it was wholly untrue that he and Mr Attwell were 'not involved' with Pennyfeathers Jersey or that they were unable to get copies of the Surrounding Land Options. He accepted that he personally had negotiated some of those options. He was asked whether there was a good

explanation of the fact that his solicitor was putting forward a false position to the Claimants' solicitor and he was unable to provide one.

31. I have no hesitation in finding that Mr Bowdery denied his connection to Pennyfeathers Jersey at the meeting of 15 January 2009 in order to obfuscate the position regarding the Surrounding Land Options. I accept that the notes that Mr Donnellan drew up of the 15 January 2009 meeting are an accurate record of what was said. They are clearly supported by the attendance note made by Mr Wilson recording a similar denial given by Mr Harvey on behalf of Mr Bowdery. The evidence of what happened at the meeting shows Mr Bowdery being dishonest, evasive and uncooperative, in that and in other respects, when responding to the understandable concerns being raised by Mr Donnellan and Mr Taylor.
32. I have formed the same conclusion about the reliability of Mr Attwell. He played a secondary role in these events but he has thrown in his lot with Mr Bowdery in pretending that he has always believed that the parties were legally bound by an agreement concluded on 27 December 2007. His evidence as to what happened on 15 January 2009 was markedly different from that of Mr Bowdery. He conceded that Mr Bowdery had denied that he was a shareholder or director of Pennyfeathers Jersey. Mr Attwell did not intervene to correct this because it was in a strict technical sense true – the directors of the Jersey company are 'independent' and the shareholder is an employee benefit trust of which Mr Bowdery and Mr Attwell were beneficiaries. I find that he must have realised that the picture that Mr Bowdery was presenting at the meeting was, at best, seriously misleading but he did not intervene to correct this. He said for the first time in the witness box that he did send an email to Mr Donnellan after the meeting seeking to correct the notes of the meeting. He did not know why that email had never been found or disclosed in these proceedings. It was clear to me at this stage of Mr Attwell's evidence that he was simply making up his answers as the need arose without any regard to the truth.
33. The Defendants also called Mr Iain Curry who was the land agent acting on behalf of Mr McDowall and Mr Glen Hepburn who was the planning consultant on the Isle of Wight. Both men were careful witnesses and I accept their evidence as truthful although it was only tangentially relevant to the issues which I have to decide. They also called Mr Pesco who is connected with Pennyfeathers Jersey. I consider his evidence later. The Defendants' final witness was Mr McDowall who gave evidence by video link from the Isle of Wight. Mr McDowall is an elderly gentleman who has formed strong views on these matters and about these people. Those views are influenced by the undoubted fact that during the time that the Farm development project was in the hands of Mr Taylor and Mr Steer, not much progress seemed to be made so far as he was concerned. Once Mr Bowdery and Mr Attwell took over, Mr McDowall received a substantial payment under the 2008 Purchase and a planning application has at last been submitted with the potential for him to receive further large sums. I accept that his evidence was honestly given, in that it reflected his perception of what happened.

#### **The issues**

34. The issues that I have to decide are as follows.

- i) Were Mr Bowdery and Mr Attwell's obligations as directors of Pennyfeathers UK terminated or superseded by a buy-out agreement concluded at the Gunwharf Quays meeting on 27 December 2007?
- ii) Were any such obligations affected by the failure of Mr Taylor and Mr Steer to assign the 2005 Option to Pennyfeathers UK?
- iii) If Mr Bowdery and Mr Attwell were still subject to fiduciary obligations, then did the conclusion of the 2008 Purchase between Pennyfeathers Jersey and Mr McDowall and/or the conclusion of the Surrounding Land Options place them in a position where their interests conflicted with those of Pennyfeathers UK?
- iv) If there was a conflict of interest, did Mr Bowdery and Mr Attwell have the consent of Mr Taylor, Mr Steer and MDS to their conduct?
- v) Did Mr Bowdery and Mr Attwell act in bad faith towards Pennyfeathers UK, Mr Taylor, Mr Steer and MDS in resolving to exclude them and Pennyfeathers UK from the opportunity without paying them anything?
- vi) Did Mr Bowdery and Mr Attwell owe fiduciary duties to Mr Taylor, Mr Steer and MDS as well as to Pennyfeathers UK, such duties arising from the joint venture among the parties to the Shareholders Agreement and/or under the equity in *Pallant v Morgan* [1953] Ch 43?
- vii) How does the fact that the 2008 Purchase and the Surrounding Land Options were entered into by Pennyfeathers Jersey rather than Mr Bowdery or Mr Attwell personally affect either their liability for breach of fiduciary duty or the relief that the court can order?
- viii) If Mr Bowdery and Mr Attwell's conduct amounts to a breach of fiduciary duty, are the Claimants estopped or otherwise prevented from bringing this action because they stood by and failed to complain while the Defendants expended time and money on making progress with the Farm development?
- ix) If I find that the Shareholders Agreement is still extant, how are the shares of Pennyfeathers UK to be allocated among Mr Taylor, Mr Steer, MDS and Trimount?
- x) If I find that that Pennyfeathers Jersey holds the benefit of the 2008 Purchase and the Surrounding Land Options on trust, should I determine whether that company has a lien for the money that has been spent on progressing the project between 2008 and today?

**(1) Was a binding agreement concluded at the Gunwharf Quays meeting?**

35. It is common ground that before the 27 December 2007 the parties had agreed in principle that Mr Bowdery and Mr Attwell, through Trimount, would buy out Mr Taylor, Mr Steer and MDS' interests in Pennyfeathers UK. There had been considerable correspondence and discussion about the deal and the parties met at the Gunwharf Quays to see if they could arrive at an agreement as to what the buy-out would involve. Mr Taylor, Mr Steer, Mr Bowdery and Mr Attwell attended the

meeting. Mr Donnellan was not there. Mr Bowdery had, he says, flown in from Spain (where he then lived) specially to attend. The meeting lasted several hours at the end of which Mr Attwell produced a hand-written note which reads as follows.

“1) £250K JON/RON/ JON RON PAY DEREK (4%)  
(WHOLE PROJECT)

2) £1.25M ON BROWNFIELD SITE 800+ UNITS EXCLUDING  
SOCIAL

3) FULL PLANNING £2M JON/RON PRO RATA DOWNWARDS  
Only

4) FULL DISCLOSURE

27/12/07

J.S. *signature*

R.T *signature*

R.B *signature*

P.A *signature*

5) CONSULTANCY RON/JON-?

6) SHARE/DIRECTORSHIPS ETC ~~CANCELLED~~ & RESIGN

7) ST HELENS FEES REMAINS

8) JON/RON & FARMER CONTRACTS CONCURRENT &  
CONDITIONAL TO EACH OTHER

9) LEGALS?

10) FARMER COMMITMENT FEES

11) 12 MONTH RENTAL AGREEMENT RENEWABLE UP TO  
2010 £50 PER YR”

36. As I have already made clear, I regard the assertion that that the parties had an intention to enter into legal relations and that the note constituted a binding contract as hopeless. In order to establish that there was a binding contract, the Defendants must show both that the parties had the subjective intention of forming a binding contract and that what occurred between them would lead objectively to the conclusion that they intended to create legal relations: see *The Hannah Blumenthal* [1983] 1 AC 854 (where the House of Lords held that a contract to abandon an arbitration did not arise from the lengthy inaction of both parties in prosecuting the arbitration because the sellers did not actually believe that the inaction of the buyers was an offer to abandon it) and *RTS Flexible Systems Ltd v Molkerei Alois Müller GmbH* [2010] 1 WLR 753 as to the objective assessment of words and conduct.

37. I reject the suggestion that the parties had the subjective intention to form a binding contract or that a reasonable observer would have thought that they did. There are many pointers to the absence of any intention to create legal relations. First, this was a substantial deal worth a large sum of money. All four men were seasoned businessmen, familiar with business transactions. They had entered into a long and comprehensive Shareholders Agreement, they held and recorded properly constituted board meetings of Pennyfeathers UK. They did not conduct themselves in an informal way in their business dealings. It is incredible that they would intend to be bound by a sketchy manuscript note taken at the meeting. Secondly, Mr Donnellan, whose company MDS held 4 per cent of the shares in Pennyfeathers UK was not present at the meeting. It was not possible to conclude an agreement to buy his shares without his consent. Mr Attwell said that Mr Taylor told them he had authority to act on behalf of Mr Donnellan and to bind MDS to the deal. I reject that evidence as entirely implausible. Mr Taylor pointed out when he was cross-examined on this issue that MDS had other shareholders as well as Mr Donnellan. Mr Taylor denied that he had any authority to bind MDS or Mr Donnellan. Mr Attwell conceded that he had taken no steps either on 27 December or afterwards to ensure that Mr Donnellan and MDS had agreed to be bound. I note also that when it was suggested to Mr Attwell that he had had authority to sign a document on behalf of Mr Bowdery a few weeks later he dismissed the suggestion saying:

“Mr Bowdery I’m sure, like most people, would not agree for me to sign a document on his behalf when he hasn’t even had a view of that document or was aware of its contents”

38. Neither he nor Mr Bowdery could have thought that Mr Donnellan was bound by whatever was agreed at the meeting.

39. The third reason why I reject the evidence that there was a binding agreement is that the terms of that agreement are very unclear. Moreover, there were many important details that needed to be hammered out between the lawyers at a later stage. For example:

- i) Items (2) and (3) of the note contemplated that £1.25 million would be paid to Mr Taylor and Mr Steer once the Farm had been designated as a ‘brownfield’ site by the Council for 800 or more housing units excluding social housing. On ‘full planning’ they would be paid a further £2 million or less, pro rata, if consent for fewer than 800 units was granted. Mr Bowdery and Mr Attwell were asked what would happen if the planning application sought and obtained consent for only, say, 600 houses but that they later sought and obtained consent for an additional 200 units. Mr Bowdery’s evidence was that Mr Taylor and Mr Attwell would be entitled only to 75 per cent of the payment on the first grant of planning permission regardless of the later expansion. Mr Attwell said that once the site got planning permission, Mr Taylor and Mr Steer would receive the whole £3.5 million. This is precisely the kind of lack of clarity that legal advisers would identify and need to put back to their respective clients to find out their intentions before drafting an appropriate contractual clause.
- ii) The parties did not agree what was meant by ‘FULL DISCLOSURE’. Mr Bowdery said that this meant only that Mr Taylor and Mr Steer were bound to

hand over all files that they had about the Farm project. Mr Taylor said that this meant that Mr Bowdery and Mr Attwell would keep him and Mr Steer fully informed about the steps they were taking to progress the project. Mr Bowdery's evidence on this point was contrary to what he told Michael Davie QC in consultation on 23 March 2012. At that consultation, Mr Davie distributed photocopies of the 27 December note and went through each item. The attendance note of the consultation records that as regards the item 'full disclosure', Mr Davie asked whether this meant that Mr Bowdery and Mr Attwell would be required to tell Mr Taylor and Mr Steer about the Surrounding Land Options. The attendance note records:

"PA responded 'yes'. RBO responded 'if they asked'."

This answer was clearly inconsistent with the evidence he gave at trial. Mr Attwell's evidence initially was that 'full disclosure' meant that Mr Taylor was obliged to tell him about the discussions he had had with surrounding land owners so that Mr Bowdery could take those forward. When it was put to him that that answer was flatly contrary to what he had told Mr Davie QC, he said that the term 'meant both' – it was a two way disclosure.

- iii) The parties also did not agree what item (9) 'LEGALS?' meant. Mr Bowdery and Mr Attwell said at the trial that this meant that they agreed to pay Mr Taylor and Mr Steer's legal costs, although they had to accept that they subsequently refused to pay these costs. Mr Taylor's evidence was that this referred to the parties' joint intention to arrange for a proper contract to be drawn up by the lawyers incorporating these points. At the consultation with Mr Davie QC, Mr Bowdery is recorded as having explained this item as indicating 'that the parties were in agreement that everything would be put into a formal legal document'. In the event, Mr Bowdery and Mr Attwell denied during negotiations in May 2008 that they had agreed to pay Mr Taylor and Mr Steer's legal fees.
40. The fourth reason I reject the suggestion that there was a binding contract is that negotiations continued between the parties soon after the Gunwharf Quays meeting and carried on over subsequent months. As one would expect, the parties' respective lawyers began drawing up proper contractual documents and exchanging drafts with track changes and advising their clients on the progress of the negotiations. On 23 January 2008 Mundays (acting for Trimount) sent Mr Wilson a 17 page document of 'legal due diligence information requests' in relation to what they called 'the proposed purchase' of part of the issued share capital of Pennyfeathers UK. The Amended Defence and Counterclaim describe these negotiations as an attempt by Mr Taylor and Mr Steer to *revise* the concluded contract. There is no reference to that in the contemporaneous documents. Most significantly there is a note of a meeting on 16 January 2008 attended by Mr Taylor, Mr Steer and Mr Attwell (but not Mr Bowdery). At the end of that meeting a note headed 'Heads of Terms' and 'Restructure proposition for Ron Taylor and John Steer subject to contract' was drawn up and signed by the three men. It was a list of 11 points, some of which were clearly the same as the points on the 27 December note and some of which showed that the parties were changing their stance on certain issues. For example, the 16 January 2008 Heads of Terms said:

“RT/JS to receive £3.5 Million Pounds on preferred land to go forward into the Island plan or outline Planning whichever arises first”

This was different from the two stage payment discussed at the Gunwharf Quays meeting. The Heads of Terms also incorporated the lease to Mr Taylor of the farmhouse that Trimount had bought from Mr McDowall on terms to be agreed and provided more detail about the consultancy arrangement that would be entered into with Mr Taylor.

41. I have no doubt that this was regarded by all the parties as a continuation of the discussions that they had had previously and not as an attempt to vary an existing binding agreement. Mr Bowdery had to accept in cross-examination that after 16 January 2008 meeting, everyone treated the 16 January 2008 Heads of Terms (rather than the Gunwharf Quays meeting note) as the working document which set out what had been agreed in principle as the way forward. He had to agree that this was clearly marked to indicate that it was not intended to be binding. What the status of the supposed contract formed on 27 December 2007 would be once it was superseded by a document clearly marked ‘subject to contract’ was left in confusion.
42. Finally, I find that the parties could not have intended to create a legally binding agreement at the Gunwharf Quays meeting because it was clear from item 8 of Mr Attwell’s note that the parties could only conclude the buy-out agreement once matters had been sorted with Mr McDowall. That makes sense as there is no reason why Mr Bowdery and Mr Attwell would want to be committed to pay substantial sums of money to Mr Taylor and Mr Steer unless and until they were sure that they could enter into a satisfactory arrangement with Mr McDowall for the purchase of the Farm. It was recognised on all sides that the 2005 Option was not a satisfactory arrangement and that a more secure deal would need to be struck. That is why, soon after the Gunwharf Quays meeting, Mr Bowdery and Mr Attwell went to see Mr McDowall to start those negotiations. I am sure that the parties’ intention was that both the buy-out agreement and the new agreement with Mr McDowall would be signed at the same time and that neither would be binding until they were both finalised. That is also supported by Mr Wilson’s correspondence with Munday between January and April 2008, as I describe later.
43. The Defendants rely on various pointers as showing that there was a binding contract arrived at on 27 December 2007. The first is that the document is signed by all four men. I do not accept that this indicates an intention to be bound. The 16 January 2008 Heads of Terms was also signed by those present even though it was marked ‘subject to contract’. They signed simply to indicate that they agreed that the note accurately recorded the points discussed at the meeting. Further, I do not accept that Mr Bowdery and Mr Attwell ever intended that they *personally* would enter into any agreement with Mr Taylor and Mr Steer. They have throughout ensured that their part in the project is kept ‘off shore’ for tax reasons. They are not personally parties to any of the arrangements which were in fact concluded; not the Shareholders Agreement nor the 2008 Purchase nor any of the Surrounding Land Options. The ‘due diligence’ information requests sent by Munday to Mr Wilson referred to the proposed purchase of the shares by ‘[NEWCO]’. After the Gunwharf Quays meeting they set up Pennyfeathers Jersey to be the vehicle for the project. No one was

expecting them to enter into any binding agreement themselves even though they signed the manuscript note.

44. The Defendants rely on a letter from the bank RBS to Kilnsea Developments Ltd which is Mr Body's company dated 14 January 2008 providing a business overdraft facility of £4 million. It was put to Mr Taylor that this indicates that Mr Body was preparing to fund the contract concluded on 27 December 2007. Mr Taylor denied being aware of this facility and in the absence of evidence from Mr Body, I cannot assume that there is any link between this particular project and the overdraft facility.
45. The Defendants point to the fact that the handwritten note of the Gunwharf Quays meeting did not contain the words 'subject to contract' or 'heads of terms' even though Mr Taylor, Mr Steer and Mr Donnellan were familiar with those terms and used them on other documents. On this point I accept the evidence of Mr Taylor that it was not suggested that this was going to be a legally binding agreement. I agree that they would have thought that it was so obvious that the note was not intended to be legally binding that there was no need to include those words.
46. I therefore find that there was no contract concluded at the Gunwharf Quays meeting on 27 December 2007.

## **(2) The failure to assign the 2005 Option to Pennyfeathers UK**

47. In the Amended Defence and Counterclaim, the Defendants allege that Mr Taylor and Mr Steer's failure to assign the 2005 Option to Pennyfeathers UK was a repudiatory breach by them of the Shareholders Agreement. It was not entirely clear how it was said that this affected the issues in the case. The Defence purported to 'accept' that repudiatory breach and hence bring to an end the Shareholders Agreement. The only relief sought in the Counterclaim in this regard was a declaration that the Shareholders Agreement was repudiated by the breaches of Mr Taylor and Mr Steer. The Claimants submitted not only that there had been no breach but also that any breach had been waived long ago and that, in any event, the purported acceptance of the breach could not affect anything that had happened between the parties before that acceptance and could not absolve Mr Bowdery and Mr Attwell of their duties towards Pennyfeathers UK. Fortunately, I do not have to decide any such difficult legal points, as I am sure that there was no repudiatory breach of the Shareholders Agreement by Mr Taylor and Mr Steer.
48. I have already set out clause 16 of the 2005 Option which provided that the option could not be assigned without the consent of Mr McDowall, that consent not to be unreasonably withheld. Mr Taylor and Mr Steer undertook by clause 6.3 of the Shareholders Agreement to assign the 2005 Option to Pennyfeathers UK. Further, clause 17.2 of the Shareholders Agreement provided:

"17.2 The existing shareholders [that is Mr Steer and Mr Taylor] hereby warrant to Trimount that:

17.2.1 ...

17.2.2 The option agreement is fully enforceable and assignable to the Company and the land the subject of the option is the land which it is proposed to be developed”

49. A draft assignment of the 2005 Option was drawn up and dated 10 January 2006 to be executed as a deed. It provided that Mr Taylor and Mr Steer assigned the 2005 Option to Pennyfeathers UK in return for Pennyfeathers UK covenanting to indemnify Mr Taylor and Mr Steer against any cost involved in obtaining Mr McDowall’s consent. The draft assignment said:

“6. Until such time as the said consent has been obtained, the Option Holders will do all such things as they are directed to do by the Company as relating to the Option”

50. The draft assignment was signed by Mr Taylor and Mr Steer but not by anyone on behalf of Pennyfeathers UK.
51. In the event, Mr McDowall did not consent to the assignment. In his evidence at the trial he explained that he did not want the Option to be assigned to Pennyfeathers UK because he discovered from publically available information that the company secretary was Mr Donnellan whom Mr McDowall had never met and the company did not have any substantial assets. He did not want to replace Mr Taylor and Mr Steer as his counterparties with a new company of which he knew nothing.
52. The contemporaneous documents show that the problem with getting the assignment finalised was mentioned at various meetings of the Board of Pennyfeathers UK. Mr Attwell agreed in his evidence that the task of obtaining Mr McDowall’s consent to the assignment was initially given to Messengers, solicitors who were long standing advisers of Mr Bowdery and became the legal advisers to Pennyfeathers UK on matters relating to the Shareholders Agreement. At a meeting in April 2007 attended by everyone other than Mr Bowdery, Mr Attwell reported that there were matters which might be holding up the assignment of the 2005 Option and that in the absence of Mr Bowdery, he would attend to outstanding matters with Chris Messenger.
53. In August 2007 there was an urgent meeting called because Mr Attwell had told Mr Taylor and Mr Steer that he was not prepared to allow Trimount to put any further money into Pennyfeathers UK until the 2005 Option had been assigned to Pennyfeathers UK as agreed. The notes of the meeting made by Mr Donnellan record that Mr Donnellan asked why Mr Messenger had not sorted this out as instructed following the April meeting. Mr Attwell said that Chris Messenger had told him that he had tried unsuccessfully on several occasions to engage with Mr McDowall’s solicitors. At that point the meeting note records that Mr Bowdery said that he would take over dealing with the matter and would ‘confront the Farmer personally on the issue as to why the assignment had not been taken up’. Mr Donnellan did not believe that confrontation was likely to be productive. He suggested instead that other solicitors, GCL, who were already working for Pennyfeathers UK on other aspects of the project, be asked to take this on. Chris Messenger should be asked to pass his file to GCL so they could deal with Mr McDowall and find out what if any issues were holding things up. The note of the meeting then continues:

“...DD would instruct GCL and determine what material (if any) effect the non-assignment of the option had in respect of the Shareholders Agreement. DD felt, and PA stated that Chris Messenger had confirmed the same, that the intention in the Shareholders Agreement was that RT and JS had assigned their benefit in the Option Agreement to the Company. RT and JS confirmed their commitment to this. Therefore if the Farmer for whatever reason decided not to complete the assignment, then there were alternative agreements that could be sought to confirm and honour RT and JS’s commitment to resolving the issue.

... DD would further instruct GCL Solicitors to present what other legal framework might be available to the Board to mitigate the issue of the assignment.

All parties agreed to this course of action.”

54. Thereafter GCL Solicitors wrote to Chris Messenger on 5 September 2007 noting that Mr Donnellan had asked them to deal with the assignment of the 2005 Option to Pennyfeathers UK and asking for a copy of the option and for an update on what steps had already been taken regarding the assignment. Mr Messenger wrote back on 5 October explaining what had happened so far. The picture was rather complicated by a proposed deed of variation to add some more land into the area covered by the option. There had also been some correspondence about the provision of personal guarantees by Mr Taylor and Mr Steer as a way of overcoming Mr McDowall’s apparent antipathy to contracting with Pennyfeathers UK.
55. Thereafter the trail goes cold. Once discussions about the buy-out by Mr Bowdery and Mr Attwell of Mr Taylor and Mr Steer’s shares in Pennyfeathers UK began, the 2005 Option became secondary to their plans. In the negotiations over the buy-out, the non-assignment of the option in fact provided a potential mechanism for giving some security to Mr Taylor and Mr Steer for the deferred consideration under any buy-out deal. As I describe elsewhere, this came to nothing. There was a letter from Mondays to Mr Wilson in March 2008 asking for a copy of the deed of assignment for the option.
56. From this it is apparent that the failure to complete the assignment of the 2005 Option was not the result of any lack of will or foot-dragging by Mr Taylor and Mr Steer. The process stalled because of Mr McDowall’s objections to Pennyfeathers UK and perhaps because the issue became linked with transfers of additional land which caused complications. Mr Taylor was cross-examined on the basis that it was up to him to organise the giving of a personal guarantee to remove the obstacle to the assignment. His answer, which I accept, was that if someone had presented him with a personal guarantee to sign, he would have signed it. The matter was in the hands of various solicitors who he thought were dealing with it. The various meeting notes show that the parties agreed how the matter would be handled and accepted that some other plan might be needed if Mr McDowall’s objections could not be overcome. For reasons that remain slightly obscure, the assignment did not happen and then the issue was overtaken by the buy-out negotiations and the 2008 Purchase.

57. Whether this was, nevertheless, strictly speaking a breach by Mr Taylor and Mr Steer of their obligations under the Shareholders Agreement I do not need to decide as, in the particular circumstances of this case, it was certainly not a repudiatory breach and was never treated as such by Trimount. Further, I accept the Claimants' submissions that there has been clear affirmation of the Shareholders Agreement by Mr Bowdery and Mr Attwell since it became apparent in August 2007 that it might not be possible to bring about the assignment (see the notes of the meeting set out in paragraph 53 above). The negotiations for the buy-out deal that took place at the Gunwharf Quays meeting were all based on the assumption that the Shareholders Agreement was still in place and there was no mention at that meeting of termination for alleged breach. I find therefore that the failure to assign the 2005 Option does not affect the fiduciary duties owed by Mr Bowdery and Mr Attwell to Pennyfeathers UK.

**(3) Conflict of the interests of Mr Bowdery and Mr Attwell with those of Pennyfeathers UK**

58. Given my findings in the previous sections, I find that the fiduciary obligations owed by Mr Bowdery and Mr Attwell to Pennyfeathers UK continued until they resigned as directors in August 2009. The original Defence sought to argue that the non-binding agreement in principle concluded at the Gunwharf Quays meeting was enough in effect to release Mr Bowdery and Mr Attwell from those duties and allow them to divert the Farm project to their own benefit. In their closing submissions the Defendants say that even if no contract was concluded on 27 December 2007, 'it is absolutely clear that at that meeting the parties agreed to go their separate ways'. I do not accept that any such agreement could affect the obligations of Mr Bowdery and Mr Attwell towards Pennyfeathers UK. They were still bound by their fiduciary duties unless and until they bought out all the other shares and were in a position to cause the company to release them from those duties. Even though the parties were agreed in principle to the buy-out taking place, that certainly did not mean that Mr Taylor and Mr Steer were agreeing to the Defendants taking over the benefit of the Farm development despite the absence of a concluded buy-out agreement.
59. The strictness of the fiduciary duties owed by a director to his company has consistently been emphasised in the case law. In *Re Bhullar Bros Ltd* [2003] BCC 711 (CA) a business had been built up by two brothers who were both directors of the company. After the relationship between the brothers' families had broken down, it was agreed in principle that the business would be divided up and that it should therefore not acquire any more properties. One of the brothers then acquired a property adjacent to the company's premises for his own benefit. The Court of Appeal held that where a fiduciary had exploited a commercial opportunity for his own benefit, the relevant question was whether the fiduciary's exploitation of the opportunity was such as to attract the application of the rule that a fiduciary should not enter into transactions in which he had a personal interest conflicting or which might possibly conflict with that of the company.
60. As to when a transaction 'might possibly conflict' with the interest of the company, the Court of Appeal cited the speech of Lord Upjohn in *Phipps v Boardman* [1967] 2 AC 46 (at page 124):

"In my view it means that the reasonable man looking at the relevant facts and circumstances of the particular case would

think there was a real sensible possibility of conflict; not that you could imagine some situation arising which might, in some conceivable possibility in events not contemplated as real sensible possibilities by any reasonable person, result in a conflict”

61. Counsel for the Defendants drew my attention to the judgment of the Court of Appeal in *Sharma v Sharma* [2013] EWCA Civ 1287, a case that was decided after the trial of this action. It was conceded in *Sharma* that the Petitioner’s conduct in acquiring dental practices for her own benefit would be a breach of the ‘no conflict’ rule and the ‘no profit’ rule since she was a director of a company which owned and operated dental practices. The Court referred to the significance of the House of Lords’ decision in *Boardman v Phipps* [1967] 2 AC 46 as being two fold:

“First, it illustrates the strictness with which the courts will enforce fiduciary duties, even where, in the absence of a breach of duty, the beneficiary would nonetheless have been unable to take advantage of the relevant potential benefit. Secondly, it establishes that the beneficiary’s consent does not absolve the fiduciary from liability, unless he has disclosed all material facts.”

62. The first point there – that it is no defence to a claim for breach of fiduciary duty that the principal would not have been able to exploit the misappropriated opportunity itself – is well established in the case law: see *per* Jonathan Parker LJ at paragraph 41 of *Bhullar*.
63. It is obvious to me that the conduct of Mr Bowdery and Mr Attwell after 27 December 2007 was in conflict with the interests of Pennyfeathers UK and a clear breach of their fiduciary duties. The development of the Farm was the very opportunity which Pennyfeathers UK had been incorporated to pursue and that development was the stated purpose of the company according to the Shareholders Agreement. The 2008 Purchase which Mr Bowdery and Mr Attwell caused Pennyfeathers Jersey to conclude with Mr McDowall imposed on Mr McDowall duties which were inimical to the interests of Pennyfeathers UK in that Mr McDowall promised to sell to Pennyfeathers Jersey the land for which Pennyfeathers UK was meant to be pursuing planning permission.

#### **(4) Consent to the conflict of interest**

64. The Defendants argued that if their conduct after 27 December 2007 was *prima facie* a breach of their duties, it was prevented from being a breach because they had the consent of the other shareholders of Pennyfeathers UK to that conduct. The question of what amounts to the consent of the shareholders was also discussed in *Sharma*. Having considered the earlier cases of *Re Duomatic Ltd* [1969] 2 Ch 365 and *Gwembe Valley Development Co Ltd (in receivership) v Koshy (No 3)* [2003] EWCA Civ 1048, Jackson LJ (with whom the other members of the Court agreed) summarised the principles as follows:

“i) A company director is in breach of his fiduciary or statutory duty if he exploits for his personal gain (a) opportunities which

come to his attention through his role as director or (b) any other opportunities which he could and should exploit for the benefit of the company.

ii) If the shareholders with full knowledge of the relevant facts consent to the director exploiting those opportunities for his own personal gain, then that conduct is not a breach of the fiduciary or statutory duty.

iii) If the shareholders with full knowledge of the relevant facts acquiesce in the director's proposed conduct, then that may constitute consent. However, consent cannot be inferred from silence unless:

a) the shareholders know that their consent is required, or

b) the circumstances are such that it would be unconscionable for the shareholders to remain silent at the time and object after the event.

iv) For the purposes of propositions (ii) and (iii) full knowledge of the relevant facts does not entail an understanding of their legal incidents. In other words the shareholders need not appreciate that the proposed action would be characterised as a breach of fiduciary or statutory duty.”

65. Mr Bowdery and Mr Attwell say that Mr Taylor, Mr Steer and Mr Donnellan knew that they were approaching Mr McDowall to organise the purchase of the Farm for their own benefit. They were told that the 2008 Purchase was about to be concluded and they did nothing to stop it. Mr Bowdery and Mr Attwell also say that Mr Taylor knew about the negotiations taking place for Pennyfeathers Jersey to acquire the Surrounding Farm Options. On this basis they assert that the other shareholders of Pennyfeathers UK consented to their actions or at least that they acquiesced in circumstances where it would now be unconscionable for them now to object.
66. It is accepted by the Claimants that after the Gunwharf Quays meeting, they agreed to Mr Bowdery and Mr Attwell making direct contact with Mr McDowall to start discussions for a new arrangement for the benefit of Mr Bowdery and Mr Attwell personally, in the expectation that a buy-out deal would soon be concluded. Beyond that, the Claimants deny that any fully informed consent was given to any of the actions of Mr Bowdery and Mr Attwell. They also say that any consent given to those initial contacts with Mr McDowall was vitiated by the bad faith of Mr Bowdery and Mr Attwell because, unbeknownst to Mr Taylor and Mr Steer, they had formed the intention of pressing forward with the Farm development for their own benefit without in fact entering into any buy-out deal with the other shareholders.
67. I consider first the question of whether there was any informed consent to Pennyfeathers Jersey concluding a contract with Mr McDowall prior to the entering into a concluded buy-out arrangement. It is clear to me that there was not. There is plenty of evidence in the contemporaneous documents that early in 2008 Mr Taylor was alarmed by Mr Bowdery and Mr Attwell's conduct in moving ahead with the

project for their own benefit even though the deadline of 31 January set for the conclusion of the buy-out deal had come and gone without any final agreement. On 4 February 2008 Mr Taylor wrote to Mr Donnellan complaining that the date for finalising the buy-out was slipping but that it appeared that Mr Bowdery and Mr Attwell were already approaching surrounding land owners and offering them more money for their land than Mr Taylor had previously been offering them on behalf of Pennyfeathers UK. He wanted ‘transparency in all dealings’ in case the buy-out deal fell through. On the same day Mr Taylor wrote to Mr Hepburn warning him that no buy-out deal had been concluded and telling him:

“For the avoidance of doubt and interim to any confirmation that the acquisition is to proceed, all matters pertaining to the project are a matter for Pennyfeathers [UK] and normal communication protocols. Therefore any matter pertaining to the project should be addressed to me unless you are otherwise informed by me that this is to change.”

68. He ended that letter:

“My concern as you will appreciate is that if the acquisition does not take place as has been proposed, then we need to maintain our focus and protect the best interests of the project going forward”

69. Unfortunately, for his own reasons, Mr Hepburn decided not to comply with Mr Taylor’s request. That letter from Mr Taylor had arrived shortly after Mr Hepburn had had a meeting with Mr Bowdery on 31 January 2008 at which Mr Bowdery had told him that in future instructions would come from him and Mr Attwell and not from Mr Taylor. Thereafter Mr Hepburn dealt exclusively with Mr Bowdery, Mr Attwell and Pennyfeathers Jersey and did not keep Mr Taylor or Mr Steer informed about the work he was doing for Pennyfeathers Jersey on the Surrounding Land Options.

70. Discussions about the terms of the buy-out took place between Mr Wilson, the solicitor acting for Mr Taylor and Mr Steer and Kevin Healy and Julian Harvey at Mundays. Mr Wilson was assured that the purchase of the Farm and the buy-out deal would be concluded at the same time. To this end Mr Wilson agreed with Mundays that he would draw up a deed of surrender of the 2005 Option and an agreement to surrender that option which would form part of the buy-out deal. On 14 March 2008 Mr Wilson wrote to Mundays:

“Obviously you will take the property subject to the terms of the Option Agreement in favour of my clients, unless of course the proposed Deed of Assignment is entered into by exchange of contracts for your clients purchase.

Please also note that it is considered that your client will be breaching the terms and conditions of the Shareholders Agreement if it proceeds to exchange on its purchase of the farm at this point in time.

As stated in previous correspondence I await my clients instructions in respect of drafting documentation but hope to be in a position to revert to you in respect of the same shortly hereafter.”

71. The response from Mundays at this stage was far from reassuring.

“Thank you for your letter of 14<sup>th</sup> March. It is my client’s intention to enter into the purchase agreement on the farm site as soon as possible and in respect of your third paragraph I should be grateful if you could please provide further explanation for the benefit of my client.

I have not seen a copy of the Shareholder Agreement and perhaps you could direct me to the provisions which your client alleges will be breached.

Finally, you confirm that you hope to be in a position to revert shortly and I should be grateful if you could try to indicate in terms of some form of tangible timescale as to when you will be in a position to respond. With Easter approaching I would wish to advise my client as soon as possible.”

72. There was growing urgency about the need to conclude the purchase of the Farm by 5 April 2008, the end of the financial year, because of some change in the capital gains tax rules that would adversely affect Mr McDowall. Mr Wilson responded promptly with the drafts that he had been asked to prepare. He sent these to Mundays on 1 April 2008. The structure being proposed was that (a) the 2005 Option would be extended by Mr McDowall for the benefit of Mr Steer and Mr Taylor for the perpetuity period allowed by law; (b) Mr Taylor and Mr Steer would therefore have the ability to buy the Farm at any time; (c) they would receive £500,000 on conclusion of the buy-out deal; (d) they would then be paid a further £3.5 million once they executed a deed of surrender for the extended 2005 Option. They would execute that deed of surrender in effect when planning permission was achieved. Mr Wilson concluded his letter saying:

“I hope that the documentation can be agreed and exchanged at the same time as your client’s conditional contract with Mr McDowall. In the meantime I look forward to receiving a copy of the draft Agreement between your clients and Ian McDowall. You will appreciate that the terms of the Agreement are particularly pertinent to the terms of my client’s Agreement.”

73. The next day, 2 April 2008, Mr Healy of Mundays replied to Mr Wilson sending back the draft contracts with his track changes. He said in the covering email:

“I should be grateful if you could approve these documents and let me have your comments and/or amendments by return. Mr McDowall wants to exchange by Friday of this week and the documents need to go to Jersey for signature.

I am instructed by my clients that they are not prepared to disclose the Sale and Purchase Agreement with Mr McDowall to your clients. However, the way the transaction is structured there is no prejudice to your client in my client not disclosing the Agreement.”

74. Mr Wilson responded rapidly on 3 April noting the refusal to provide the copy of the draft contract between Mr McDowall and Munday's clients. He asked Mr Healy to provide an undertaking that he would ensure that that contract included an obligation on Mr McDowall, at the Defendants' request, to extend the 2005 Option. He wrote again on 4 April enclosing agreed amended versions of the documents. He said at the end of that letter:

“The Supplemental Agreement [*i.e. the extension of the 2005 Option*] is to be revised to extend the Option Period yet further, to be equal to the perpetuity period allowable in law. This has been agreed with [Mr McDowall] already. I enclose herewith a revised copy of the Supplemental Agreement. Please confirm that an appropriate clause is within your contract with [Mr McDowall] to oblige the farmer to enter into the Supplemental Agreement at your client's request.

I trust that all matters raised herein and in earlier correspondence can be dealt with prior to tomorrow's deadline.”

75. There was no response to this letter prior to the 2008 Purchase being entered into on 4 April 2008. That contract, as I have already described, far from including the term that Mr Wilson had requested to protect his clients' position, precluded Mr McDowall from extending the 2005 Option without Pennyfeathers Jersey's consent.
76. On the basis of that correspondence it is impossible for the Defendants to contend that Pennyfeathers UK's shareholders consented to Mr Bowdery and Mr Attwell's conduct so as to prevent that conduct amounting to a breach of their fiduciary duties to the company. On the contrary, the Claimants consistently maintained, through Mr Wilson, that no contract should be concluded with Mr McDowall until the buy-out contract was concluded. They were seriously misled by the assurance that there was nothing in the draft 2008 Purchase that would prejudice their position and were clearly prejudiced by the failure to include a term providing for the extension of the 2005 Option. It is true that they did not take steps to disrupt the negotiations between Mr Bowdery and Mr McDowall. At that stage, as Mr Taylor said in evidence, he still believed that Mr Bowdery and Mr Attwell were 'going to do the honourable thing and complete a contract with us'.
77. So far as the Surrounding Land Options are concerned, the position is even clearer. Mr Attwell's evidence was that he mentioned the options to Mr Taylor in various discussions they had during the course of 2008. Mr Taylor denied that he had been told about these options. I accept Mr Taylor's evidence on this point. It is apparent from the correspondence that Mr Taylor found out about the approaches to the surrounding land owners from those land owners themselves and not from Mr

Attwell. GCL Solicitors wrote to Munday to that effect on 5 February 2008. That letter said:

“It has come to my clients’ attention that a number of adjoining land owners have been approached by your clients without the permission or knowledge of Pennyfeathers Ltd and/or my clients. A number of such adjoining land owners have been in discussion with Pennyfeathers Limited and my clients previously. Please refer your clients to clause 9 of the Shareholders Agreement and the non-competition restrictions contained therein. Any further negotiations must be with the express knowledge and consent of my clients”

78. The exchanges at the heated meeting of 15 January 2009 that I have already described are only explicable on the basis that Mr Bowdery and Mr Attwell concealed their work on the Surrounding Land Options. In addition to the passages I have already set out, in which Mr Bowdery misleadingly downplayed his responsibility for the fact that Pennyfeathers Jersey was entering into the Surrounding Land Options, the following exchange is recorded:

“RT asked why we were not given the opportunity. There was sufficient capital under the Shareholders Agreement in relation to the £500k investment by Trimount to achieve this. In addition this was never discussed so how could RB arrive at this assumption?

...

DD requested that RB PA provide full disclosure on the surrounding option agreement as these were the property of Pennyfeathers [UK]

RT seconded this on the basis that these options provided increased value to the company and would need to be reflected in any proposal from Trimount. They should be returned to the Company

RB stated that he did not need to disclose these details.

DD stated that if necessary a Court Order could be obtained!”

79. The note then records that there was a short break when the meeting broke up, no doubt for tempers to cool. This shows, in my judgment, that Mr Bowdery and Mr Attwell withheld information about the acquisition of the Surrounding Land Options from the other shareholders. It cannot be contended therefore that they had the consent of the other shareholders for Pennyfeathers Jersey to obtain these options.
80. The Defendants’ alternative response was that information about those options was publically available from the Land Registry. That is no basis on which to allege that they obtained the fully informed consent of Pennyfeathers UK to conduct that was clearly in conflict with the interests of the company. Mr Levy also put to Mr Taylor that the Claimants had not taken steps to bring injunction proceedings against Pennyfeathers Jersey when they found out about the Surrounding Land Options. I do not accept, if this is what is suggested, that a principal is to be treated as consenting to

or ratifying breaches of fiduciary duty unless it brings injunction proceedings to prevent further breach.

81. I therefore find that Mr Bowdery and Mr Attwell's conduct in causing Pennyfeathers Jersey to enter into (a) the 2008 Purchase agreement with Mr McDowall and (b) the Surrounding Farm Options was a serious breach of their fiduciary duties towards Pennyfeathers UK since they had not acquired the informed consent of the other shareholders to that conduct.

**5. Did Mr Bowdery and Mr Attwell act in bad faith towards Pennyfeathers UK and the other shareholders?**

82. The Claimants allege not only a breach of the 'no conflict' rule but also that Mr Bowdery and Mr Attwell were in breach of their obligation to act in good faith towards Pennyfeathers UK. The Claimants assert that Mr Bowdery and Mr Attwell never intended to conclude a buy-out deal with Mr Taylor, Mr Steer and MDS. Their intention, at least as from shortly before the 2008 Purchase was concluded, was to take the Farm opportunity for themselves and, if possible, avoid paying the others anything. They decided to do this by dragging their heels over the conclusion of the buy-out agreement in the knowledge that the only lever Mr Taylor had to pull was the 2005 Option and that that might well expire before planning permission was granted. In support of their allegation of bad faith, the Claimants rely on some of the events that I have already described: the volte face in the way the Defence was pleaded when the case was amended to allege a concluded agreement at the Gunwharf Quays meeting; the refusal to disclose a draft of the 2008 Purchase before it was signed and the misleading reassurance that nothing in it would prejudice the position of Pennyfeathers UK; Mr Bowdery and Mr Attwell's attempt to sow confusion as to the real nature of their connection with Pennyfeathers Jersey and their refusal to disclose details of the Surrounding Farm Options.
83. The Defendants deny that there was any bad faith here. They point to the fact that negotiations between the solicitors continued over the terms of the buy-out agreement long after 4 April 2008; the Claimants were the ones changing their stance on the desired terms and trying always to extract more money for themselves; the Defendants have, at least since the Amended Defence and Counterclaim been able and willing – and are now able and willing - to pay Mr Taylor and Mr Steer the substantial sums which they say were due to them under the contract concluded at the Gunwharf Quays meeting.
84. To determine who is to blame for the failure to conclude a buy-out deal, I pick up the narrative after 4 April 2008, the date on which the 2008 Purchase was concluded without making provision for the extension of the 2005 Option. There was no response to Mr Wilson's letters of 3 and 4 April although Mr Bowdery and Mr Hepburn were busy during that month in negotiating the Surrounding Land Options. Mr Wilson wrote to Mr Healy on 29 April saying that his clients were 'growing slightly anxious at the continuing delay'. Mundays replied on 6 May 2008 with a first draft of the deed of surrender. As Mr Wilson pointed out to Mr Healy the following day, Mr Healy's draft document was completely different from the drafts they had hitherto been working on. The earlier drafts involved extending the 2005 Option and surrendering it only once planning permission was received and all the deferred consideration of £3.5 million paid. Mr Healy's draft involved the *immediate*

surrender of the 2005 Option so that the only security for the future payment of the £3.5 million was a charge over the 2008 Purchase. Mr Wilson asked Mr Healy to explain why this change had been made since it was contrary to the Heads of Terms agreed by both parties. He concludes saying:

“My client is keen to complete the transaction as soon as possible (by the end of the week if achievable) and I therefore look forward to hearing from you”

85. On the evening of 8 May, Mr Wilson wrote to Munday's expressing his disappointment at the lack of response to his email. He asks them to explain the current proposed structure of the buy-out deal and in particular to explain what would trigger payment of the deferred element of consideration (the £3.5 million) and what security was offered for that deferred payment.
86. There is further correspondence back and forth during May with proposals that meetings be held which were not then held; with Mr Wilson complaining generally about the lack of response to his requests for information and insisting that some security be provided for any deferred consideration under the buy-out deal. Deadlines were set for the conclusion of the buy-out agreement but they passed without any concluded agreement. What emerges from the contemporaneous documents was that there was a very considerable amount of activity on the part of Mr Bowdery and his advisers negotiating and concluding the Surrounding Land Options on behalf of Pennyfeathers Jersey and corresponding with the Council but very little energy directed at sorting out the buy-out deal.
87. It seemed that by 9 July 2008 the parties were finally agreed as to the structure of the transaction and Mr Wilson set this out in an email to Mr Healy. This would involve both an extension of the 2005 Option which would then be assigned but subject to a charge and also a charge over the 2008 Purchase. The solicitors began exchanging drafts of the various agreements that would need to be signed. No agreement was in fact signed. There was a meeting between Mr Bowdery, Mr Steer and their respective solicitors at Munday's on 21 August 2008. Mr Healy made clear at the outset that his clients no longer agreed the structure thus far set out in the draft documentation. During the discussion Mr Cooney, a solicitor in the same firm as Mr Wilson protested that there was no effective security being offered to his clients for the deferred consideration since all that was being offered was a charge over the extended option over the Farm. Mr Bowdery is recorded as saying that that was all that was on offer and they must “take it or leave it”. The meeting concluded with the parties agreeing that the deal would be completed along the lines proposed by Mr Healy on 19 September 2008.
88. At the same time as these discussions were taking place, Mr Bowdery and Mr Attwell had started negotiations with a potential investor, Keith Conner, who might replace Mr Body as the funder of the project. Keith Conner discussed the Pennyfeathers site with Mr Bowdery at a meeting on 12 August 2008 and emailed him the next day to comment on the figures that Mr Bowdery had provided to him. He said:

“We need clarification on a few issues.

1. The options with both Ron and John would appear to lapse in 2010, and your suggestion is that if the allocation arrives in 2011 or later, then why are we having to allocate monies against them, at £4,200,000 it is certainly a big cost, but we need to fully understand your thinking here. Have they charges against the company or indeed the lands, have they paid monies to date etc etc”

89. Mr Bowdery faxed Mr Attwell some figures dated 4 September 2008 outlining the proposal from Mr Conner. It set out the sums of money already paid and said:

“4. Ron & John – purchase option and comp. for total of 4.2 million - £500,000 now and 3.7 million on full planning. Although as stated before, this agreement does not have to be signed as their options run out in 2010 and are therefore worthless as allocation is in 2011”

The figures that Mr Bowdery jotted down on the proposal sent to him by Mr Conner referred to £500,000 payable to Mr Taylor and Mr Steer but not the remaining deferred consideration.

90. The negotiations on the buy-out deal continued on and off during the rest of 2008 and into 2009. There were more meetings between the parties and more heads of terms drawn up and circulated. Mr Taylor’s evidence was that he and Mr Steer were also having meetings with Mr Conner and Mr Body directly to try to push matters forward. He and Mr Steer met Mr Conner around Christmas time in 2008. Mr Conner told them that he intended to take over the financing of the project from Mr Body. He also told Mr Taylor and Mr Steer first, that Mr Bowdery and Mr Attwell had no intention of paying Mr Taylor and Mr Steer anything for their interest and secondly that Mr Bowdery and Mr Attwell were buying the Surrounding Land Options through Pennyfeathers Jersey. Mr Conner offered to buy them out for £3.25 million, and there is an email to that effect from Mr Connor to them on 15 January 2009. They were not prepared to accept that.
91. My reading of the contemporaneous documents shows that the persistent concern of the Claimants was the lack of security being offered for the deferred consideration. Given the attitude of Mr Bowdery and Mr Attwell, the Claimants could see their interest in the Farm development slipping from their grasp. Their exasperation at the meetings and that of Mr Wilson when chasing Mundays to make progress is clear. A legal report dated 26 November 2008 and prepared by Mr Wilson for his clients advised them in detail about the offer on the table from Mr Bowdery and Mr Attwell. Under the heading ‘Risks’ Mr Wilson told them: (emphasis in the original)

“8 RISKS

8.1 The obligation to pay this consideration of £4.3m is on a Jersey based company.

We can not assess the covenant strength of this company. We have no way of carrying out the usual financial strength of the company. **Lets demand it and understand the financial covenants in place? DD 2.12.08**

Please note, however, the initial payment of £500,000.00 will be paid simultaneously with completion of the documentation and this sum therefore is not at risk.

8.2 You have no security for the deferred element of the consideration. This is a considerable risk particularly given point 8.1 above.

8.3 You are only being granted an option for a legal charge over the Extant Option Agreement if the deferred consideration is not paid.

The form of this legal charge should be agreed now and must include step in rights to the Extant Option Agreement. It is questionable whether the option for a legal charge will be binding on any successor in title as it is currently worded.

In its current form the security on offer is worthless.

As it stands our advice is that there is considerable risk that the deferred consideration will not be paid. It is not secured. You should not proceed on this basis.”

92. Having reviewed the correspondence and the evidence before me, I am sure that the blame for the failure to agree reasonable terms for the buy-out of Mr Taylor and Mr Steer’s interest lies squarely with Mr Bowdery and Mr Attwell. That also accords with commercial sense. Mr Taylor and Mr Steer had nothing to gain by prevarication or delay and everything to lose. Mr Bowdery was aware of that and he made sure that Mr Taylor and Mr Steer knew that they had little or no bargaining power. Mr Levy stressed in his written and oral closing submissions that Mr Bowdery and Mr Attwell were always offering Mr Taylor and Mr Steer a buy-out with substantial consideration. However, as Mr Wilson advised his clients, that deal was unacceptable if it required them to deliver up their entire interest in the project in return for a promise that in the happening of an uncertain event at some point in the future a Jersey company with an opaque ownership and no discernible assets would pay them £3.5 million.
93. I find that, at the latest by the time of Mr Conner’s involvement, the Defendants had no intention of paying Mr Taylor or Mr Steer anything beyond the initial £500,000. Before that time, I find that, at the least, they were deliberately and in bad faith manoeuvring themselves into a position where they could, if they chose, exclude Pennyfeathers UK and its other shareholders from the project. That is clear from their decision to conclude the 2008 Purchase without making provision for the extension of the 2005 Option. The need to conclude the 2008 Purchase before the end of the financial year does not justify the inclusion of clause 18.1 which had the effect of greatly devaluing the 2005 Option. That 2005 Option effectively represented the stake that Mr Taylor, Mr Steer and Mr Donnellan had in the project, a stake to which they were entitled because they had the initial idea of developing the Farm and devoted time and resources to gaining acceptance of the Isle of Wight to the idea of a major development there.
94. So far as the Surrounding Land Options are concerned, I find that Mr Bowdery began in February 2008, through Mr Hepburn, approaching the owners of the surrounding

land and that Mr Attwell must have known this was happening (since it is his case that he discussed this with Mr Taylor). I have set out my findings as to how this was concealed from Mr Taylor, Mr Steer and Mr Donnellan. I have no doubt that Mr Bowdery and Mr Attwell were acting in bad faith in concealing their actions in relation to the Surrounding Land Options and trying to throw Mr Taylor, Mr Steer and Mr Donnellan off the scent when they found out about Pennyfeathers Jersey from other sources.

95. It is also clear that Mr Bowdery and Mr Attwell formed the view that Mr Taylor and Mr Steer lacked the funds to vindicate their rights in court. Among the privileged material disclosed from Munday's files was a memorandum discussing the Defendants' earlier decision not to respond substantively to a lengthy letter before action sent by those acting for Mr Taylor and Mr Steer. The memorandum records that the decision was based in part on the understanding that Pennyfeathers UK, Mr Taylor and Mr Steer were without funds to bring the claim they were asserting.
96. My conclusion on this part of the case is therefore that Mr Bowdery and Mr Attwell were in breach of their duty to Pennyfeathers UK to act in good faith.

#### **6. Joint venture and *Pallant v Morgan* equitable duties**

97. In the Particulars of Claim, in addition to the claim based on breach of fiduciary duty there was a claim put in the alternative that a trust has arisen in respect of the rights held under the 2008 Purchase and the Surrounding Land Options under the equity in *Pallant v Morgan*. As I have found in favour of Pennyfeathers UK on the primary basis I do not need to consider this alternative claim.
98. It was also asserted that the fiduciary duties owed by Mr Bowdery and Mr Attwell arose not only from their directorships of Pennyfeathers UK but also from the fact that all five men were 'parties to a joint venture directed at the profitable development of the [Farm]'. It was asserted that it was necessarily implicit in the existence of the joint venture that each of the men would act in good faith towards each other and in furtherance of the venture. The point was not argued extensively at the trial but it does make a difference to the result of the case in that the fiduciary duties asserted, if they indeed arise, will be owed not just to Pennyfeathers UK but to Mr Taylor, Mr Steer and MDS personally.
99. The Claimants referred me to the decision in *Ross River Ltd v Waveley Commercial Ltd & Peter Barnett* [2013] EWCA Civ 910 where the Court of Appeal reviewed the case law on when a fiduciary duty is owed by one joint venturer to another and the content of that duty. The principles that I derive from that case are as follows:
- i) As a matter of general principle, the court should be slow to introduce uncertainty into commercial transactions by the over-ready use of equitable concepts such as fiduciary obligations. Thus, the court should not use equitable principles 'to make up for what might be seen as deficiencies (in the events which happened) in the agreed contract' (see paragraph 31 of the judgment of Lloyd LJ).
  - ii) Where the relationship is governed by contract, then the terms of the contract are of primary importance and wider duties will not lightly be implied, in

particular in commercial contracts negotiated at arms' length between parties of comparable bargaining power (see paragraph 56 of the judgment quoting from the judgment of Briggs J in *Ross River v Cambridge City Football Club* [2007] EWHC 2155 (Ch)).

- iii) The fact that the alleged fiduciary has his own, personal interest in the exploitation of the development, to which he is entitled to have regard, does not rule out the existence of a fiduciary duty: paragraph 55.
  - iv) The existence of a fiduciary duty in such a case is very fact-sensitive.
100. The factors that Morgan J had relied on in the judgment under appeal in *Ross River* were that: the agreement was expressed to be a joint venture; the parties were to share in the profits of the development; Ross River had no control over most if not all of the incurring of expenses to be deducted from the revenues earned; Ross River had no nominee director on the board of the joint venture company and no shares in that company; the alleged fiduciary, Mr Barnett, had accepted in evidence that Ross River had reposed a very high degree of trust in him to run the venture for the benefit of all the parties and that this trust gave rise to duties on his part. The Court of Appeal upheld the finding that equitable duties had arisen in that case.
101. Applying those principles to the facts of this case, I do not consider that a fiduciary duty arose in these circumstances. There was no expectation when the Shareholders Agreement was signed that Mr Bowdery and Mr Attwell would be handling the project without the involvement of the other three or that the other three shareholders were reposing a high degree of trust in their handling of the project. At that stage it was expected that they would all be involved and they entered into the deal as equals, each with their part to play in ensuring that the development was taken forward. It is not alleged that the fiduciary duty arose only after the Gunwharf Quays meeting; on the contrary the thrust of the Claimants' case is that nothing happened then to change the nature of the relationships between the parties. In the present case the agreement was described as a Shareholders Agreement and not a joint venture. It also contained an 'entire agreement' clause and a 'no partnership' clause. Mr Taylor, Mr Steer and Mr Donnellan accepted that the counterparty would be Trimount rather than Mr Bowdery and Mr Attwell personally and as reasonably experienced business men they must have understood that the effect of that was that Mr Bowdery and Mr Attwell were not bound to them in a personal capacity. This was not a case where Trimount would be incurring expenses on behalf of Pennyfeathers UK with no oversight by the other shareholders. It was accepted that Trimount would have to provide proof of expenditure on behalf of the company in order to claim its additional 384 shares. All these factors – whilst none is determinative in itself – militate strongly against the existence of additional equitable duties.
102. The Claimants rely on the fact that in cross-examination, Mr Bowdery agreed, when it was put to him, that the men were entering into a 'joint venture' for the development of the Farm. When Mr Lawrence put to him that 'it was implicit in that joint venture that the parties should act in good faith toward each other?' Mr Bowdery replied 'Yes'. I do not consider that Mr Bowdery's answer can be treated as indicating his acceptance that, as a matter of law or equity, fiduciary obligations were owed as between him and the other individuals involved in the project. That answer cannot be

binding on the court as to the existing of such obligations and there are many factors which point in the other direction.

103. I therefore reject the assertion that Mr Bowdery and Mr Attwell owed equitable duties to Mr Taylor, Mr Steer or MDS arising out of a joint venture.

#### **7. The relationship between Pennyfeathers Jersey, Mr Bowdery and Mr Attwell**

104. The counterparty to the 2008 Purchase and the Surrounding Land Options is Pennyfeathers Jersey. What is the relationship between Pennyfeathers Jersey, Mr Bowdery and Mr Attwell and how does it effect the rights and liabilities that arise in this case? The Claimants assert that Pennyfeathers Jersey is simply the creature of Mr Bowdery and Mr Attwell and should be disregarded for the purposes of this case. In the Amended Defence and Counterclaim it was asserted that Pennyfeathers Jersey ‘was incorporated upon instructions received from Trimount acting through Mr Bowdery’. The registered shareholders are said to be First Names Jersey Ltd and Legibus (Nominees) Ltd. The pleading then stated:

“15. The allegation ... that at all material times Pennyfeathers Jersey was owned and/or controlled by Messrs Attwell and Bowdery is denied. The shareholders of Pennyfeathers Jersey are set out in the preceding paragraph. The directors of Pennyfeathers Jersey are First Names Corporate Services Limited and Winter Hill Financial Services Limited who are currently represented by Jennifer Le Chevalier, Mark Pesco, Ben Newman and Kevin O’Connell. Mr Attwell and Mr Bowdery are not and have never been directors of Pennyfeathers Jersey. The directors of Pennyfeathers Jersey do not act in accordance with the commands/demands of either Mr Attwell or Mr Bowdery, and are not accustomed to doing so. They are independent directors.

16. Messrs Attwell’s and Bowdery’s association with Pennyfeathers Jersey is as employees and directors of Trimount by reason of the following facts and matters:

- Trimount provides and has provided services to Pennyfeathers Jersey in connection with the development of [the Farm] and surrounding land;
- Trimount is the sponsoring company of an Employee Benefit Trust called the Trimount Settlement. The Trimount Settlement is a beneficial owner of the shares held in Pennyfeathers Jersey by First Names (Jersey) Limited. As employees of Trimount Mr Attwell and Mr Bowdery are eligible to receive the distribution of benefits from the Trimount Settlement at the discretion of the trustees of the Trimount Settlement. The trustee of the Trimount Settlement is First Names (Jersey) Limited.”

105. Mr Bowdery’s evidence was once the idea for the project had arisen, he and Mr Attwell took advice from their accountants that it would be a good idea to make

arrangements for the project to be dealt with off shore for tax reasons. They contacted a consultant called Mercury Tax Group who he said 'have been used to things like these'. In cross examination, Mr Bowdery conceded that the whole structure then put in place had cost about £160,000 to set up and that he hoped to recoup this expense from tax advantages. There was then the following exchange:

"A. It was recommended to us by my accountants, it was a tax efficient way legally to set something up that may benefit you later on when it all happens and we followed that advice and we did it. And we paid the money to set the company up, or the structure in the company.

Q. We can look at the details later or tomorrow morning if we need to, but there was never any question of you or Mr Attwell giving up effective control of the way in which the development was carried forward because this tax efficient structure involving a Jersey company had been set up. You would remain the effective controllers of the project with Mr Body standing behind you, isn't that right?

A. I'm not quite following, sorry. I think I do, sorry. I want to answer properly.

Q. Mr Bowdery the point arises in this way: in order to achieve the tax advantages that can be achieved by using an offshore company like Pennyfeathers Jersey you have to be able to persuade the Revenue that the company's operations are offshore and remain offshore and there are people offshore, namely directors, and we will hear from one of them I think, who are party to the company's decisions. You understand that?

A. Yes, I do.

Q. But where a tax avoiding I don't say evading, I say avoiding .. structure of this nature is put in place, in reality control of the decisions on the ground relating to the project in question, here the Pennyfeathers development, remain with the people who are the beneficiaries of the company and those people were yourself and Mr Attwell. That's the reality, isn't it?

A. I don't think you can put it quite as simply as that.

Q. All right, you tell me why not?

A. As I say, it was set up because that's what we were advised to do. And the directors they run Pennyfeathers and it is quite difficult to work with them, but they do the day-to-day running. The monies go in there and the decisions and signatures and options et cetera that were then entered into over the proceeding years were by the Jersey company. Although yes, the structure is set up, which I think is in the book, we don't control it from a day-to-day basis like that at all. It is not done like that and it has to be done like that to keep an arm's length ... to make it tax efficient. I'm not sure if the word evading or whatever ...

Q. I used the word avoiding to be polite to you. But the shares in Pennyfeathers Jersey were owned by a trust, is that right?

A. That's right. They were owned by a trust that's I think an EBT that then is - - it is an EBT of the Trimount Residential Isle of Wight Limited.

Q. And the employees of Trimount, which ever Trimount company it is - -

A. Isle of Wight Limited.

Q. - - who benefit from that trust are yourself and Mr Attwell?

A. Yes, the benefit is obviously like that, correct, yes.

Q. The ultimate benefit, if any, to be extracted from the operations of the Jersey company will vest in yourself and Mr Attwell?

A. Yes, that's correct.”

106. Benjamin Newman and Mark Pesco, two directors of First Names (Jersey) Ltd, provided a joint witness statement on that company's behalf. First Names Corporate Services Ltd is a wholly owned subsidiary of First Names (Jersey) Ltd and is one of the two corporate directors of Pennyfeathers Jersey. They say that Pennyfeathers Jersey:

‘is an independent legal entity formed under the laws of the Bailiwick of Jersey. Its directors exercise their own independent discretion and judgment.’

107. They then describe the agreement between Pennyfeathers Jersey and Trimount under which Pennyfeathers Jersey ‘will listen to and take on board advice it receives’ from Trimount usually ‘through Mr Bowdery’. They then say, as regards the allegation that Pennyfeathers Jersey was liable for knowing receipt or dishonest assistance in the acquisition of the property alleged to be held of constructive trust that:

“I hereby state that neither [Pennyfeathers Jersey] nor any of its directors had cause to suspect that it was receiving trust property as alleged or at all... In acquiring the interests, [Pennyfeathers Jersey] paid full and proper consideration for the acquisition of those interests and was a bona fide purchaser for value without notice.”

108. The witness statement goes on to describe the various Board meetings at which the directors of Pennyfeathers Jersey resolved to enter into the 2008 Purchase, the agreement with Trimount for the provision by Trimount of ‘services’ in relation to the management of the development site on the Isle of Wight, the various Surrounding Land Options and later extensions of them between September 2008 and June 2013 and the contracts with various professional consultancies providing advice relating to the development.

109. Mr Pesco, who is a chartered accountant, was cross-examined briefly by Mr Lawrence on behalf of the Claimants. He accepted that:

- i) the purpose of Pennyfeathers Jersey over the past five years has been largely or wholly to acquire land or options relating to the development of the Farm;
- ii) the people for whose benefit Pennyfeathers Jersey was set up are the beneficiaries of the Trimount Settlement, that is Mr Bowdery, Mr Attwell and their families;
- iii) over the years, Mr Bowdery had communicated with him or with other people in Jersey his wishes as to what should happen on the Isle of Wight as regards taking out options or other matters relating to the development;
- iv) he could not recall any occasion on which the directors of the company had told Mr Bowdery that they were not prepared to proceed in the way that he wished them to proceed.

110. In their closing submissions on this point, the Claimants posed the following question:

“Suppose a malfeasant director arranges for assets properly belonging to his company to be appropriated by a different company which is his creature (i.e. it is owned and controlled by him). Can the director then rely upon the principle of corporate personality to say that: whilst he committed the breach he does not have the assets; and the creature company, whilst it has the assets, has committed no breach; and consequently the claimant company cannot recover its assets?”

111. They submit that the answer to that question must be ‘no’. The Claimants referred me to the decision of Rimer J in *Gencor v Dalby* [2000] 2 BCLC 734. There the claimant company brought a claim against a former director Mr Dalby alleging that he had diverted various business opportunities to his own off shore company, Burnstead, in breach of his fiduciary duties. It was argued that the off shore company could not be accountable to the claimant because it was not in a fiduciary relationship with it. Rimer J rejected that submission in the following terms:

“[26] I do not accept that argument which, if correct, would provide the easiest possible escape from the rigours of equity's strict principle of accountability. All that would be required would be for the profiting director to ensure that he diverts the profit into his own creature company. The facts of this case are that Burnstead was an offshore company which was wholly owned and controlled by Mr Dalby and in which nobody else had any beneficial interest. Everything it did was done on his directions and on his directions alone. It had no sales force, technical team or other employees capable of carrying on any business. Its only function was to make and receive payments. It was in substance little other than Mr Dalby's offshore bank account held in a nominee name. ... Burnstead is simply a creature company used for receiving profits for which equity

holds Mr Dalby to be accountable to ACP. Its knowledge was in all respects the same as his knowledge. The introduction into the story of such a creature company is, in my view, insufficient to prevent equity's eye from identifying it with Mr Dalby: ... I hold that Mr Dalby and Burnstead are both accountable for the profit represented by this commission and I will make an order against them accordingly.”

112. The *Gencor* case was considered by the Supreme Court in the recent case of *Prest v Petrodel Resources Ltd* [2013] UKSC 34. That case concerned whether the court could order companies controlled by a husband to transfer their properties to the wife as part of her matrimonial settlement on the grounds that that property of the companies should be treated as the property of the husband. Lord Sumption JSC noted that the judge at first instance had found that the management of the company had always been in the hands of the husband, ostensibly as chief executive under a contract of employment, conferring on him complete discretion in the management of its business. The judge had also found that none of the companies had ever had any independent directors: see paragraph 12 of Lord Sumption’s judgment. The ownership of the companies was opaque, but the judge had found that the husband had treated the companies’ cash balances and property as his own and drew on them in addition to his salary as he saw fit.

113. Citing earlier case law which referred to situations where the company was a ‘façade’ or a ‘sham’, Lord Sumption said (at paragraph 28):

“References to a "facade" or "sham" beg too many questions to provide a satisfactory answer. It seems to me that two distinct principles lie behind these protean terms, and that much confusion has been caused by failing to distinguish between them. They can conveniently be called the concealment principle and the evasion principle. The concealment principle is legally banal and does not involve piercing the corporate veil at all. It is that the interposition of a company or perhaps several companies so as to conceal the identity of the real actors will not deter the courts from identifying them, assuming that their identity is legally relevant. In these cases the court is not disregarding the "facade", but only looking behind it to discover the facts which the corporate structure is concealing. The evasion principle is different. It is that the court may disregard the corporate veil if there is a legal right against the person in control of it which exists independently of the company's involvement, and a company is interposed so that the separate legal personality of the company will defeat the right or frustrate its enforcement. Many cases will fall into both categories, but in some circumstances the difference between them may be critical.”

114. Lord Sumption held that the judge at first instance had been right to say that there was no basis for finding the kind of impropriety which would justify piercing the corporate veil. Although the husband had acted improperly in many ways, the court could not disregard the legal personality of the companies with the same insouciance

as the husband did. The properties to which the wife laid claim had been vested in the companies long before the marriage broke up: “Whatever the husband’s reason for organising things in that way, there is no evidence that he was seeking to avoid any obligation which is relevant in these proceedings.” The first instance judge had found that the husband’s purpose was “wealth protection and the avoidance of tax” but that did not justify the piercing of the corporate veil.

115. However, the Supreme Court went on to conclude that it was possible for the court to order the transfer of the properties over to the wife on the straight-forward basis that, although they were legally held by the companies, they were held beneficially on behalf of the husband by virtue of the particular circumstances in which the properties came to be vested in the companies: see paragraph 43 of Lord Sumption’s judgment. Lord Sumption examined how each particular house came to be purchased, noting in conclusion that:

“Whether assets legally vested in a company are beneficially owned by its controller is a highly fact-specific issue. It is not possible to give general guidance going beyond the ordinary principles and presumptions of equity, especially those relating to gifts and resulting trusts.”

116. Transposing the concealment and evasion principles to the present case they raise two separate questions:

- i) Does the concealment principle mean that I can attribute the actions of Pennyfeathers Jersey in entering into the 2008 Purchase and obtaining the Surrounding Land Options to Mr Bowdery and Mr Attwell so that when it is alleged that the two men broke their fiduciary duties by doing those things, they cannot answer “It was not us, it was Pennyfeathers Jersey”?
- ii) Does the evasion principle mean that in considering what relief can be granted as a result of the breach of fiduciary duty, I may decide that Pennyfeathers Jersey holds property on constructive trust just as much as Mr Bowdery and Mr Attwell would if they had entered into the contracts personally?

117. As regards the first of those questions, I accept that the way Pennyfeathers Jersey is run is different from the way Burnstead was run as described by Rimer J in *Gencor* and the way Prestodel Resources Ltd was run by the husband in *Prest*. Given Mr Pesco’s careful evidence, it would not be right to describe Pennyfeathers Jersey as merely being Mr Bowdery and Mr Attwell’s ‘offshore bank account held in a nominee name’. Attention is paid by Mr Pesco and his colleagues to ensuring that there is material to evidence some consideration by Pennyfeathers Jersey’s directors of every proposal brought to them by Mr Bowdery through Trimount so that the effort of setting up these companies, trusts and service agreements is not in vain. I am prepared to assume for present purposes that Pennyfeathers Jersey is sufficiently independent of Mr Bowdery and Mr Attwell to achieve the tax advantages that are sought. Does this mean that the structure is also effective in distancing Mr Bowdery and Mr Attwell from the company’s actions for the purpose of escaping their fiduciary duties? In my judgment it does not. There is no need to pierce the corporate veil here. It was a breach of Mr Bowdery and Mr Attwell’s fiduciary duties to divert the opportunity to Pennyfeathers Jersey regardless of the links between them and that

company. They were supposed to be pursuing those opportunities for the benefit of Pennyfeathers UK not for any other company. Their links with Pennyfeathers Jersey explain why they diverted the opportunities to that company but they are not necessary to establish that their behaviour was a breach of their duties to Pennyfeathers UK. I am satisfied that the concealment principle means that Mr Bowdery and Mr Attwell cannot interpose Pennyfeathers Jersey to disguise the nature of their own conduct in diverting the opportunities that they should have pursued on behalf of Pennyfeathers UK to their own benefit instead. Even on their own evidence, they were sufficiently involved in bringing the opportunities to Pennyfeathers Jersey and encouraging that company to enter into the contracts for that to amount to a breach of their duties to Pennyfeathers UK.

118. As regards the evasion principle, fortunately the position here is not as opaque as it was in *Prest*. It is accepted by Mr Pesco and Mr Bowdery that the Trimount Settlement is a beneficial owner of the shares held in Pennyfeathers Jersey by First Names (Jersey) Ltd and that the beneficiaries of the Trimount Settlement are Mr Bowdery and Mr Attwell and their families only. Whatever may be the effect of that for tax purposes, I find that it means that the benefit of the contracts entered into by Pennyfeathers Jersey in relation to the Farm development are impressed with the same trust as they would be if they had been entered into by Mr Bowdery and Mr Attwell personally. The interposition of Pennyfeathers Jersey and the Trimount Settlement should not be allowed to defeat Pennyfeathers UK's rights against Mr Bowdery and Mr Attwell or to frustrate the enforcement of those rights.
119. My reading of *Prest* indicates that there was no need to establish in this case that Mr Bowdery and Mr Attwell were in control of Pennyfeathers Jersey. The references in *Prest* to the husband 'controlling' the companies was part of the factual matrix relied to support the conclusion that the company held its assets on trust for the husband sufficiently to entitle the court to regard those assets as available for distribution to the wife. Here, where there is an express trust set up in the Trimount Settlement, there can be no question but that Pennyfeathers Jersey holds its assets, including its interest in the contracts, on trust ultimately for Mr Bowdery and Mr Attwell. Further, there was no discussion in *Prest* as to whether the directors of the company had dishonestly or knowingly assisted in any wrongdoing. It was enough to find that the companies held the beneficial interests on behalf of the husband. I therefore make no findings as to the state of knowledge of the directors of Pennyfeathers Jersey or as to whether the knowledge of Mr Bowdery and Mr Attwell ought to be attributed to them.

**8. Are the Claimants prevented from complaining about the breach of fiduciary duty by laches or acquiescence?**

120. The Defendants submit that even if there has been a breach of fiduciary duty on the part of Mr Bowdery and Mr Attwell, the Claimants should not be allowed to complain. Over the past five and a half years, Pennyfeathers Jersey has invested about £6 million in the development of the Farm. In their closing submissions, the Defendants say:

“it is noticeable that at the time that most of the investment was going on, Taylor and Steer sat back, did nothing and contributed nothing. It was only when the Defendants risking their own capital had moved the project forward to advanced

stages and most of the work necessary to bring the project to planning had been done did the Claimants demand the project be put back into their control”.

121. I do not accept that description of what has happened here. The Defendants provided a schedule of that expenditure. It appears that the money has been spent on (a) professional fees to Mundays, Mr Hepburn and the design consultants Farrell Design; (b) payments to Trimount, that is in effect to Mr Bowdery and Mr Attwell, (amounting as I see it to about £900,000); and (c) payments to Mr McDowall and the holders of the Surrounding Land Options. There are many entries in the schedule that are too brief for me to understand to what they relate.
122. In so far as the monies spent by Pennyfeathers Jersey relates to the payments for the Surrounding Land Options, I have already set out the facts which show that during the course of 2009 the Claimants objected strongly and consistently to Pennyfeathers Jersey acquiring these options. They insisted that these opportunities should be pursued for the benefit of Pennyfeathers UK. I have also described Mr Bowdery and Mr Attwell’s attempts to distance themselves from what Pennyfeathers Jersey was doing. In December 2009, by which time the relationship between the parties had finally broken down, Mr Taylor and Mr Steer instructed solicitors to write to some of the owners of the surrounding land notifying them of a potential dispute between Pennyfeathers UK and Pennyfeathers Jersey and telling them that it was contended that Pennyfeathers Jersey held the benefit of the option on constructive trust for Pennyfeathers UK. They subsequently made applications to the Land Registry to be noted as beneficiaries on the titles of the Farm and of the land which was the subject of the Surrounding Land Options.
123. In the light of that, I reject the suggestion that the Claimants have stood by and done nothing whilst £6 million has been invested by the Defendants unaware that the Claimants asserted rights to the project. Mr Levy took me to two cases on acquiescence. *Clegg v Edmondson* (1855) 44 ER 593 concerned partners in a mining partnership who after dissolution of the partnership obtained a new lease of the mine which they then exploited for their exclusive benefit. The other partners objected and asserted their right to participate in the profits but took no steps to enforce those rights for nine years. It was held that they were precluded by laches from obtaining any relief. Lord Justice Turner referred to the fact that in relation to property like mines, the profits are very uncertain and achievable only after extensive and risky outlay. He held that the claimants could not in justice enjoy the profits when they could not have been made subject to the losses had all the investment in the mine proved unproductive. In the case of *In Re Jarvis* [1958] 1 WLR 815, two sisters had been left a tobacconist shop by their deceased father. One sister invested in the shop, repairing it after it was devastated by wartime bomb damage and running it as a successful business. The other sister who had not contributed to the business sought an account of the profits. Upjohn J held that the defendant held the business on constructive trust for herself and her sister but that the plaintiff was barred by laches from relief because although she had been fully aware of her rights she took no steps to assert them over the six years prior to the issue of the writ.
124. The facts of those cases are entirely different from the facts of the present case. Even assuming, which I do not decide, that the Farm should be regarded as property akin to the mine in *Clegg* or the shop in *Jarvis*, there was no ‘standing by’ by the Claimants.

Mr Bowdery and Mr Attwell could not have believed that they were entitled to take advantage of the rights that Pennyfeathers Jersey acquired over the Farm and the surrounding land for their exclusive benefit. The Claimants were vigorously attempting to secure their stake in the project, asserting their rights and taking what steps they could to vindicate those rights. I reject the submission that laches or acquiescence is established in this case.

#### **9. How should the shares in Pennyfeathers UK be allocated?**

125. As I described at the outset of this judgment, the initial allocation of shares in Pennyfeathers UK in the Shareholders Agreement was 96 shares to Trimount, 432 to Mr Taylor, 432 to Mr Steer and 40 to MDS (Mr Donnellan's company). Trimount had the option of 'earning' a further 384 shares by paying the expenses incurred during the development phase of the project. The Claimants accept that Trimount did settle some invoices and that it is entitled therefore to some more shares in Pennyfeathers UK. For reasons which were not quite clear at the trial, the formal transfer of those shares over to Trimount was never implemented.
126. The Claimants proposed that this aspect of the case be left over to be considered by the parties, and then if necessary brought back to court in due course. I agree that that is the sensible course. I would expect, if the matter did come back to court, to see some independent evidence or audit of the expenditure by Trimount which supports a transfer over of shares.

#### **10. Is Pennyfeathers Jersey entitled to a trustee's lien?**

127. The Defendants assert that they are entitled to a trustee's lien in the event that I find that Pennyfeathers Jersey holds the benefit of the relevant contracts on trust for Pennyfeathers UK. The Claimants proposed that this aspect of the case be dealt with after handing down this judgment, particularly in the light of the dispute over whether bad faith was established. I have held that Mr Bowdery and Mr Attwell did act in bad faith. I have also commented on the schedule of expenses that has been presented as having been incurred by Pennyfeathers Jersey. I am very far from being in a position to decide which, if any, of those expenses should properly be treated as liable to reimbursement. I will therefore leave this part of the case for another occasion if it can not be resolved by agreement among the parties.

#### **Conclusion and relief**

128. In summary my conclusions are:
- i) There was no concluded agreement arrived at on 27 December 2007 for the purchase by Trimount of Mr Taylor, Mr Steer and MDS' shares in Pennyfeathers UK.
  - ii) The failure to bring about the assignment of the 2005 Option did not constitute a repudiatory breach of the Shareholders Agreement by Mr Taylor and Mr Steer.
  - iii) Mr Bowdery and Mr Attwell's conduct in causing Pennyfeathers Jersey to enter into the 2008 Purchase and the Surrounding Land Options was a breach

of their fiduciary duty as directors of Pennyfeathers UK because it created a conflict between their own interests and the interests of Pennyfeathers UK.

- iv) There was no informed consent given by Mr Taylor, Mr Steer and MDS to the breaches of fiduciary duty by Mr Bowdery and Mr Attwell.
  - v) Mr Bowdery and Mr Attwell also acted in bad faith towards the Claimants by pushing ahead with plans for the development of the Farm and by concluding the 2008 Purchase and the Surrounding Land Options without concluding an agreement for the buy-out of the other shareholders' interests in Pennyfeathers UK. They also acted in bad faith towards the Claimants in concealing their activities from Mr Taylor, Mr Steer and Mr Donnellan by presenting a very misleading picture of their connection with Pennyfeathers Jersey.
  - vi) There are no additional fiduciary duties owed by Mr Bowdery and Mr Attwell to Mr Taylor or Mr Steer arising from a joint venture or under the equity in *Pallant v Morgan*.
  - vii) The interposition of Pennyfeathers Jersey does not operate to prevent the conclusion of the 2008 Purchase and the Surrounding Land Options being a breach by Mr Bowdery and Mr Attwell of their fiduciary duties and the assets held by that company are impressed with the same trust as they would have been if Mr Bowdery and Mr Attwell held them personally.
  - viii) The Claimants are not prevented from pursuing this claim by laches or acquiescence.
  - ix) Issues relating to the proper allocation of the shares of Pennyfeathers UK among the shareholders and the existence and the value of any trustee's lien for Pennyfeathers Jersey cannot be determined in this judgment.
129. The relief sought in the Particulars of Claim was a declaration as to the trusts on which the 2008 Purchase and the Surrounding Land Options are held, equitable compensation (in the event that the value of those contracts has been diminished by the Defendants' actions) and all necessary accounts and enquiries. I note that in *Sharma* (at paragraph 38) the Court commented that the area of the law relating to the appropriate remedies for a breach of fiduciary statutory duty 'is now in flux', in particular because of the pending appeal to the Supreme Court from the decision in *FHR European Ventures LLP v Mankarious* [2013] EWCA Civ 17. That case concerned the receipt of a secret commission and the question whether the remedy of the company against the recipient of the unlawful commission was a personal one only or a proprietary one. The Court considered a distinction drawn by Lord Neuberger MR in *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd* [2011] EWCA Civ 347 between (i) a fiduciary enriching himself by depriving a claimant of an asset and (ii) a fiduciary enriching himself by doing a wrong to the claimant. Lord Neuberger made clear that the first category included the situation where the fiduciary acquired the asset or money by taking advantage of an opportunity or right which was properly that of the beneficiary: see paragraph 66 of *Mankarious*.

130. My present view is that the controversy described in *Mankarious* does not cast doubt on the settled principles which apply where the agent acquires for himself property which he was instructed by the principal to acquire or which the principal would have been interested in acquiring. In those cases, Lewison LJ regarded it as clear both that the agent holds the acquired property on (true) constructive trust for the principal, and also that the principal can acquire a proprietary interest in an asset acquired by his agent, even though the principal had no pre-existing proprietary interest in the asset, and the asset was, in the first instance, acquired by the agent with his own money. At the end of his judgment in *Mankarious* the Chancellor said the case had thrown into clear relief the considerable difficulties inherent in trying to draw distinctions between the different kinds of cases. There was a need for the Supreme Court to consider, amongst other matters, the true jurisprudential nature of the constructive trust in this area of the law: see paragraph 116 of his judgment.
131. In the instant case, the facts fit squarely within the kind of situation where the Court of Appeal in *Mankarious* regarded the availability of a proprietary remedy as settled. This is true in relation both to the 2008 Purchase and the Surrounding Land Options. Pennyfeathers UK was aware of and was pursuing the opportunity to acquire the farm and the surrounding land before Pennyfeathers Jersey stepped in and concluded the contracts. However, the issues as to appropriate relief were not canvassed in any detail at the hearing and so I will not make any declarations as to trust at this stage.

## COMPANIES ACT

### (CHAPTER 50)

(Original Enactment: Act 42 of 1967)

REVISED EDITION 2006

(31st October 2006)

An Act relating to companies.

[29th December 1967]

#### PART I

#### PRELIMINARY

##### Short title

1. This Act may be cited as the Companies Act.

##### Division into Parts

2. This Act is divided into Parts, Divisions and Subdivisions as follows:

Part I sections 1-7A	...	Preliminary sections 1-7A.
Part II sections 8-16	...	Administration of this Act sections 8-16.
Part III Constitution of Companies sections 17-42A	...	Division 1 — Incorporation sections 17-22. Division 2 — Powers sections 23-42A.
Part IV Shares, Debentures and Charges sections 43-141	...	Division 1 — Prospectuses sections 43-56.  ... Division 2 — Restrictions on allotment and commencement of business sections 57-62.  ... Division 3 — Shares sections 62A-78.

### **As to the duty and liability of officers**

**157.**—(1) A director shall at all times act honestly and use reasonable diligence in the discharge of the duties of his office.

(2) An officer or agent of a company shall not make improper use of his position as an officer or agent of the company or any information acquired by virtue of his position as an officer or agent of the company to gain, directly or indirectly, an advantage for himself or for any other person or to cause detriment to the company.

*[62/70]*  
*[Act 36 of 2014 wef 01/07/2015]*

(3) An officer or agent who commits a breach of any of the provisions of this section shall be —

(a) liable to the company for any profit made by him or for any damage suffered by the company as a result of the breach of any of those provisions; and

(b) guilty of an offence and shall be liable on conviction to a fine not exceeding \$5,000 or to imprisonment for a term not exceeding 12 months.

*[15/84]*

(4) This section is in addition to and not in derogation of any other written law or rule of law relating to the duty or liability of directors or officers of a company.

(5) In this section —

“officer” includes a person who at any time has been an officer of the company;

“agent” includes a banker, solicitor or auditor of the company and any person who at any time has been a banker, solicitor or auditor of the company.

*[Aust., 1961, s. 124]*

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20 Attorneys for Jonathan D. King as Chapter 7 Trustee

21 **UNITED STATES BANKRUPTCY COURT**  
22 **CENTRAL DISTRICT OF CALIFORNIA**  
23 **LOS ANGELES DIVISION**

24 In re:  
25 ZETTA JET USA, INC., a California corporation,  
26 Debtor.

24 Lead Case No.: 2:17-bk-21386-SK  
25 Chapter 7  
26 Jointly Administered With:  
27 Case No.: 2:17-bk-21387-SK

28 In re:  
29 ZETTA JET PTE, LTD., a Singaporean  
30 corporation,  
31 Debtor.

28 Adv. Proc. No. 2:19-ap-01383-SK

32 JONATHAN D. KING, solely in his capacity as  
33 Chapter 7 Trustee of Zetta Jet USA, Inc. and Zetta  
34 Jet PTE, Ltd.,  
35 Plaintiff,

32 **APPENDIX OF UNPUBLISHED**  
33 **OPINIONS CITED IN TRUSTEE'S**  
34 **OPPOSITION TO DEFENDANT LI**  
35 **QI'S MOTION TO DISMISS**  
36 **COUNTS I, II, VII, VIII, AND IX OF**  
37 **AMENDED ADVERSARY**  
38 **COMPLAINT**

39 v.  
40 YUNTIAN 3 LEASING COMPANY  
41 DESIGNATED ACTIVITY COMPANY f/k/a  
42 YUNTIAN 3 LEASING COMPANY LIMITED,  
43 YUNTIAN 4 LEASING COMPANY  
44 DESIGNATED ACTIVITY COMPANY f/k/a  
45 YUNTIAN 4 LEASING COMPANY LIMITED,  
46 MINSHENG FINANCIAL LEASING CO., LTD.,  
47 MINSHENG BUSINESS AVIATION LIMITED,  
48 EXPORT DEVELOPMENT CANADA, LI QI,<sub>1</sub>

39 Next Hearing:  
40 Date: August 11, 2021  
41 Time: 9:00 a.m. (PDT)  
42 Place: Courtroom 1575  
43 255 East Temple Street  
44 Los Angeles, CA 90012

1 UNIVERSAL LEADER INVESTMENT  
2 LIMITED, GLOVE ASSETS INVESTMENT  
3 LIMITED, and TRULY GREAT GLOBAL  
4 LIMITED,

5 WELLS FARGO BANK NORTHWEST, N.A., in  
6 its capacity as trustee to Yuntian 3 Trust dated  
7 September 20, 2016 (formed and administered in  
8 Utah) and its capacity as trustee of Yuntian 4 Trust  
9 dated September 20, 2016 (formed and  
administered in Utah); TVPX ARS, INC., in its  
capacity as trustee to Zetta MSN 9688 Statutory  
Trust dated September 20, 2016 (formed as  
Wyoming statutory trust), Zetta MSN 9606  
Statutory Trust dated September 20, 2016 (formed  
as Wyoming statutory trust), collectively Nominal  
Defendants,

Defendants.

11  
12 In accordance with Local Bankruptcy Rule 9013-2(b)(4), the Trustee hereby submits copies  
13 of unpublished judicial opinions cited in Trustee's Opposition to Defendant Li Qi's Motion to  
14 Dismiss Counts I, II, VII, VIII, and IX of Amended Adversary Complaint (the "Opposition"). The  
15 unpublished judicial opinions cited in the Opposition are attached hereto as follows:

- 16 1. Exhibit 1: *Ahcom, Ltd. v. Smeding*, 2008 WL 1701731 (N.D. Cal. Apr. 10, 2008)
- 17 2. Exhibit 2: *Bleu Prod., Inc. v. Bureau Veritas Consumer Prod. Servs. (Hong Kong) Ltd.*,  
18 2009 WL 649061 (C.D. Cal. Mar. 9, 2009)
- 19 3. Exhibit 3: *Blizzard Ent., Inc. v. Joyfun Inc Co., Ltd.*, 2020 WL 1972284 (C.D. Cal. Feb. 7,  
20 2020)
- 21 4. Exhibit 4: *In re Brace*, 2017 WL 1025215 (B.A.P. 9th Cir. Mar. 15, 2017)
- 22 5. Exhibit 5: *Chunghwa Telecom Glob., Inc v. Medcom, LLC*, 2016 WL 5815831 (N.D. Cal.  
23 Oct. 5, 2016)
- 24 6. Exhibit 6: *Fin. Express LLC v. Nowcom Corp.*, 2008 WL 11342755 (C.D. Cal. Mar. 6,  
25 2008)
- 26 7. Exhibit 7: *First United Methodist Church of San Jose v. Atl. Mut. Ins. Co.*, 1995 WL 150429  
27 (N.D. Cal. Mar. 29, 1995)

- 1 8. Exhibit 8: *Fru-Con Const. Corp. v. Sacramento Mun. Util. Dist.*, 2007 WL 2384841 (E.D.  
2 Cal. Aug. 17, 2007)
- 3 9. Exhibit 9: *GT Sec., Inc. v. Klastech GmbH*, 2014 WL 2928013 (N.D. Cal. June 27, 2014)
- 4 10. Exhibit 10: *Herring Networks, Inc. v. AT&T Servs., Inc.*, 2016 WL 4055636 (C.D. Cal. July  
5 25, 2016)
- 6 11. Exhibit 11: *Hyperion Fund, L.P. v. Samarium Tech. Grp., Ltd.*, 2009 WL 10699441 (C.D.  
7 Cal. Jan. 29, 2009)
- 8 12. Exhibit 12: *Indep. Elec. Supply Inc. v. Solar Installs, Inc.*, 2018 WL 6092800 (N.D. Cal.  
9 Nov. 21, 2018)
- 10 13. Exhibit 13: *Kayne v. Ho*, 2010 WL 4794824 (C.D. Cal. Nov. 15, 2010)
- 11 14. Exhibit 14: *Kayne v. Ho*, 2013 WL 12120081 (C.D. Cal. Nov. 4, 2013)
- 12 15. Exhibit 15: *L.A. Terminals, Inc. v. City of Los Angeles*, 2020 WL 8028241 (C.D. Cal. Dec.  
13 21, 2020)
- 14 16. Exhibit 16: *M.O. Dion & Sons, Inc. v. VP Racing Fuels, Inc.*, 2019 WL 4750116 (C.D. Cal.  
15 Sept. 27, 2019)
- 16 17. Exhibit 17: *In re Moshen*, 2010 WL 6259979 (B.A.P. 9th Cir. Dec. 21, 2010)
- 17 18. Exhibit 18: *Palumbo Design, LLC v. 1169 Hillcrest, LLC*, 2019 WL 10944852 (C.D. Cal.  
18 Dec. 3, 2019)
- 19 19. Exhibit 19: *Platypus Wear, Inc. v. Bad Boy Europe Ltd.*, 2018 WL 3706876 (S.D. Cal. Aug.  
20 2, 2018)
- 21 20. Exhibit 20: *Shinde v. Nithyananda Found.*, 2014 WL 12597121 (C.D. Cal. Aug. 25, 2014)
- 22 21. Exhibit 21: *Soares v. Lorono*, 2015 WL 151705 (N.D. Cal. Jan. 12, 2015)
- 23 22. Exhibit 22: *In re Turner*, 2007 WL 7238117 (B.A.P. 9th Cir. Sept. 18, 2007)
- 24 23. Exhibit 23: *US Fire Pump Co., LLC v. Alert Disaster Control (Middle E.) Ltd.*, 2021 WL  
25 296073 (M.D. La. Jan. 28, 2021)
- 26 24. Exhibit 24: *US Philips Corp. v. KXD Tech., Inc.*, 2014 WL 12564095 (C.D. Cal. June 24,  
27 2014)
- 28

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- 25. Exhibit 25: *Vizio, Inc. v. LeEco V. LTD.*, 2018 WL 5303078 (C.D. Cal. July 27, 2018)
- 26. Exhibit 26: *In re Vrabel*, 2005 WL 6960238 (B.A.P. 9th Cir. June 17, 2005)
- 27. Exhibit 27: *In re Wells*, 2017 WL 4768106 (B.A.P. 9th Cir. Oct. 10, 2017)

Respectfully submitted,

DATED: June 3, 2021

**DLA PIPER LLP (US)**

By: /s/ John K. Lyons  
DAVID B. FARKAS (SBN 257137)  
JOHN K. LYONS (*Pro Hac Vice*)  
JEFFREY S. TOROSIAN (*Pro Hac Vice*)  
JOSEPH A. ROSELIUS (*Pro Hac Vice*)

*Attorneys for the Chapter 7 Trustee*

# Exhibit 1

Ahcom, Ltd. v. Smeding, Not Reported in F.Supp.2d (2008)

**H** KeyCite history available

2008 WL 1701731

Only the Westlaw citation is currently available.  
United States District Court,  
N.D. California.

AHCOM, LTD., Plaintiff,

v.

Hendrik SMEDING, Lettie Smeding, and  
Does 1–15, inclusive, Defendants.

No. C–07–1139 SC.

|  
April 10, 2008.

#### Attorneys and Law Firms

Kenneth Michael Wentz, III, William Henry Parish,  
Parish & Small, Stockton, CA, for Plaintiff.

John Geelan Michael, Baker Manock & Jensen, Fresno,  
CA, for Defendants.

#### ORDER DENYING MOTIONS FOR SUMMARY JUDGMENT

SAMUEL CONTI, District Judge.

#### I. INTRODUCTION

\*1 Plaintiff Ahcom, Ltd., (“Ahcom”) brought this suit in the Napa County Superior Court, alleging that the Defendants Hendrik and Lettie Smeding (“Defendants” or “Smedings”) are the alter egos of Nuttery Farms, Inc. (“NFI”), and asking the court to confirm and enforce the award issued in an arbitration between Plaintiff and NFI. *See* Notice of Removal, Docket No. 1, Ex. A (“Compl.”). Defendants timely removed the suit to this Court under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“Convention”), codified in

chapter 2 of the Federal Arbitration Act, 9 U.S.C. § 201, *et seq.* *See* Notice of Removal.

Now before the Court are the parties’ cross-motions for summary judgment. *See* Docket No. 22 (“Defs.’ Mot.”), 27 (“Pl.’s Mot.”). Each party filed a reply brief. *See* Docket Nos. 30 (“Defs.’ Reply”), 31 (“Pl.’s Reply”). The Court took the matter under submission without oral argument. While the motions were pending, Defendants submitted an *ex parte* Application to File Supplementary Letter Brief. Docket No. 32. Plaintiff opposed this application. Docket No. 33.

Having considered the parties’ submissions, the Court DENIES Defendants’ Motion and DENIES Plaintiff’s Motion.

#### II. BACKGROUND

NFI was incorporated in California in 1985. The Smedings were the founders and only shareholders of NFI. Hendrik Smeding was the president and treasurer of NFI. Lettie Smeding was the vice president and secretary of NFI. According to the Smedings, they each owned 5,000 shares of NFI stock.

NFI was a broker of dried fruit and nuts for around 21 years. As a broker, NFI simultaneously bought and sold its products, and attempted to turn a profit on the margin based on fluctuations in market pricing. In late 2004 and early 2005, NFI’s pistachio suppliers chose not to renew their contracts, even though NFI had already entered contracts to sell the same pistachios. At the same time, NFI’s pecan and almond suppliers defaulted on a number of contracts, leaving NFI short in these commodities as well. As a result, NFI lacked the necessary capital to meet a number of its own obligations and it defaulted on numerous contracts. Ultimately, NFI entered Chapter 7 bankruptcy and ceased to operate.

Ahcom is a London-based fruit and nut broker. Ahcom claims that, through NFI’s agent S.J. Redfern, Ltd. (“Redfern”), it had entered a series of contracts to purchase almonds from NFI. For each transaction, Redfern prepared a written confirmation. At the bottom of every confirmation, the following text appears in the “SPECIAL REMARKS” section:

AS PER THE EXPORT CONTRACT FOR DRIED  
FRUIT, TREE NUTS AND KINDRED PRODUCTS,  
ADOPTED BY THE CALIFORNIA DRIED FRUIT

Ahcom, Ltd. v. Smeding, Not Reported in F.Supp.2d (2008)

EXPORT ASSOCIATION EFFECTIVE MARCH 1989.—ARBITRATION IN ACCORDANCE WITH THE RULES OF WAREN VEREIN—INTERNATIONAL PARTICIPATION PERMITTED—SHALL BE COMPETENT FOR FINAL SETTLEMENT OF ALL AND ANY DISPUTES ARISING THEREFROM.

See Michael Decl. Ex. B (capitalization in original). Based on these confirmation documents, Ahcom would send NFI a purchase contract, listing Redfern as the broker, and including the following conditions of sale:

\*2 All other terms and conditions as per USDA/DFA terms and conditions, including Waren–Verein arbitration clause and the rules of arbitration and appeal, of which the parties admit acknowledgment. In the event of arbitration and subsequent legal enforcement, all costs to be borne by the loser.

See *id.*

According to Ahcom, NFI defaulted on one or more of these purchase contracts. Ahcom then initiated an arbitration with the Waren–Verein der Hamburger Börse e.V. The Waren–Verein is a German trade association that represents the interests of wholesale traders in dried fruit and edible nuts, among other commodities, and that maintains its own arbitral tribunal.<sup>1</sup> The arbitrators awarded Ahcom \$1,428,000.00 plus interest. NFI never satisfied this award.

Ahcom brought this suit to confirm and enforce the WarenVerein’s arbitration award. Although the Smedings were not parties to the arbitration, Ahcom alleges that they are NFI’s alter egos, and that they should therefore be liable for the arbitration award. The Smedings moved for summary judgment on the grounds that they are not NFI’s alter egos and that the Court lacks jurisdiction to confirm the arbitration award because there was not a signed, written agreement containing an arbitration clause. Ahcom moved for summary judgment on the same issues.

### III. LEGAL STANDARD

Entry of summary judgment is proper “if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.” Fed.R.Civ.P. 56(c). “Summary judgment should be granted where the evidence is such that it would require a directed verdict for the moving party.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242,

250, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). Thus, “Rule 56(c) mandates the entry of summary judgment ... against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). In addition, entry of summary judgment in a party’s favor is appropriate when there are no material issues of fact as to the essential elements of the party’s claim. *Anderson*, 477 U.S. at 247–49.

### IV. DISCUSSION

The Court finds that there remain significant disputes regarding material issues of fact underlying both of the legal issues presented in the motions.

Under Article II section 2 of the Convention, “The term ‘agreement in writing’ shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.” The Smedings argue that there is no contract signed by NFI agreeing to the arbitration rules. Ahcom claims that Redfern agreed to the terms as NFI’s agent. Ahcom further claims that when the dispute arose, Hendrik Smeding agreed in email, a written communication Ahcom claims satisfies the Convention, that the dispute should proceed before the Waren–Verein. The Smedings respond that Redfern was only a broker, not an agent, and had no authority to agree to an arbitration provision on NFI’s behalf. The Smedings also claim that the email on which Ahcom relies was in jest, a sarcastic reply to Ahcom’s threat. These factual disputes are central to the question of whether the parties actually agreed to arbitrate, and therefore determinative of the Court’s jurisdiction. See, e.g., *Czarina, L.L.C. v. W.F. Poe Syndicate*, 358 F.3d 1286, 1291–92 (11th Cir.2004). Considering the evidence offered by each party, while drawing the necessary inferences for the other as the non-moving party, the Court cannot grant summary judgment on the jurisdiction question.

\*3 With regard to the question of alter ego, the parties dispute whether California or federal law governs. The Court DENIES Defendants’ *ex parte* application to submit additional authority. Defendants provide no reason why they could not have cited these authorities earlier. In their moving papers, Defendants cited exclusively to California law to support their position regarding alter ego. See *Defs.’ Mot.* at 6–9. What’s more, the additional authorities Defendants attempt to offer demonstrate that it

Ahcom, Ltd. v. Smeding, Not Reported in F.Supp.2d (2008)

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is unclear whether courts should follow state or federal law on the issue, and that resolution of the ambiguity is unnecessary because there is no meaningful difference between the two and federal courts regularly look to state law for guidance. See, e.g., *Ministry of Def. of Iran v. Gould*, 969 F.2d 974, 769 n. 3 (9th Cir.1992) (citing *Mesler v. Bragg Mgt. Co.*, 39 Cal.3d 290, 216 Cal.Rptr. 443, 702 P.2d 601, 606 (Cal.1985)); *Bowoto v. Chevron Texaco Corp.*, 312 F.Supp.2d 1229, 1236 n. 6 (N.D.Cal.2004) (“California law on piercing the corporate veil is substantially similar to the rule announced in federal cases.”) (citing *Ministry of Def. of Iran*, 969 F.2d at 769 n. 3).

Given the significant factual disputes on the record, there is no need at this juncture for the Court to enter uncharted waters and resolve the tension, if any exists, between application of state and federal law. The parties provide directly conflicting declarations and documentary evidence regarding whether and to what extent the Smedings observed corporate formalities and distinguished their own interests from those of NFI. As one example among many, Ahcom argues that NFI was never adequately capitalized, and therefore could not be

legally separate from the Smedings. The Smedings assert that NFI was adequately capitalized for nearly two decades and that the financial difficulties NFI faced near its demise are not indicative of identity of interest between the Smedings and NFI. Without resolution of these factual issues, summary judgment for either party is inappropriate, regardless of which law governs.

**V. CONCLUSION**

The Court finds that there remain significant disputes regarding material issues of fact. The Court therefore DENIES Defendants’ Motion and DENIES Plaintiff’s Motion.

IT IS SO ORDERED.

**All Citations**

Not Reported in F.Supp.2d, 2008 WL 1701731

Footnotes

- 1 The information regarding the Waren–Verein is taken from the English language section of that association’s web site, available at <http://www.waren-verein.de/index.afp? & LG=EN & CMD=STARTSEITE>.

## Exhibit 2

Bleu Products, Inc. v. Bureau Veritas Consumer Product..., Not Reported in...

**H** KeyCite history available

2009 WL 649061

Only the Westlaw citation is currently available.  
United States District Court,  
C.D. California.

BLEU PRODUCTS, INC.

v.

BUREAU VERITAS CONSUMER  
PRODUCT SERVICES (HONG KONG)  
LTD. et al.

No. CV 08-2591 CAS (JCx).

March 9, 2009.

**Attorneys and Law Firms**

Laurie Butler, for Plaintiffs.

[Alexandra Eband](#), for Defendants.

**Proceedings: Plaintiff's Motion For Leave to File a  
Second Amended Complaint** (filed 1/21/09)

[CHRISTINA A. SNYDER](#), Judge.

\*1 Catherine Jeang, Deputy Clerk.

Laura Elias, Court Reporter / Recorder.

**I. INTRODUCTION AND BACKGROUND**

On November 21, 2007, plaintiff Bleu Products, Inc. filed the instant action in Los Angeles County Superior Court against defendant Bureau Veritas Consumer Products Services, Inc. (a Massachusetts corporation) ("BV-MA") and Does 1-50. On February 28, 2008, plaintiff filed a first amended complaint ("FAC"), in which it added as defendants Bureau Veritas Consumer Product Services (Hong Kong) LTD. ("BV-HK") and Bureau Veritas S.A.

("BV-SA").

In plaintiff's FAC, plaintiff alleges that defendants are in the business of inspecting and testing products to ensure their proper manufacture and their compliance with laws, regulations, standards, and/or guidelines. FAC ¶ 10. Plaintiff alleges that it contracted with third parties to manufacture and market jackets to be sold by Costco Wholesale ("Costco"). FAC ¶ 11. Plaintiff alleges that on May 19, 2006, it entered into a contract with BV-HK, "which acted as the agent, department, alter-ego, and/or instrumentality" of BV-MA, through which BV-HK agreed to conduct a textile laboratory test and inspection of the various garments which plaintiff had contracted to manufacture for Costco. FAC ¶ 12. Plaintiff alleges that it submitted Costco's "Textile Lab Test & Inspection Request" ("testing order") to BV-HK. FAC ¶ 13. Plaintiff alleges that BV-HK contravened the testing order terms when it failed to test a sample of garments selected from 10,000 pieces, and instead chose a sample from less than 10,000 pieces. FAC ¶ 15. Plaintiff alleges that, subsequently, the testing report issued by BV-HK failed to identify the critical problem (defective buttons) that affected almost all of the garments in the order. FAC ¶ 16. Plaintiff alleges that, as a result of defendants' breach of the testing order, Costco returned almost 57,000 garments to plaintiff. FAC ¶ 22. Plaintiff's FAC asserts claims for (1) breach of written contract; (2) fraud and deceit; (3) negligent misrepresentation; (4) negligence; and (5) breach of covenant of good faith and fair dealing.

Defendants BV and BV-HK removed the instant action to this Court on April 18, 2008. At the time of removal, BV-SA had not been served with the FAC.

On June 23, 2008, the Court held a scheduling conference. The Court established a deadline of November 14, 2008 as the last day to file a request for amended pleadings or for leave to add parties.

On July 16, 2008, due to plaintiff's continuing failure to serve the FAC on BV-SA, the Court issued an order to show cause as to why plaintiff's action against BV-SA should not be dismissed for lack of prosecution. On July 22, 2008, plaintiff filed a notice of dismissal of BV-SA.

On January 21, 2009, plaintiff filed the instant motion to amend its FAC. Defendants filed an opposition on February 6, 2009. A reply was filed on February 13, 2009. Defendants filed a surreply on February 27, 2009. A hearing was held on March 9, 2009. After carefully considering the arguments set forth by the parties, the Court finds and concludes as follows.

Bleu Products, Inc. v. Bureau Veritas Consumer Product..., Not Reported in...

## II. LEGAL STANDARD

\*2 Once a court has filed a pretrial scheduling order pursuant to Fed.R.Civ.P. 16, the standards of Rule 16 govern amendment of the pleadings. *Hood v. Hartford Life and Acc. Ins. Co.*, 567 F.Supp.2d 1221, 1224 (E.D.Cal.2008) (citing *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 607–08 (9th Cir.1992)). Orders entered before the final pretrial conference may be modified only “upon a showing of good cause.” Fed.R.Civ.P. 16(b). The “good cause” requirement of Rule 16 “primarily considers the diligence of the party seeking the amendment. The pretrial scheduling order can only be modified ‘if it cannot reasonably be met despite the diligence of the party seeking the extension.’” *Id.* (quoting *Mammoth Recreations*, 975 F.2d at 609).

When the proposed modification is an amendment to the pleadings, the moving party may establish good cause by showing “(1) that she was diligent in assisting the court in creating a workable Rule 16 order; (2) that her noncompliance with a Rule 16 deadline occurred or will occur, notwithstanding her diligent efforts to comply, because of the development of matters which could not have been reasonably foreseen or anticipated at the time of the Rule 16 scheduling conference; and (3) that she was diligent in seeking amendment of the Rule 16 order, once it became apparent that she could not comply with the order.” *Jackson v. Laureate, Inc.*, 186 F.R.D. 605, 608 (E.D.Cal.1999).

If the moving party can demonstrate diligence under Rule 16, the Court then applies Fed.R.Civ.P. 15 to determine if the amendment is proper. *Hood*, 567 F.Supp.2d at 1224. Pursuant to Rule 15(a), “leave [to amend] is to be freely given when justice so requires.” Fed.R.Civ.P. 15(a). “[L]eave to amend should be granted unless amendment would cause prejudice to the opposing party, is sought in bad faith, is futile, or creates an undue delay.” *Martinez v. Newport Beach*, 125 F.3d 777, 785 (9th Cir.1997).

## III. DISCUSSION

### A. Plaintiff Seeks to Add Additional Defendants

Plaintiff seeks to add a number of Bureau Veritas entities

as defendants in its proposed second amended complaint (“SAC”). Plaintiff alleges that these entities hold themselves out as the Bureau Veritas Group (“BV–Group”), an entity which includes 288 subsidiaries and which, plaintiff argues, operates in effect as a single entity under the control of BV–SA. MPA at 3.

#### 1. BV–HKL

Plaintiff seeks to add as a defendant Bureau Veritas Hong Kong Limited (“BVHKL”). Mot. at 4. Plaintiff alleges that, during discovery, it learned of the existence of BV–HKL, which, plaintiff contends, in addition to having a similar name to defendant BV–HK, also maintains its two offices at the same street address as BV–HK. Mot. at 4. Plaintiff alleges that it learned during discovery that BV–HKL is the entity that actually invoiced plaintiff for the services at issue in this case. Memorandum of Points and Authorities (“MPA”) at 3.

#### 2. BV–Shanghai

\*3 Plaintiff also alleges that discovery has revealed that an entity called Shanghai SIC–MTL Testing Co. Ltd. (“BV–Shanghai”) exists, which, plaintiff contends, is referred to under a different name (BVCPS–III, China) in BV–HK’s August 2008 initial disclosure statement, and which is 60 percent owned by BV–HK. Mot. at 5. Plaintiff contends that it learned during discovery that BV–Shanghai is the entity that actually performed the tests on the garments at issue in this suit. MPA at 3.

#### 3. BV–SA

Plaintiff seeks to add as a defendant BV–SA, the entity that was previously dismissed as a defendant on July 22, 2008. Plaintiff alleges that it dismissed BV–SA in July 2008 because BV–SA is based in France and, at the time of dismissal, plaintiff was unaware of any jurisdiction within the United States where BV–SA could be served; plaintiff contends that it could not afford the cost of translating the necessary papers in order to effect service in France. Mot. at 3. However, plaintiff alleges that it recently discovered that BV–SA maintains offices in New York, is registered as a foreign corporation with the New York Department of State, Division of Corporations, and

**Bleu Products, Inc. v. Bureau Veritas Consumer Product..., Not Reported in...**

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has an agent for service of process in the U.S. Mot. at 4.

#### **4. BVH**

Plaintiff alleges that discovery has revealed the existence of Bureau Veritas Holding, Inc. (“BVH”), a Delaware corporation, which is wholly owned by BV–SA and which wholly owns defendant BV–MA. Mot. at 6. Plaintiff argues that, because the “chain of responsibility” flows through BVH, it should be named as a defendant. Mot. at 6.

#### **5. BVIS**

Plaintiff also alleges that discovery has revealed the existence of Bureau Veritas International SAS (“BVIS”), headquartered in France. Mot. at 7. Plaintiff contends that BVIS is wholly owned by BV–SA, and that BVIS wholly owns defendant BV–HK and proposed defendant BV–HKL. Mot. at 7. Plaintiff argues that because the “chain of responsibility” flows through BVIS, it should be named as a defendant. Mot. at 7.

#### **6. Good Cause for Amendment**

Plaintiff argues that it discovered most of the relevant facts regarding the additional entities it seeks to add as defendants either directly from discovery, or indirectly by investigation prompted by discovery. MPA at 4. Plaintiff argues that defendants were late in responding to plaintiff’s October 8, 2008 discovery requests, and that plaintiff granted extensions because defendants’ former attorneys, Thelen, Reid, Brown, Raysman, & Steiner LLP, went out of business and withdrew from this action. MPA at 4. Plaintiff argues that because it did not receive defendants’ discovery responses until December 3, 2008, and did not receive defendants’ document production until December 15, 2008, it was not able to file the instant motion to amend before the November 14, 2008 cut-off date established in the scheduling conference. MPA at 4.

Plaintiff further argues that the interests of justice require granting plaintiff leave to amend, so as to ensure that all pertinent BV entities directly involved in the testing at issue—namely BV–HKL and BV–Shanghai—are named, and for the purpose of establishing agency and alter ego

liability against the other entities. MPA at 5. Plaintiff further argues that, without amendment, plaintiff may have difficulty obtaining relief. MPA at 5. For example, plaintiff argues that if the additional entities are not added as defendants, plaintiff may have difficulty collecting a money judgment from BV–HK, which has no offices in the United States. MPA at 6. Furthermore, plaintiff argues that BV–HK might succeed in arguing to the Court that the Court lacks personal jurisdiction over it, while BV–MA might argue successfully that it had nothing to do with the garment testing at issue. MPA at 6. Finally, plaintiff argues that BV–HK might succeed in arguing that it was in fact BV–HKL and BV–Shanghai, not BV–HK, who were responsible for the testing at issue, and that, without the addition of these entities, plaintiff will not be able to collect. MPA at 6.

\*4 Defendants, however, argue that plaintiff should not be permitted to add these additional entities as defendants.

#### **a. BV–HKL and BV–Shanghai**

Defendants argue that BV–Shanghai and BV–HKL may not be added because (1) there was undue delay in bringing claims against these defendants and (2) such an amendment would be futile because the Court lacks personal jurisdiction over these defendants. Opp’n at 2.

Defendants also take issue with plaintiff’s contention that it did not learn until after the FAC was filed that BV–HKL was the entity that invoiced plaintiff and that BV–Shanghai performed the tests at issue. Opp’n at 7. Defendants note that the inspection report, attached as Exhibit D to plaintiff’s FAC, is twice signed “BV CPS IAA Shanghai Office” and includes BV–Shanghai’s office address. Opp’n at 7; FAC Ex. D. Furthermore, defendants note that plaintiff appended as Exhibit C to its FAC an email attaching an electronic version of the invoice for inspection services, which included in its signature line “Bureau Veritas Hong Kong Ltd.” (ie. BV–HKL, not BV–HK) and stated “please make payable to Bureau Veritas Hong Kong Limited.” Opp’n at 8; FAC Ex. C. Furthermore, plaintiff argues that the hardcopy of the invoice was expressly issued by “Bureau Veritas Hong Kong Limited.” Opp’n at 8; Epend Decl. Ex. 1.

In addition, defendant argues that granting leave to add BV–HKL and BV–Shanghai would be futile because the Court lacks personal jurisdiction over these defendants. Opp’n at 10. Specifically, defendants argue that, contrary to the assertion in plaintiff’s SAC that BV–HKL and BV–Shanghai are doing business in California and that

**Bleu Products, Inc. v. Bureau Veritas Consumer Product..., Not Reported in...**

they contracted to buy and sell goods and services in California, there is no indication that BV–HKL or BV–Shanghai took any action in the United States; instead, defendants argue, BV–HKL and BV–Shanghai provided testing and inspection services and invoiced for such services in their home jurisdictions, and that the goods at issue were inspected in China at the Chinese factory that manufactured them. Opp’n at 10.

The Court finds that, given the discovery delay and the potentially confusing similarity in the names of some of the BV–entities, granting plaintiff leave to amend to add BV–HKL and BV–Shanghai is appropriate. Furthermore, the Court cannot conclude at this juncture that the Court lacks personal jurisdiction over BV–HKL and BV–Shanghai, although defendants may raise such arguments in a separately noticed motion to dismiss.

**b. BV–SA, BVH, and BVIS**

**i. Personal Jurisdiction over BV–SA**

Defendants argue that adding BV–SA as a defendant would also be futile, because the Court lacks personal jurisdiction over BV–SA. Opp’n at 2. Specifically defendants argue that plaintiff is incorrect in stating that BV–SA has offices in New York. Opp’n at 11. Defendants argue that the address listing on the New York Department of State, Division of Corporations is out of date, that BV–SA has not done business in New York since 1991 and that BV–SA filed a Certificate of Surrender of Authority in February 2008. Opp’n at 11.

**ii. Alter Ego Liability for BV–SA, BVH, and BVIS**

\*5 Finally, defendants argue that any claims against BV–SA, BVH, and BVIS are futile, because the proposed SAC does not plead with particularity any basis for alter ego liability against these affiliates.<sup>1</sup> Opp’n at 12.

The alter ego doctrine “arises when a plaintiff comes into court claiming that an opposing party is using the corporate form unjustly and in derogation of the plaintiff’s interests.” *Neilson v. Union Bank of Cal., N.A.*, 290 F.Supp.2d 1101, 1116 (C.D.Cal.2003). Under California law, “[w]hether alter ego applies is a question of fact which necessarily varies according to the

circumstances of each case.” *Inst. of Veterinary Pathology, Inc. v. Cal. Health Labs., Inc.*, 116 Cal.App.3d 111, 119, 172 Cal.Rptr. 74 (1981). However, in order for alter ego liability to apply, two conditions must be met: “(1) such a unity of interest in ownership exists so as to dissolve the separate corporate personalities of the parent and the subsidiary, relegating the latter to the status of merely an instrumentality, agency, conduit or adjunct of the former, and (2) an inequitable result will occur if the conduct is treated as that of the subsidiary alone.” *Id.* In other words, the plaintiff must show “specific manipulative conduct by the parent toward the subsidiary which relegates the latter to the status of merely an instrumentality, agency, conduit or adjunct of the former.” *Laird v. Capital Cities/ABC, Inc.*, 68 Cal.App.4th 727, 742, 80 Cal.Rptr.2d 454 (1998) (quoting *Veterinary Pathology*, 116 Cal.App.3d at 119–120, 172 Cal.Rptr. 74).

Defendants note that courts have found that “[c]onclusory allegations of ‘alter ego’ status are insufficient to state a claim. Rather, a plaintiff must allege specifically both of the elements of alter ego liability, as well as facts supporting each.” *Neilson v. Union Bank of Cal., N.A.*, 290 F.Supp.2d 1101, 1116 (C.D.Cal.2003); *Hokama v. E.F. Hutton & Co.*, 566 F.Supp. 636, 647 (C.D.Cal.1983) (“[c]onclusory allegations of alter ego status such as those made in the present complaint are not sufficient”); *Brennan v. Concord EFS, Inc.*, 369 F.Supp.2d 1127, 1136 (N.D.Cal.2005).

Defendants note that plaintiff’s proposed SAC contains allegations that various named and proposed defendants “[are] and still [are] an agent, department, alter-ego, and/or instrumentality of” BV–SA, BVS, and BVH; that defendants and proposed defendants “held themselves out as a single, unified, global entity[;]” and that “BV–Group provides globally-centralized services for most or all 200+ subsidiaries in the areas of quality management, information technology ..., human resources management, ethics management, environmental management, financial management, cash management, risk management, and litigation management ...”<sup>2</sup> Opp’n at 15; see SAC at ¶¶ 14, 16–20, 24, 26, 29, 37. Defendants argue that these conclusory allegations fail to state either of the required elements for alter ego liability: unity of interest or inequitable result. Opp’n at 15; see SAC at ¶¶ 14, 16–20, 24, 26, 29, 37; see *Neilson, N.A.*, 290 F.Supp.2d at 1116.<sup>3</sup> Furthermore, defendants contend that plaintiff’s justification for adding these entities—that the Court may lack personal jurisdiction over some of the defendants and that therefore, without amendment, plaintiff may be unable to collect a judgment—is insufficient to justify amendment to add entities who were not directly involved

Bleu Products, Inc. v. Bureau Veritas Consumer Product..., Not Reported in...

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in the transaction at issue. Opp'n at 16; *Sonora Diamond Corp. v. Superior Court*, 83 Cal.App.4th 523, 537, 99 Cal.Rptr.2d 824 (Cal.Ct.App.2000) (“the alter ego doctrine does not guard every unsatisfied creditor of a corporation but instead affords protection where some conduct amounting to bad faith makes it inequitable for the corporate owner to hide behind the corporate form. Difficulty in enforcing a judgment or collecting a debt does not satisfy this standard.”)

\*6 The Court concludes that, despite defendants' arguments, granting leave to amend to add BV-SA, BVH, and BVIS is appropriate. First, the Court cannot conclude at this juncture that it lacks personal jurisdiction over such defendants. Second, the Court declines to find at this juncture that plaintiff cannot as a matter of law establish alter ego liability for these entities.

#### B. Other Amendments

Plaintiff also seeks to amend its FAC in order to correct “several minor factual errors in the FAC based on what has been learned in discovery and investigation.” MAP at 5. Defendants do not address the specific changes that plaintiff seeks to make. However, in their opposition, defendants do argue that *any* amendment to plaintiff's claims for breach of contract, breach of the covenant of good faith and fair dealing, fraud, and negligent misrepresentations claims would be futile, and therefore,

leave to amend should not be granted. In their reply, plaintiff submits a revised SAC, which, plaintiff argues, cures the purported defects in the pleading. In their surreply, defendants state that they do not object to these revisions of the SAC, and will raise arguments regarding whether the SAC states a claim in a motion to dismiss. However, defendants request an extension of the discovery deadline in order to permit briefing of their motion to dismiss plaintiff's SAC.

#### IV. CONCLUSION

For the foregoing reasons, the Court GRANTS plaintiff's motion to amend its first amended complaint. Plaintiff is hereby granted twenty (20) days in which to amend its complaint.

The Court GRANTS defendants' request for an extension of the discovery deadline. The parties may file a joint stipulation extending the discovery and motion cut-off dates and pretrial conference and trial dates for a period not to exceed 120 days.

IT IS SO ORDERED.

#### All Citations

Not Reported in F.Supp.2d, 2009 WL 649061

#### Footnotes

- 1 Plaintiff's SAC lists BV-HKL, BV-Shanghai, BVHK, and BV-MA as “primary defendants” i.e. as the defendants with whom plaintiff contracted to perform the services at issue. SAC ¶¶ 25., 35. Therefore, it appears that the remaining defendants—BV-SA, BVH, and BVIS—are named exclusively under an alter ego liability theory.
- 2 Specifically, plaintiff alleges that all defendants and proposed defendants are alter egos of BV-SA, that BV-MA is an alter ego of BVH, and that BV-HKL and BV-HK are alter egos of BVIS. SAC ¶¶ 17, 18, 19.
- 3 With its reply, plaintiff submits a revised SAC, which, it argues, responds to defendants' arguments and therefore moots their motion. Defendants in their surreply, however, maintain that plaintiff's revised SAC is also deficient in its pleading of alter-ego liability, because the proposed SAC lacks any allegations that BV-Shanghai and BV-HKL are sham corporate entities that were created by BV-SA in order “to perpetrate a fraud, circumvent a statute, or accomplish some other wrongful or inequitable purpose.” Surreply at 11, citing *Robbins v. Blecher*, 52 Cal.App.4th 886, 892, 60 Cal.Rptr.2d 815 (1997).

Bleu Products, Inc. v. Bureau Veritas Consumer Product..., Not Reported in...

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## Exhibit 3

Blizzard Entertainment, Inc. v. Joyfun Inc Co., Limited, Slip Copy (2020)

**C** KeyCite citing references available

2020 WL 1972284

Only the Westlaw citation is currently available.  
United States District Court, C.D. California.

BLIZZARD ENTERTAINMENT, INC.  
v.  
JOYFUN INC CO., LIMITED et al

Case No. SACV 19-1582 JVS (DFMx)

Filed 02/07/2020

#### Attorneys and Law Firms

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#### Proceedings: [IN CHAMBERS] Order Regarding Motions to Dismiss and to Serve by Alternative Means

The Honorable James V. Selna, U.S. District Court Judge

\*1 Before the Court are four motions.

First, Defendant Zroad Hong Kong Co., Ltd. (“Zroad HK”), moved to dismiss Plaintiff Blizzard Entertainment, Inc.’s (“Blizzard’s”) First Amended Complaint (“FAC”) for (1) lack of personal jurisdiction pursuant to [Federal Rule of Civil Procedure 12\(b\)\(2\)](#), and (2) failure to state a claim upon which relief can be granted pursuant to [Federal Rule of Civil Procedure 12\(b\)\(6\)](#). Mot., Dkt. No. 36. Blizzard opposed. Opp’n, Dkt. Nos. 45, 48. Zroad K replied. Reply, Dkt. Nos. 53, 56.

Second, Defendant Zroad Inc. moved to dismiss Blizzard’s FAC for (1) lack of personal jurisdiction pursuant to [Federal Rule of Civil Procedure 12\(b\)\(2\)](#), (2) lack of subject matter jurisdiction pursuant to [Federal Rule of Civil Procedure 12\(b\)\(1\)](#), and (3) failure to state a claim upon which relief can be granted pursuant to [Federal Rule of Civil Procedure 12\(b\)\(6\)](#). Mot., Dkt. No. 37. Blizzard opposed. Opp’n, Dkt. Nos. 45, 48. Zroad Inc. replied. Reply, Dkt. Nos. 54, 55.

Third, Defendant Joyfun Inc. Co., Limited (“Joyfun”) moved to dismiss Blizzard’s FAC (1) lack of personal jurisdiction pursuant to [Federal Rule of Civil Procedure 12\(b\)\(2\)](#), and (2) failure to state a claim upon which relief can be granted pursuant to [Federal Rule of Civil Procedure 12\(b\)\(6\)](#). Mot., Dkt. No. 43-1. Blizzard opposed. Opp’n, Dkt. Nos. 46, 48. Joyfun replied. Reply, Dkt. Nos. 57, 62.

Fourth, Blizzard filed a motion to serve (1) Defendant Howell Wang, the “sole owner” of Zroad HK, and (2) Defendant Carly Zhou, the “sole owner” of ZRoad, Inc. by alternative means. Mot., Dkt. No. 52. The motion is unopposed.

For the following reasons, the Court **DENIES** Zroad HK’s motion, **DENIES** Zroad Inc.’s motion, **GRANTS IN PART and DENIES IN PART** Joyfun’s motion, and **GRANTS** Blizzard’s motion.

#### I. Background

Blizzard asserts three causes of action for copyright infringement, contributory copyright infringement, and vicarious copyright infringement. See generally, FAC, Dkt. No. 32.

Blizzard, which has its principal place of business in Irvine, California, is a developer and publisher of interactive video and computer games for personal computers, game consoles, and mobile devices. Id. ¶ 8. Among Blizzard’s products are the games in the *Warcraft* game franchise (the “Warcraft Games”), which include *Warcraft III*, *World of Warcraft*, and *Hearthstone*. Id. ¶ 19. Blizzard is the owner of valid and subsisting registered copyrights in each of the Warcraft Games. Id. ¶ 23.

The Warcraft Games take place in the fictional universe of “Azeroth.” Id. ¶ 24. Various distinct humanoid or

**Blizzard Entertainment, Inc. v. Joyfun Inc Co., Limited, Slip Copy (2020)**

anthropomorphic “races” populate the Warcraft Universe, as well as hundreds of different animal species, creatures, monsters, and other recognizable characters. *Id.* ¶¶ 26-30.

Blizzard claims that the Defendants are infringing its intellectual property with their mobile and web-based game “Glorious Saga” (the “Infringing Game”). *Id.* ¶¶ 1-3, 33. The Infringing Game was released to the public in or about October 2018. *Id.* ¶ 50. At the time of its release, the Infringing Game was made available to be played by any member of the public around the world through the InstantFuns Websites. *Id.* Defendants also made the Infringing Game available to members of the public via Android and/or Windows distribution platforms such as the Google Play store and the Microsoft Store, and via an InstantFuns mobile “portal” downloadable from the Google Play store. *Id.* The Infringing Game is made available to the public on a “free-to-play” basis; Defendants do not charge users to play the Infringing Game. *Id.* ¶ 52. Instead, Defendants generate revenue by selling to their users (for actual currency) virtual currency in the form of “Khorium” gems. *Id.*

\*2 The Infringing Game was marketed to the public as a product developed by or originating from “Instantfuns” or “Instantfuns Game.” *Id.* ¶ 33. However, there is no registered corporate entity with the name “Instantfuns.” *Id.* Rather, Blizzard alleges that “Instantfuns” is a fictitious name used by several interrelated companies located or incorporated in Hong Kong, the British Virgin Islands, and mainland China. *Id.*

According to Blizzard, Defendant Joyfun has provided support and assistance with respect to the operation, development, marketing, promotion, and monetization of the Infringing Game. *Id.* ¶¶ 9, 42-45. Defendant Zroad HK claims to be the current owner of exclusive rights, including copyrights, in the Infringing Game and in various websites pursuant to which the Infringing Game was marketed and offered to the public. *Id.* ¶¶ 10, 36, 37. Defendants Zroad HK and Joyfun are Hong Kong companies owned or controlled by Defendant Howell Wang (“Wang”). *Id.* ¶¶ 9-10, 15. The two entities share owners, officers, founders, addresses, phone numbers, employees, credit cards, IP addresses, Internet service providers, and domain name servers. *Id.* ¶ 47.

Zroad Inc., which is incorporated under the laws of the British Virgin Islands, is a subsidiary or affiliate of Zroad HK and Joyfun. *Id.* ¶ 12. Zroad Inc. purports to own domain names and copyrights related to the Infringing Game. *Id.* ¶ 37.

Blizzard alleges that Defendants collectively are

responsible for the creation, distribution, marketing, and monetization of the Infringing Game in the United States. *Id.* ¶ 34.

## II. Legal Standard

### A. Fed R. Civ. Proc. 12(b)(1)

Dismissal is proper when a plaintiff fails to properly plead subject matter jurisdiction in the complaint. Fed. R. Civ. P. 12(b)(1). A “jurisdictional attack may be facial or factual.” *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). If the challenge is based solely upon the allegations in the complaint (a “facial attack”), the court generally presumes the allegations in the complaint are true. *Id.*; *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1139 (9th Cir. 2003). If instead the challenge disputes the truth of the allegations that would otherwise invoke federal jurisdiction, the challenger has raised a “factual attack,” and the court may review evidence beyond the confines of the complaint without assuming the truth of the plaintiff’s allegations. *Safe Air*, 373 F.3d at 1039. The plaintiff bears the burden of establishing subject matter jurisdiction. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994).

If, however, the question of jurisdiction is intertwined with factual issues going to the merits, the court should not resolve genuinely disputed facts, and require the movant to establish that there are no material facts in dispute and that the movant is entitled to prevail as a matter of law. *Roberts v. Corrothers*, 812 F.2d 1173, 1177 (9th Cir. 1987).

Pursuant to Article III of the Constitution, the Court’s jurisdiction over the case “depends on the existence of a ‘case or controversy.’” *GTE Cal., Inc. v. FCC*, 39 F.3d 940, 945 (9th Cir. 1994). A “case or controversy” exists only if a plaintiff has standing to bring the claim. *Nelson v. NASA*, 530 F.3d 865, 873 (9th Cir. 2008), *rev’d on other grounds*, 131 S. Ct. 746 (2011). To have standing, “a plaintiff must show (1) it has suffered an ‘injury in fact’ that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that their injury will be redressed by a favorable decision.” *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 180–81 (2000); see also *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *Nelson*, 530 F.3d at 873.

Blizzard Entertainment, Inc. v. Joyfun Inc Co., Limited, Slip Copy (2020)

**B. Fed R. Civ. Proc. 12(b)(2)**

\*3 Before trial, nonresident defendants may move to dismiss the case for lack of personal jurisdiction. [Fed. R. Civ. P. 12\(b\)\(2\)](#). Personal jurisdiction refers to a court's power to render a valid and enforceable judgment against a particular defendant. See [World-Wide Volkswagen Corp. v. Woodson](#), 444 U.S. 286, 291 (1980); [Pennoyer v. Neff](#), 95 U.S. 714, 720 (1877), overruled in part by [Shaffer v. Heitner](#), 433 U.S. 186, 206 (1977). The contours of that power are shaped, in large part, by the Due Process Clause of the Fourteenth Amendment, which requires sufficient "contacts, ties, or relations" between the defendant and the forum state before "mak[ing] binding a judgment *in personam* against an individual or corporate defendant." [Int'l Shoe Co. v. Washington](#), 326 U.S. 310, 319 (1945). Due Process requires that "there exist 'minimum contacts' between the defendant and the forum" in order to protect the defendant "against the burdens of litigating in a distant or inconvenient" court and lend "a degree of predictability to the legal system." [World-Wide Volkswagen](#), 444 U.S. at 291, 292, 297.

Jurisdiction must also comport with law of the forum state. See [Fed. R. Civ. P. 4\(k\)\(1\)\(A\)](#); [Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme](#), 433 F.3d 1199, 1205 (9th Cir. 2006) (en banc). Because California's long-arm statute allows the exercise of jurisdiction on any basis consistent with the state and federal constitutions, the jurisdictional analyses of state law and federal due process are the same. [Cal. Code Civ. Proc. § 410.10](#); see also [Yahoo!](#), 433 F.3d at 1205.

"Where a defendant moves to dismiss a complaint for lack of personal jurisdiction, the plaintiff bears the burden of demonstrating that jurisdiction is appropriate." [Schwarzenegger v. Fred Martin Motor Co.](#), 374 F.3d 797, 800 (9th Cir. 2004). Plaintiff's allegations of jurisdictional facts must also be supported by competent proof. [Hertz Corp. v. Friend](#), 559 U.S. 77, 96-97 (2010). In the absence of an evidentiary hearing, "[h]owever, this demonstration requires that the plaintiff 'make only a prima facie showing of jurisdictional facts to withstand the motion to dismiss.'" [Pebble Beach Co. v. Caddy](#), 453 F.3d 1151, 1154 (9th Cir. 2006) (quoting [Doe v. Unocal Corp.](#), 248 F.3d 915, 922 (9th Cir. 2001)). To make the requisite showing, a plaintiff "need only demonstrate facts that if true would support jurisdiction over the defendant." [Harris Rutsky & Co. Ins. Servs., Inc. v. Bell & Clements Ltd.](#), 328 F.3d 1122, 1129 (9th Cir. 2003) (internal quotation marks and citation omitted). In evaluating the plaintiff's showing, all uncontroverted allegations in the

complaint are taken as true and all disputed facts are resolved in plaintiff's favor. *Id.*; [Schwarzenegger](#), 374 F.3d at 800. If defendants adduce evidence controverting the allegations, the plaintiff must "come forward with facts, by affidavit or otherwise, supporting personal jurisdiction." [Scott v. Breeland](#), 792 F.2d 925, 927 (9th Cir. 1986)).

Personal jurisdiction may be premised on general personal jurisdiction (based on a defendant's continuous presence in a state) or specific personal jurisdiction (based on specific contacts with the state specifically related to the claims at issue). The parties appear to be in agreement that general jurisdiction is not at issue in this case. Thus, the issue is whether Defendants, who are not citizens of California, can be subject to personal jurisdiction in California based on their contacts with the forum state.

**1. Specific Personal Jurisdiction**

A defendant is subject to specific jurisdiction "if the controversy [is] sufficiently related to or arose out of [the defendant's] contacts with the forum state." [Omeluk v. Langsten Slip & Batbyggeri A/S](#), 52 F.3d 267, 270 (9th Cir. 1995). The Ninth Circuit employs a three-part test to determine whether a court possesses specific jurisdiction over a particular defendant: (1) the defendant must have "performed some act or consummated some transaction within the forum or otherwise purposefully availed himself of the privileges of conducting activities in the forum"; (2) the claim must "arise[ ] out of or result[ ] from the defendant's forum-related activities"; and (3) the exercise of jurisdiction must be reasonable. [Pebble Beach](#), 453 F.3d at 1155.

\*4 The plaintiff bears the burden on the first two prongs. [Schwarzenegger](#), 374 F.3d at 802. If the plaintiff fails to satisfy either prong, "jurisdiction in the forum would deprive the defendant of due process of law." See [Omeluk](#), 52 F.3d at 270. "If the plaintiff succeeds in satisfying both of the first two prongs, the burden then shifts to the defendant to 'present a compelling case' that the exercise of jurisdiction would not be reasonable." [Schwarzenegger](#), 374 F.3d at 802 (quoting [Burger King Corp. v. Rudzewicz](#), 471 U.S. 462, 476-78 (1985)).

The first requirement for specific jurisdiction is purposeful availment. [Schwarzenegger](#), 374 F.3d at 802 (quoting [Burger King Corp. v. Rudzewicz](#), 471 U.S. 462, 476-78 (1985)). A defendant will not be haled into a jurisdiction solely as a result of random, fortuitous, or attenuated contacts, or of the unilateral activity of another

Blizzard Entertainment, Inc. v. Joyfun Inc Co., Limited, Slip Copy (2020)

party of a third person. Id. at 475. A defendant must act in a way that purposefully avails himself to the privilege of conducting activities within the forum state. Id. A defendant does not need to physically enter into the forum state to be subject to jurisdiction, “so long as a commercial actor’s efforts are purposefully directed toward residents of another state.” Id. at 476 (quoting Keeton v. Hustler Magazine, Inc., 465 U.S., 770, 774–75).

The second requirement for specific jurisdiction is that the claim must arise out of a defendant’s forum related activities. For this factor, courts use a traditional “but for” causation test. Bancroft, 223 F.3d at 1088. The contacts constituting purposeful availment must be the ones that give rise to the current suit. Id. The analysis is such that, but for the contacts between a defendant and the forum state, the claim would not have arisen. Ziegler v. Indian River Cty., 64 F.3d 470, 474 (9th Cir. 1995).

Even if the first two prongs are satisfied, an unreasonable exercise of jurisdiction violates the Due Process Clause. Id. at 474–75. Courts consider seven factors in evaluating whether the exercise of jurisdiction is unreasonable:

- (1) the extent of a defendant’s purposeful interjection;
- (2) the burden on the defendant in defending in the forum;
- (3) the extent of conflict with the sovereignty of the defendant’s state;
- (4) the forum state’s interest in adjudicating the dispute;
- (5) the most efficient judicial resolution of the controversy;
- (6) the importance of the forum to the plaintiff’s interest in convenient and effective relief; and
- (7) the existence of an alternative forum.

Rio Properties, Inc. v. Rio Intern. Interlink, 284 F.3d 1007, 1021 (9th Cir. 2002). All seven factors must be weighed. Id. None of the factors is dispositive. Id.

### C. Fed R. Civ. Proc. 12(b)(6)

Under Rule 12(b)(6), a defendant may move to dismiss for failure to state a claim upon which relief can be granted. A plaintiff must state “enough facts to state a claim to relief that is plausible on its face.” Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). A claim has “facial plausibility” if the plaintiff pleads facts that “allow[ ] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009).

In resolving a 12(b)(6) motion under Twombly, the Court must follow a two-pronged approach. First, the Court must accept all well-pleaded factual allegations as true,

but “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” Iqbal, 556 U.S. at 678. Nor must the Court “accept as true a legal conclusion couched as a factual allegation.” Id. at 678–80 (quoting Twombly, 550 U.S. at 555). Second, assuming the veracity of well-pleaded factual allegations, the Court must “determine whether they plausibly give rise to an entitlement to relief.” Id. at 679. This determination is context-specific, requiring the Court to draw on its experience and common sense, but there is no plausibility “where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct.” Id.

### D. Fed R. Civ. Proc. 4(f)(3)

\*5 Fed. R. Civ. P. 4(f)(3) permits service in a place not within any judicial district of the United States “by other means not prohibited by international agreement, as the court orders.” Service under Rule 4(f)(3) must be directed by the Court and not prohibited by international agreement. Rio Properties, Inc. v. Rio International Interlink, 284 F.3d 1007, 1014 (9th Cir.2002). Courts have authorized a variety of alternative means of service, including publication, ordinary mail, mail to the defendant’s last known address, delivery to the defendant’s attorney, telex, and email. Id. at 1015. The court-directed method of service of process must “comport with constitutional notions of due process,” which requires that the method be “reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” Id. at 1016.

## III. Discussion

### A. Zroad HK’s Motion to Dismiss

#### 1. Specific Jurisdiction

The Court concludes that it has personal jurisdiction over Zroad HK regarding this action because the requirements for specific jurisdiction have been met.

First, the relevant forum is the entire United States, not merely California. See Blizzard Entm’t, Inc. v. Bossland GmbH, 2017 WL 412262, at \*4 (C.D. Cal. Jan. 25,

Blizzard Entertainment, Inc. v. Joyfun Inc Co., Limited, Slip Copy (2020)

2017).<sup>1</sup>

Rule 4(k)(2) provides that:

For a claim that arises under federal law, serving a summons ... establishes personal jurisdiction over a defendant if: (A) the defendant is not subject to jurisdiction in any state's courts of general jurisdiction; and (B) exercising jurisdiction is consistent with the United States Constitution and laws.

Courts in the Ninth Circuit use a three-part analysis to assess whether jurisdiction is proper under Rule 4(k)(2). "First, the claim against the defendant must arise under federal law. Second, the defendant must not be subject to the personal jurisdiction of any state court of general jurisdiction. Third, the federal court's exercise of personal jurisdiction must comport with due process." [Pebble Beach Co. v. Caddy](#), 453 F.3d 1151, 1159 (9th Cir. 2006) (internal citations omitted). Blizzard has alleged claims under federal copyright law, so the first part of the test is met. As for the second requirement, it is Joyfun's burden to establish that another state would have jurisdiction, but it has not done so. Accordingly, the second requirement is also met. The third requirement of the Rule 4(k)(2) analysis is the same as the Ninth Circuit's test for specific jurisdiction, except that instead of looking at the defendant's contact with the forum state, the Court must consider contacts with the nation as a whole. Therefore, the Court will proceed to evaluate if specific jurisdiction over Joyfun is appropriate, considering the United States as the relevant forum.

#### a. Purposeful Availment

This test requires Blizzard to establish that Zroad HK "(1) committed an intentional act, (2) expressly aimed at the forum state, (3) causing harm that the defendant knows is likely to be suffered in the forum state." [Axion Foods, Inc. V. Acerchem International, Inc.](#), 874 F.3d 1064, 1069 (9th Cir. 2017).

The Ninth Circuit has developed a framework for analyzing whether a defendant's maintenance of a website constitutes purposeful availment towards a forum state. [Cybersell, Inc. v. Cybersell, Inc.](#), 130 F.3d 414 (9th Cir. 1997). A passive website, which establishes a "mere web presence," does not establish jurisdiction by itself. [Holland](#), 485 F.3d at 460; [Cybersell](#), 130 F.3d 414 at 417-418 (discussing [Bensusan Rest. Corp. v. King](#), 937 F. Supp. 295 (S.D.N.Y. 1996), *aff'd* 126 F.3d 25 (2d Cir. 1997) (general access web page that did not sell concert tickets but rather directed browsers to names and

addresses of ticket sellers did not provide minimum contacts with forum state)).

\*6 On the other hand, an "interactive" website may provide sufficient contacts depending on the "level of interactivity and commercial nature of the exchange of information" that occurs on the website. [Cybersell](#), 130 F.3d at 418. "If a website falls somewhere between passive and interactive, 'the likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of commercial activity that an entity conducts over the internet.'" [Quigley v. Guvera IP Pty Ltd.](#), 2010 WL 5300867 (N.D. Cal. 2010) (finding website interactive and commercial when it required users to register in order to download free music because registration information was used to generate targeted advertising revenue; quoting [Cybersell](#), 130 F.3d at 418). Internet advertisement alone is insufficient to subject the advertiser to jurisdiction in the plaintiff's home state; rather, "something more" is needed "to indicate that the defendant purposefully (albeit electronically) directed his activity in a substantial way to the forum state." *Id.*

Zroad HK argues that it did not purposefully avail itself of the privilege of conducting activities in California and that Blizzard has not alleged it "specifically exploited the California or United States market for commercial gain." Mot., Dkt. No. 36 at 12. Zroad HK contends that it did not create a special version of the game for the U.S. or California market, conduct a "special advertising campaign" aimed toward California, nor does it derive a high percentage of revenue from the state. *Id.* Indeed, Zroad HK notes that it has no offices or personnel in California. *Id.* Accordingly, Zroad HK argues that the first prong of the specific personal jurisdiction test is not satisfied.

The Court disagrees. The Court finds that Zroad HK purposefully availed itself of the privilege of conducting business in the United States by distributing the Infringing Game on platforms such as the Google Play store and Microsoft App store, selling virtual currency to American customers, and advertising the Infringing Game via platforms like Facebook. See FAC ¶ 6; [Goes Int'l, AB v. Dodur Ltd.](#), 2015 WL 5043296, at \*9 (N.D. Cal. Aug. 26, 2015). ("[D]efendants' acts of distributing infringing games to U.S. consumers and generating revenue (and diverting customers from Goes's games) are acts 'expressly aimed' at the U.S."). Zroad HK has done more than merely distribute a game for a worldwide audience or advertise to U.S. customers. Blizzard persuasively demonstrates that Zroad HK, along with the other Defendants, targets American players, intentionally.

Blizzard Entertainment, Inc. v. Joyfun Inc Co., Limited, Slip Copy (2020)

Opp'n at 13-17. Blizzard notes the following:

Server maintenance was scheduled at times that would cause minimum disruption to U.S. players, and were referred to using "US EDT." Declaration of James Berkley ("Berkley Decl."), Dkt. No. 48-2, Exs. 3, 53. In-game "events" or promotions were designed to coincide with U.S. holidays such as Labor Day and St. Patrick's Day. *Id.*, Exs. 3, 17. In-game currency prices were listed in U.S. dollars. FAC ¶ 52. Additionally, customer chat rooms and support forums were in English. Berkley Decl. ¶¶ 64-69, 79-82 & Exs. 52-56, 64-66 ... Defendants communicated with players using California-based Discord, which is a platform through which individuals can participate in public or private text or voice chats. *Id.* ¶¶ 79-83 & Exs. 64-67.

Opp'n at 7-10. The Court is satisfied that Zroad HK's activities were "intentional act[s]" that were "expressly aimed" at U.S. customers. See *Adobe Sys. Inc. v. Blue Source Group, Inc.*, 125 F. Supp. 3d 945, 960-61 (N.D. Cal. 2015) ("the Ninth Circuit has held that specific jurisdiction exists where a plaintiff files suit in its home state against an out-of-state defendant and alleges that defendant intentionally infringed its intellectual property rights knowing [the plaintiff] was located in the forum state."). Blizzard alleges that the Defendants, including Zroad HK, included the words "Warcraft" and "Blizzard" in their website html code. FAC ¶¶ 2-3, 54-58.

\*7 In its Reply, Zroad HK argues that Blizzard improperly collapses all of the Defendants together for the specific jurisdiction analysis. Reply at 5-6, 10. However, Blizzard alleges that Zroad HK worked together with Joyfun and Zroad Inc. to distribute, market, advertise, and support the Infringing Game in the United States. FAC ¶¶ 32-39. Blizzard has alleged sufficient evidence, at this stage in the proceedings, for the Court to consider the Zroad HK, Zroad Inc., and Joyfun entities "alter egos" of each other. *Id.* ¶¶ 35-49

**b. Arising Out of or Resulting From Forum-Related Activities**

Zroad HK objects to the argument that the suit arises out of or results from its forum-related activities in the U.S., contending that Blizzard has not alleged that Zroad HK, on its own, initiated contacts with the U.S. Mot. at 13. It argues that it "can access and use [Google Play, Facebook, and the Microsoft store] all over the world without ever having stepped foot in California or the US." *Id.*

But players in the U.S. would not have downloaded and played the Infringing Game *but for* Zroad HK's role in the distribution and marketing of the Infringing Game to users within the United States. In *AMA Multimedia LLC v. Sagan Ltd.*, 2016 WL 5946051, at \*5-6 (D. Ariz. Oct. 13, 2016), for example, the court reasoned that the Rule 4(k)(2) "but for" test was satisfied because:

the "[defendant's website] anticipated, desired and achieved a substantial [United States] viewer base with the intent of commercial gain.... [The website's] alleged infringement of [plaintiff's] copyrighted works would serve only to further the purpose of growing the United States viewership for commercial gain. What is more, [defendant's website] specifically targeted [plaintiff's] content, knowing [plaintiff] was a United States company protected by United States copyright laws, and proceeded to post that content in the United States, where [plaintiff] is attempting to make business use of its copyrighted material."

Accordingly, the Court finds that this prong of the jurisdictional analysis is satisfied.

**c. Reasonability**

Zroad HK argues that Blizzard "has failed to allege any facts showing that [it] purposefully injected themselves in the affairs of California or the US in connection with the alleged infringement." Mot. at 14. Further, it argues that it would be burdened by litigating in a foreign jurisdiction, given that it is incorporated and has its principal place of business in Hong Kong. *Id.* at 15-17. California, it argues, would be an "inconvenient location," since "all alleged wrongful acts and witnesses would be overseas." *Id.* at 16-17.

The Court finds that Zroad HK has failed to present "a compelling case" that the exercise of jurisdiction would be unreasonable. See *Schwarzenegger*, 374 F.3d at 802. Zroad HK's argument that Hong Kong may be a more reasonable forum is not enough; Zroad HK has not shown that having this action heard in California "would make the litigation *so gravely difficult and inconvenient* that a party unfairly is at a severe disadvantage in comparison to [its] opponent." *Sher v. Johnson*, 911 F.2d 1357, 1365 (9th Cir.1990) (quoting *Burger King Corp.* 471 U.S. at 478) (emphasis added). The Court has already addressed Zroad HK's argument regarding purposeful injection above. And Zroad HK's nonspecific objections regarding inconvenience are insufficient to show that jurisdiction is unreasonable. *Indiana Plumbing Supply, Inc. v. Standard*

Blizzard Entertainment, Inc. v. Joyfun Inc Co., Limited, Slip Copy (2020)

[of Lynn, Inc.](#), 880 F. Supp. 743, 748 (C.D. Cal. 1995) (“[I]n almost any case where the defendant does not reside in the forum state, some additional inconvenience is inevitable.”).

\*8 In sum, the Court **denies** dismissal of the FAC based on lack of personal jurisdiction over Zroad HK.

## 2. Failure to State a Claim

Zroad HK makes two main arguments in its motion. First, it argues that Blizzard has failed “to specify exactly what actions, if any, were carried out by” it, specifically, as opposed to the other Defendants. Mot., Dkt. No. 36 at 18. Zroad HK suggests that Blizzard is “unable to specify which Defendant did which wrongful action.” Reply, Dkt. No. 56 at 4. Second, Zroad HK contends that Blizzard “makes no allegations as to what serious and irreparable harm” it has suffered. Mot. at 18.

The Court finds that Blizzard’s FAC sufficiently alleges infringing behavior by Zroad HK. Blizzard claims that Zroad HK is the U.S. publisher of the Infringing Game and is responsible for the creation, marketing, advertising, distribution, and servicing of the Infringing Game in the United States. FAC ¶¶ 10, 36, 37. Blizzard alleged that Zroad HK created the English-language version of the Infringing Game; uploaded the Infringing Game to Google servers for further distribution to members of the public; engaged in extensive advertising and promotion of the Infringing Game; and provided customer and technical support services. *Id.* ¶ 36. And Blizzard adequately alleges that Zroad HK, along with the other Defendants, maintains common ownership and control over the Infringing Game. *Id.* ¶¶ 38-39. Contrary to Zroad HK’s assertion, Blizzard is not required to plead “specific damages” for copyright infringement at this stage. See [Martin Family Trust v. Christian Research Institute, Inc.](#), 2010 WL 11597956, at \*3 (C.D. Cal. Nov. 16, 2010) (“The FAC, however, alleges that infringement took place when the [defendants] uploaded the copyrighted material onto the Internet ... Plaintiffs ask for declaratory relief, actual damages, and attorneys’ fees. There is no heightened pleading standard for copyright infringement.”).

Accordingly, the Court **denies** Zroad HK’s motion to dismiss.

## B. Zroad Inc.’s Motion to Dismiss

### 1. Specific Jurisdiction

The Court concludes that it has personal jurisdiction over Zroad Inc. regarding this action because the requirements for specific jurisdiction have been met. The same legal standards apply as those articulated in discussing Zroad HK’s motion to dismiss on personal jurisdiction grounds.

#### a. Purposeful Availment

Zroad Inc. argues that there are “no factual allegations showing that [it] specifically exploited the California or United States market for commercial gain, nor could it since [it] is a shell corporation without employees or offices.” Mot., Dkt. No. 37 at 12. Zroad Inc. Adds that the Infringing Game “was available in most countries around the world,” Blizzard “made no allegation as to whether [it] advertised or marketed the alleged infringing game expressly aiming at California or the US” or that it “created a special website or version of the game that was catered to the California or US market.” *Id.* Therefore, Zroad Inc argues that the FAC does not satisfy this first prong of the jurisdictional analysis.

But Blizzard alleges that Zroad Inc. “exists in whole or in part to obscure the actual parties responsible for the Infringing Game” and purports “to be among the owners or prior owners of the copyright in the Infringing Game and related Internet websites. FAC ¶ 12. Blizzard claims that along with Zroad HK, Zroad Inc.:

\*9 created or oversaw the creation of the final form of the English-language Infringing Game; created and maintained portions of the websites dedicated to the Infringing Game, such as Instantfuns.com and Zroad.me (collectively, the “InstantFuns Websites”); entered into agreements with Google and Microsoft for the distribution of the Infringing Game on the Google Play and Microsoft Stores in the United States, entered into agreements with XSolla and similar third-party platforms for payment services for the Infringing Game (including for payments from United States players); uploaded the Infringing Game app to Google servers for further distribution to members of the public; and engaged in extensive advertising and promotion for the Infringing Game in the United States and other English-speaking countries. The ZRoad Defendants also engaged in ongoing customer and technical support (including to customers in the United States)

Blizzard Entertainment, Inc. v. Joyfun Inc Co., Limited, Slip Copy (2020)

through social media platforms, including by regularly posting to U.S.-based websites such as Facebook and Twitter and by setting up and participating in “chat rooms” on the U.S.-based social media platform “Discord.”

Id. ¶ 36. These allegations are sufficient to make out a prima facie case that Zroad Inc. “expressly aimed” its distribution and marketing of the Infringing Game towards the United States; *i.e.*, has purposefully directed its activities at this forum. And, the Court is satisfied that Blizzard has sufficiently alleged at this stage that Zroad Inc. is an “alter ego” of the other Defendants. See Opp’n, dkt. No. 48 at 19-21. Indeed, Zroad Inc. was the registered owner of the Instantfuns.com domain name from February 2018 to August 2019 and purported to own the copyright in the Instantfuns Website. Berkley Decl., Dkt. No. 48-2, Ex. 38.

#### b. Arising Out of or Resulting From U.S. Activities

The same reasoning applied to Zroad HK’s motion applies here: customers in the United States would not have downloaded and played the Infringing Game *but for* Zroad Inc.’s role in the distribution and marketing of the Infringing Game to users within the country. The fact that Zroad Inc. is incorporated in the British Virgin Islands and has no offices or employees does not negate the connection between this entity and the other defendants. The Court finds that this prong of the jurisdictional analysis is also met.

#### c. Reasonability

Zroad Inc. has failed to show that any of the relevant factors present a “compelling case” for why exercising jurisdiction would be unreasonable. Instead of meeting its burden, as it must under this prong, Zroad Inc. argues that Blizzard has failed to allege facts to meet a burden that it does not have here. See Mot. at 13-16. Therefore, the Court finds that it has personal jurisdiction over Zroad Inc. in this action and **denies** dismissal on this basis.

### 2. Subject Matter Jurisdiction

Zroad Inc. argues that all three standing factors demonstrate that the Court does not have subject matter jurisdiction over it in this action. First, Zroad Inc.

contends that Blizzard has not alleged it suffered “injury in fact” because the Infringing Game “has not been active for some time,” and because Blizzard “has made no allegation as to any monies lost directly related to the sale and distribution of the alleged infringing game or any decline in sales or players which can be directly related to the sale and distribution of the alleged infringing game.” Mot., Dkt. No. 37 at 18. Second, Zroad Inc. contends that Blizzard cannot show any injury is traceable to it, because it is a shell corporation without employees or offices. Id. at 19. Finally, it asserts that the alleged injury would not be redressed by a favorable decision because “[a] favorable decision by this Court against Zroad Inc. would bear no effect on the parties who indeed are responsible for the injury of [Blizzard].” Id. at 20.

The Court is not persuaded by these arguments, which are not supported by pertinent case law. Blizzard has adequately alleged an injury in fact with its infringement allegations. The suggestion that the Infringing Game is no longer in operation does not mean there is no longer an injury to be redressed. The alleged injury may be traced to Zroad Inc., as Blizzard alleges that it engaged in acts of infringement by developing, promoting, and supporting the Infringing Game and that it worked in concert with other Defendants to obfuscate the Game’s origins. FAC ¶¶ 36, 39. Blizzard also alleges that Zroad Inc. received revenue in connection with the Infringing Game. Id. ¶¶ 52, 58. Finally, Blizzard’s injury may be redressed by a favorable court decision, including in the form of statutory and actual damages, disgorgement of profits, injunctive relief, and impoundment. See 17 U.S.C. §§ 502, 504.

\*10 The Court concludes that Blizzard has standing to pursue this action against Zroad Inc., and **denies** the latter’s motion to dismiss on this ground.

### 3. Failure to State a Claim

Zroad Inc. argues that Blizzard has failed to plead, with specificity, what actions were carried out by Zroad Inc. and that Blizzard has inadequately alleged harm it has suffered. Mot. at 21-22.

The Court finds that Blizzard’s FAC sufficiently alleges infringing behavior by Zroad Inc. Blizzard claims that Zroad “has at various times purported to own or control the Infringing Game and the InstantFuns Websites.” FAC ¶ 37. Zroad Inc. also allegedly “is a developer, distributor, and/or publisher of the Infringing Game” and “exists in whole or in part to obscure the actual parties responsible

**Blizzard Entertainment, Inc. v. Joyfun Inc Co., Limited, Slip Copy (2020)**

for the Infringing Game.” *Id.* ¶ 12. And Blizzard adequately alleges that Zroad Inc., along with the other Defendants, maintains common ownership and control over the Infringing Game. *Id.* ¶¶ 38-39. Contrary to Zroad Inc.’s assertion, Blizzard is not required to plead “specific damages” for copyright infringement at this stage, as the Court noted above in discussing Zroad HK’s motion.

Accordingly, the Court **denies** Zroad Inc.’s motion to dismiss.

### **C. Joyfun’s Motion to Dismiss**

#### **1. Personal Jurisdiction**

The Court concludes that it has personal jurisdiction over Joyfun in this action because the requirements for specific jurisdiction have been met.<sup>2</sup> The same legal standards apply as those articulated above in discussing Zroad HK’s and Zroad Inc.’s motions to dismiss on personal jurisdiction grounds.

As a general matter, Joyfun objects that Blizzard’s allegations made collectively against it, Zroad Inc. and Zroad HK cannot establish jurisdiction over Joyfun. This is correct: “[e]ach defendant’s contacts with the forum State must be assessed individually.” *Calder v. Jones*, 465 U.S. 783, 790 (1984). And Joyfun argues that Blizzard cannot rely on an alter ego theory to establish jurisdiction because Blizzard has not plead enough facts to pierce the corporate veil. Mot. at 15-17. “To satisfy the alter ego test, a plaintiff must make out a prima facie case (1) that there is such unity of interest and ownership that the separate personalities [of the two entities] no longer exist and (2) that failure to disregard [their separate identities] would result in fraud or injustice.” *Ranza v. Nike, Inc.* 793 F.3d 1059, 1073 (9th Cir. 2015) (internal quotation marks and citations omitted).

As discussed below, the Court does not evaluate whether it has jurisdiction over Joyfun based upon an alter ego theory because it believes that Blizzard has adequately alleged that Joyfun had enough individual contacts with the forum.

#### **a. Purposeful Availment**

Joyfun argues that Blizzard has failed to show that it specifically targeted California with its allegedly infringing acts and that Joyfun’s acts “caused harm [it] knows is likely to be suffered in the forum state.” Mot., Dkt. No. 43-1 at 7-11; *Mavrix Photo, Inc. v. Brand Techs., Inc.*, 647 F.3d 1218, 1231 (9th Cir. 2011).

\*11 The Court finds that Blizzard has sufficiently alleged Joyfun engaged in “intentional acts” that were “expressly aimed” at the United States. See *Axiom Foods*, 874 F.3d at 1068–69. As discussed above, the relevant analysis is whether Joyfun purposefully availed itself of the privilege of conducting activities in the *United States*, not merely California, as Blizzard’s claims are asserted under federal law. Joyfun argues that “[t]here is no basis to find Rule 4(k)(2) jurisdiction here because Blizzard’s complaint does not meaningfully distinguish between Joyfun’s contacts with California and with the United States.” Mot. at 15. It spends much of its motion disputing that its activities were aimed at California, specifically, and cites *Werner v. Dowlatsingh*, 2018 WL 6975142, at \*7–8 (C.D.Cal. Sept. 17, 2018) for this argument. There, the court found that there was no purposeful direction to the United States where the defendant’s “aggregate contacts with the United States are not meaningfully different from his contacts with California.” *Id.* But that case is distinguishable; the plaintiff had thinly supported allegations regarding the defendant’s contacts with California and the rest of the United States. Here, by contrast, Blizzard has significantly more allegations regarding Joyfun’s activities expressly aimed at the United States.

Blizzard alleges that Joyfun worked with Zroad Inc. and Zroad HK to distribute, market, advertise, support and exploit the Infringing Game in the United States. FAC ¶¶ 32-34, 38. See *Michael Grecco Prods., Inc. v. Netease, Inc.*, 2019 WL 3245872, at \*1 (N.D. Cal. July 3, 2019) (personal jurisdiction where “[t]he Complaint alleges that [the corporate parent and subsidiary] worked together to curate American content that, allegedly, included [plaintiff’s] works.”) Defendants made the Infringing Game available to U.S. users via two Instantfuns Websites, which were in English and displayed an American flag. Berkley Decl. ¶¶ 3-4 & Exs. 1-2, 57.

Blizzard’s allegations not only consider collective actions, but also specific allegations of infringing conduct by Joyfun. Joyfun’s “operations and affairs are substantially intermingled with the ZRoad Defendants,” and Joyfun allegedly “provided material assistance to these Defendants in connection with their development, operation, distribution, monetization, and exploitation of the Infringing Game in the United States.” FAC ¶ 43.

**Blizzard Entertainment, Inc. v. Joyfun Inc Co., Limited, Slip Copy (2020)**

Blizzard gives the example that “JoyFun’s representatives, using Joyfun.com email addresses, issued press releases, tweets, and other online messages promoting the Infringing Game and other games published by ‘Instantfuns,’ ” and “[i]n some of those promotional materials, JoyFun purports to be located in the United States.” Id.

Further, Blizzard alleges that Joyfun “directed the creation of, and provided the ZRoad Defendants ... with software that was integrated into the Infringing Game, known as the JoyFun SDK,” and that “among other functions the JoyFun SDK enabled the Infringing Game to be monetized in the United States through XSolla and other payment platforms, and to be advertised in the United States through various platforms.” Id. ¶ 44. Finally, Blizzard alleges that “JoyFun provided the ZRoad ... Defendants with a variety of other services and facilities necessary to promoting and operating the Infringing Game, such as Internet hosting services, telephone services, customer support services, credit card and financial services, and domain name and email services.” Id. ¶ 45. And “JoyFun, including but not limited to through its co-owner and CEO Wang, knew or had reason to know that the Infringing Game was being distributed in the United States and was infringing Blizzard’s copyrights.” Id. Blizzard also alleges that Joyfun and the other Defendants targeted U.S. customers by facilitating their ability to create an Instantfuns account, assent to its Terms of Service, and purchase in-game currency. Id. ¶ 52. In addition, Blizzard claims that Joyfun representatives advertised and promoted the Infringing Game through press releases that announced its location as the “United State[s]” and contained links to websites where U.S. users could play or download the Infringing Game. Id. ¶ 43. And, Joyfun representatives created and oversaw the Discord channel through which its representatives communicated directly with U.S. players. Berkley Decl. ¶¶ 79-83, Exs. 64-67. These forms of support facilitated the distribution and monetization of the Infringing Game.

\*12 The Court views distribution of the Infringing Game to consumers and generating revenue from this distribution as intentional acts expressly aimed at the forum (the United States). And, Blizzard adequately alleges that Joyfun knew these acts would cause harm. Accordingly, the purposeful availment prong of the specific jurisdiction test is satisfied here.

**b. Arising Out of or Resulting From U.S. Activities**

Joyfun argues that “[n]one of Blizzard’s claims arise from Joyfun’s alleged acts—online statements about Glorious Saga or other games, writing non-infringing code embedded in Glorious Saga, and providing basic ‘services and facilities’ like Internet hosting.” Mot. at 12. However, these acts allegedly facilitated the distribution and monetization of the Infringing Game. But for Joyfun’s conduct, directed at the United States, Blizzard would not have been injured. Therefore this prong of the specific jurisdiction analysis is also met.

**c. Reasonability**

Joyfun contends that the first three factors involved in assessing the reasonability of exercising jurisdiction – extend of purposeful interjection, the burden of defending itself here, and conflict with foreign sovereignty – “weigh heavily” against doing so. See Mot. at 13; [Rio Properties, Inc](#), 284 F.3d at 1021. But the next three factors – the United States’ interest in adjudicating the dispute, the most efficient judicial resolution of the action, and the importance of the forum to Blizzard’s interest in convenient and effective relief – are, according to Joyfun, “more neutral.” Mot. at 14.

The Court has already found that Joyfun purposefully injected itself in the forum via its various forms of support for the operation and monetization of the Infringing Game. And the Court is not convinced that Joyfun would be unduly burdened by an action in this Court, or that the other factors strongly weigh against exercising jurisdiction. Accordingly, Joyfun has failed to present a “compelling case” for why exercising jurisdiction would be unreasonable.

**2. Failure to State a Claim**

Joyfun also moves to dismiss Blizzard’s FAC pursuant to [Rule 12\(b\)\(6\)](#). Mot. at 18-23.

**a. Direct Infringement**

First, Joyfun argues that Blizzard fails to state a claim for direct infringement because this claim requires showing that “that the defendant himself violated one or more of the plaintiff’s exclusive rights.” Id. at 18; [Ellison v. Robertson](#), 357 F.3d 1072, 1076 (9th Cir. 2004). Joyfun

Blizzard Entertainment, Inc. v. Joyfun Inc Co., Limited, Slip Copy (2020)

contends that the FAC does not assert “facts supporting the conclusion that Joyfun *itself* unlawfully infringed elements of the Warcraft works,” as opposed to the other defendants. Id.

Construing the pleadings in the light most favorable to Blizzard, the Court finds that it has stated a claim for direct infringement. Blizzard alleges the wrongful conduct in which Joyfun engaged, including that JoyFun advertised and promoted the Infringing Game (FAC ¶ 43), facilitated the monetization of the Game (id. ¶ 44), provided software that enabled the Infringing Game to connect to online servers (id.), and provided Internet hosting services, telephone services, customer support services, credit card and financial services, and domain name and email services. Id. ¶ 45. Blizzard alleges that Joyfun, including but not limited to through the actions of its co-owner and CEO Wang, knew or had reason to know that the Game was infringing Blizzard’s copyrights, in the United States. Id. Blizzard’s allegations “provide sufficient notice to all of the Defendants as to the nature of the claims being asserted against them,” including “what conduct is at issue,” and “identify what action each Defendant took that caused [Blizzard’s] harm.” See Adobe Systems Incorporated v. Blue Source Group, Inc., 125 F. Supp. 3d 945, 964-65 (N.D. Cal. 2015).

\*13 Accordingly, the Court **denies** dismissal of Blizzard’s direct infringement claim.

### b. Contributory Infringement

Next, Joyfun argues that Blizzard fails to plead contributory infringement. Id. at 18-20. This cause of action requires Blizzard to show that Joyfun knew (or had reason to know) of the infringing activities, and that it induced or materially contributed to them. Perfect 10, Inc. v. Visa Int’l Serv. Ass’n, 494 F.3d 788, 795 (9th Cir. 2007). In the Internet context, the Ninth Circuit has found contributory liability when the defendant “engages in personal conduct that encourages or assists the infringement.” ” A & M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1019 (9th Cir. 2001). Where a defendant has knowledge of the primary infringer’s infringing activities, it will be liable if it “induces, causes or materially contributes to the infringing conduct of” the primary infringer,” and “[s]uch participation must be substantial.” Religious Tech. Ctr. v. Netcom On-Line Comm’n Servs., Inc., 907 F. Supp. 1361, 1375 (9th Cir. 1995)

First, Joyfun argues that Blizzard’s allegations are

conclusory regarding knowledge. Mot. at 19; see FAC ¶ 45 (“At all relevant times, JoyFun, including but not limited to through its co-owner and CEO Wang, *knew or had reason to know* that the Infringing Game was being distributed in the United States and was infringing Blizzard’s copyrights.”). The Court disagrees. Contrary to Joyfun’s argument (see Mot. at 19), the knowledge requirement may be met without the defendant having been notified through a cease-and-desist letter. See, e.g., Sega Enterprises Ltd. v. MAPHIA, 857 F. Supp. 679, 687 (N.D. Cal. 1994) (knowledge established without prior cease-and-desist letter). Blizzard alleges that the Infringing Game is “almost entirely copied” from the Warcraft Games (FAC ¶¶ 2, 54), that the Infringing Game used the same character and equipment names as the Warcraft Games (id. at ¶ 55), that the Instantfuns websites included the keyword metatags “Blizzard,” “Warcraft,” and “WOW” (id. at ¶ 3), that Defendants created an app icon modeled on *World of Warcraft* (id. at ¶ 2), and that promotional materials for the Infringing Game feature *Warcraft* characters (id. at ¶ 58). These allegations, in addition to the allegations regarding Joyfun’s connections to Zroad Inc. and Zroad HK, are sufficient to satisfy the knowledge element of contributory infringement.

Second, Joyfun argues that neither Joyfun’s posting of “online messages” promoting the Infringing Game, nor provision of services to facilitate payment by users, constitutes a material contribution. Mot. at 19-20. In the FAC, Blizzard claims that JoyFun advertised and promoted the Infringing Game ( ¶ 43), provided essential services for the Infringing Game ( ¶ 45), financed the Infringing Game ( ¶ 45), operated the Infringing Game’s remote servers ( ¶ 44), and wrote code for the Infringing Game that allowed it to be monetized and to connect to the remote servers. Id. ¶ 44. This combination of contributions is substantial and satisfies this element of contributory infringement. See, e.g., Mophie, Inc. v. Shah, 2014 WL 10988339, at \*7-8 (C.D. Cal., Jul. 24, 2014); see also A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1022 (9th Cir. 2001) (“[w]ithout the support services defendant provides, Napster users could not find and download the music they want with the ease of which [Napster] boasts.”).

\*14 The Court finds that the FAC adequately states a claim for contributory infringement, and **denies** dismissal on this basis.

### c. Vicarious Infringement

“[T]o succeed in imposing vicarious liability, a plaintiff

Blizzard Entertainment, Inc. v. Joyfun Inc Co., Limited, Slip Copy (2020)

must establish that the defendant exercises the requisite control over the direct infringer and that the defendant derives a direct financial benefit from the direct infringement.” [Perfect 10, Inc. v. Amazon.com, Inc.](#), 508 F.3d 1146, 1173 (9th Cir. 2007). “[A] defendant exercises control over a direct infringer when he has both a legal right to stop or limit the directly infringing conduct, as well as the practical ability to do so.” *Id.*

The Court agrees with Joyfun that Blizzard’s allegations as to this allegation are conclusory and lack adequate support. Blizzard argues that “through the JoyFun SDK and its ownership of the remote servers for the Infringing Game, JoyFun possessed the ability at any time to block access to the Infringing Game by end-users, including users in the United States,” but does not point to any specific allegations in the FAC that support this point. Opp’n at 10. The FAC alleges that the software, JoyFun SDK, “was integrated into the Infringing Game,” and “enabled the Infringing Game to be monetized in the United States,” and “to be advertised in the United States,” but this does not amount to a “legal right to stop or limit the directly infringing conduct,” given that the game was offered, for free, to customers. *See* FAC ¶ 44.<sup>3</sup> Blizzard specifically alleges that Wang “supervised the acts of infringement alleged herein, and personally benefitted or profited from the infringement.” FAC ¶ 48. But this allegation is unsupported.

Because the control element is not satisfied, the Court finds that dismissal of the vicarious infringement claim is warranted, and **grants** Joyfun’s motion for this cause of action.

#### D. Blizzard’s Motion for Leave to Serve by Alternative Means

Pursuant to [Federal Rule of Civil Procedure 4\(f\)\(3\)](#), Blizzard moves to serve Wang and Zhou by delivering a copy of the initiating documents (in English and Chinese) to Anderson & Anderson LLP (“A&A”), which represents Zroad HK and Zroad Inc. in this action. Mot., Dkt. No. 52. Blizzard points out that Wang and Zhou have filed declarations in support of Zroad HK and Zroad Inc.’s motions to dismiss claiming that they are the “sole owners” of these two entities. Declaration of Marc E. Mayer (“Mayer Decl.”), Dkt. No. 36, Ex. 1 (Declaration of Howell Wang) ¶ 1; Dkt. No. 37-1 ¶ 1 (Declaration of Carly Zhou).

Blizzard argues that “Wang and Zhou are aware of this lawsuit, are directly involved in the defense of the ZRoad

Defendants to this lawsuit, and appear to be in regular contact with A&A,” and “cannot sign and submit sworn declarations in this action while simultaneously refusing to appear as defendants.” Mot at 2. Accordingly, Blizzard argues that “[s]ervice of process via A&A is not just ‘reasonably calculated’ to give notice; Wang and Zhou *already* are aware of this lawsuit, and A&A can ensure that they have received all necessary initiating documents.” Mot. at 2.

\*15 The Court finds that service via A&A is appropriate. The Motion asserts that neither can be located in the United States. *Id.* at 5-6. A&A has communicated with both, as they submitted declarations in this action. Blizzard has attempted to serve the defendants by conventional means, but has so far been unsuccessful, and it appears that a backlog of requests through China’s Ministry of Justice will mean that service on Wang could take over a year. *Id.* at 8-9. Meanwhile, Blizzard cannot locate Zhou’s address. *Id.* And the Hague Convention, the applicable international agreement here, does not prohibit this method of service. *See Prods. & Ventures Int’l v. Axus Stationary (Shanghai) Ltd.*, 2017 WL 1378532, at \*2 (N.D. Cal. Apr. 11, 2017) (“Courts have held that the Hague Convention does not prohibit service on a foreign defendant through counsel based in the United States.”).

The Court concludes that Blizzard’s proposed method of service comports with constitutional notions of due process and is “reasonably calculated, under all the circumstances, to apprise [Wang and Zhou] of the pendency of the action and afford them an opportunity to present their objections.” *See Rio Properties*, 284 F.3d at 1016; *see also Feyko v. Yuhe Int’l, Inc.*, 2013 WL 5142362, \*2 (C.D. Cal. Sept. 12, 2013) (“[T]his court joins the others that have found that due process permits authorizing service on counsel for the company that employs foreign individual defendants.”).

#### IV. Conclusion

For the foregoing reasons, the Court **DENIES** Zroad HK’s motion, **DENIES** Zroad Inc.’s motion, **GRANTS IN PART and DENIES IN PART** Joyfun’s motion, and **GRANTS** Blizzard’s motion.

**IT IS SO ORDERED.**

#### All Citations

Slip Copy, 2020 WL 1972284

Blizzard Entertainment, Inc. v. Joyfun Inc Co., Limited, Slip Copy (2020)

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Footnotes

- 1 At the hearing, Joyfun attempted to distinguish this case, arguing that the defendant's contacts were more extensive than its contacts with the United States here. It did not address this case in its Motion or Reply. Either way, the Court believes that the contacts in this case are sufficiently comparable.
- 2 Although Joyfun's motion discusses general jurisdiction (see Mot., Dkt. No. 43-1 at 5-6), Blizzard "does not claim that Defendants are subject to general jurisdiction in the United States." Opp'n, Dkt. No. 48 at 11. Accordingly, the Court only considers the parties dispute regarding specific jurisdiction.
- 3 Blizzard focuses on the "limit" language in the test, but does not adequately explain how Joyfun's software allowed it to *block access* to the Game. Opp'n at 10.

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## Exhibit 4

In re Brace, Not Reported in B.R. Rptr. (2017)

**H** KeyCite history available

2017 WL 1025215

Only the Westlaw citation is currently available.

**NOT FOR PUBLICATION**

United States Bankruptcy Appellate Panel of the  
Ninth Circuit.

IN RE: Clifford Allen BRACE, Jr., Debtor.  
Clifford Allen Brace, Jr., Individually and  
as the Trustee of the Crescent Trust  
Dated July 30, 2004; Anh N. Brace,  
Individually and as the Trustee of the  
Crescent Trust Dated July 30, 2004,  
Appellants,

v.

Steven M. Speier, Chapter 7 Trustee,  
Appellee.

BAP No. CC-16-1041-LNTa

|  
Bk. No. 6:11-bk-26154-SY

|  
Adv. No. 6:11-ap-02053-SY

|  
Argued and Submitted on January 19, 2017 at  
Pasadena, California

|  
Filed March 15, 2017

Appeal from the United States Bankruptcy Court for the  
Central District of California, Honorable Scott Ho Yun,  
Bankruptcy Judge, Presiding

#### Attorneys and Law Firms

Stephen R. Wade argued for appellants; Matthew W.  
Grimshaw of Marshack Hays LLP argued for appellee.

Before: LAFFERTY, TAYLOR, and NOVACK,\*\*  
Bankruptcy Judges.

#### MEMORANDUM\*

#### INTRODUCTION

\*1 Pre-petition, Debtor formed a living trust, named his non-debtor spouse as the sole beneficiary, and transferred into it his interests in real properties formerly held by Debtor and his spouse as joint tenants. At the time of the transfers, Debtor was a defendant in state court litigation; a default judgment was entered in that litigation shortly after the transfers. Debtor and his spouse testified that the transfers were for her sole benefit as part of long-contemplated estate planning, and from the face of the relevant documents, the transfers to the trust appeared to be for the sole benefit of Debtor's spouse. Post-transfer, however, Debtor and his spouse ignored the stated purpose of the transfers and continued to treat the trust property as they had pre-transfer.

After Debtor filed his chapter 7<sup>1</sup> petition, the trustee filed an adversary proceeding against Debtor and his non-debtor spouse seeking to avoid the transfers under the California Uniform Fraudulent Transfer Act ("CUFTA") and other theories. After a one-day trial, the bankruptcy court entered judgment in favor of the chapter 7 trustee. On reconsideration, the bankruptcy court amended the judgment to clarify that while the avoidance of the transfers restored title to the Debtor and his spouse as joint tenants, under the court's understanding of the effect of California's presumptions involving the manner in which married couples are deemed to hold real property, the properties were community property. Consequently, the court determined that the estate held the entire interest in all of the properties that had been improperly transferred to the trust.

Debtor and his spouse appeal the bankruptcy court's findings that the transfers were avoidable as actually fraudulent transfers and that the estate has a deemed community property interest in the recovered properties.

In this unpublished memorandum, we AFFIRM the decision of the bankruptcy court with respect to its findings that the transfers were avoidable as actually fraudulent transfers. In a separate published opinion, we also AFFIRM the bankruptcy court's ruling that the recovered properties were restored to community property status and thus were fully recoverable by the bankruptcy estate.

#### FACTS

In re Brace, Not Reported in B.R. Rptr. (2017)

### A. Pre-Petition Events

Debtor and his non-debtor spouse, Anh N. Brace, were married in 1972. Debtor is a real estate consultant with approximately 30 years of experience as a licensed real estate agent, broker, and consultant. During the marriage, Appellants acquired their residence in Redlands, California, a rental property in San Bernardino, California, and a parcel of real property in Mohave, Arizona (collectively, the “Properties”). Appellants took title to each of the Properties as “husband and wife as joint tenants.”

\*2 On July 30, 2004, Debtor formed the Crescent Trust. The instrument creating the Crescent Trust states that it is an irrevocable trust and that Debtor is the sole trustee; Ms. Brace is the sole beneficiary of the trust. The trust instrument was not recorded. Shortly thereafter, Debtor executed and had recorded trust transfer deeds transferring his interests in the Redlands and San Bernardino properties into the Crescent Trust for no consideration. Additionally, the box on each deed was checked indicating that the transfer was to a revocable trust. Thus, although the unrecorded trust instrument for the Crescent Trust appeared to place the trust assets out of the reach of creditors, the public record reflected that the trust was revocable and thus its assets were potentially subject to execution by creditors and subject to disposition by the trustor. See [Laycock v. Hammer](#), 141 Cal. App. 4th 25, 29–30 (2006) (in order to reach trust assets, creditor must show that trust was revocable); Cal. Prob. Code § 18200.

For reasons that were not explained, Ms. Brace did not transfer her interests in the Redlands and San Bernardino properties into the Crescent Trust. Also, no deed transferring the Mohave property was ever recorded, although Debtor testified that such a deed was prepared. In the parties’ joint pre-trial statement, Appellants stipulated that the Mohave property was an asset of the bankruptcy estate.

At the time of the transfers, Debtor was a defendant in litigation in San Bernardino County Superior Court; a default judgment in the amount of \$60,000 was entered against the Debtor in that litigation approximately one month after the transfers occurred.

After the Redlands and San Bernardino properties were transferred into the Crescent Trust, Debtor and Ms. Brace continued to live in the Redlands property; they also used those properties to secure bail bonds in a criminal matter. Debtor never filed tax returns for the Crescent Trust.<sup>2</sup>

### B. Post-Petition Events

Debtor filed a chapter 7 petition on May 16, 2011, and Robert L. Goodrich was appointed chapter 7 trustee (“Trustee”).<sup>3</sup> Debtor did not list any real property on Schedule A. At Debtor’s 341 meeting, he testified that he had owned no real property in the prior two years. He also testified that Ms. Brace owned no property that was not listed in his schedules.

On December 15, 2011, Trustee filed an adversary proceeding against Appellants, individually and in their capacities as trustees of the Crescent Trust,<sup>4</sup> seeking: a declaration that the Properties were property of the bankruptcy estate; a judgment quieting title to the Properties in the bankruptcy estate; turnover of any of the Properties determined to be property of the estate; and avoidance and recovery of Debtor’s transfers of the Redlands and San Bernardino properties into the Crescent Trust as actually and/or constructively fraudulent transfers under Cal. Civ. Code § 3439.04(a) (collectively, the “Fraudulent Transfer Claims”); and revocation of Debtor’s discharge under §§ 727(d)(1) and (d)(2).

The bankruptcy court ordered the issues bifurcated for trial pursuant to Civil Rule 42(b), applicable via Rule 7042, with the Fraudulent Transfer Claims being tried before the revocation of discharge claims. Trial was held on the Fraudulent Transfer Claims on May 11, 2015. The witnesses were Debtor, Ms. Brace, Trustee, and Burke Huber, an attorney who authenticated Debtor’s deposition testimony from a separate lawsuit. Direct testimony was by declaration;<sup>5</sup> Debtor, Ms. Brace, and Trustee were cross-examined at trial. The bankruptcy court thereafter made oral findings and conclusions in favor of Trustee on the actually fraudulent transfer claim.

\*3 The bankruptcy court found: that the Crescent Trust was an illegal trust and should be disregarded because Debtor had created it for the sole purpose of defrauding creditors; that the transfers of the Redlands and San Bernardino properties into the Crescent Trust were actually fraudulent transfers; that the Crescent Trust was Debtor’s alter ego; that Ms. Brace was not a good faith transferee; and that the Trustee was entitled to avoid the unrecorded transfer of the Mohave property as a hypothetical bona fide purchaser under § 544. For all of these reasons, the bankruptcy court concluded that the transfers of the Redlands and San Bernardino properties into the Crescent Trust were avoidable and recoverable by Trustee as property of the estate.

In re Brace, Not Reported in B.R. Rptr. (2017)

The court entered judgment on September 25, 2015. The judgment provided that the Properties were property of the estate and were to be turned over to Trustee. Defendants timely moved to reconsider and amend the judgment, arguing that the judgment should have provided that the Properties were owned one half by Debtor and one half by Ms. Brace as tenants in common and that only Debtor's interests in the Properties, and not Ms. Brace's, were property of the estate. After oral argument, the bankruptcy court issued its findings on the record, granting the motion to reconsider in part: the bankruptcy court entered an amended judgment clarifying that although the Properties were restored to joint tenancy as a matter of title, they were community property under California law and were thus property of the estate.

Appellants timely appealed.<sup>6</sup>

## JURISDICTION

The bankruptcy court had jurisdiction pursuant to 28 U.S.C. §§ 1334 and 157(b)(2)(E), (H), and (J). We have jurisdiction under 28 U.S.C. § 158.

## ISSUES

A. Whether the bankruptcy court erred in finding that the transfers of the Redlands and San Bernardino properties into the Crescent Trust were actually fraudulent transfers.

B. Whether the bankruptcy court erred in finding that the Crescent Trust was Debtor's alter ego.

C. Whether the bankruptcy court erred in finding that Ms. Brace was not a good faith transferee.

## STANDARDS OF REVIEW

We review the bankruptcy court's findings of fact for clear error, and its conclusions of law de novo. [Carrillo v. Su \(In re Su\)](#), 290 F.3d 1140, 1142 (9th Cir. 2002). A finding is clearly erroneous "when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." [Anderson v. City of Bessemer City, N.C.](#), 470 U.S. 564, 573 (1985) (citation

omitted). Where two permissible views of the evidence exist, the factfinder's choice between them cannot be clearly erroneous. [Id.](#) at 574. We are to give "due regard to the trial court's opportunity to judge the witnesses' credibility." Civil Rule 52(a)(6) (incorporated via Rule 7052). We also give deference to inferences drawn by the trial court. [Beech Aircraft Corp. v. United States](#), 51 F.3d 834, 838 (9th Cir. 1995).

## DISCUSSION

**A. The bankruptcy court did not err in finding that the transfers of the Redlands and San Bernardino properties into the Crescent Trust were avoidable as actually fraudulent transfers.**

**1. The bankruptcy court correctly found that the transfers were made with actual fraudulent intent.**

[California Civil Code § 3439.04](#) provides:

(a) A transfer made or obligation incurred by a debtor is voidable as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation as follows:

\*4 (1) With actual intent to hinder, delay, or defraud any creditor of the debtor.

The statute further provides that, in determining actual intent to defraud, the court may consider the following factors:

- (1) Whether the transfer or obligation was to an insider.
- (2) Whether the debtor retained possession or control of the property transferred after the transfer.
- (3) Whether the transfer or obligation was disclosed or concealed.
- (4) Whether before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit.
- (5) Whether the transfer was of substantially all the debtor's assets.

In re Brace, Not Reported in B.R. Rptr. (2017)

- (6) Whether the debtor absconded.
- (7) Whether the debtor removed or concealed assets.
- (8) Whether the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred.
- (9) Whether the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred.
- (10) Whether the transfer occurred shortly before or shortly after a substantial debt was incurred.
- (11) Whether the debtor transferred the essential assets of the business to a lienor that transferred the assets to an insider of the debtor.

[Cal. Civ. Code § 3439.04\(b\)](#).

These eleven factors:

provide neither a counting rule, nor a mathematical formula. No minimum number of factors tips the scales toward actual intent. A trier of fact is entitled to find actual intent based on the evidence in the case, even if no “badges of fraud” are present. Conversely, specific evidence may negate an inference of fraud notwithstanding the presence of a number of “badges of fraud.”

[Wolkowitz v. Beverly \(In re Beverly\)](#), 374 B.R. 221, 236 (9th Cir. BAP 2007), [aff’d in part, dismissed in part](#), 551 F.3d 1092 (9th Cir. 2008) (citations omitted).

The bankruptcy court found that the presence of numerous badges of fraud supported a finding that the Crescent Trust was created for the purpose of defrauding creditors and thus was an illegal trust that should be disregarded. Specifically, the bankruptcy court found that the following factors supported a finding of actual fraud: (1) the transfers to the Crescent Trust were to an insider because Ms. Brace was the sole beneficiary of the Crescent Trust; (2) the Debtor retained possession and control of the transferred properties—he continued to live in the Redlands Property, and Debtor used the San Bernardino Property as collateral to post bonds for himself and a friend in criminal matters; (3) the Debtor concealed the nature of the transfers by claiming on the trust transfer deeds that the properties were transferred into a revocable trust; (4) at the time of the transfers the Debtor was a defendant in state court litigation; (5) the Debtor removed or concealed the properties by transferring them to the Crescent Trust; and (6) the Debtor transferred the properties shortly before a

substantial debt was incurred, that is, the entry of the \$60,000 default judgment.

Appellants argue that the bankruptcy court’s finding of actual fraudulent intent was clearly erroneous because there was no evidence that Debtor had notice of the state court lawsuit which resulted in entry of the default judgment. Debtor testified that he did not know of the lawsuit because he was not personally served with the summons and complaint in that action, which were served only by publication. Additionally, as discussed below, Appellants contend that the transfers to the Crescent Trust were done for estate planning purposes and to memorialize the couple’s longstanding agreement for Ms. Brace to hold title to the Properties.

\*5 These arguments are not persuasive; they ignore the trial court’s function in assessing credibility of witnesses and this Panel’s duty to defer to that assessment, and they misconstrue the rationale for the court’s reliance on “badges of fraud” to assess fraudulent intent.

As should be obvious, fraudulent intent is not readily conceded and, for that reason among others, not easily proven. In these instances, courts have access to two tools to assist them in determining fraudulent intent: (1) assessment of a witness’s credibility via observing his or her demeanor and testimony at trial, and (2) consideration of the “badges of fraud” that provide essentially a checklist of the circumstances that typically surround fraudulent acts.

**a. This Panel must defer to the trial court’s findings regarding credibility.**

At the outset of its ruling, the bankruptcy court observed that neither Debtor nor Ms. Brace were credible witnesses. The bankruptcy court noted that Debtor was “alert, educated, [and] sophisticated” but that he had a “very selective memory”: he had good recall of events that were in his favor, but his memory failed him when he was questioned by Trustee’s counsel. Regarding Ms. Brace, the bankruptcy court noted that she testified “like she was reading a script that her husband or someone gave her to say. But even then, she was neither convincing nor credible.”

We must defer to the bankruptcy court’s credibility determination to the extent it was based on the witnesses’ demeanor.

When factual findings are based on determinations

In re Brace, Not Reported in B.R. Rptr. (2017)

regarding the credibility of witnesses, we give great deference to the bankruptcy court's findings, because the bankruptcy court, as the trier of fact, had the opportunity to note variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said.

[Retz v. Samson \(In re Retz\)](#), 606 F.3d 1189, 1196 (9th Cir. 2010)(citing [Anderson v. City of Bessemer City](#), 470 U.S. 564, 575 (1985)).

Moreover, there was ample evidence in the record to support an inference that Debtor was not an honest individual: (1) Debtor had a history of using multiple aliases that he did not disclose in his bankruptcy petition; (2) at Debtor's 341 meeting, he contradicted deposition testimony he gave in 2012 in state court litigation; (3) Debtor pled guilty to forgery in 2010; and (4) according to the declaration filed in the superior court in support of the state court plaintiffs' request to serve defendants by publication, plaintiffs made the request because, in prior litigation against the same defendants, plaintiffs' counsel had been unable to locate Debtor:

In the [prior lawsuit] ... I never could find ... WALTER HARRIS or CLIFF BRACE and am not certain that these are their real names. ... I believe the WILSON DEFENDANTS have set up P.O. Boxes, created false names, and false entities in order to evade service. ... I am not certain that Defendants JUAN GARCIA, WALTER HARRIS, NANCY NETTER, C. ALLEN, or CLIFF BRACE are even real people. I have been unable to find any information that they exist.<sup>7</sup>

In granting the request, the state court necessarily found that defendants had a history of evading service, which warranted service by publication.

\*6 Because there is nothing in the record to suggest that the bankruptcy court's credibility determinations were erroneous, we defer to those determinations.

**b. The bankruptcy court correctly applied the "badges of fraud" to determine that the Debtor made the transfers with actual intent to defraud creditors.**

Appellants claim that the trial court incorrectly determined that the transfers were made with actual intent to defraud, because there was no evidence that Debtor knew about the pending state court claim at the time of the transfers. This assertion is erroneous.

First, Appellants ignore the fact that the trial court found

that six separate badges of fraud were present with respect to the challenged transfers and that only two related to the existence of litigation: whether Debtor had been sued before the transfer was made and whether the transfer occurred shortly before a substantial debt was incurred. Thus, even if we agreed with Appellants that the trial court wrongly relied on the existence of litigation, or the imminent entry of a judgment, as badges of fraud, there was ample, and unchallenged, support in the record for a finding of fraudulent intent; there are four additional badges of fraud present here.

Second, and as noted above, the bankruptcy court need not find the presence of a majority, or even any set number, of the enumerated badges of fraud to conclude that a party likely engaged in fraud. Rather, the court is entitled to conclude that a party acted with actual intent to defraud creditors based on the court's reasonable assessment of all the facts and circumstances; the badges of fraud are merely a tool to assist in that task.

Third, Debtor's premise that unless the court could essentially demonstrate that the Debtor "knew" a fact that he denied knowing, it could not conclude that he had acted with fraudulent intent, requires exactly the sort of impossible "seeing inside the debtor's conscience" that the legislature sought to avoid by compiling the badges of fraud. To require demonstrable certainty of a debtor's knowledge would completely obviate the utility of consideration of circumstantial, and reliable, evidence. See [In re Beverly](#), 374 B.R. at 235 ("Since direct evidence of intent to hinder, delay or defraud is uncommon, the determination typically is made inferentially from circumstances consistent with the requisite intent.") (citing [Filip v. Bucurenciu](#), 129 Cal. App. 4th 825, 835, 28 Cal. Rptr. 3d 884, 890 (2005)).

**c. The bankruptcy court was not required to believe Debtor's wholly implausible explanation for the transfers.**

Putting aside Debtor's courtroom demeanor and history of deceptive practices, as well as the court's reliance on the existence of numerous "badges of fraud," the bankruptcy court was not required to believe Appellants' version of the reasons for the transfers. Stated plainly, Appellants' testimony concerning the background for and their motivations to conclude the transfers was consistently implausible.

For example, Appellants' contention that the timing of the subject transfers was merely the consummation of a

**In re Brace, Not Reported in B.R. Rptr. (2017)**

longstanding agreement between spouses to divide the couple's property would require a finding that the timing of the transfers right before judgment was entered against Debtor was purely and entirely coincidental, and would require the court to ignore the numerous suspicious circumstances surrounding the transactions.

\*7 In light of these circumstances, any argument in support of Appellants' version of the rationale for these transactions would have to be supported by the most indubitable evidence of their innocent intent. Yet, Appellants offered nothing of any genuinely probative, let alone persuasive, value. Appellants did not present any documentation of the couple's plan to divide their property, nor did they testify to an alternative catalyst for the execution of that plan.

Moreover, there is nothing about the acquisition of the Properties or the history of the financial arrangements between Appellants as a married couple that would objectively support their story that they "always intended" to hold the Properties separately. There was no contention that the Properties were acquired via inheritance or with separate funds, or any other facts that would support a claim that the Properties should have been categorized as separate property; to the contrary, it is undisputed that the Properties were acquired with community assets. Nor would the fact that the Appellants alternately paid expenses of the Properties, depending on which of them was gainfully employed at various points during the marriage, described in greater detail in subsection C below, suggest a different result. Indeed, it is the nature of a "community" that a married couple acknowledges that they will pool their resources to acquire and maintain property, and there is no requirement that the contributions of the spouses be equal or available at the same time.

We note also certain inconsistencies in the documentation of the transactions that suggest an ulterior motive: first, despite Debtor's vast experience in real estate matters, the trust transfer deeds recited that the transfers were to a revocable trust (rather than an irrevocable trust as set forth in the Trust Agreement) and designated that Debtor was the sole grantee. Even though the Properties were held by the couple as joint tenants, there was no evidence that Ms. Brace ever transferred her interests into the Crescent Trust. Debtor proffered no plausible explanation for these inconsistencies, which suggest that Debtor was focused on divesting himself of his interests in the Properties and confusing the state of title to shield the Properties from the impending judgment. And as discussed below, even after the transfers, Appellants continued to treat the Properties as their own.

In light of the foregoing, the bankruptcy court did not clearly err in giving Debtor's testimony little to no weight in finding that the transfers were made with actual fraudulent intent. The court also supported its finding of fraudulent intent by reference to numerous badges of fraud that accompanied the transactions. Moreover, the court did not need to find that Debtor knew about the litigation or to believe Debtor's highly implausible "explanations" for his behavior. The finding of actual intent to defraud is supported by the evidence and is not clearly erroneous.

**B. The bankruptcy court did not err in finding that the Crescent Trust was Debtor's alter ego.**

As an alternative theory for recovery of the Properties, the bankruptcy court found that the Crescent Trust was Debtor's alter ego. In determining whether the alter ego doctrine applies to eliminate any distinction between an entity and an individual controlling or dominating that entity, we apply the law of the forum state. [In re Schwartzkopf](#), 626 F.3d at 1037–38. California courts have applied the alter ego doctrine to trusts. [Id.](#) at 1038. Alter ego liability exists where two conditions are met: (1) where there is such a unity of interest and ownership that the separateness of the individual and the entity has ceased; and (2) where adherence to the fiction of the separate existence of the entity would sanction a fraud or promote injustice. [See id.](#) Factors suggesting an alter ego relationship include: (a) commingling of assets and failure to segregate funds; (b) treatment by an individual of the assets of the corporation as his own; (c) the disregard of legal formalities and the failure to maintain arm's length relationships among related entities; and (d) the diversion of assets from a trust by or to another person or entity, to the detriment of creditors, or the manipulation of assets between entities so as to concentrate the assets in one and the liabilities in another. [See id.](#)

\*8 The bankruptcy court concluded that the Crescent Trust was Debtor's alter ego based on its findings that (1) the trust was formed for a fraudulent purpose; (2) Debtor treated the trust's assets as his own; (3) Debtor disregarded legal formalities by failing to file trust tax returns; and (4) by transferring real property into the trust, Debtor manipulated assets so as to concentrate the assets in one entity and the liabilities in another.

Appellants contend that the bankruptcy court erred in finding that the Crescent Trust was an illegal trust formed for an improper purpose; thus, the second condition

In re Brace, Not Reported in B.R. Rptr. (2017)

required for an alter ego finding was not met. However, as discussed above, the bankruptcy court did not err in that finding. Accordingly, we find no error in the bankruptcy court's ultimate finding that the Crescent Trust was Debtor's alter ego.

**C. The bankruptcy court did not err in finding that Ms. Brace was not a good faith transferee.**

[California Civil Code § 3439.08](#) states, "(a) A transfer or obligation is not voidable under [paragraph \(1\) of subdivision \(a\) of Section 3439.04](#), against a person that took in good faith and for a reasonably equivalent value given the debtor or against any subsequent transferee or obligee." A defendant asserting the existence of good faith has the burden of proof. [Plotkin v. Pomona Valley Imports, Inc. \(In re Cohen\)](#), 199 B.R. 709, 718–19 (9th Cir. BAP 1996).

**1. Good faith**

It is not necessary that a defendant actually participate in another's fraud, or even be completely aware of the fraud, to fail to qualify as a good faith transferee. [See id.](#) at 719 (transferee lacks good faith if "possessed of enough knowledge of the actual facts to induce a reasonable person to inquire further about the transaction"). [See also CyberMedia, Inc. v. Symantec Corp.](#), 19 F. Supp. 2d 1070, 1075 (N.D. Cal. 1998) (under UFTA, a transferee lacks good faith if he or she (1) colludes with the debtor or otherwise actively participates in the debtor's fraudulent scheme, or (2) has actual knowledge of facts which would suggest to a reasonable person that the transfer was fraudulent).

The bankruptcy court found that although Ms. Brace had not engineered the scheme to defraud, she participated in and benefitted from the scheme:

[Ms. Brace] may not have been the one who engineered this scheme to create the Crescent Trust and transfer the Debtor's interest in the property to the trust, so to defraud Mr. Brace's creditors. But she did not act in good faith either. Maybe she didn't act in bad faith, but she participated in the scheme; and even though her testimony was conflicting, at best, she continues to support her husband's attempt at defrauding his creditors. So I don't believe she acted in good faith.

Appellants argue that the bankruptcy court erred in finding that Ms. Brace was not a good faith transferee because there was no evidence that she was aware of any fraudulent intent on her husband's part or that she had participated in the scheme. Appellant's first point misapprehends the applicable standard—the bankruptcy court did not need to find that Ms. Brace was aware of Debtor's fraudulent intent. And there was evidence in the record that Ms. Brace knew of and was complicit in the transfers. Importantly, the bankruptcy court found not credible Appellants' explanations for the transfers.

Debtor and Ms. Brace testified in their declarations that the transfers into the Crescent Trust were part of an agreement the couple made early in their marriage to keep their financial affairs separate. Debtor testified that shortly after the couple were married they purchased the San Bernardino Property as their residence. Debtor further testified that while Ms. Brace was in nursing school, Debtor made the payments on the residence, and that after Ms. Brace became employed the payments were made from the couple's joint checking account. According to Debtor, virtually all of the funds in the joint checking account were deposited by Ms. Brace because Debtor did not have regular income at that time.

\*9 Debtor's testimony continued: sometime in the 1970s the couple purchased the Redlands Property and made it their residence; the couple agreed prior to 1978 that because Ms. Brace had made the payments on the San Bernardino and Redlands properties that those properties would belong to her. Thereafter, in 2001 and 2004, respectively, Debtor purchased real properties in Moreno Valley and Palm Springs, taking title as a married man as his sole and separate property; Ms. Brace relinquished her interests in those properties.

Debtor testified that he created the trusts for estate planning purposes and to carry out the couple's agreement for Ms. Brace to own the Redlands and San Bernardino properties as her separate property and for Debtor to own the Moreno Valley and Palm Springs properties as his separate property.

Ms. Brace testified in her declaration that the couple had a longstanding oral agreement to keep their financial affairs separate and that the San Bernardino and Redlands properties would belong to Ms. Brace. She further testified that Debtor had set up the Crescent Trust "to place his interest in my properties into an irrevocable living trust to protect that interest for me."

Our review of the record convinces us that the bankruptcy court had ample reason to be skeptical of the Appellant's

In re Brace, Not Reported in B.R. Rptr. (2017)

version of the background to the transfers, and support for its conclusion that Ms. Brace had not met her burden to show she was a good faith transferee.

As an initial matter, we restate the point made earlier in connection with the “actual intent to defraud” analysis, that the bankruptcy court found both Debtor’s **and Ms. Brace’s** testimony to be not credible. In particular, with respect to Ms. Brace’s testimony, the court stated that it was as if she were reading a script that someone (i.e., her husband) had given her—and even in this polished, scripted form, she was not at all convincing.

That conclusion was not only an appropriate exercise of a trial court’s prerogative in assessing credibility, it appears entirely justified and accurate in light of Ms. Brace’s testimony on cross-examination, which repeatedly contradicted and undermined the narrative presented in her declaration. On cross-examination, Ms. Brace testified that she did not remember hearing of the Crescent Trust, did not know why Debtor transferred his interests in the Redlands and San Bernardino properties into the Crescent Trust, and did not remember asking Debtor to do so. Ms. Brace also testified that she did not believe Debtor owed her money for the payments she had made on the San Bernardino property mortgage or that she had paid a disproportionate amount of the expenses on the Redlands property.

The repeated and striking disharmony between the scripted narrative of Ms. Brace’s declaration and the spontaneous and apparently quite genuine answers she provided on cross-examination not only raise troubling questions about her credibility but eviscerate her claim to be a good faith transferee. See [Filip](#), 129 Cal. App. 4th at 836, 28 Cal. Rptr. 3d at 891 (affirming trial court’s finding that defendant was not a good faith transferee because defendant’s testimony was not credible).

That said, the evidence in the record supports the bankruptcy court’s finding that Ms. Brace participated in and benefitted from the transfers. Although Ms. Brace gave conflicting testimony regarding her knowledge of the transfers, the bankruptcy court’s choice among multiple plausible views of the evidence cannot be clearly erroneous. See [Anderson v. City of Bessemer City](#), 470 U.S. 564, 573–75 (1985). Ms. Brace testified that she was aware that her husband had set up the Crescent Trust “to place his interest in my properties into an irrevocable living trust to protect that interest for me.” And the transfers benefitted Ms. Brace because they effectively conveyed to Ms. Brace her husband’s interests in the transferred properties. Although the bankruptcy court did not explicitly find that Ms. Brace was possessed of

enough knowledge to put a reasonable person on inquiry notice, the record supports such a finding. Ms. Brace knew about the transfers, and, as discussed in subsection A.1.c. above, no plausible explanation was provided for the timing of the transfers or the irregularities in the documentation of the transactions, and Appellants continued to treat the transferred properties as their own even after the transfers. Under these circumstances, Ms. Brace was on notice that Debtor may have had a fraudulent motive in making the transfers.

\*10 For all of these reasons, the bankruptcy court did not err in finding that Appellants had failed to meet their burden of showing that Ms. Brace acted in good faith.

## 2. Reasonably Equivalent Value

The bankruptcy court correctly found that there was insufficient evidence from which to make a finding that Ms. Brace gave reasonably equivalent value for the transfers. The only valuation evidence presented was Debtor’s opinion testimony, to which the bankruptcy court gave no weight: there was no basis to conclude that Debtor was an expert in real property valuations, and the bankruptcy court found implausible that Debtor knew during the bankruptcy what the transferred properties were worth in 2004.

Appellants argue that the undisputed fact that Debtor obtained a \$240,000 credit line against his Palm Springs property shortly after it was acquired supports an inference that the Palm Springs property was worth an amount reasonably equivalent to the approximately \$527,000 of equity transferred by Debtor to the Crescent Trust. The bankruptcy court gave little weight to this evidence, observing that in 2004 lending standards were more relaxed, thus implicitly finding that any extrapolation of value from the amount of the credit line would be inherently unreliable.

Appellants argue that the bankruptcy court’s observation regarding 2004 lending standards was speculative and not supported by evidence, but even if we were to disregard that observation, we would not find error in the bankruptcy court’s conclusion. In fact, a finding of value of real property based solely on the amount a lender would loan against it would constitute speculation, as the amount that a particular lender would loan is subject to a number of factors. More importantly, the bankruptcy court rejected Debtor’s opinion evidence of the value of the Redlands and San Bernardino properties, making impossible any finding as to whether Ms. Brace gave

In re Brace, Not Reported in B.R. Rptr. (2017)

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“reasonably equivalent” value.

Therefore, we find no error in the bankruptcy court’s conclusion that Appellants failed to carry their burden of proving a good faith transferee defense.

concluding that the transfers into the Crescent Trust were actually fraudulent, that the Crescent Trust was Debtor’s alter ego, or that Ms. Brace was not a good faith transferee.

Accordingly, we AFFIRM.

**All Citations**

Not Reported in B.R. Rptr., 2017 WL 1025215

**CONCLUSION**

For these reasons, the bankruptcy court did not err in

Footnotes

- \*\* Hon. Charles Novack, United States Bankruptcy Judge for the Northern District of California, sitting by designation.
- \* This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have (see [Fed. R. App. P. 32.1](#)), it has no precedential value. See 9th Cir. [BAP Rule 8024–1](#).
- 1 Unless otherwise indicated, all chapter and section references are to the Bankruptcy Code, [11 U.S.C. §§ 101–1532](#), “Rule” references are to the Federal Rules of Bankruptcy Procedure, and “Civil Rule” references are to the Federal Rules of Civil Procedure.
- 2 At the time he formed the Crescent Trust, Debtor owned two other parcels of real property, one in Palm Springs and the other in Moreno Valley, which he held as his sole and separate property. Concurrently with the formation of the Crescent Trust, Debtor formed two additional trusts, the Cardillo Trust and the Casilla Trust. Debtor transferred into those trusts his interests in the Palm Springs and Moreno Valley properties, respectively.
- 3 Appellee Steven M. Speier was substituted as chapter 7 trustee after Mr. Goodrich resigned in December 2015.
- 4 As noted, Ms. Brace is not a trustee of the Crescent Trust.
- 5 The bankruptcy court sustained certain objections to the declaration testimony. No party has assigned error to those rulings.
- 6 Because the amended judgment did not dispose of all the claims in the adversary proceeding, after this appeal was filed the parties obtained a second amended judgment from the bankruptcy court that contained a Rule 54(b) certification.
- 7 Debtor admitted at trial that he had used the names “C. Allen,” “Robert Keller,” and “David Walton” as aliases for various purposes.

## Exhibit 5

Chunghwa Telecom Global, Inc v. Medcom, LLC, Not Reported in Fed. Supp. (2016)

**H** KeyCite history available

2016 WL 5815831

Only the Westlaw citation is currently available.  
United States District Court, N.D. California,  
San Jose Division .

CHUNGHWA TELECOM GLOBAL, INC,  
Plaintiff,

v.

MEDCOM, LLC, a Nevada Limited  
Liability company; [QT Talk, Inc.](#), a  
Nevada Corporation; David Cooper, an  
individual, Defendants.

Case No. 5:13-cv-02104-HRL

Signed 10/05/2016

#### Attorneys and Law Firms

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Francisco, CA, for Defendants.

#### ORDER DENYING DEFENDANTS' MOTION TO DISMISS FIRST AMENDED COMPLAINT

Re: Dkt. No. 44

[HOWARD R. LLOYD](#), United States Magistrate Judge

\*1 This is a diversity action for alleged breach of contract and fraud arising out of a reciprocal telecommunications service agreement (Agreement) entered between plaintiff Chunghwa Telecom Global, Inc. (Chunghwa) and defendant Medcom, LLC (Medcom). In sum, Chunghwa

claims that defendants fraudulently induced the company to provide telecommunications services for which they had no intention of paying. Plaintiff says it is owed over \$197,000. Medcom reportedly is defunct, and Chunghwa claims that defendants QT Talk LLC (QT)<sup>1</sup> and David Cooper (an alleged officer, employee, or shareholder of Medcom and QT) are on the hook for the sums allegedly due. Defendants maintain that this lawsuit is nothing more than a simple contract dispute between plaintiff and Medcom (and Medcom alone) over one missed invoice payment.

Chunghwa's original complaint was filed in state court against Medcom, QT, Cooper, and one Chris Sander. Defendants removed the matter here, asserting diversity jurisdiction, 28 U.S.C. § 1332. They subsequently moved to dismiss for lack of personal jurisdiction, improper service of process, and failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(2), 12(b)(5), and 12(b)(6).

This court denied the motion to dismiss for improper service, but granted the motion to dismiss for lack of personal jurisdiction and for failure to state a claim, with leave to amend. Plaintiff subsequently filed a First Amended Complaint (FAC). The FAC drops Sander from this suit. It reasserts a breach of contract claim against Medcom and QT, as well as claims for fraud and negligent misrepresentation against all defendants. The FAC also reasserts a claim for quantum meruit against QT. Unlike the original complaint, the FAC no longer asserts a separate claim for punitive damages; but, plaintiff continues to seek punitive damages as part and parcel of its claims for fraud and negligent misrepresentation.

Pursuant to Fed. R. Civ. P. 12(b)(2), QT and Cooper move, once again, to dismiss for lack of personal jurisdiction.<sup>2</sup> QT also moves to dismiss under Fed. R. Civ. P. 12(b)(6), arguing that Chunghwa has no claim for breach of contract<sup>3</sup> or quantum meruit. All defendants move to dismiss the remaining claims for fraud and negligent misrepresentation under Fed. R. Civ. P. 12(b)(6), arguing that the FAC still fails to state a claim for relief. They also maintain that the FAC does not sufficiently allege any basis for punitive damages. Upon consideration of the moving and responding papers, as well as the arguments of counsel, the court denies the motion.<sup>4</sup>

#### DISCUSSION

### A. Personal Jurisdiction

\*2 QT and Cooper maintain that they are not subject to this court's jurisdiction. Cooper, who identifies himself as a "member" of both Medcom and QT, says that he is a New York resident who owns no property in California and conducts no personal business here. (Cooper Decl. ¶ 5). Additionally, Cooper attests that QT is a Nevada limited liability company with no offices or property in California. (*Id.* ¶ 6). He also says that QT does not conduct regular or continuous business here. (*Id.*). Both QT and Cooper emphasize that they are not, and never were, parties or signatories to the Chunghwa-Medcom Agreement.

Chunghwa, on the other hand, contends that this court properly may exercise jurisdiction over QT by virtue of an alter ego relationship between QT and Medcom. Plaintiff further contends that QT purposefully availed itself of the privilege of conducting activities in California. As for Cooper, Chunghwa says that this court has personal jurisdiction over him based on his involvement in the alleged tortious conduct.

"A federal district court sitting in diversity has in personam jurisdiction over a defendant to the extent the forum state's law constitutionally provides." [Metropolitan Life Ins. Co. v. Neaves](#), 912 F.2d 1062, 1065 (9th Cir. 1990) (citing [Data Disc, Inc. v. Systems Technology Ass'n](#), 557 F.2d 1280, 1286 (9th Cir. 1977)). "California's long-arm statute, Cal. Civ. Proc. Code § 410.10, is coextensive with federal due process requirements, so the jurisdictional analyses under state law and federal due process are the same." [Mavrix Photo, Inc. v. Brand Technologies, Inc.](#), 647 F.3d 1218, 1223 (9th Cir. 2011) (citing [Schwarzenegger v. Fred Martin Motor Co.](#), 374 F.3d 797, 800-01 (9th Cir. 2004)). "For a court to exercise personal jurisdiction over a nonresident defendant consistent with due process, that defendant must have 'certain minimum contacts' with the relevant forum 'such that maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Id.* (quoting [Int'l Shoe Co. v. Washington](#), 326 U.S. 310, 316, 66 S. Ct. 154, 90 L.Ed. 95 (1945)).

There are two types of jurisdiction: general and specific. There are no allegations supporting the exercise of general jurisdiction over Cooper and QT.<sup>5</sup> Thus, this court may exercise personal jurisdiction over these defendants only if specific jurisdiction exists. Specific jurisdiction arises when (1) the non-resident defendant purposefully directs his activities or consummates some transaction with the forum or a forum resident; or performs some act

by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws; (2) the claim is one which arises out of or relates to the defendant's forum-related activities; and (3) the exercise of jurisdiction comports with fair play and substantial justice, i.e., it must be reasonable. [Mavrix Photo, Inc.](#), 647 F.3d at 1227-28 (quoting [Schwarzenegger](#), 374 F.3d at 802).

Chunghwa bears the burden of establishing this court's jurisdiction over defendants. Where, as here, no evidentiary hearing is held, "plaintiff need only make a prima facie showing of jurisdiction to avoid the defendant's motion to dismiss." [Harris Rutsky & Co. Ins. Services, Inc. v. Bell & Clements, Ltd.](#), 328 F.3d 1122, 1129 (9th Cir. 2003). That is, plaintiff "need only demonstrate facts that if true would support jurisdiction over the defendant." *Id.* (quotation marks and citation omitted). And, unless directly contravened, Chunghwa's version of the facts must be taken as true; and, conflicts between facts contained in affidavits must be resolved in Chunghwa's favor. *Id.* If Chunghwa satisfies its burden as to the first two elements of specific jurisdiction, then the burden shifts to defendants to present a "compelling case" establishing that the exercise of jurisdiction over them is unreasonable. [Bancroft & Masters, Inc. v. August Nat'l, Inc.](#), 223 F.3d 1082, 1088 (9th Cir. 2000).

### 1. Defendant QT

\*3 As discussed above, Chunghwa maintains that this court properly may exercise jurisdiction over QT because QT and Medcom are alter egos of one another and because QT purposefully directed certain activities in California that perpetrated or furthered defendants' alleged fraud. The gist of plaintiff's allegations is that QT and Medcom were held out to be one and the same.

"Alter ego is a limited doctrine invoked only where recognition of the corporate form would work an injustice to a third person." [Moreland v. Ad Optimizers, LLC](#), No. C13-00216 PSG, 2013 WL 1410138 at \*2 (N.D. Cal., Apr. 8, 2013) (citations omitted). "The doctrine requires: (1) a unity of interest and ownership such that the separate identities of the corporation and the individual no longer exist; and (2) if the acts are treated as those of the corporation alone, an inequitable result will follow." *Id.* "Sole ownership and control is insufficient to support a finding of alter ego liability." *Id.* To establish an alter ego relationship, "the plaintiff must make out a prima facie case (1) that there is such unity of interest and ownership

Chunghwa Telecom Global, Inc v. Medcom, LLC, Not Reported in Fed. Supp. (2016)

that the separate personalities of the two entities no longer exist and (2) that failure to disregard their separate identities would result in fraud or injustice.” [Harris Rutsky & Co. Ins. Services, Inc.](#), 328 F.3d at 1134-35 (quotations and citations omitted). That is, “[t]he plaintiff must show that the parent exercises such control over the subsidiary so as to render the latter the mere instrumentality of the former.” *Id.* (quotations and citations omitted).

In determining whether both prongs of the alter ego test are satisfied, a number of factors are considered, including (1) commingling of funds; (2) failure to maintain minutes or adequate corporate records; (3) identical equitable owners with dominion and control over both entities; the use of the same business location; (4) employment of the same employees; (5) inadequate capitalization; (6) the use of a corporation as a mere shell, instrumentality, or conduit for the business of an individual or another corporation; (7) concealment or misrepresentation of the identity of responsible ownership or management; (8) disregard of legal formalities; and (9) the manipulation of assets and liabilities between entities so as to concentrate the assets in one and the liabilities in another. [Fed. Reserve Bank of San Francisco v. HK Sys. No. C-95-1190 MHP](#), 1997 WL 227955 at \*6 n.7 (N.D. Cal., Apr. 24, 1997) (citing [Associated Vendors, Inc. v. Oakland Meat Co.](#), 26 Cal. Rptr. 806, 813 (1962)). “Not all of the enumerated factors must be found. They merely suggest those matters that may be considered in analyzing the two-prong test.” *Id.*

Chunghwa’s FAC alleges the following facts:

- Medcom and QT share a substantial unity of ownership and interest: “According to corporate filings, Defendant MedCom is and was managed by Managing Members Eric Ramos, David Cooper and Carlton Barlow.” (FAC ¶ 5).<sup>6</sup> “On information and belief, Ramos and Cooper are also the Managing Members of defendant [QT].” (*Id.*). “Additionally, according to corporate filings, Ramos and Cooper are or were Director and Treasurer, and President and Secretary, respectively, of [QT].” (*Id.*). “Cooper has also represented himself on written communications to Plaintiff as the Chief Executive Officer of [QT].” (*Id.*).
- Medcom and QT operate their businesses at the same location: 5 Hanover Square, Suite 1401, New York, New York 10004 and are “also associated with the addresses of 15 Broad Street, New York, New York and 45 Broadway Street #1440, New York, New York.” (FAC ¶ 6).

\*4 • Medcom and QT each carried on one another’s business, did not adhere to corporate formalities, and exercised dominion and control over one another such that the entities were mere shells and instrumentalities for the conduct of the other’s business: “Defendants MedCom and [QT] shared employees and commingled funds and other assets of each other. Employees and officers of [QT] regularly responded to communications directed to MedCom, and vice versa. Defendant [QT] billed Plaintiff for telecommunication traffic supplied by MedCom, and directed that payment be made to the bank account of [QT] and QT Wholesale LLC. Defendant [QT] also made payments on invoices sent by Plaintiff to MedCom.” (FAC ¶ 7). “MedCom’s billing department sent invoices to Plaintiff directing Plaintiff to submit payment to [QT]. These invoices from MedCom were on [QT] letterhead. Additionally, in January 2011 MedCom directed its partners to send their current balances with MedCom, as well as all future payments, to the bank account of [QT].” (*Id.* ¶ 8).

- Medcom and QT were held out to be part of the same company. (FAC ¶ 9).

In particular, Chunghwa says that around July 2011, it noticed that QT was issuing invoices for telecommunication services Chunghwa received pursuant to the Agreement with Medcom and that QT made payment on some of Chunghwa’s invoices. (FAC ¶ 19). On July 27, 2011, HongYi Shih (plaintiff’s accounting manager) asked Eric Lin (Chunghwa’s contact at Medcom) whether Medcom had changed its name to QT-Talk and requested notice of any name change so that plaintiff could make a notation in its accounting system for audit purposes. (*Id.*). In response, Paul Cordasco (QT’s Director of Finance) sent Shih a copy of QT’s reciprocal contract form, which was identical to the Medcom-Chunghwa Agreement, except that Medcom’s name was replaced with QT’s. (*Id.* ¶ 20). Dissatisfied with this response, on July 29, 2011 Chunghwa said it decided to stop sending traffic to either Medcom or QT. (*Id.* ¶ 21). Two days later, Lin emailed QT’s officers Cordasco and defendant Cooper, requesting an answer to Chunghwa’s July 27 inquiry “or they will stop to send traffic to us.” (*Id.* ¶ 22).

Plaintiff says that on August 1, 2011, it again requested more information about the relationship between Medcom and QT. (*Id.* ¶ 23). Several days later, on August 5, 2011, Cordasco told Chunghwa that QT was the “retail brand” and Medcom was the “wholesale” side of the same company, adding that “due to brand unification we are collapsing [M]edcom into [Q]t [T]alk.” (*Id.*). That same

Chunghwa Telecom Global, Inc v. Medcom, LLC, Not Reported in Fed. Supp. (2016)

day, plaintiff says that Cordasco provided plaintiff's accounting department with a January 20, 2011 bank change notice from Medcom to its "partners," advising that QT had penetrated the marketplace and "has quickly become the engine for [Medcom's] growth." (*Id.* ¶¶ 23-24). The notice, which was signed by Medcom's Chief Operating Officer, Carlton Barlow, further advised that the new banking information was to be used for "any current balances/future payments" and directed Medcom's partners to make payments to QT's bank account. (*Id.* ¶ 24). Chunghwa further alleges that Cooper was included on the emails about the Medcom-QT relationship, and he never once contradicted Cordasco's statements or took any action to correct any understanding by plaintiff that Medcom and QT were one and the same company. (*Id.* ¶ 26).

Chunghwa further contends that QT purposefully availed itself of the privilege of conducting activities in California by: soliciting and receiving business services from Chunghwa, a California corporation; directing, from at least 2010 to 2012, numerous communications to Chunghwa in California; sending payments to plaintiff's California bank account; sending invoices to plaintiff in California; and otherwise engaging in business transactions with plaintiff. (FAC ¶ 13).

Relying on defendants' representations that QT and Medcom were the same company, Chunghwa says that it continued to provide telecommunications services to them. (FAC ¶ 27). Between January 2012 and September 2012, plaintiff says that QT/Medcom's telecommunications usage was typically less than \$100 per week. (*Id.* ¶ 28). In September 2012, however, plaintiff says that Cooper, in his capacity as QT's Chief Executive Officer, asked Chunghwa's sales representative, Peter Pan, to add Cooper on MSN Skype messenger. (*Id.* ¶¶ 14, 29). Thereafter, in September and October 2012, plaintiff says that Cooper phoned or messaged Pan just about every day, asking that telecommunications traffic capacity for Medcom/QT be increased. (*Id.* ¶ 29). Pan did so. (*Id.*).

\*5 According to the FAC, Medcom/QT's usage then skyrocketed to \$6,360.04 for the week of September 24-30, 2012; \$32,849.53 for the week of October 1-7, 2012; and then to \$34,417.07 and \$58,731.04 in the following weeks. (FAC ¶ 30). Plaintiff says that Medcom and QT did not pay for these services. (*Id.*).

In late October or early November 2012, plaintiff says that it contacted Medcom and QT about the increased usage and outstanding balance. (FAC ¶ 31). Defendants allegedly said that payments were simply delayed because

of Hurricane Sandy and requested that plaintiff continue to provide service and to also provide additional telecommunications traffic to Guatemala. (*Id.*). Specifically, Cooper allegedly told Pan on November 9, 2012 that he was working on making payment to Chunghwa, but asked Pan to be patient because servers were down due to the hurricane. (*Id.* ¶ 32). That same month, QT's Director of Business Development, Chris Sander, told plaintiff that payments were delayed because of the hurricane, asked for Chunghwa's patience while QT worked to resolve its accounts payable, and assured plaintiff that payments were forthcoming. (*Id.*). Plaintiff declined to provide additional services for traffic to Guatemala, but says that it continued to provide service to Medcom/QT based on defendants' assurances that payments were forthcoming. (*Id.* ¶ 33). Chunghwa claims that Medcom and QT never did pay up, even after Hurricane Sandy passed and normal business operations resumed. (*Id.* ¶ 34). The FAC further alleges that Medcom is no longer in business and that defendants now claim that Medcom and QT are entirely separate entities, leaving Chunghwa with \$197,698.18 in unpaid invoices. (*Id.* ¶¶ 2, 35-36).

QT argues that the FAC's alter ego allegations are entirely conclusory and that the FAC fails to say that Medcom was undercapitalized, incapable of paying its bills, or is or ever was defunct. If anything, QT says that the FAC indicates that Medcom was sufficiently capitalized and paid its bills for two years before defaulting. Whether plaintiff will actually succeed in establishing a claim for relief remains to be seen. For present purposes, however, the court finds that plaintiff has alleged sufficient facts supporting its alter ego theory and indicating that its claims arise out of QT's forum-related activities.

## 2. Defendant Cooper

Cooper argues that under the fiduciary shield doctrine, he cannot be subject to this court's jurisdiction simply because of his association with Medcom or QT.

"The fiduciary shield doctrine protects individuals from being subject to jurisdiction solely on the basis of their employers' minimum contacts within a given jurisdiction." [j2 Global Commc'ns, Inc. v. Blue Jay, Inc.](#), No. 4:08-cv-04254-PJH, 2009 WL 29905, at \*5 (N.D. Cal., Jan. 5, 2009). Thus, "a person's mere association with a corporation that causes injury in the forum state is not sufficient in itself to permit that forum to assert jurisdiction over the person." [Davis v. Metro Products](#),

Chunghwa Telecom Global, Inc v. Medcom, LLC, Not Reported in Fed. Supp. (2016)

[Inc.](#), 885 F.2d 515, 520 (9th Cir. 1989); [Wolf Designs, Inc. v. DHR Co.](#), 322 F. Supp.2d 1065, 1072 (C.D. Cal. 2004). But while employees are not necessarily subject to liability in a given jurisdiction based on the contacts of their employers, “their status as employees does not somehow insulate them from jurisdiction. Each defendant’s contacts with the forum State must be assessed individually.” [Calder v. Jones](#), 465 U.S. 783, 790 (1984) (finding jurisdiction proper over non-resident corporate employees where the employees were the primary participants in an alleged wrongdoing intentionally directed at a California resident).

\*6 “The fiduciary shield doctrine may be ignored in two circumstances: (1) where the corporation is the agent or alter ego of the individual defendant; or (2) by virtue of the individual’s control of, and direct participation in the alleged activities.” [j2 Global](#), 2009 WL 29905, at \*5 (citing [Wolf Designs](#), 322 F. Supp.2d at 1072). “A corporate officer or director is, in general, personally liable for all torts which he authorizes or directs or in which he participates, notwithstanding that he acted as an agent of the corporation and not on his own behalf.” [Wolf Designs](#), 322 F. Supp.2d at 1072 (quoting [Coastal Abstract Serv., Inc. v. First Am. Title Ins. Co.](#), 173 F.3d 725, 734 (9th Cir. 1999) (corporate officers cannot “hide behind the corporation where [the officer was] an actual participant in the tort”). “Personal liability on the part of corporate officers have typically involved instances where the defendant was the ‘guiding spirit’ behind the wrongful conduct, or the ‘central figure’ in the challenged corporate activity.” [j2 Global](#), 2009 WL 29905, at \*5 (citing [Wolf Designs](#), 322 F. Supp.2d at 1072). “If acts taken by a corporate officer subjects the officer to personal liability (i.e., the corporate officer authorized, directed or participated in tortious conduct), and those acts create contact with the forum state, such acts are not only acts of the corporation but also acts of the individual, and may be considered contacts of the individual for purposes of determining whether long-arm jurisdiction may be exercised over the individual.” [Id.](#) at \*6 (citing [Seagate Technology v. A.J. Kogyo Co.](#), 268 Cal. Rptr. 586, 588-91 (Cal. Ct. App. 1990); [Taylor-Rush v. Multitech Corp.](#), 265 Cal.Rptr. 672, 680 (Cal. Ct. App. 1990)).

As discussed above, Chunghwa alleges that Cooper personally directed, participated in, and ratified the alleged fraudulent acts giving rise to this lawsuit. Chunghwa claims that Cooper knew about and essentially went along with Paul Cordasco’s representations that Medcom and QT were the same company. Plaintiff further claims that it was Cooper who solicited increased traffic capacity through near daily phone calls or on Skype with Chunghwa’s Pan. Plaintiff specifies at least

one phone call in which Cooper told Pan that he was working on making payment to Chunghwa. Cooper argues that these acts do not subject him to jurisdiction in California because they were made in New York in his corporate (not individual) capacity. The gravamen of the FAC, however, is that Coopers’ representations were false or fraudulent in that defendants had no intention of ever paying Chunghwa. Thus, Coopers’ participation and control in making these representations on behalf of Medcom/QT subject him to personal jurisdiction here. See [Taylor-Rush](#), 265 Cal. Rptr. at 677 (“Corporate officers and directors cannot ordinarily be held personally liable for the acts or obligations of their corporation. However, they may become liable if they directly authorize or actively participate in wrongful or tortious conduct.”).

### 3. Whether the exercise of jurisdiction is reasonable

The court must nevertheless consider whether the exercise of jurisdiction is reasonable. In determining reasonableness, the court considers (1) the extent of the defendants’ purposeful interjection into the forum state, (2) the burden on the defendants of defending in the forum state, (3) the extent of the conflict with the sovereignty of the defendants’ state, (4) the forum state’s interest in adjudicating the dispute, (5) the most efficient resolution of the controversy, (6) the importance of the forum to the plaintiff’s interest in convenient and effective relief, and (7) the existence of an alternative forum. [Burger King Corp. v. Rudzewicz](#), 471 U.S. 462, 476-77 (1985); [Bancroft & Masters](#), 223 F.3d at 1088.

As discussed above, defendants have a “heavy burden” to present a “compelling case” that the exercise of jurisdiction is unreasonable. They have not met that burden here. Indeed, defendants’ moving papers do not clearly address each of the [Burger King](#) factors. Inasmuch as plaintiff has shown purposeful availment into California, the first factor favors Chunghwa. The second factor is neutral because the burden of litigating in California will be no greater than the burden on Chunghwa of litigating in Nevada or in New York. The third factor is also neutral because no one has identified a conflict between California and Nevada or New York. The fourth factor favors Chunghwa because California has a strong interest in providing an effective means of redress for its residents from unlawful conduct. The fifth factor is neutral in that, on the limited record presented, it appears that there may be an equal number of witnesses in and outside California. The sixth factor favors Chunghwa in that it is important to plaintiff to have this dispute

Chunghwa Telecom Global, Inc v. Medcom, LLC, Not Reported in Fed. Supp. (2016)

resolved here. Finally, while there may be an alternate viable forum in Nevada or New York, defendants make no arguments as to the preferability of either one over California.

\*7 On balance, most of these factors either favor plaintiff or are neutral. Thus, defendants have not met their burden of demonstrating that the exercise of jurisdiction is unreasonable. Their motion to dismiss for lack of personal jurisdiction is denied.

**B. Fed. R. Civ. P. 12(b)(6) Motion to Dismiss**

Defendants nevertheless maintain that the FAC still fails to allege sufficient facts establishing a claim for relief. A motion to dismiss for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6) tests the legal sufficiency of the claims in the complaint. Navarro v. Block, 250 F.3d 729, 732 (9th Cir. 2001). Dismissal is appropriate where there is no cognizable legal theory or an absence of sufficient facts alleged to support a cognizable legal theory. Id. (citing Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1990)). In such a motion, all material allegations in the complaint must be taken as true and construed in the light most favorable to the claimant. Id. However, “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009). Moreover, “the court is not required to accept legal conclusions cast in the form of factual allegations if those conclusions cannot reasonably be drawn from the facts alleged.” Clegg v. Cult Awareness Network, 18 F.3d 752, 754-55 (9th Cir. 1994).

Federal Rule of Civil Procedure 8(a)(2) requires only “a short and plain statement of the claim showing that the pleader is entitled to relief.” This means that the “[f]actual allegations must be enough to raise a right to relief above the speculative level.” Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007) (citations omitted) However, only plausible claims for relief will survive a motion to dismiss. Iqbal, 129 S.Ct. at 1950. A claim is plausible if its factual content permits the court to draw a reasonable inference that the defendant is liable for the alleged misconduct. Id. A plaintiff does not have to provide detailed facts, but the pleading must include “more than an unadorned, the-defendant-unlawfully-harmed-me accusation.” Id. at 1949.

Documents appended to the complaint or which properly are the subject of judicial notice may be considered along

with the complaint when deciding a Fed. R. Civ. P. 12(b)(6) motion. See Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc., 896 F.2d 1542, 1555 n.19 (9th Cir. 1990); MGIC Indem. Corp. v. Weisman, 803 F.2d 500, 504 (9th Cir. 1986).

While leave to amend generally is granted liberally, the court has discretion to dismiss a claim without leave to amend if amendment would be futile. Rivera v. BAC Home Loans Servicing, L.P., 756 F. Supp.2d 1193, 1997 (N.D. Cal. 2010) (citing Dumas v. Kipp, 90 F.3d 386, 393 (9th Cir. 1996)).

**1. Claim 1: Breach of Contract**

The FAC asserts a claim for breach of contract as to both Medcom and QT. As to QT, the FAC alleges that QT is liable under the Agreement as MedCom’s alter ego and also because QT “assumed the Agreement when it subsumed MedCom.” (FAC ¶ 38). QT moves to dismiss this claim, arguing that it is not MedCom’s alter ego and that QT was not a party to the subject Agreement.

Chunghwa’s claim, based on the alter ego theory, does not create separate primary liability in QT; rather, the alter ego doctrine provides a means for extending liability to QT. See Hennessey’s Tavern, Inc. v. American Air Filter Co., 251 Cal. Rptr. 859, 863 (“A claim against a defendant, based on the alter ego theory, is not itself a claim for substantive relief, e.g., breach of contract or to set aside a fraudulent conveyance, but rather, procedural, i.e., to disregard the corporate entity as a distinct defendant and to hold the alter ego individuals liable on the obligations of the corporation where the corporate form is being used by the individuals to escape personal liability, sanction a fraud, or promote injustice.”). As discussed above, the FAC alleges sufficient facts re alter ego liability. Those allegations, if proved, may extend the liability alleged to exist for breach of contract to QT.

\*8 QT nevertheless disputes plaintiff’s allegations that it somehow assumed the Agreement, pointing out that the Agreement provides that it “may not be modified, except by written documents signed by authorized officers of the Parties hereto.” (Agreement § 19). That is an issue to be decided another day. On the present motion, the court must take all material allegations as true and construe them in the light most favorable to Chunghwa.

QT’s motion to dismiss this claim is denied.

## 2. Claims 2 and 3: Fraud and Negligent Misrepresentation and Request for Punitive Damages

Defendants move to dismiss these claims, arguing that the FAC lacks the necessary specificity and fails, in any event, to allege sufficient facts establishing that any fraud actually took place. Additionally, defendants argue that any claim for punitive damages is barred by the terms of the Agreement itself. In defendants' view, this merely is an action for breach of contract for which no punitive damages are available. See [Cal. Civ. Code § 3294\(a\)](#) (providing that "[i]n an action for breach of an obligation not arising from contract," a plaintiff may seek punitive damages "where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice....")

To state a claim for fraud under California law, a plaintiff must allege: (1) a misrepresentation (false representation, concealment, or non-disclosure); (2) knowledge of falsity (or scienter); (3) intent to defraud (i.e., to induce reliance); (4) justifiable reliance; and (5) resulting damage. [Lazar v. Super. Ct.](#), 909 P.2d 981, 984 (Cal. 1996). "Negligent misrepresentation is a form of deceit, the elements of which consist of (1) a misrepresentation of a past or existing material fact, (2) without reasonable grounds for believing it to be true, (3) with intent to induce another's reliance on the fact misrepresented, (4) ignorance of the truth and justifiable reliance thereon by the party to whom the misrepresentation was directed, and (5) damages." [Fox v. Pollack](#), 226 Cal. Rptr. 532, 537 (Cal. Ct. App. 1986).

Regardless of the theory under which plaintiff seeks to assert a claim for fraud, his complaint "must state with particularity the circumstances constituting fraud or mistake." [Fed. R. Civ. P. 9\(b\)](#). Allegations of fraud must be stated with "specificity including an account of the 'time, place, and specific content of the false representations as well as the identities of the parties to the misrepresentations.'" [Swartz v. KPMG LLP](#), 476 F.3d 756, 764 (9th Cir. 2007) (quoting [Edwards v. Marin Park, Inc.](#), 356 F.3d 1058, 1066 (9th Cir. 2004)). To survive a motion to dismiss, "allegations of fraud must be specific enough to give defendants notice of the particular misconduct which is alleged to constitute the fraud charged so that they can defend against the charge and not just deny that they have done anything wrong.'" [Id.](#) (quoting [Bly-Magee v. California](#), 236 F.3d 1014, 1019 (9th Cir. 2001)).

As discussed above, the FAC alleges that defendants

falsely represented that MedCom and QT were one and the same company. Cooper allegedly knew that QT and Medcom were not adhering to corporate formalities and that such conduct would cause plaintiff to believe that the two companies were actually one, thereby allegedly inducing plaintiff to continue providing telecommunications services. Then came the surge in defendants' telecommunications capacity usage, followed by nonpayment for plaintiff's provision of services. The upshot of this alleged scheme was that defendants falsely induced plaintiff into providing ever increasing capacity, knowing that they were not going to pay for those services.

\*9 Defendants contend that these allegations state nothing more than a claim for nonpayment (i.e., breach of contract) because simply asking for increased capacity is not fraud. Nevertheless, taking all material allegations in the complaint as true and construing them in the light most favorable to Chunghwa, the gravamen of plaintiff's fraud and negligent misrepresentation claims is that defendants duped plaintiff into continuing to provide ever-increasing telecommunications capacity and then ran up the bill, knowing that they were never going to pay. And, punitive damages may be recovered "upon a proper showing of malice, fraud or oppression even though the tort incidentally involves a breach of contract." [Schroeder v. Auto Driveaway Co.](#), 523 P.2d 662, 671 (Cal. 1974).<sup>7</sup>

Defendants nevertheless argue that punitive damages are barred by a limitation of liability term in the Agreement that provides that no party will be liable for "any indirect, special, incidental or consequential losses arising from the Agreement and the performance (or nonperformance) of obligations under that contract. (Dkt. 44, Mot. at ECF p. 27). Limitation of liability clauses, however, are ineffective with respect to claims of fraud or misrepresentation. [Blankeheim v. E.F. Hutton & Co.](#), 266 Cal. Rptr. 593, 598-99 (Cal. Ct. App. 1990); [Cal. Civ. Code § 1668](#) ("All contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law.").

Defendants' motion to dismiss this claim is denied.

## 3. Quantum Meruit

The FAC asserts a claim for quantum meruit against QT Talk. "Quantum meruit (or quasi-contract) is an equitable remedy implied by the law under which a plaintiff who

Chunghwa Telecom Global, Inc v. Medcom, LLC, Not Reported in Fed. Supp. (2016)

has rendered services benefiting the defendant may recover the reasonable value of those services when necessary to prevent unjust enrichment of the defendant.” [In re De Laurentis Entertainment Group, Inc.](#), 963 F.2d 1269, 1272 (9th Cir. 1992). “Quantum meruit is based *not* on the intention of the parties, but rather on the provision and receipt of benefits and the injustice that would result to the party providing those benefits absent compensation.” *Id.* “To recover on a claim for the reasonable value of services under a quantum meruit theory, a plaintiff must establish both that he or she was acting pursuant to either an express or implied request for services from the defendant and that the services rendered were intended to and did benefit the defendant.” [Ochs v. PacificCare of Cal.](#), 9 Cal. Rptr.3d 734, 742 (Cal. Ct. App. 2004).

QT argues that a claim for quantum meruit cannot be pled where an actual contract exists. Additionally, QT contends that it is of no significance whether QT may have received certain beneficial services, arguing that there can be no quantum meruit recovery from a party who accepted services, but did not agree to pay for them. *See, e.g., Corsini v. Canyon Equity, LLC*, 2011 U.S. Dist. Lexis 54872 (N.D. Cal, May 23, 2011) (dismissing the plaintiff’s quantum meruit claim where the pleading failed to present facts supporting an understanding that anyone other than the non-moving defendant agreed to compensate the plaintiff for services).

Chunghwa does not dispute that, under California law, a defendant may not be held liable for breach of an express contract and for quantum meruit. Rather, plaintiff says that its quantum meruit claim is an alternate theory of

liability. Alternate theories of recovery are allowed at the pleading stage. [Fed. R. Civ. P. 8\(d\)\(3\)](#) (“A party may state as many separate claims or defenses as it has, regardless of consistency.”); [Int’l Medcom, Inc. v. S.E. Int’l, Inc.](#), No. C13-05193 LB, 2014 WL 262125, at \*7 (N.D. Cal., Jan. 23, 2014) (concluding that the plaintiff could proceed on claims for breach of contract and an alternate quantum meruit claim). As discussed above, the FAC alleges that QT issued invoices for services; plaintiff provided services; and that QT Talk accepted and enjoyed the benefits of those services, knowing that Chunghwa expected QT Talk to pay for those services. (*See, e.g.,* FAC ¶¶ 19, 33-34, 67).

\*10 Defendants’ motion to dismiss this claim is denied.

**ORDER**

Based on the foregoing, the court denies defendants’ [Fed. R. Civ. P. 12\(b\)\(2\)](#) motion to dismiss for lack of personal jurisdiction and their [Fed. R. Civ. P. 12\(b\)\(6\)](#) motion to dismiss for failure to state a claim.

SO ORDERED.

Dated: October 5, 2016.

**All Citations**

Not Reported in Fed. Supp., 2016 WL 5815831

Footnotes

- 1 QT Talk says it erroneously was sued as “QT Talk, Inc.”
- 2 This court’s jurisdiction over Medcom is undisputed. Medcom contractually agreed to submit to the jurisdiction of any California court. (FAC ¶ 12).
- 3 The court denied Medcom’s prior motion to dismiss Chunghwa’s contract claim (Dkt. 33), and Medcom does not reassert a challenge to that claim here.
- 4 All parties have expressly consented that all proceedings in this matter may be heard and finally adjudicated by the undersigned. [28 U.S.C. § 636\(c\)](#); [Fed. R. Civ. P. 73](#).
- 5 *See* [Mavrix Photo, Inc.](#), 647 F.3d at 1223-24 (“For general jurisdiction to exist, a defendant must engage in continuous and systematic general business contacts that approximate physical presence in the forum state.”) (citations omitted).
- 6 Ramos and Barlow are not named defendants.
- 7 Punitive damages, however, are not awardable for negligent misrepresentation. [Reid v. Moskovitz](#), 255 Cal. Rptr. 910, 912 (Cal. Ct. App. 1989).

Chunghwa Telecom Global, Inc v. Medcom, LLC, Not Reported in Fed. Supp. (2016)

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## Exhibit 6

Finance Express LLC v. Nowcom Corporation, Not Reported in Fed. Supp. (2008)

**H** KeyCite history available

2008 WL 11342755

Only the Westlaw citation is currently available.  
United States District Court, C.D. California.

FINANCE EXPRESS LLC  
v.  
NOWCOM CORPORATION, et al.

Case No. SACV 07-01225-CJC(ANx)

Signed March 6, 2008

#### Attorneys and Law Firms

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**PROCEEDINGS: (IN CHAMBERS) ORDER DENYING DEFENDANTS' MOTIONS TO DISMISS AND FOR A MORE DEFINITE STATEMENT** [filed 01/17/08]

HONORABLE [CORMAC J. CARNEY](#), UNITED STATES DISTRICT JUDGE

\*1 Having read and considered the papers presented by the parties, the Court finds this matter appropriate for disposition without a hearing. *See Fed. R. Civ. P. 78*; Local Rule 7-15. Accordingly, the hearing set for March 10, 2008 at 1:30 p.m. is hereby vacated and off calendar.

#### Background

Plaintiff Finance Express LLC ("Finance Express") is in

the business of providing software to automate and facilitate credit relationships between used automobile dealers and lenders. Finance Express operates the Finance Express Dealer Management System, an Internet-based technology platform that enables auto dealers to obtain financing for their inventory. Finance Express also offers a product known as the Tracker Dealer Management Software ("Tracker DMS") that it purchased from a competitor, Manheim Interactive, Inc. The Tracker DMS product is a dealer management database solution that allows automobile dealers to track their profitability, manage their inventory, conduct sales, and perform other services. Finance Express alleges that it is the owner of several trademarks at issue: Finance Express®, Tracker™, and Tracker DMS™. Finance Express further asserts that Defendants have infringed on their marks by undertaking an advertising campaign that uses the Tracker™ marks and Finance Express' name in order to divert current and potential customers of Finance Express to Defendants' competing product, Dealer Desktop. Specifically, Finance Express contends that Defendant Rufus Hankey, the president of Nowcom Corp. ("Nowcom"), registered at least two websites, <trackerdmsonline.com> and <financeexpressdms.com>, to Nowcom that featured a "Press Release" that purported to have been issued by Finance Express. The press release encourages site visitors to "seamless[ly] migrat[e] from Tracker to Nowcom's Dealer Desktop product. Finance Express alleges that such conduct constitutes trademark infringement, false advertising, and false designation of origin under the Lanham Act and that it also violates the Anticybersquatting Consumer Protection Act and various state laws. Finance Express not only named Nowcom, the registered owner of the allegedly infringing websites, as a Defendant, but also named Nowcom's sister companies, Westlake Services, Inc., Hankey Investment Company, and the Hankey Group, an unincorporated association. Finally, Finance Express also named Don and Rufus Hankey as defendants, the father and son directors of the defendant companies.

Defendants Westlake Services, Inc., Hankey Investment Company, Hankey Group and Don Hankey now move to dismiss all claims against them pursuant to [Federal Rule of Civil Procedure 12\(b\)\(6\)](#) on the grounds that Defendants cannot be held liable under an agency or alter ego theory and that Hankey Group is a non-existent entity. Defendants also move for a more definite statement. Because the Court finds that the First Amended Complaint ("FAC") alleges sufficient facts to support theories of alter ego or agency liability for the moving parties, Defendants' motion to dismiss is DENIED. Moreover, the Court finds that the trademark infringement

Finance Express LLC v. Nowcom Corporation, Not Reported in Fed. Supp. (2008)

allegations are sufficiently clear and therefore Defendants' motion for a more definite statement is also DENIED.

**Standard on a Motion to Dismiss**

\*2 A motion to dismiss under [Federal Rule of Civil Procedure 12\(b\)\(6\)](#) tests the legal sufficiency of the claims asserted in the complaint. The issue on a motion to dismiss for failure to state a claim is not whether the claimant will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims asserted. *Gilligan v. Jamco Dev. Corp.*, 108 F.3d 1370, 1374 (9th Cir. 1997). When evaluating a [Rule 12\(b\)\(6\)](#) motion, the Court must accept all material allegations in the complaint as true and construe them in the light most favorable to the non-moving party. *Mayo v. Gomez*, 32 F.3d 1382, 1384 (9th Cir. 1994). [Rule 12\(b\)\(6\)](#) is read in conjunction with [Rule 8\(a\)](#), which requires only a short and plain statement of the claim showing that the pleader is entitled to relief. [Fed. R. Civ. P. 8\(a\)\(2\)](#). Dismissal of a complaint for failure to state a claim is not proper where a plaintiff has alleged "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, — U.S. —, 127 S.Ct. 1955, 1974 (2007). In keeping with this liberal pleading standard, the district court should grant the plaintiff leave to amend if the complaint can possibly be cured by additional factual allegations. *Doe v. United States*, 58 F.3d 494, 497 (9th Cir. 1995).

**Analysis**

**A. Alter Ego Theory**

Finance Express concedes that Nowcom is the only Defendant that registered the allegedly infringing and cybersquatting domain names at issue. Finance Express asserts that Rufus Hankey, the president of Nowcom, registered the domain names and that Nowcom owned and operated the allegedly infringing websites. However, Finance Express avers that Nowcom's various sister-companies as well as their majority shareholder, Don Hankey, should also be held liable because Nowcom, Westlake, Hankey Investment, and Hankey Group<sup>1</sup> are merely alter egos of Don Hankey. (FAC, ¶¶ 43–45, 69, 79, 109, 121.) Defendants, on the other hand, argue that Finance Express is unable to allege facts sufficient to

support an alter ego theory of liability because each Defendant is a separate, individually-managed entity.

[Federal Rule of Civil Procedure 8](#) only requires a "short and plain statement of the claim showing that the pleader is entitled to relief." In keeping with the liberal standard of notice pleading, motions to dismiss for failure to state a claim are generally disfavored. *Gilligan v. Jamco Dev. Corp.*, 108 F.3d 246, 249 (9th Cir. 1997). Finance Express has pled the facts necessary to meet the requirements of [Rule 8](#) with respect to its alter ego theory of liability. Ordinarily, a corporation is regarded as a legal entity separate from its stockholders, officers, and directors. *Robbins v. Blecher*, 52 Cal. App. 4th 886, 892 (1997). "The law allows corporations to organize for the purpose of isolating liability of related corporate entities. Only in unusual circumstances will the law permit a parent corporation to be held either directly or indirectly liable for the acts of its subsidiary... Mere ownership of a subsidiary does not justify the imposition of liability on a parent." *Bowoto v. Chevron Texaco Corp.*, 312 F. Supp. 2d 1229, 1234–35 (N.D. Cal. 2004) (citations and quotations omitted).<sup>2</sup> Under the alter ego doctrine, however, a court may disregard the corporate entity and treat the corporation's acts as if they were done by the persons controlling the corporation if the corporation was used by the individuals to perpetrate fraud, circumvent a statute, or accomplish some other wrongful or inequitable purpose. *Robbins*, 52 Cal. App. 4th at 892. The Ninth Circuit applies the law of the forum state with respect to the alter ego doctrine. *See Sec. & Exch. Comm'n v. Hickey*, 322 F.3d 1123, 1128 (9th Cir. 2003). California law recognizes an alter ego relationship, such that a corporation's liabilities may be imposed on an individual or a related corporation, only when two conditions are met: (1) there is such a unity of interest and ownership that the individuality of the said person and corporation has ceased; and (2) an adherence to the fiction of the separate existence of the corporation would sanction a fraud or promote injustice. *See id.*; *Ministry of Defense v. Gould*, 969 F.2d 764, 769, n.3 (9th Cir. 1992).

\*3 Here, in order to properly plead alter ego liability, Finance Express needed to plead facts showing that (1) there is such a unity of interest and ownership between Nowcom, its sister companies, and Don Hankey that the individuality of Nowcom and the other Defendants has ceased; and (2) an adherence to the fiction of the separate existence of the eight sister companies would sanction a fraud or promote injustice. Finance Express has done so. The FAC alleges that Hankey Group consists of nine sister companies all controlled and directed by Don R. Hankey. (FAC, ¶ 11.) The FAC also alleges that the nine sister companies do business as a single integrated and

Finance Express LLC v. Nowcom Corporation, Not Reported in Fed. Supp. (2008)

coordinated entity. (FAC, ¶¶ 33, 37–38, 45.) The FAC also alleges that the companies allegedly share bank accounts, lines of credit, offices, employees, directors and outside counsel. (FAC, ¶¶ 12, 33, 37, 40–42.) The FAC also alleges that Don Hankey and Hankey Group all use Nowcom to own, register and operate the companies' websites. (FAC, ¶ 39.) Most importantly, the FAC alleges that the alleged infringement, cybersquatting and false advertising were committed under the direction, with the approval and for the benefit of Don Hankey and the companies comprising Hankey Group. (FAC, ¶¶ 44–45.) Simply stated, the FAC sufficiently alleges that there is such a unity of interest and ownership forming the Hankey Group that the individuality of each entity has ceased to exist.

With respect to the fraud or injustice prong of the alter ego analysis, Finance Express alleges “[f]raud, injustice, and inequity would result if the corporate forms of Defendants NOWCOM, WESTLAKE, and HANKEY INVESTMENT were recognized for purposes of this lawsuit.” (FAC, ¶ 43.) For the purposes of this motion, the Court must accept as true Plaintiff's allegations that Defendants have failed to observe corporate formalities and that they are in fact one entity controlled by Don Hankey. *Shwarz v. United States*, 234 F.3d 428, 435 (9th Cir. 2000). If indeed Defendants are one integrated and coordinated entity engaging in trademark infringement, then injustice would result if Don Hankey is permitted to evade liability by adhering to the fiction of separate corporate existences.<sup>3</sup>

### B. Agency Theory

Defendants also argue that Finance Express' agency theory of liability is deficient because only Nowcom and Rufus Hankey were involved in the allegedly infringing activity. “To establish actual agency a party must demonstrate the following elements: (1) there must be a manifestation by the principal that the agent shall act for him; (2) the agent must accept the undertaking; and (3) there must be an understanding between the parties that the principle is to be in control of the undertaking.” *Bowoto v. Chevron Texaco Corp.*, 312 F. Supp. 2d 1229, 1239 (N.D. Cal. 2004) (citations omitted). To establish a parent corporation's liability for acts or omissions of its subsidiary on an agency theory, a plaintiff must show more than mere representation of the parent by the subsidiary in dealings with third persons. *Monaco v. Liberty Life Assur. Co.*, 2007 U.S. Dist. LEXIS 31298, \*20 (N.D. Cal. 2007). The showing required is that “a

parent corporation so controls the subsidiary as to cause the subsidiary to become merely the agent or instrumentality of the parent.” *Id.*

The Court finds that the same facts alleged in the FAC that support Finance Express' alter ego theory are sufficient to support an agency theory of liability. The FAC alleges that Hankey Group holds itself out as a single entity that is controlled and directed by Don Hankey. More importantly, the FAC alleges that the alleged infringement, cybersquatting and false advertising were all committed under the direction, with the approval and for the benefit of Hankey Group and Don Hankey. Nothing further need be alleged to defeat a motion to dismiss.<sup>4</sup>

\*4 Defendants' motion for a more definite statement is also DENIED. When a party's pleading may be so vague or ambiguous that the adversary cannot respond, the court may, in its discretion, grant a Rule 12(e) motion for a more definite statement. *McHenry v. Renne*, 84 F.3d 1172, 1179 (9th Cir. 1996). However, motions for a more definite statement are disfavored in light of the liberal pleading standards of Rule 8, and should not be granted unless the moving party “literally cannot frame a responsive pleading.” *Bureerong v. Uvawas*, 922 F. Supp. 1450, 1461 (C.D. Cal. 1996). Indeed, a Rule 12(e) motion is only proper where the complaint is so indefinite that the defendant cannot ascertain the nature of the claim being asserted. See *Famolare, Inc. v. Edison Bros. Stores, Inc.*, 525 F. Supp. 940, 949 (E.D. Cal. 1981); *Cellars v. Pac. Coast Packaging, Inc.*, 189 F.R.D. 575, 578 (N.D. Cal. 1999); *Davison v. Santa Barbara High Sch. Dist.*, 48 F.Supp.2d 1225, 1228 (C.D. Cal. 1998). Defendants argue that Finance Express' FAC must be amended because it incorporates each preceding paragraph into each claim. The Court does not find that this practice creates such ambiguity that Defendants cannot understand the allegations or respond to them. Defendants also argue that the FAC generally attacks Defendants' “Six Reasons” Advertising campaign, and in doing so, Finance Express seeks to restrain valid, comparative advertising. While the FAC may indeed attack advertising that will be determined to be valid by the fact-finder, this goes to the merits of the claim rather than to the issue of whether the FAC is vague and ambiguous. The allegations of cybersquatting and trademark infringement are sufficient to meet the notice-pleading standard of Rule 8.

### All Citations

Not Reported in Fed. Supp., 2008 WL 11342755

Finance Express LLC v. Nowcom Corporation, Not Reported in Fed. Supp. (2008)

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Footnotes

- 1 Defendants also argue that Hankey Group cannot be sued because it is not an incorporated entity, but just a collection of companies. The Court finds that Finance Express has the better understanding of California law, under which an unincorporated association may be sued by the name in which it is known or holds itself out to be. *See Cal. Code. Civ. Proc. § 369.5* (“A partnership or other unincorporated association, whether organized for profit or not, may sue and be sued in the name it has assumed or by which it is known.”) Here, the Hankey Group’s website stated that “Hankey Group has been in business since 1972” and that its “companies include financial, real estate, insurance, and technology services companies as well as rental car and dealership operations.” (FAC, ¶ 33.) A group of affiliated companies that share a common purpose and function under a common name has the legal capacity to be sued.
- 2 The Court agrees with Defendants that although this case involves the liability of a corporation for the conduct of its sister corporation rather than the liability of a parent for its subsidiary, the distinction is not significant for purposes of the alter ego and agency analyses. *See Nichols v. Pabtex, Inc.*, 151 F. Supp. 2d 772, 780 (E.D. Tex. 2001). Accordingly, the Court may properly rely on cases involving liability of a parent for the conduct of its subsidiary in its analysis here.
- 3 Because the facts regarding other evidence supporting alter ego theory, such as commingling of funds, undercapitalization of a corporation, or failure to maintain adequate corporate records are exclusively within Defendants control and the parties have not yet commenced discovery, it would be inappropriate for the Court to grant Defendants’ motion without allowing Finance Express an opportunity to obtain discovery as to those other factors.
- 4 The agency cases which Defendants rely on are procedurally inapposite because they were not decided at the pleadings stage, but instead were decided at summary judgment. *See, e.g., Bowoto v. Chevron Texaco Corp.*, 312 F. Supp. 1229 (N.D. Cal. 2004); *M2 Software, Inc. v. Madacy Entm’t*, 421 F.3d 1073 (9th Cir. 2005). Whether Don Hankey and the other moving Defendants exercised sufficient control to cause Nowcom to become their agent is a factual question that is more appropriately decided in the context of a summary judgment motion

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## Exhibit 7

First United Methodist Church of San Jose v. Atlantic Mut..., Not Reported in...

 KeyCite cautionary citing references available  
Opinion Modified on Denial of Reconsideration by [First United Methodist Church of San Jose v. Atlantic Mut. Ins. Co.](#), N.D.Cal., June 1, 1995

1995 WL 150429

Only the Westlaw citation is currently available.  
United States District Court, N.D. California.

FIRST UNITED METHODIST CHURCH  
OF SAN JOSE, a nonprofit organization,  
Plaintiff,

v.

ATLANTIC MUTUAL INSURANCE  
COMPANY, a New York corporation;  
Centennial Insurance Company,  
Defendants.

No. C 94-20036 RPA.

|  
March 29, 1995.

#### Attorneys and Law Firms

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Richard O. McDonald, [Ellen McKissock](#), Losa S. Tudzin,  
Thelen, Marrin, Johnson & Bridges, San Jose, CA.

ORDER GRANTING PLAINTIFF'S CROSS MOTION  
FOR PARTIAL SUMMARY JUDGMENT AND  
DENYING DEFENDANTS' MOTION FOR  
SUMMARY JUDGMENT AND FOR STAY OF  
PROCEEDINGS

AGUILAR, District Judge.

\*1 Before this court are defendants' Motion For Summary Judgment on Claim For Declaratory Relief, or in the Alternative, Request For Order Specifying Those Facts That Are Without Substantial Controversy, and plaintiff's Cross Motion For Partial Summary Judgment or Summary Adjudication of Issues. These two motions came on regularly for hearing on February 24, 1995. Both

parties appeared represented by counsel. Following the hearing, the court took the motions under submission. Based on the pleadings, the submitted declarations, evidence, oral argument, the court records and good cause appearing therefor, the court denies defendants' motion and grants plaintiff's motion.

The court has previously taken under submission without oral argument the motion of defendants Atlantic Mutual Insurance Company ("Atlantic") and Centennial Insurance Company ("Centennial") to dismiss/stay this action until plaintiff First Methodist Church of San Jose ("First Church") exhausts its administrative remedies. After having reviewed all pleadings submitted by the parties, and after ruling on the Cross Motions For Summary Judgment, the court now denies the Motion to Dismiss/Stay.

#### FACTUAL BACKGROUND

First Church's 29,000 square foot Sanctuary building was built in 1911. It stood at the corner of 5th and Santa Clara Streets in downtown San Jose. A fire destroyed the building on March 25, 1991. The Sanctuary was the primary place of worship for generations of San Jose's United Methodist congregation. Since the fire, First Church has conducted services in the old social hall/gymnasium which was next door to the Sanctuary. This building was not damaged in the fire.

#### *Facts related to the filing of the initial claim*

Three months before the fire, First Church purchased a \$15 million "full replacement cost" fire insurance policy (the "Policy") from defendants. The Policy included coverage for increased construction costs caused by enforcement of zoning laws. This coverage is set forth in Building and Personal Property Coverage Form, A.5. Coverage Extensions, e. Building Ordinance Coverage. Under Endorsement 5, the limits of coverage are set at \$15 million.

As of the date of the fire, the Sanctuary was classified as a "legal non-conforming use" under San Jose's zoning laws. This was because there were only 72 off-street parking places for the Sanctuary, which had a seating

First United Methodist Church of San Jose v. Atlantic Mut..., Not Reported in...

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capacity of 1,298 members. Under current zoning requirements, a church of that size, at that location, must have 329 off-street parking places.

The adjuster's notes reflect that Atlantic was aware of the "possibility" of a parking requirement under the City of San Jose's (the City) local zoning ordinances within a week after the fire. Atlantic allegedly never said a word to First Church about investigating the applicable laws or seeking a variance or suing the City of San Jose.

First Church initially believed that the Atlantic adjuster would be investigating everything having to do with rebuilding the Sanctuary. This included the application of anticipated changes due to building ordinances.

\*2 In July 1991, over three months after the fire, the insurance company informed First Church that the church should conduct its own investigation into the cost of rebuilding the Sanctuary. First Church hired a contractor to prepare a reconstruction cost estimate. During the contractor's investigation, he learned nothing about the City's new parking requirements.

In the summer of 1991, First Church filed an initial claim for rebuilding the sanctuary. In the initial claim the church did not make a claim for parking improvements but it did reserve the right to file a claim should the City require the church to comply with the new city parking ordinance. In October 1991, First Church settled its initial claim with Atlantic. At that point First Church allegedly learned that Atlantic had misrepresented the coverage. First Church claims that Atlantic initially informed it that the church had only \$500,000 in building ordinance coverage. Instead of only \$500,000 of available building ordinance coverage, there was \$15 million.

At that point, First Church chose not to file its claim for the monies to build a parking facility because it was not sure that the City would require the additional parking spaces. Further, it claims not to have the funds to have pursued this issue.

An applicant must first have architectural plans prepared, submitted to, and reviewed by the City. This way an applicant can learn what conditions might be imposed on any permits to be issued. According to First Church, this process takes substantially longer than nine months. The process costs thousands of dollars in design fees. Defendants claim that First Church delayed to the extent that they missed the opportunity to obtain a "grandfather clause" permit. This permit would have enabled the church to continue as a non-conforming use with respect to its parking places. First Church claims to have been in

no position to know about or take advantage of the "grandfather clause." The Church could not move forward until it settled its claim and had the money to hire an architect.

First Church hired an architect in 1992, after settling its initial claim. It was at this time that it became aware of the already lapsed "grandfather clause." At that point, it became clear that the City would indeed enforce its off-street parking requirements. In April 1993, the planning and permit process ran its course and the City issued a conditional use permit. The permit required First Church to provide 329 parking places before the Church could receive an occupancy permit. First Church notified Atlantic about this problem and requested the additional money to provide the parking spaces in December 1992. Atlantic said, "... put it in writing." Accordingly, First Church submitted a formal claim in March, 1993. Atlantic did not inform First Church of its decision to deny this formal claim for additional monies until ten months thereafter. In January 1994, Atlantic denied the claim on several grounds.

\*3 At the time it denied the claim, Atlantic also indicated that it would sue First Church in federal court. First Church immediately filed this lawsuit for declaratory relief and bad faith.

*The Promotion of the Insurance by Atlantic and Centennial*

Atlantic insured thousands of other United Methodist Churches across the United States. Plaintiff claims that Atlantic stated that it had an "unparalleled understanding of a church's exposures." This was one of the reasons that First Church opted for insurance with Atlantic. (Jordan Depo. pp. 116:10-25 to 117:1-17). Atlantic had developed a new property and liability insurance program that it had specially designed for the United Methodist Church. This new program was set up as a unit plan for the various conferences of churches. First Church is a member of the California-Nevada Annual Conference of the United Methodist Church. This Conference covers Northern California and parts of Nevada. The Conference Unit Plan program allowed member churches of each Conference to obtain broader coverage, higher limits, and lower premiums than previously. There was one "master policy" for all participating churches within each Conference, instead of smaller, separate policies for each individual church. Plaintiff claims that Atlantic assured them they would have the "broader coverage and the security which comes from knowing that every church

First United Methodist Church of San Jose v. Atlantic Mut..., Not Reported in...

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that participates in the plan is properly covered.” (Exh. 3 containing Exh. 503 of Alegria Depo. pp. UMC00022)

The Policy provided for “full replacement cost” property insurance up to the \$15 million policy limits. (Exh. 13)

First Church signed up for the plan and, effective January 1, 1991, it believed it had \$15 million of property damage coverage under its new Atlantic insurance policy (“the Policy”). First Church’s previous Atlantic policy was for \$3,200,000.

Plaintiff now claims that the Policy provisions specifically covered the building of new off-street parking spaces that were required by the City. According to First Church, the property coverage provisions of the Policy were very broad. The policy included a “building ordinance coverage” extension form. Under this extension the carrier agreed to pay up to \$500,000 for the “increased cost to repair, rebuild or construct damaged or destroyed covered property” which was “caused by enforcement of local building zoning or land use law”. Sep. Stmt., Facts 22, 23, 24 & 25; Exh. 8 & 9, RFA 31, and Exh. 12. UMC00310–00311.) Additionally, the Policy included Endorsement 5, which plaintiff claims granted extra coverage. In Endorsement 5 the \$500,000.00 sub-limit on zoning ordinance coverage was eliminated. The carrier agreed to provide up to the full \$15 million policy limits for “building ordinance coverage” claims. (Sep. Stmt., Facts 27, 28, 29 & 30; Exh. 10 pp. 7:24–8:9, and other references.)

Plaintiff claims that the uniquely broad building ordinance coverage was specifically requested by the insured and agreed to by the carrier as part of the United Methodist Church’s Cal–Pacific Policy in 1988. Further, this endorsement was specifically included in the Cal–Nevada Policy as well. (Exh. 17, p. UWO175; Exh. 10, pp. 50:24 to 51:14).

\*4 Apparently, two years after the First Church fire, Atlantic eliminated the “no cap” provision of Endorsement 5 and reinstated a \$1,000,000 sublimit on available building ordinance coverage in its subsequent conference unit plan policies. (Sep. Stmt., Fact 31)

*Facts relating to the relationship between Atlantic and Centennial*

Defendant claims that the defendants, Atlantic and Centennial, are separate entities. Defendants claim that liability on one defendant should not extend to the other.

Defendants claim that the companies are affiliated but are separately incorporated insurance companies. Atlantic Mutual Insurance Company both writes and issues its own insurance policies, as well as adjusts claims made to its affiliated insurance companies. One of Atlantic’s divisions has a business arrangement with defendant Centennial. Under this arrangement it provides adjusting services for Centennial’s insureds when a fire claim is made on a policy written and issued by Centennial. (Decl. of Ted Henke, Exhibit 33).

Defendants claim that there is no such entity as “Atlantic Mutual Insurance Companies.” The defendants in this action are Atlantic Mutual Insurance Company and Centennial Insurance Company. Centennial is not a wholly owned subsidiary of Atlantic.

In contrast, First Church claims that Atlantic was not a stranger to the contract. First Church claims that Atlantic wrote the contract, negotiated the contract, marketed the contract, adjusted and paid First Church’s initial claim. First Church claims Atlantic was a party to the contract despite the fact that its name was not placed on the declarations page.

David Jordan, a key witness for Defendants, testified in a deposition that “there is no difference between Atlantic and Centennial. They have the same employees.” (McDonald Dec., Exh. “A”). First Church also claims that the two companies have the same president. They also have the same designated agent for service. Atlantic was responsible for designing the form of the Policy. In fact, the insurance form used by Centennial is the “Atlantic Insurance for Churches” Form.

In addition, Atlantic admitted that it serves as the underwriter for Centennial. First Church claims that Atlantic actively promoted its church insurance and solicited business from the Conference churches. The material it distributed highlighted Atlantic, not Centennial, as the expert in church insurance. Atlantic allegedly was the one familiar with all the needs peculiar to the industry.

*THE CROSS MOTIONS FOR SUMMARY JUDGMENT*

*Standard for summary judgment.*

First United Methodist Church of San Jose v. Atlantic Mut..., Not Reported in...

Under [Rule 56 of the Federal Rules of Civil Procedure](#), summary judgment is proper if no factual issues exist for trial. To survive a motion for summary judgment, the non-moving party must demonstrate that the fact in contention is material, i.e., a fact that might affect the outcome of the suit under the governing law. *Anderson v. Liberty Lobby*, 477 U.S. 242, 248–49, 10 S.Ct. 2505, 2510 (1986). In addition, the non-moving party must demonstrate that the factual dispute is genuine, i.e., the evidence is such that a reasonable jury could return a verdict for the non-moving party. *Id.*

\*5 These same standards apply to motions for summary adjudication.

#### ISSUES PRESENTED

Defendants' Motion claims that (1) the Policy only insures buildings in existence at the time of the fire (and not any non-existing parking garage), (2) the Building Ordinance Coverage provisions are limited so that indemnity is only available for the increased costs necessitated by compliance with building ordinances for repairing, building or constructing a structure of the same height, floor areas and style as the damaged or destroyed premises and that such a limitation would preclude a new parking structure; and (3) Atlantic Mutual Insurance Company should not be held liable to plaintiff for declaratory relief, breach of contract and/or bad faith, when it is a "stranger" to the insurance contract between plaintiff and Centennial, having merely acted in the role of an adjuster of the plaintiff's claim.

Plaintiff's Cross Motion claims that (1) the Policy clearly covers the increased cost to rebuild the Sanctuary caused by the City's off-street parking requirement. Plaintiff claims that according to the "no-cap" limit of Endorsement 5, the Policy provides \$15 million in coverage for zoning requirements under the Building Ordinance Coverage Section.

*PLAINTIFF SUCCEEDS ON THE CROSS MOTION FOR SUMMARY JUDGMENT BECAUSE NO QUESTIONS OF FACT REMAIN AS TO WHETHER THE POLICY LANGUAGE PROVIDES FOR THE BUILDING OF EXTRA PARKING SPACES.*

#### Language:

The basic conflict in this case revolves around the passages contained in the Building Ordinance Coverage section of the Policy. In relevant part, the Building Ordinance Coverage of the Policy provides as follows:

(1) The insurance that applies to your building(s) applies also to:

(a) Loss or damage caused by the enforcement of any law that:

(i) Requires the demolition of parts of the same property not damaged by a Covered Cause of Loss;

(ii) Regulates the construction or repair of buildings, or establishes zoning or land use requirements at the described premises; and

(iii) Is in force at the time of loss.

(b) The increased cost to repair, rebuild or construct the property caused by enforcement of building, zoning or land use law. If the property is repaired or rebuilt it must be intended for similar occupancy as the current property, unless otherwise required by zoning or land use law.

(c) The cost to demolish and clear the site of undamaged parts of the property caused by enforcement of the building, zoning or land use law  
...

(3) We will not pay more:

(a) If the property is repaired or replaced on the same premises, than the amount you actually spend to:

(i) Demolish and clear the site; and

(ii) Repair, rebuild or construct the property but not for more than property of the same height, floor area and style on the same premises.

(b) If the property is not repaired or replaced on the same premises, then:

(i) The amount you actually spend to demolish and clear the site of the described premises; and

\*6 (ii) The cost to replace, on the same premises, the damaged or destroyed property with other property:

(a) Of comparable material and quality;

(b) Of the same height, floor area and style; and

First United Methodist Church of San Jose v. Atlantic Mut..., Not Reported in...

(c) Used for the same purpose.

Initially, the Building Ordinance provision of the policy was limited to \$500,000 in coverage. Endorsement 5 of the Policy, however, removed this sublimit and provided for up to \$15 million in coverage.

First Church claims that the parking facility now required by the City's Zoning ordinance is clearly covered under the Policy. In contrast, defendants claim that the language set forth in part 3 limiting the coverage to buildings of the same "height, floor area and style" excludes the creation of any off-street parking spaces.

The issue then becomes whether the creation of off-street parking is covered under this section of the policy. Neither of the parties has been able to provide a case related specifically to the issue of whether parking is typically covered under a "building ordinance" policy.

Upon review of the Policy as a whole, the court finds that the Policy language clearly covers every building ordinance requirement since none is specifically excluded. Parking, therefore, is included and covered under the Policy. It necessarily follows that if parking requires an underground garage it is covered. This would also be the case as to off-site parking.

Defendants claims that the "height, floor area and style" language acts to limit the type of zoning requirements that are covered under the building ordinance section of the policy. They claim that only ordinances that apply to the building of the same "height, floor area and style" are covered. Therefore, defendants argue that any ordinance that would change the "height, floor area and style" are not covered. Therefore, the creation of additional parking spaces would not be covered since it would expand the "floor area" of the building.

The court, however, finds this reasoning flawed for several reasons. The allegedly limiting "height, floor area and style" language is within the form language of the Policy. The language is not found in the "exclusions" section, the "limitations" section or even the "loss payment" section. It is only found five paragraphs down in a coverage extension form where an insured would not typically look for it. In itself, this placement of the allegedly key limiting language, indicates that the language was not to serve as exclusionary or limiting language. Such placement of any limiting language makes the policy confusing and ambiguous.

Nowhere in the policy was there contained specific exclusion for parking facilities. Nor is any found in

Endorsement 5. The fact that First Church was an older down-town church should have placed the insurance company on notice of potential zoning problems related to providing parking. No specific exclusion was included in the contract. This goes to show that the parties contemplated that the parking issue would be covered.

\*7 Further, the court finds an inconsistency between the language contained in the Building Ordinance Coverage sections (1)(b) and (3)(a)(ii).

Section (1)(b) provides as follows:

[The insurance applies to] The increased cost to repair, rebuild or construct the property caused by enforcement of building, zoning or land use law. If the property is repaired or rebuilt, it must be intended for similar occupancy as the current property, unless otherwise required by zoning or land use law.

Section (3)(a) provides as follows:

(3) We will not pay more

(a) If the property is repaired or replaced on the same premises, than the amount you actually spend to:

(i) Demolish and clear the site; and

(ii) Repair, rebuild or construct the property but not for more than property of the same height, floor area and style on the same premises.

The language contained in (1)(b) states that the building to be rebuilt must be intended for similar occupancy. Such language indicates that so long as the building were meant to house the same number of people, whatever building ordinance changes required by law would be covered under the policy. Plaintiffs are intending to build the same size sanctuary. It is merely the zoning ordinance requirements regarding parking that are different. (1)(b) leans in favor of the plaintiff's argument to allow the coverage for the parking spaces.

Defendants claim that the language in (3)(a)(ii) restricts the coverage to zoning improvements that can be fit into a building of the same height, floor area and style as the prior building. Thus, argue defendants, a parking garage, or additional parking spaces, since they would not fit into the same space as the original structure, should not be covered under the policy. The language in (1)(b), however, conflicts with the allegedly "limiting language" of (3)(a)(ii) that the building must be the same height, floor area and style. The court finds that the language must be interpreted to cover the construction of a parking

First United Methodist Church of San Jose v. Atlantic Mut..., Not Reported in...

facility to comply with the zoning ordinance for the following reasons.

If the court were to interpret the language of this section of the policy as defendants desire, the contract would make little sense. Many zoning ordinances might be excluded under the defendants' interpretation of the "height, floor area and style" language. The resulting number of exclusions would render the contract irrational and nonsensical. For instance, a zoning ordinance might require the building of a handicapped access ramp on the exterior of the building. Such an access ramp would require an extension of the "floor area" of the building. Under defendants' reading of the contract, a handicap access ramp would not be covered. If a zoning ordinance were to require fire escapes or an extensive septic field, this might also require an extension of the "floor area." If a zoning ordinance were to now limit the height of the sanctuary because of its proximity to the airport, defendants would read the contract as forbidding a wider sanctuary despite the fact that the sanctuary would be intended to house the same number of church members.

\*8 The allegedly limiting terms "height, floor area and style" are inherently ambiguous. For instance, it would be unfair that a church rebuilding in a contemporary style would not be covered under the policy but a church choosing a more traditional style would be covered. Instead of a discussion about the costs of rebuilding, the rebuilders might have to pay a builder more to rebuild in an outdated style. It could conceivably be impossible to rebuild a church in the same style as the original building given the nonavailability of more traditional building materials. The court notes that the original sanctuary was built in the "Spanish-style." It may not be cost-effective to obtain Spanish tiles, and other more traditional building materials so as to rebuild a church in the same style as before. Many ambiguities exist in interpreting these terms. According to defendants' arguments, the location of the walls to be within the same "floor area" and the height of the ceilings may need to be exactly the same to be sure the Sanctuary is within the "same height." as the prior building. If the former bell tower was five stories high, it is unclear whether the Sanctuary needs to be five stories or whether the bell tower alone needs to be five stories high. Further, with respect to the term "floor area" there are ambiguities. Does "same floor area" mean that the Church must include any newly required handicapped ramps, elevator shafts, lobbies and parking in the same overall floor area even if these additions do not increase the actual functional floor area of the sanctuary? "Under California law an insurer cannot avoid its primary duty to provide coverage by incorporating into an insurance policy an exclusionary policy clause that is ambiguous ...

had [the insurer] intended to exclude coverage ... the exclusionary clause should have been written more precisely." *Interstate Fire & Cas. Co. v. Stuntman Inc.*, 861 F.2d 203, 204–205 (9th Cir.1988).

The court finds it interesting that the "height, floor area and style" language have been removed from later renditions of this insurance policy. An examination of subsequent policies shows that these restrictions have been deleted.

Atlantic, in its oral argument, asks the court to draw a line between ordinance coverage requiring the addition of smaller zoning structures such as fire escapes and ramps and large zoning structures such as parking spaces. Nowhere in the language of the Policy does such a distinction exist.

The court chooses to read the "height, floor area, style" language as descriptive of how the coverage works, i.e. as long as the building is to be the same height, floor area and style, then the policy covers all related building ordinance costs. The policy would not necessarily mean that all the zoning changes had to be squeezed into a building of the exact same height and floor area.

The court finds that Endorsement 5 clearly covers the addition of parking spaces required under the zoning ordinance.

\*9 Yet, even if the language of Endorsement 5 were less clear, all potentially confusing aspects of the contract must be interpreted in favor of the insured. *Bank of the West v. Superior Court*, 2 Cal.4th 1254, 1266, 10 Cal.Rptr. 538, 545 (1992) citing *AIU Ins. Co. v. Superior Court*, 51 Cal.3d 807, 822, 274 Cal.Rptr. 820 (1990).

The court's reading of the "height, floor area and style" language gives clarity to the building ordinance section of the policy. The defendants' strained reading of these words in the Policy makes the contract nonsensical.

*Intent of the parties:*

Further, the court also concludes that it was the intent of the parties for the policy to cover improvements related to parking ordinances.

It is the goal of contractual interpretation to give effect to the mutual intent of the parties. If the terms of a promise are ambiguous in any respect, the courts must interpret them in the way the promisor believed, and the promisee

First United Methodist Church of San Jose v. Atlantic Mut..., Not Reported in...

understood, at the time of making the contract. In the case of insurance contracts, the courts resolve doubts in favor of the insured. “This rule, as applied to a promise of coverage in an insurance policy, protects not the subjective beliefs of the insurer but, rather, ‘the objectively reasonable expectations of the insured.’ ” *Bank of the West v. Superior Court*, 2 Cal.4th 1254, 1266 (1992). Typically, “coverage clauses ... [are] interpreted broadly and exclusionary clauses ... [are] interpreted narrowly against the insurer.” *Consolidated American Insurance v. Mike Soper Marine Services*, 951 F.2d 186, 188–9.

Testimony of the Treasurer for the Cal–Nevada Annual Conference for the United Methodist Church (“the UMC”), and the Pastor of First Church indicated that First Church understood that the building ordinances section of the policy covered “whatever we would need for rebuilding.” (Sep. Stmt., Facts 32, 33 & 34; Exh 3, pp. 13:1–9; 29:6–11; 57:18 to 58:25; Exh 25, p. 118:2–12). Further, First Church believed that Endorsement 5, by deleting the sublimit of \$500,000 on Building Ordinance Coverage, intended that First Church had up to \$15 million for that coverage.

Additionally, when the Policy endorsement increased the coverage, the church understood that this increase would add value to the coverage. The sanctuary was previously valued at \$3,200,000. The policy was increased to \$15,000,000. It was reasonable for the Church to presume that the additional \$11,800,000 was to cover any possible ordinance problem involved in rebuilding the church.

Atlantic made representations that they were experts in establishing coverage for churches. The court finds this to be an important fact. Atlantic should have been aware of the potential zoning problems associated with rebuilding an older downtown church. The Church’s location in the middle of down-town San Jose should have placed the insurance company on notice that parking might be a problem in any rebuilding effort.

\*10 Atlantic admits that it was never its intention to exclude parking laws from the building ordinance coverage. (Sep. Stmt., Facts 22 & 35; Exh. 11, pp. 140:25 to 141:11; 142:12–21.) It would appear, then, that Atlantic is claiming that it merely sought to exclude the building of a parking facility if the facility was a very expensive proposition.

This argument is not reasonable. The court finds that all building and zoning laws must be treated alike under the Policy. There is no basis in the Policy or at law to treat enforcement of parking laws differently from enforcement

of other zoning or building laws. (Plaintiff’s Sep. Stmt., Facts 22 & 35; Exh. 11, pp. 140:25 to 141:11; 142:12–21.) The court will, therefore, grant plaintiff’s Motion For Partial Summary Judgement and deny this aspect of defendants’ Motion For Summary Judgement.

The court finds that providing additional parking spaces to accompany the Church is covered under the policy.

*Questions of Fact remain on the issue of the relationship between Atlantic and Centennial.*

Atlantic pled as an affirmative defense that it cannot be liable to First Church because it was not a party to the insurance contract between the Church and Centennial. Although it is true that Atlantic was not an actual signatory to the insurance contract, other factors exist that weigh in favor of finding Atlantic to be liable under the contract.

The facts as pled indicate that Atlantic may be liable as an agent of Centennial or in the alternative that Centennial is an agent of Atlantic. Further, plaintiff claims that Atlantic was involved in the promotion and sale of the policy, the writing of the policy and the adjusting of the Church’s claim.

Centennial, Atlantic claims, was part of the Atlantic Mutual Insurance Company. Centennial signed the policy as agent for Atlantic. It was always the understanding of First Church that Atlantic was a party to the contract through Centennial and that Centennial was acting in a representative capacity when it signed the contract.

The case law cited by Atlantic for the proposition that it was not a party to the Policy does not support such a conclusion. As a general proposition an independent adjuster or underwriter alone cannot be held liable for breach of the insurance policy or bad faith. However, none of the cases relied upon by Atlantic address the situation presented here. Our case involves a parent company of the wholly-owned subsidiary actively involved in the underwriting, promotion, sale, adjusting, and payment of a claim.

Atlantic relies primarily on *Gruenberg v. Aetna Insurance Company*, 9 Cal.3d 566 (1973). In that case, none of the dismissed defendants had any corporate relationship with the insurers, nor were they apparently in the business of issuing insurance policies themselves. Atlantic is claiming that it is not a party to the insurance contract. Atlantic is raising this issue for the first time at this late state.

First United Methodist Church of San Jose v. Atlantic Mut..., Not Reported in...

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Initially, Atlantic merely filed a general denial in response to plaintiff's complaint without specifying this defense. The court will address this issue nonetheless. Plaintiff, in contrast, has pled that defendants were agents and employees of the insurers, not that they were the contracting party themselves. The *Gruenberg* court held that since the defendants were not parties to the insurance contract, they were not subject to an implied duty of good faith and fair dealing, nor could they be liable for conspiracy. *Id.* at 487.

\*11 In response to Atlantic's argument that it was not a party to the contract, plaintiff claims now that Atlantic could be liable as an alter ego of Centennial. In its initial complaint, plaintiff did not specifically allege an alter ego theory because it understood Centennial to be a member of the "Atlantic Companies." Plaintiff did, however, set forth its allegation that there was a very close relationship between the companies and that Atlantic should be liable because of said relationship. According to the pleadings, it is possible that Atlantic is liable as an alter-ego of Centennial. Plaintiffs have pled that Atlantic has an agency relationship with Centennial. "Whether alter-ego applies is a question of fact which necessarily varies according to the circumstance of each case." *Institute of Veterinary Pathology, Inc. v. California Health Laboratories, Inc.*, 116 Cal.App.3d 111, 119 (1981).

The Ninth Circuit and California law rely on similar factors to determine whether to disregard a corporate entity: (1) the amount of respect given to corporate separateness, (2) fraudulent intent of the incorporators, and (3) the degree of injustice imposed upon the litigants by recognition of separate corporate identities. *Ministry of Defense of the Islamic Republic of Iran v. Gould, Inc.*, 969 F.2d 764, 769 (9th Cir.1992).

Atlantic has put forth no evidence concerning these three factors in support of its claim of "separateness." Plaintiff's evidence suggests that Atlantic and Centennial are one and the same. Atlantic and Centennial both are licensed to issue insurance policies and allegedly do so separately. This does not mean that they are never joint insurers, especially on an account of the magnitude presented by the Conference United Plan Program. Moreover, the degree of involvement displayed by Atlantic in every aspect of this Policy, including paying First Church's claim belies the notion that it was a stranger to the contract. Liability may be imposed on a parent where it controls the subsidiary so as to render the latter a mere instrumentality of the parent. *McLaughlin v. L. Bloom Sons Co.*, 206 Cal.App.2d 848, 851 (1962). The plaintiff should have the opportunity to make its case to a jury.

Atlantic's motion fails because genuine factual disputes remain regarding: (1) whether it truly was a party to the Policy, and (2) whether Atlantic is the alter ego of Centennial.

The court therefore, will deny this aspect of defendant's Motion For Summary Judgment.

#### MOTION TO STAY

Insurers brought their Motion to Dismiss or Stay the present federal action until First Church had exhausted its administrative remedies with the City. The court has determined that costs incurred in complying with the parking ordinances is covered under the policy. Therefore, there is no reason that the Church must first seek an administrative remedy in this instance. The Motion To Stay, therefore, is moot. To clarify its reasoning, however, the court will address the Motion and discuss its reasons for denying the Motion to Dismiss or Stay.

\*12 Defendants claim that First Church must apply for a conditional use permit with special use permit findings for purposes of reinstating the non-conforming use (i.e. without added parking) prior to continuing with this lawsuit. If the continuing use application is denied by the City, the defendant insurers offer to hire an attorney to challenge the constitutionality of the ordinance(s). The attorney will claim a deprivation of First Church's and its members' constitutional rights both to a free exercise of religion and/or to be free from a taking of the Church's property without just compensation.

The defendant insurers claim that a stay is proper for the following reasons: (1) If the City allows First Church to rebuild the church without added parking, the present federal action to obtain money for parking would be moot; (2) The Insurers have already paid in excess of five million dollars to First Church to rebuild the church and the parties are in substantial agreement on the Church's supplemental claim for additional monies; (3) If the City refused to grant First Church reinstatement of its nonconforming use, an attorney hired by insurers will attack the ordinance's constitutionality. (The attorney will assert that the nine month window still applies); (4) If the City cannot establish a compelling state interest, the ordinance would fail and this federal action would be moot; (5) If the City did establish a compelling reason,

First United Methodist Church of San Jose v. Atlantic Mut..., Not Reported in...

then the lawsuit could resume.

First Church argues that the case is a mere coverage case and that the constitutionality of San Jose's zoning ordinance is irrelevant to the coverage issue. If plaintiff's claim is covered under the policy, the insurers have to reimburse the cost of construction. This would be true whether or not the applicable zoning ordinance is "constitutional."

First Church's complaint seeks a declaration of the parties' rights and obligations under the Policy. First Church also alleges that defendants' failure to pay Policy benefits is a breach of contract, and that defendants have acted in bad faith. First Church claims that the availability of a variance and the constitutionality of the zoning ordinance have nothing to do with those issues.

Neither party cites any policy language or any case authority regarding the issue of whether or not an insured has to exhaust its administrative remedies before the local zoning authority or seek a variance of a covered zoning law before zoning law coverage applies. The court has not found any applicable cases.

*Issues Presented:*

- (1) Can defendant insurance carriers delay a coverage action by demanding that their insured seek a variance and mount a constitutional challenge to a zoning law?
- (2) Have defendants waived the issue of obtaining a variance by failing to raise the issue until now?

*The Policy Language:*

Specifically, the Policy covers "[t]he increased cost to repair, rebuild or construct the property caused by enforcement of building, zoning or land use law." Policy, Form AIC 05 07 87, p. 3, ¶ A.5(e)(1)(b). The Policy further provides that defendants "will pay for covered loss or damage within 30 days after [they] receive the sworn statement of loss" subject to certain conditions which do not apply here. Policy, Form AIC 05 07 87, p. 6, ¶ E(4)(f). The Policy does not mention "administrative remedies" in the building ordinance coverage or anywhere else. The Policy does not state that this coverage only applies after the insured has tried everything conceivable to avoid the normal application of those zoning laws. The Policy does

not state that the coverage only applies if the carrier agrees with the ordinances being enforced, or a court determines those ordinances to be constitutional. The policy contains no language which suggests that the insured has to request any variances to applicable zoning or land use laws. There is nothing which says that the insured must wait to rebuild the property while the carriers seek a variance. Nor does the policy require the insured to file suit in its name to challenge the constitutionality of covered zoning laws.

\*13 There is no policy language or case authority cited by defendants which gives defendants the right to suspend their duties to their insured while they mount a constitutional challenge to the application of a zoning ordinance to an insured loss.

*Prejudice to First Church*

Staying the litigation at this late stage would severely harm First Church and delay the Church's rebuilding indefinitely. Such a delay will harm hundreds of members of the congregation. Had defendants wanted to pursue a variance or even a constitutional lawsuit, the Policy gave them certain rights to take over the rebuilding project. The policy provides as follows:

In the event of loss or damage ... [the insuree] will either: (1) Pay the value of lost or damaged property; (2) Pay the cost of repairing or replacing the lost or damaged property, plus any reduction in value of repaired items; (3) Take all or any part of the property at an agreed or appraised value; or (4) Repair, rebuild or replace the property with other property of like kind and quality."

Policy, Form AIC 05 07 87, p. 6, ¶ E.4(a).

Defendants, however, agreed to pay the insured to replace the Sanctuary. (option number 2).

Defendants now state that they can withhold policy benefits if First Church does not seek a variance under the "duty to cooperate" clause. By this, defendants seek an unprecedented expansion of the boilerplate cooperation clause in the Policy. It is settled law, that, even if the insured has breached its contractual obligation to cooperate with the insurer, the insurer still has a duty of good faith and fair dealing. *Gruenberg v. Aetna Ins. Co.*, [supra](#), 9 Cal.3d at 578, "In other words, the insurer's duty is unconditional and independent of the performance of plaintiff's contractual obligations." An insured "cannot excuse its unreasonable delay in the payment of policy

First United Methodist Church of San Jose v. Atlantic Mut..., Not Reported in...

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benefits by citing plaintiffs' alleged non-performance of some contractual obligation under the policy." *Mock v. Michigan Millers Mutual Ins. Co.*, 4 Cal.App.4th 306 (1992).

*The insurers have waived their "right" to require Church to seek a variance:*

The court finds that defendants have waived any right to force First Church to seek administrative remedies. The adjuster's notes indicate that defendants knew about the possibility of the City of San Jose's enforcement of its parking requirements within a week of the fire. Nonetheless, defendants did not exercise their right to rebuild the church themselves. They could have chosen to take responsibility for the rebuilding project within 30 days of the proof of loss.

In addition, the insurers never raised exhaustion of administrative remedies as a reason for denial of coverage for the additional parking in defendants' denial letter. "[A]n insurer waives its right to rely on defenses not specified in its denial letter which reasonable investigation would have uncovered." *McLaughlin v. Connecticut General Life Ins. Co.*, 565 F.Supp. 434, 452 (N.D.Cal.1983).

\*14 Instead of requesting First Church to seek a variance, defendants threatened litigation. The insurers elected to seek a judicial resolution of this dispute and cannot now suggest that First Church should have pursued an "administrative remedy."

Based on the above, the court holds that any stay of this matter pending an administrative review would severely

prejudice First Church and its congregation. Defendants waived their right to require a zoning lawsuit by not choosing the right-to-rebuild option under the policy. The insurers left the decisions related to the rebuilding of the sanctuary up to the Church. The court will therefore not now stay the lawsuit.

#### CONCLUSION

The court hereby denies defendants' motion for summary judgment and grants plaintiff's cross motion for summary judgment. The court finds that there is no triable question of fact on the issue of coverage. The Policy provides First Church with coverage of \$15 million for all zoning upgrades under its Building Ordinance Coverage section and Endorsement 5. This coverage clearly includes the obligation to build a parking garage on the property or to indemnify for off-site parking if required by ordinance. However, the Church may waive its right to an on-site garage. The Church can negotiate with the insurance company in an effort to find a more cost effective way to obtain the requisite number of parking spaces.

The court further denies defendants' Motion For Stay pending the resolution of all other issues involved in this lawsuit.

IT IS SO ORDERED.

#### All Citations

Not Reported in F.Supp., 1995 WL 150429

## Exhibit 8

Fru-Con Const. Corp. v. Sacramento Municipal Utility Dist., Not Reported in F.Supp.2d...

 KeyCite Yellow Flag - Negative Treatment  
Distinguished by [City and County of San Francisco v. Purdue Pharma L.P.](#), N.D.Cal., September 30, 2020

2007 WL 2384841

Only the Westlaw citation is currently available.  
United States District Court,  
E.D. California.

FRU-CON CONSTRUCTION  
CORPORATION, a Missouri corporation,  
Plaintiff,  
v.  
SACRAMENTO MUNICIPAL UTILITY  
DISTRICT, a municipal utility district;  
Utility Engineering Corporation, a Texas  
corporation, Defendants.

No. CIV. S-05-583 LKK/GGH.

Aug. 17, 2007.

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ORDER

[LAWRENCE K. KARLTON](#), Senior Judge.

\*1 Pending before the court in this matter are three motions. The first two are motions to dismiss for lack of personal jurisdiction filed by counter-defendants Bilfinger Berger AG (“Bilfinger”) and Fru-Con Holding Corporation (“FCHC”). The third motion, filed by the Sacramento Municipal Utility District (“SMUD”), seeks jurisdictional discovery and a stay of the pending motions to dismiss. The crux of the present dispute is whether the court may exert personal jurisdiction over these counter-defendants based on an alter ego theory. The court resolves the matter on the parties’ papers and after oral argument. For the reasons set forth below, the court grants the motions to dismiss and denies the motion seeking jurisdictional discovery.

#### I. Background<sup>1</sup>

On December 15, 2006, the court granted Fru-Con’s motion to file an amended counterclaim adding Bilfinger and FCHC as counter-defendants in this action. Fru-Con is owned by FCHC, which in turn is owned by Bilfinger. The first amended counterclaim alleges that Bilfinger and FCHC are directly liable to SMUD “because there exists a unity and identity of interest between Bilfinger Berger, Fru-Con Holding and Fru-Con such that adherence to the fiction of separate existences of these entities would sanction fraud and promote injustice.” Counterclaim ¶ 6. The counterclaim further alleges that Bilfinger and/or FCHC completely controlled Fru-Con, that Fru-Con was inadequately capitalized, that Bilfinger and/or FCHC made loans to Fru-Con and guaranteed certain aspects of Fru-Con’s business obligations, and that employees of the corporations were freely interchanged. *Id.*

In support of these allegations and in response to the pending motions to dismiss, Fru-Con has set forth two sets of facts (detailed in the analysis section of this order) that fall under the two prongs of the alter ego test. *See Sonora Diamond Corp. v. Super. Ct.*, 83 Cal.App.4th 523, 538, 99 Cal.Rptr.2d 824 (2000). One pertains to the alleged unity and identity of interest shared by Bilfinger, FCHC, and Fru-Con (collectively, “the parties”). The

Fru-Con Const. Corp. v. Sacramento Municipal Utility Dist., Not Reported in F.Supp.2d...

other pertains to the alleged injustice that would result if Bilfinger and FCHC were not made parties to this action. With regard to the first set of facts, SMUD maintains it can prove that (1) Bilfinger and FCHC exerted control over Fru-Con's day-to-day activities (2) the parties shared employees, (3) the parties shared legal services, (4) Fru-Con relied upon Bilfinger's experience and financial wherewithal, and (5) Fru-Con was inadequately capitalized.

## II. Standard

### Motion to Dismiss for Lack of Personal Jurisdiction

When a defendant challenges the sufficiency of personal jurisdiction, the plaintiff bears the burden of establishing that the exercise of jurisdiction is proper. *Sinatra v. National Enquirer, Inc.*, 854 F.2d 1191, 1194 (9th Cir.1988).

Analysis of the appropriateness of the court's personal jurisdiction over a defendant in a case in which the court exercises diversity jurisdiction begins with California's long arm statute. *Aanestad v. Beech Aircraft Corp.*, 521 F.2d 1298, 1300 (9th Cir.1974). California's long arm statute authorizes the court to exercise personal jurisdiction on any basis consistent with the due process clause of the United States Constitution. *Cal.Code Civ. Proc.* § 410.10; *Rocke v. Canadian Auto. Sport Club*, 660 F.2d 395, 398 (9th Cir.1981).

\*2 Consistent with the due process clause, the court may exercise personal jurisdiction over a defendant when the defendant has certain minimum contacts with the forum state such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice. *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S.Ct. 154, 90 L.Ed. 95 (1945). If the defendant is domiciled in the forum state, or if the defendant's activities there are "substantial, continuous and systematic," a federal court can exercise general personal jurisdiction as to any cause of action involving the defendant, even if unrelated to the defendant's activities within the state. *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437, 72 S.Ct. 413, 96 L.Ed. 485 (1952); *Data Disc, Inc. v. Systems Technology Assoc., Inc.*, 557 F.2d 1280, 1287 (9th Cir.1977).

If a non-resident defendant's contacts with California are not sufficiently continuous or systematic to give rise to general personal jurisdiction, the defendant may still be

subject to specific personal jurisdiction on claims arising out of defendant's contacts with the forum state. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477-78, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985); *Haisten v. Grass Valley Medical Reimbursement Fund, Ltd.*, 784 F.2d 1392, 1397 (9th Cir.1986).

The court employs a three-part test to determine whether the exercise of specific jurisdiction comports with constitutional principles of due process. See *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 802 (9th Cir.2004). First, specific jurisdiction requires a showing that the out-of-state defendant purposefully directed its activities toward residents of the forum state or purposefully availed itself of the privilege of conducting activities in the forum state, thus invoking the benefits and protections of its laws. *Burger King*, 471 U.S. at 474-75. Second, the controversy must be related to or arise out of defendant's contact with the forum. *Ziegler v. Indian River County*, 64 F.3d 470, 473 (9th Cir.1995). Third, the exercise of jurisdiction must comport with fair play and substantial justice, i.e., it must be reasonable. *Haisten*, 784 F.2d at 1397.

## III. Analysis

Here, SMUD argues that the court may exercise personal jurisdiction under an alter ego or agency theory, or directly. As explained below, none of these avenues is availing, and the motions to dismiss must be granted.

### A. Alter Ego & Agency Theory

First, SMUD asserts that the court may exercise personal jurisdiction over Bilfinger and FCHC because they are alter egos of Fru-Con. Under California law, two conditions must both be met in order to invoke the alter ego theory: (1) a unity of interest and ownership must exist between two corporate entities such that there does not exist a separateness between them; and (2) injustice would result if the acts in question were treated as those of only one of the corporate entities. *Sonora Diamond*, 83 Cal.App.4th at 538, 99 Cal.Rptr.2d 824. "[B]oth of these requirements must be found to exist before the corporate existence will be disregarded." *Associated Vendors, Inc. v. Oakland Meat Co.*, 210 Cal.App.2d 825, 837, 26 Cal.Rptr. 806 (1962). SMUD bears the burden in presenting evidence that satisfies both prongs of the test. *Mid-Century Ins. Co. v. Gardener*, 9 Cal.App.4th 1205,

Fru-Con Const. Corp. v. Sacramento Municipal Utility Dist., Not Reported in F.Supp.2d...

1212, 11 Cal.Rptr.2d 918 (1992).

\*3 The agency theory of jurisdiction is closely related but distinct. In the case of agency, “the question is not whether there exists justification to disregard the subsidiary’s corporate identity, the point of the alter ego analysis, but instead whether the degree of control exerted over the subsidiary by the parent is enough to reasonably deem the subsidiary an agent of the parent under traditional agency principles.”<sup>2</sup> *Sonora Diamond*, 83 Cal.App.4th 523, 541, 99 Cal.Rptr.2d 824. Nevertheless, in the case at bar, one of the principal arguments marshaled by SMUD in support of its claim that a unity of interest exists (under the first prong of the alter ego test) is that FCHC and Bilfinger exerted day-to-day control over Fru-Con. Accordingly, the court addresses both the alter ego and agency theories simultaneously, because they both rely on a similar body of evidence.

### 1. Injustice

Here, in reverse order, the motions can be resolved on the second prong of the test, because SMUD has not put forward (and cannot put forward) enough evidence to prove that injustice would result if Bilfinger and FCHC were not made parties to this action.

SMUD initially maintains that “inequity would result because ... Bilfinger, FCHC, and Fru-Con failed in key instances to draw any division between themselves as allegedly separate entities.” Opp. at 28. If this were sufficient, however, the injustice prong of the test would collapse into the unity prong and become superfluous. Acknowledging as much, SMUD then goes on to argue that Fru-Con would not be able to pay a judgment if one is obtained in the District’s favor, or that there is at least a risk of such a result. In the vast majority of cases, courts have only pierced a corporation that was bankrupt, insolvent, or otherwise incapable of paying judgment.<sup>3</sup>

There appears to be no dispute that at all times relevant to this matter, that Fru-Con was covered by a bond that had a minimum capacity of \$750 million dollars, and its present uncommitted capacity is in excess of \$500 million dollars-which would almost certainly cover any judgment that SMUD might obtain in this action. Decl. of James Scott, ¶ 8. This fact alone is sufficient to negate the imposition of alter ego liability.<sup>4</sup> In addition, Fru-Con has provided evidence that it is presently involved in ongoing projects throughout the United States totaling approximately \$600 million. Scott Decl., ¶ 8. Of course, this figure represents the gross total value of its current

construction contracts-not necessarily its ability to pay a judgment of a particular size-but it is at least suggestive of Fru-Con’s current financial health.

SMUD makes several arguments, none of which are responsive to the fact that a bond covers the project. For example, SMUD asserts that Fru-Con may be unable to pay because it was allegedly undercapitalized for the project. The alleged undercapitalization stems from the fact that the project’s performance bond, which SMUD required, was obtained by Bilfinger, rather than independently by Fru-Con. Nevertheless, the counterclaim states that “[a]s part of the Contract, Fru-Con was obligated to obtain and provide to the District a performance bond in a form acceptable to the District, which Fru-Con did”-suggesting that SMUD found the bond itself to be acceptable, even if it was unhappy to discover the ultimate source supporting the bond. Counterclaim ¶ 2.

\*4 SMUD also points out that there have been frequent infusions of money into Fru-Con by Bilfinger. Decl. of John Poulos, Ex. P (discussing cash infusions from Bilfinger). There is also evidence, however, indicating that Fru-Con has never failed to have cash available to meet its obligations as they became due. Poulos Decl., Ex. P. See *Platt v. Billingsley*, 234 Cal.App.2d 577, 583, 44 Cal.Rptr. 476 (1965) (focusing on whether company had assets to meet its debts “as they came due”). To the extent that this cash was infused by Bilfinger, there is no guarantee that such an infusion would be forthcoming in the event of a judgment against Fru-Con, but Fru-Con’s historical payment history is nevertheless probative of its future payment ability.<sup>5</sup>

Furthermore, while it is unclear if the presence of bad faith is a requirement for alter ego liability or merely a factor, compare *Sonora Diamond*, 83 Cal.App.4th at 539, 99 Cal.Rptr.2d 824 with *Elliott*, 272 Cal.App.2d at 377, 77 Cal.Rptr. 453, there is also insufficient evidence from which to conclude that Fru-Con acted in bad faith. SMUD claims that it was misled because Fru-Con described itself in its Statement of Qualifications as “a major international constructor” and that it had a \$750 million bonding capacity-which SMUD maintains would be true only if the statements encompassed both Fru-Con and Bilfinger, rather than only Fru-Con. This is far from clear, however, and SMUD has not discharged its heavy burden in piercing the corporate veil.<sup>6</sup>

In any event, because the bond is sufficient to cover any judgment, the court finds that it is not apparent that injustice would result if Bilfinger and FCHC were not party to this action.

## 2. Unity and Identity of Interest

Even if Fru-Con could meet the hurdle presented by the injunctive prong of the alter ego analysis, it would nevertheless falter under the unity prong. The factors relevant to whether there is a unity and identity of interest between corporations were set forth in *Associated Vendors*, 210 Cal.App.2d at 837-40, 26 Cal.Rptr. 806. They include, as SMUD maintains is present here, the control of the subsidiary's day-to-day operations, commingling of funds, shared employees, shared legal services, disregard of corporate formalities, and inadequate capitalization. *Id.* There is no required magic number of factors that must be met in order for alter ego liability to be imposed. See *Mesler v. Bragg Mgmt. Co.*, 39 Cal.3d 290, 300, 216 Cal.Rptr. 443, 702 P.2d 601 (1985) ("There is no litmus test to determine when the corporate veil will be pierced"). A corporate veil, however, ought to be pierced only in "rare" and "exceptional" circumstances. *Dole Food Co. v. Patrickson*, 538 U.S. 468, 475, 123 S.Ct. 1655, 155 L.Ed.2d 643 (2003).

Some of the factors alleged in the counterclaim, such as commingling of funds and the diversion of assets, lack any evidentiary support whatsoever. See Decl. of Joerg Mrosek ¶ 11-12 (adherence to corporate formalities and no shared bank accounts); Scott Decl. ¶ 5-6 (same). Accordingly, the court only focuses on the factors supported by evidence.

### a. Day-to-Day Control

\*5 Where a parent dictates every facet of a subsidiary's business from policy to day-to-day operations, courts have found the alter ego test satisfied. See *Rollins Burdick Hunter of S. Cal., Inc. v. Alexander & Alexander Servs., Inc.*, 206 Cal.App.3d 1, 11, 253 Cal.Rptr. 338 (1988) (finding alter ego where "every facet" of the subsidiary's business seemed to be dictated by the parent, including budget approval, hiring, compensation, and certain real estate purchases and leases); *Mathes v. Nat'l Utility Helicopters Ltd.*, 68 Cal.App.3d 182, 190-91, 137 Cal.Rptr. 104 (1977) (finding alter ego where parent exercised control over subsidiary's budget, replaced the subsidiary's general manager, and sent employees to subsidiary to investigate problems and report back).

Nevertheless, a "parent corporation may be directly involved in the activities of its subsidiaries without incurring liability so long as that involvement is 'consistent with the parent's investor status.' Appropriate parental involvement includes: 'monitoring of the subsidiary's performance, supervision of the subsidiary's finance and capital budget decisions, and articulation of general policies and procedures.'" *AT & T v. Compagnie Bruxelles Lambert*, 94 F.3d 586, 591 (9th Cir.1996); see also *Calvert v. Huckins*, 875 F.Supp. 674, 679 (E.D.Cal.1995) (holding that plaintiffs "must present evidence showing that [the parent companies] do more than exercise the broad oversight indicated by common ownership and common directorship").

Here, SMUD identifies two examples of Bilfinger's and (to a lesser extent) FCHC's alleged day-to-day control over Fru-Con. First, SMUD points to a "Letter of Direction" issued by Bilfinger to Fru-Con setting forth the overall limits of Fru-Con's management authority. Poulos Decl., ¶¶ 7, Ex. C. The Letter required Fru-Con to seek the written approval of the FCHC Board for what SMUD terms "routine" activities, such as "buying or selling real estate; leasing real estate for more than five years; opening or closing branch offices; entering into contracts outside of Fru-Con's traditional business activities; initiating litigation estimated to cost more than \$200,000; setting an annual salary budget for employees; and appointing officers." Opp. at 11-12.

These activities may reasonably be characterized, as counter-defendants term them, "macro-management" decisions. They show that only FCHC was entitled to make decisions regarding significant contracts and major personnel decisions. They do not evidence day-to-day control over Fru-Con. See *Wady*, 216 F.Supp.2d at 1068-69 (finding appropriate parental involvement where parent monitored subsidiary's performance, supervised the subsidiary's finance and capital budget decisions, and articulated general policies and procedures); *Fletcher v. ATEX, Inc.*, 68 F.3d 1451, 1459-60 (2d Cir.1995) (no alter ego liability where parental approval was required for leases, major capital expenditures, and the sale of its subsidiary's assets). The fact that some of the required approvals were obtained via telephone with a group of three board members, Poulos Decl. ¶ 8, Ex. D, rather than through the formality of a full board meeting, gives the court pause, but this does not justify alter ego liability.

\*6 The second example cited by SMUD of alleged day-to-day control stems from the involvement of Peter Ophoven, a Bilfinger executive, at the project site. Ophoven testified that he was present at the site for a maximum of approximately 36 days spread out over the

course of several months. Poulos Decl., Ex. T (4 days in March; 5 days in September; 2 days in December; 18 days in January; 7 days in February); *Id.* (stating that “[m]ost of the guys knew me.”). He was at the site long enough that he was listed as a “monthly employee” (at least for accounting purposes). Poulos Decl. ¶ 21, Ex. Q. He also had his own telephone extension at the site. Poulos Decl. ¶ 22, Ex. R. During his visits, Ophoven discussed the project schedule, cost forecasts, possible improvements regarding cost and time, and interviewed various project executives. Poulos Decl. ¶ 25, Ex. U.

Again, these activities are not enough to show that Bilfinger overstepped its bounds. Permissible parental conduct includes monitoring and oversight of the subsidiary. *See Wady*, 216 F.Supp.2d at 1068-69; *AT & T*, 94 F.3d 586 at 591. Interviewing project executives, keeping abreast of project developments, and discussing potential improvements do not rise to the level of day-to-day control. Unlike the cases in which courts pierced the corporate veil, *see, e.g., Rollins*, 206 Cal.App.3d at 11, 253 Cal.Rptr. 338; *Mathes*, 68 Cal.App.3d at 182, 137 Cal.Rptr. 104, Fru-Con and Bilfinger each adhered to their own set of corporate formalities from accounting and tax standpoints through annual meetings, had separate bank accounts and payrolls, and separately maintained corporate minutes. Jrosek Decl. ¶ 11; Scott Decl. ¶ 5.

#### b. Shared Employees

Next, SMUD points out that Bilfinger, FCHC, and Fru-Con have shared some of the same employees.<sup>7</sup> Courts have noted the existence of shared employees in imposing alter ego liability. *See, e.g., Rollins*, 206 Cal.App.3d at 11, 253 Cal.Rptr. 338; *Mathes*, 68 Cal.App.3d at 191, 137 Cal.Rptr. 104. At the same time, however, other courts have observed that “[i]t is considered a normal attribute of ownership that officers and directors of the parent serve as officers and directors of the subsidiary.” *Sonora Diamond*, 83 Cal.App.4th at 548-49, 99 Cal.Rptr.2d 824; *see also Doe v. Unocal*, 248 F.3d 915, 925-26 (9th Cir.2001) (noting that it is appropriate for directors of a parent to serve as directors of the subsidiary without exposing the parent to liability for the subsidiary’s act). Accordingly, while this factor carries some weight, the court will not impose alter ego liability without a more substantial showing.

#### c. Legal Services

SMUD also argues that Len Ruzicka, Fru-Con’s general counsel, provided legal services for both Fru-Con and FCHC, and was an officer of both. Poulos Decl. ¶ 38, Ex. HH. The use of the same lawyers is another relevant factor in the alter ego analysis. *See Slottow v. Am. Cas. Co.*, 10 F.3d 1355, 1360 (9th Cir.1993) (use of same lawyer a “relevant factor[ ]”); *Marr v. Postal Union Life Ins. Co.*, 40 Cal.App.2d 673, 683, 105 P.2d 649 (1940) (use of same lawyer “a fact entitled to consideration”); *Calvert*, 875 F.Supp. at 679 (use of same lawyer “carries plaintiffs’ [alter ego] argument the furthest” but nevertheless finding no alter ego liability). At the same time, “common characteristics [such] as ... shared professional services” may be normal and appropriate. *See Sonora Diamond*, 83 Cal.App.4th at 540-41, 99 Cal.Rptr.2d 824.

\*7 Here, Ruzicka did not testify that he provided legal advice to both Fru-Con and FCHC in his capacity as an officer of each corporation; rather, he stated that it was his role in such capacities to complete the meeting minutes and oversee certain activities from a corporate legal standpoint. Poulos Decl. ¶ 38, Ex. HH (“My primary function as a secretary of each of those corporations is to do the corporate minutes, [ ] be involved in overseeing what was done from a legal corporate point of view. So it would have been more of ... corporate legal services.”). That Ruzicka “change[d] hats,” *Sonora Diamond*, 83 Cal.App.4th at 548-49, 99 Cal.Rptr.2d 824, like the other employees who have worked for Fru-Con in addition to FCHC and/or Bilfinger, is still not enough to establish alter ego liability.

Ruzicka’s contact with Bilfinger was even less direct than the contact with FCHC. He testified that he would call Bilfinger’s general counsel and “keep him informed.” Poulos Decl. ¶ 38, Ex. HH. As a subsidiary, Fru-Con had a duty to report significant legal issues to its parent. *Sonora Diamond*, 83 Cal.App.4th at 548-89, 99 Cal.Rptr.2d 859. There is no indication that Bilfinger or its general counsel directed Fru-Con’s day-to-day litigation.

#### d. Experience and Financial Wherewithal

SMUD also maintains that Fru-Con misrepresented its experience, relying on Bilfinger’s track record for its representation that it was a “major international constructor,” (a point addressed above) and also misrepresented its financial wherewithal by not disclosing Bilfinger’s backing in obtaining the bond. “[T] he

Fru-Con Const. Corp. v. Sacramento Municipal Utility Dist., Not Reported in F.Supp.2d...

concealment and misrepresentation of the identity of responsible ownership, management and financial interest, or concealment of personal business activities” is a factor in the alter ego analysis. *Associated Vendors*, 210 Cal.App.2d at 840-41, 26 Cal.Rptr. 806; *Morrison Knudsen Corp. v. Hancock, Rothert & Bunshoft, LLP*, 69 Cal.App.4th 223, 251, 81 Cal.Rptr.2d 425 (1999) (describing “financial misrepresentation” as an “important” factor).

Fru-Con’s conduct, however, does not rise to the level of a “financial misrepresentation.” The fact that Bilfinger used its financial weight to secure Fru-Con’s bond is insufficient to establish alter ego liability. See *Akzona, Inc. v. E.I. Du Pont De Nemours and Co.*, 607 F.Supp. 227, 238 (D.Del.1984) (parental guaranty of third party loans insufficient); *Japan Petroleum Co. (Nigeria) Ltd. v. Ashland Oil*, 456 F.Supp. 831, 841-43 (D.Del.1978) (surety on bank loans insufficient); *Calvert*, 875 F.Supp. at 679 (parental guarantees appropriate feature of parent-subsidiary relationship). As noted above, from all that appears, what was most valuable to SMUD (and what SMUD inquired about) was the existence of the bond, not its source.

#### e. Undercapitalization

SMUD argues that Fru-Con was undercapitalized, another factor in the alter ego analysis. See *Associated Vendors*, 210 Cal.App.2d at 839, 26 Cal.Rptr. 806. To be adequately capitalized, a subsidiary must have “capital reasonably regarded as adequate to enable the corporation to operate its business and pay its debts as they mature.” *Laborers Clean-Up Contract Admin. Trust Fund v. Uriarte Clean-Up Serv., Inc.*, 736 F.2d 516, 524 (9th Cir.1984).

\*8 SMUD bases its argument on Bilfinger’s role in securing the bond (addressed above) and on the cash infusions that Fru-Con received from Bilfinger. Poulos Decl. ¶ 20, Ex. P (testimony of Fru-Con’s cash manager, who stated that “if there was ever a need for cash that Bilfinger would—there would be a cash infusion.”). This latter practice, however, is a common feature of parent-subsidiary relationships, and the fact that a subsidiary receives cash infusions from time to time does not necessarily mean that it has been inadequately capitalized. See *Sonora Diamond*, 83 Cal.App.4th at 546, 99 Cal.Rptr.2d 824 (finding corporation “was adequately capitalized at the outset and regularly funded, by intercompany loans, when operational losses made cash infusions necessary”); Poulos Decl. ¶ 20, Ex. H (Fru-Con

controller testifying that when Fru-Con “had some longer-term cash flow problems” in the 1980s, Bilfinger would send cash).

In sum, SMUD has not tendered sufficient evidence to show that there was a unity of interest and identity between Fru-Con, on the one hand, and Bilfinger or FCHC, on the other. With regard to FCHC, the only evidence presented in support of an alter ego theory is that (1) Fru-Con was required to obtain FCHC board approval with respect to certain “macro-management” decisions contained in the Letter of Direction, (2) Fru-Con and FCHC shared certain employees, and (3) Fru-Con’s general counsel also performed certain tasks as an officer of FCHC from a legal standpoint. This falls far short of the required showing for alter ego liability.

With regard to Bilfinger, the evidence at issue consists of (1) Ophoven’s periodic visits to the site over a span of several months, (2) shared employees, (3) the description of Fru-Con as a major international constructor and the alleged reliance on Bilfinger’s experience in making that statement, (4) Bilfinger’s role in obtaining the bond, and (5) Bilfinger’s cash infusions to Fru-Con. While perhaps a closer issue than that presented by FCHC, SMUD has also not introduced sufficient evidence to prove that alter ego liability is warranted.

#### B. Direct Contacts

Alternately, SMUD asserts that the court may exert jurisdiction over Bilfinger and FCHC based on their direct contacts with California. As detailed below, this argument is even less availing than jurisdiction under an alter ego or agency theory.

##### 1. General Jurisdiction

General jurisdiction can exist where a foreign corporation’s contacts with the forum are “continuous and systematic general business contacts.” *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414-16, 104 S.Ct. 1868, 80 L.Ed.2d 404 (1984). The standard for establishing general jurisdiction is “fairly high and requires that the defendant’s contact be of the sort that approximate physical presence.” *Bancroft & Masters, Inc. v. Augusta Nat’l Inc.*, 223 F.3d 1082, 1086 (9th Cir.2000) (internal citations and quotations omitted).

With regard to Bilfinger, the only alleged direct contact with California consists of two general engineering licenses, the most recent of which expired in 1992, a decade before Fru-Con's contract with SMUD was negotiated. Poulos Decl. ¶¶ 17, 19, Ex. O. These licenses are simply too stale to permit the exercise of general jurisdiction. Courts reach back no more than five to seven years in examining jurisdictional facts. See *Metropolitan Life Ins. Co. v. Robertson-Ceco Corp.*, 84 F.3d 560, 569 (2d Cir.1996) (noting that other courts have found three to seven years to be reasonable); *Slurry Sys. v. Birmingham Found. Equip.*, 2006 U.S. Dist. LEXIS 20238, \*12-13 (N.D.Ind.2005) (declining to examine contacts beyond seven years).

\*9 With regard to FCHC, there are two alleged contacts: (1) a lease for three cars associated with the project and (2) an insurance policy endorsement that covered some project-related equipment. Poulos Decl. ¶ 27, Ex. W (lease agreements); ¶ 28, Ex. X (insurance policy). These two contacts are not the sort that "approximate physical presence." *Bancroft & Masters*, 223 F.3d at 1086.

## 2. Specific Jurisdiction

Alternately, a court may exert specific jurisdiction where (1) the defendant has purposefully availed itself of a forum benefit, (2) the controversy is related to or arises out of the defendant's contacts, and (3) the exercise of jurisdiction would comport with fair play and substantial justice. *Burger King*, 471 U.S. at 475-78.

With regard to Bilfinger, all of SMUD's jurisdictional claims are derivative. Accordingly, because SMUD cannot establish jurisdiction under an alter ego or agency theory, there is no specific jurisdiction over Bilfinger. With regard to FCHC, the evidence shows that FCHC received the lease agreements, but there is no indication that FCHC was the contracting party or in control of the cars in question. Moreover, although there is evidence that an insurance policy obtained by FCHC was amended to include certain Fru-Con equipment used on the project, this contact, like the lease agreement, is simply too peripheral to be said to give rise to the present controversy. Relatedly, it would not comport with fair play and substantial justice to hail international defendants into California on such an attenuated basis.

## C. Discovery

The final matter before the court is SMUD's motion, which seeks jurisdictional discovery and requests that the court stay any decision on the pending motions to dismiss.

There is no definitive standard for whether to permit jurisdictional discovery. Some courts have held that before allowing such discovery, the plaintiff must first make a "colorable or prima facie showing of personal jurisdiction." See *Central States v. Reimer Express World Corp.*, 230 F.3d 934, 946 (7th Cir.2000); see also *United States v. Swiss Am. Bank, Ltd.*, 274 F.3d 610, 625 (1st Cir.2001) ("[A] diligent plaintiff who sues an out-of-state corporation and who makes out a colorable case for the existence of in personam jurisdiction may well be entitled to a modicum of jurisdictional discovery if the corporation interposes a jurisdictional defense."); *Jazini v. Nissan Motor Co.*, 148 F.3d 181, 186 (2d Cir.1998) (denying discovery where plaintiffs "did not establish a prima facie case that the district court had jurisdiction").

Other courts, however, have rejected the requirement of a prima facie case. See *Orchid Biosciences Inc. v. St. Louis Univ.*, 198 F.R.D. 678, 673 (S.D.Cal.2001) ("It would [ ] be counterintuitive to require a plaintiff, prior to conducting discovery, to meet the same burden that would be required in order to defeat a motion to dismiss. Moreover, the authorities from our circuit ... indicate that our Federal Rules envision a broader scope of even preliminary discovery."). The Ninth Circuit has also held that while "[a]n appellate court will not interfere with the trial court's refusal to grant discovery except upon the clearest showing that the dismissal resulted in actual and substantial prejudice to the litigant," discovery "should be granted where pertinent facts bearing on the question are controverted ... or where a more satisfactory showing of the facts is necessary." *Wells Fargo & Co. v. Wells Fargo Exp. Co.*, 556 F.2d 406, 430 n. 24 (internal quotation marks omitted).

\*10 Here, most of the facts themselves are not seriously in dispute; the issue is whether they rise to a level warranting application of the alter ego theory. Furthermore, there is no reasonable likelihood that additional discovery would help SMUD to prove that injustice would result if Bilfinger and FCHC were not made party to this action.<sup>8</sup> Without proof of this necessary element, any other discovery would be futile. The simple fact remains that a bond exists (with an uncommitted capacity almost assuredly large enough to satisfy any judgment). In addition, Fru-Con has ongoing projects worth hundreds of millions of dollars and has a track record of timely payment of debts. Against this background, it would be unfair to permit SMUD to

Fru-Con Const. Corp. v. Sacramento Municipal Utility Dist., Not Reported in F.Supp.2d...

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conduct jurisdictional discovery.

412) and DENIES SMUD's motion for jurisdictional discovery (Doc. No. 419).

IT IS SO ORDERED.

#### IV. Conclusion

For the reasons set forth above, the court GRANTS Bilfinger and Fru-Con Holding Corporation's motions to dismiss for lack of personal jurisdiction (Doc. Nos. 410 &

#### All Citations

Not Reported in F.Supp.2d, 2007 WL 2384841

#### Footnotes

- 1 The court dispenses with any recitation of the general background of this case, as it has been discussed in previous orders.
- 2 A "variant" of the agency theory is the "representatives services" doctrine, which permits jurisdiction where the subsidiary "performs a function that is compatible with, and assists the parent in the pursuit of, the parents' *own business*." *Sonora Diamond*, 83 Cal.App.4th at 543, 99 Cal.Rptr.2d 824. This doctrine is inapplicable to the facts here, because Fru-Con operated its business for over 100 years prior to its relationship with Bilfinger, just as Bilfinger has likewise conducted its business operations for a century prior to affiliating with Fru-Con.
- 3 See, e.g., *Norins Realty Co. v. Consol. Abstract & Title Guar. Co.*, 80 Cal.App.2d 879, 883, 182 P.2d 593 (1947); *M.O.D. of the Islamic Republic of Iran v. Gould, Inc.*, 969 F.2d 764, 770 (9th Cir.1992); *Wady v. Provident Life & Accident Ins. Co. of Am.*, 216 F.Supp.2d 1060, 1070 (C.D.Cal.2002); *Haskell v. Time, Inc.*, 857 F.Supp. 1392, 1403 (E.D.Cal.1994). Nevertheless, there have also been cases in which the courts were silent on the ability of a defendant to satisfy a judgment. See, e.g., *Elliott v. Occidental Life Ins. Co. of Cal.*, 272 Cal.App.2d 373, 377, 77 Cal.Rptr. 453 (1969); *Mathes v. Nat'l Utility Helicopters Ltd.*, 68 Cal.App.3d 182, 190, 137 Cal.Rptr. 104 (1977).
- 4 The fact that the bonding company, Travelers, has filed its own suit and disputes its obligation to pay does not change this conclusion. SMUD has the burden of showing that injustice would result, and the chance that Travelers might be able to avoid liability is not enough to satisfy SMUD's burden under the alter ego test. Furthermore, this is an obstacle that no amount of discovery pertaining to the unity of interest prong can cure.
- 5 Although SMUD has presented (hearsay) evidence that Bilfinger is contemplating getting out of the U.S. construction business, this does not prove that Fru-Con or Bilfinger is in financial trouble. Poulos Decl., Ex. YY (news article reporting Bilfinger is considering pulling out of the U.S. construction business). It is also worth noting that Fru-Con has been in existence for over 130 years and is the 10th oldest contracting firm in the U.S.
- 6 With regard to the quibble over whether Fru-Con was an "international" constructor, there is evidence that the company had, at the time of its application, conducted "start-up work" in non-U.S. countries such as Mexico and Indonesia, Poulos Decl., ¶ 17, Ex. M, but it is unclear if this could reasonably refer to "construction" work, and if not, whether this would rise to the level of bad faith conduct.  
With regard to the bonding issue, there is simply no dispute that Fru-Con was in fact covered by a \$750 million bond. The only point of contention is that SMUD was unaware of the parental guarantee that supported the bond. The ability to secure a bond may have been valuable to SMUD for, primarily, its existence and, incidentally, what it signaled (i.e., Fru-Con's wherewithal to secure a bond), but it is doubtful that the non-disclosure of Bilfinger's role rose to the level of bad faith.
- 7 For example, Fru-Con Vice President and General Counsel Len Ruzicka testified that he was an officer of Fru-Con, FCHC, and other Fru-Con related entities. Poulos Decl. ¶ 38, Ex. HH. Fru-Con controller Martin Schaper and Vice President of Audit Tanya Gale testified about various positions that they alternately filled for Bilfinger and Fru-Con over the years. Poulos Decl. ¶ 12, Ex. H; ¶ 59, Ex. CCC. Fru-Con Operations Manager Earle Hardgrave also came from Bilfinger and went back to Bilfinger. Poulos Decl. ¶ 35, Ex. EE.
- 8 As noted earlier, although SMUD maintains that Travelers' legal obligation to pay is in doubt, this doubt is not enough to satisfy its burden of showing that injustice will result. Furthermore, additional discovery would not help SMUD with regard to this issue.

Fru-Con Const. Corp. v. Sacramento Municipal Utility Dist., Not Reported in F.Supp.2d...

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## Exhibit 9

GT Securities, Inc. v. Klastech GmbH, Not Reported in Fed. Supp. (2014)

**H** KeyCite history available

2014 WL 2928013

Only the Westlaw citation is currently available.  
United States District Court, N.D. California.

**GT SECURITIES, INC.**, Plaintiff,  
v.  
**KLASTECH GMBH**, et al., Defendants.

Case No. C-13-03090 JCS

Signed 06/27/2014

#### Attorneys and Law Firms

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#### ORDER DENYING DEFENDANTS' MOTIONS TO DISMISS FOR LACK OF PERSONAL AND SUBJECT MATTER JURISDICTION

Dkt. Nos. 58, 59

JOSEPH C. SPERO, United States Magistrate Judge

#### I. INTRODUCTION

\*1 Plaintiff GT Securities, Inc. ("GTK") brings an action for breach of contract against Defendant Klastech GmbH ("Klastech") and an action for interference with contract against Defendant Triangle Venture Capital Group GmbH

& Co. KG Nr. IV ("Triangle"). Klastech and Triangle each bring a Motion to Dismiss ("Klastech Motion" and "Triangle Motion," respectively) for lack of personal jurisdiction under [Rule 12\(b\)\(2\) of the Federal Rules of Civil Procedure](#). In addition, Klastech argues that Plaintiff's claims are subject to arbitration based on the theory of equitable estoppel and therefore subject to dismissal under either 12(b)(1), (3), or (6). The Court held a hearing on the Motion on Friday, June 27, 2014, at 9:30 a.m. For the reasons state below, both Motions are DENIED.<sup>1</sup>

#### II. BACKGROUND

##### A. Procedural Background

Plaintiff filed its Complaint in this action on July 3, 2013. On April 15, 2014, both Klastech and Triangle filed Motions to Dismiss for lack of personal jurisdiction pursuant to [Rule 12\(b\)\(2\) of the Federal Rules of Civil Procedure](#). GTK filed a combined Opposition to Defendants' Motions on April 29, 2014. Triangle replied to GTK's Opposition on May 6, 2014. Klastech did not file a Reply to GTK's Opposition to its Motion. On May 28, 2014, Klastech filed a notice stating that for financial reasons, it would not be filing a Reply brief.

##### 1. The Complaint

GTK alleges that Triangle principals, Bernd Geiger and Wiebke Langhans,<sup>2</sup> negotiated a letter agreement dated July 31, 2010 ("Agreement"), on behalf of Klastech,<sup>3</sup> engaging GTK to provide advisory and investment banking services with respect to the exploration of strategic alternatives for Klastech, including a sale or merger ("Transaction"). Compl. ¶ 8-9 & Exhibit ("Ex.") A (Agreement). GTK alleges that a Transaction, in the form of the sale of Klastech to Power Technology, Inc. ("PTI") took place on January 21, 2013 and that, therefore, pursuant to the Agreement, Klastech owed GTK the "Success Fee" as well as public recognition of its role in providing services that led to the Transaction. Compl. ¶ 18-19.

GTK alleges that, in breach of their contract, Klastech refused to pay GTK. *Id.* at 19. GTK further alleges that it

GT Securities, Inc. v. Klastech GmbH, Not Reported in Fed. Supp. (2014)

is informed and believes that Triangle falsely represented to PTI that Klastech had no obligations to any investment bank or other entity in connection with the Transaction, and/or wrongfully failed to disclose the Agreement, with the intent to induce Klastech to breach the Agreement and to deprive GTK of the payments and other benefits due it under the Agreement. Compl. ¶ 27. GTK asserts that Triangle did so fraudulently, maliciously, and in willful and conscious disregard for the rights of GTK under the Agreement. Compl. ¶ 30.

\*2 Against Klastech and Triangle, GTK seeks compensatory damages in an amount to be proven at trial, but in no event less than \$400,000, plus pre and post judgment interest, attorneys' fees, and reasonable costs and expenses as provided by law and in the Agreement. Compl. ¶ 24. Additionally, against Triangle, for its willful and malicious conduct, GTK seeks punitive damages. Compl. ¶ 30.

## 2. Klastech Motion

Klastech argues that, pursuant to California's long-arm jurisdictional statute and federal due process requirements, it should be dismissed from this breach of contract action because the Complaint fails to allege facts establishing either general or specific jurisdiction over it. Klastech Motion at 2 (citing *Pebble Beach Co. v. Caddy*, 453 F.3d 1151, 1154 (9th Cir.2006)).

Klastech contends that, because its activities in California are not "substantial, continuous and systematic" and it is not domiciled in California, it is not subject to this Court's general jurisdiction. Klastech Motion at 3 (citing *Panavision Int'l, L.P. v. Toeppen*, 141 F.3d 1316, 1320 (9th Cir.1998)). With regards to specific jurisdiction, Klastech asserts that its single contract with a resident of California, GTK, is not sufficient on its own to establish that it purposefully availed itself of the benefits of doing business in California. Klastech Motion at 4 (citing *Thomas P. Gonzalez Corp. v. Consejo Nacional De Produccion De Costa Rica*, 614 F.2d 1247, 1253 (9th Cir.1980); *Azzarello v. Navagility, LLC*, 2008 WL 4614667, at 3 (N.D.Cal. Oct. 16, 2008)).

In addition, Klastech moves to dismiss GTK's claim against it under [Rules 12\(b\)\(1\), \(3\), and \(6\)](#) <sup>4</sup> of the [Federal Rules of Civil Procedure](#) on the grounds that GTK's claim is subject to arbitration pursuant to the agreement for the purchase of Klastech by PTI ("Purchase Agreement"). Klastech Motion at 8. According to Klastech, because Plaintiff's Complaint alleges Plaintiff is

entitled to payment based upon the Purchase Agreement, and in an amount to be determined by examining the Purchase Agreement, the Purchase Agreement's arbitration clause governs. Klastech Motion at 8-9; Declaration of William Burgess ("Burgess Decl."), Ex. A ("Purchase Agreement").

## 3. Triangle Motion

Triangle asks the Court to dismiss the claim against it under [Rule 12\(b\)\(2\) of the Federal Rules of Civil Procedure](#) because it asserts that it does not have sufficient contacts with California to allow this Court to establish personal jurisdiction over it. Triangle Motion at 1 (citing *Rocke v. Can. Auto. Sport Club*, 660 F.2d 395, 398 (9th Cir.1981)). Triangle argues that it has not engaged in the type of "substantial, continuous and systematic" activity necessary for California to assert general jurisdiction over it because it has no offices, employees, directors, managers, or property in California. Triangle Motion at 7; Declaration of Bernd Geiger ("Geiger Decl.") ¶¶ 4-7. Triangle also argues that, as a non-party to the Agreement, it has not purposefully directed any of its activities at California residents or availed itself of the privilege of conducting activities in California and thus is not subject to the Court's specific jurisdiction. Triangle Motion at 7; Geiger Decl. ¶¶ 5, 13.

## 4. GTK Opposition

\*3 In its Opposition, GTK asserts that its claims against both Defendants are based on a long and involved relationship in California and that, therefore, the exercise of specific personal jurisdiction is proper as to both Defendants. Plaintiff's Opposition to Defendant's Motion to Dismiss ("Opp.") at 1. GTK also contends that Klastech is subject to general jurisdiction due its continued sales presence in California and the attendance of its personnel at an annual trade show in California. *Id.* GTK asks the Court to allow it to conduct jurisdictional discovery, if necessary. *Id.* Finally, GTK argues that Klastech's motion to compel arbitration should be denied because GTK has never agreed to arbitrate any dispute with Klastech. *See id.* at 13-14; Declaration of Ali Tabibian ("Tabibian Decl.") ¶ 15.

## 5. Triangle Reply

GT Securities, Inc. v. Klastech GmbH, Not Reported in Fed. Supp. (2014)

Triangle's primary argument against personal jurisdiction in its Reply brief is that Geiger and Langhans were acting as Beiratsmitglieder (German for "directors" or "members of the board") for Klastech until its acquisition by PTI, and therefore the actions that occurred during the relevant contract formation negotiations were done at the direction and for the benefit of Klastech, not Triangle. Triangle's Reply to Plaintiff's Opposition to Triangle Motion to Dismiss ("Reply") at 2; Geiger Decl. ¶ 3. Triangle asserts that, pursuant to German law, as members of Klastech's board Langhans and Geiger had a "duty of loyalty" to Klastech. Reply at 3. Accordingly, Triangle contends that, as an entity in and of itself, it was not involved in the formation of the contract between GTK and Klastech nor in any of the actions undertaken by Langhans and Geiger "during the time PTI purchased Klastech." *Id.*; Geiger Decl. ¶¶ 2, 3, 7.

## 6. Factual Background

GTK is a California corporation with its principal place of business in Los Angeles County, California. Compl. ¶ 5. Triangle and Klastech are German corporations with their headquarters in Germany. *See* Geiger Decl. ¶ 4; Burgess Decl. ¶ 4. Klastech asserts that it has no operations, offices, or employees in the United States or California. Klastech Motion at 4. However, GTK argues that Klastech used an independent contractor to sell its products in California prior to its acquisition and that, since its acquisition, its website lists a designated sales representative for the "USA West" with two California phone numbers. Opp. at 14 (citing Klastech Motion at 4); Declaration of Geoffrey C. Rushing ("Rushing Decl.") ¶ 2 & Exs. 1–2. Triangle has no offices, employees, directors, managers, agent for service, sales, marketing, or property in California. Geiger Decl. ¶¶ 3–8, 10. According to GTK, during the actions that gave rise to this Complaint, Klastech was a wholly owned subsidiary of Triangle. Compl. ¶ 4. As of January 21, 2013, Klastech has been acquired by PTI, an Arkansas-based corporation. Comp. ¶ 18; Rushing Decl., Ex. 3.

In September, 2009, Langhans, a principal at Triangle, emailed GTK to inquire about the possibility of engaging its investment management services for Klastech in the exploration of strategic alternatives, including a Transaction. Tabibian Decl., Ex. 1. Langhans sent this email from her @triangle-venture.com email account, with a signature block that identified her as an Investment Manager at Triangle Venture Capital Group Management GmbH, to Tabibian at GTK. It states:

I received information that you are an expert in transactions in the photonics industries and that you supported the SpectraPhysics—Newport deal in the past.

Triangle has invested in 2006 into a German start-up called KLASTECH which develops and commercializes a new generation of DPSS lasers. We would like to identify potential M & A possibilities and shape the company's future strategy to make i[t] attractive for an exit. Potentially especially the company's patented technology is interesting for its competitors.

\*4 I would be happy to set up a conference call with my colleague Dr. Geiger to exchange some information about Triangle and Klastech and would like to ask if you are available for a call on Friday.

Tabibian Decl., Ex. 1.

Langhans and Geiger, another Triangle principal, negotiated the Agreement between GTK and Klastech with the help of sophisticated counsel from Foley & Lardner. Tabibian Decl. ¶ 6. The negotiations were conducted through telephone discussions and email exchanges, including one dated June 2010. Tabibian Decl. ¶ 6 & Ex. 5. In this email exchange, Sven Riethmueller from Foley & Lardner writes that he is "awaiting feedback on one issue f[r]om Triangle" after "sending the revised proposed draft based on our conversation of Friday this morning California time." Tabibian Decl., Ex. 5. Langhans, from her @triangle-venture.com email address was part of the email conversation and participated in planning a phone call. *Id.*

GTK's contractual relationship with Klastech began on July 31, 2010, pursuant to the Agreement negotiated by Triangle. Tabibian Decl. ¶ 1; Compl., Ex. A. In the Agreement, GTK agreed to share at least bi-weekly written reports of its progress via Tabibian, the individual with "principal senior responsibility for the day to day management." Compl., Ex. A, Section 1. In return for GTK's services under the Agreement, Klastech promised to make three retainer payments of \$10,000 each due in July, August, and September of 2010 and to cover GTK's out-of-pocket expenses. *Id.*, Sections 2(a) and 3. In the event of the consummation of a Transaction during GTK's engagement and prior to termination of the Agreement, the Agreement specifies that Klastech pays a minimum "Success Fee" of \$400,000, plus an additional amount to be determined based on the ultimate value of the Transaction. *Id.*, Section 2(b)(1). Klastech must mention GTK's role as advisor in any press release or public announcement it makes about the Transaction. *Id.*, Section 6. Klastech is allowed to terminate at any time by

GT Securities, Inc. v. Klastech GmbH, Not Reported in Fed. Supp. (2014)

giving seven days prior written notice to GTK. *Id.*, Section 4. In addition, Klastech has no obligation to agree to any other employee of GTK to serve as a suitable replacement of Mr. Tabibian. *Id.* Under certain circumstances, GTK is still eligible for the “Success Fee” for Transactions consummated after Klastech’s termination. *Id.* The Agreement is governed by New York law. *Id.*, Section 8.

As contemplated by the Agreement, in August and September 2010, Klastech, Triangle, and GTK exchanged information, developed an Executive Summary presentation for potential acquirors, and communicated several times a week, sometimes daily. Tabibian Decl. ¶ 7. In July, August, and September 2010, Klastech made three monthly retainer payments by wire to GTK’s California bank account. *Id.* Between September and December 2010, Tabibian contacted approximately twenty potential acquirors on behalf of GTK, several of which were located in California. *Id.* ¶ 8.

When Tabibian left GTK to work at Citigroup in December 2010, GTK offered Klastech the option to transfer the Agreement to Citigroup or to terminate it. Tabibian Decl. ¶ 10 & Compl., Ex. B. Tabibian informed Triangle of his departure as well and explained to Geiger over the phone that the option to terminate allowed Klastech to keep the engagement open and re-start at GTK without the need for payment of a new retainer. Tabibian Decl. ¶ 10. When Tabibian returned to GTK in January 2012 after two years at Citigroup, Klastech executed a subsequent written agreement for additional services. Tabibian Decl. ¶ 11 & Ex. 4.

\*5 From January 2012 through July 2012, GTK continued to provide advice, identify potential acquirors, develop approach strategies, and exchange periodic updates with Klastech and Triangle. Tabibian Decl. ¶ 12. Tabibian met with the CEO of Klastech, Chris Madin, and a Klastech sales representative in San Francisco to discuss the status of their work, while the two were attending a trade show in California. *Id.* Tabibian also provided advice to Klastech and Triangle on their interactions with PTI. *Id.* ¶ 13. In an email exchange that took place on July 2, 2012, Langhans, again from her @triangle-venture.com email account, emailed Tabibian regarding “a response from PTI” and expressed a desire to schedule a meeting. Tabibian Decl., Ex. 3. The email exchange also included Madin at his @klastech.de email account. *Id.*

On January 28, 2013, Tabibian contacted Madin to suggest a meeting in San Francisco, at which point, Madin informed Tabibian that as of January 21, 2013, Klastech had been acquired by PTI pursuant to the

Purchase Agreement signed by Klastech, Triangle, and PTI. Comp. ¶ 18; Burgess Decl., Ex. A (Purchase Agreement). GTK alleges that Klastech is now wholly owned by and run in close coordination with Arkansas-based PTI. Opp. at 11 (citing Compl. ¶ 4). GTK refers the Court to a 2014 press release, entitled “Power Technology Inc. Acquires Advanced DPSS Laser Manufacturer KLASTECH GmbH.” Rushing Decl., Ex. 3. The press release states, in part:

“Power Technology will retain the KLASTECH organization in its entirety, and will be working over the next several months to seamlessly integrate both products and employees into the Power Technology organization. Production and sales of KLASTECH laser line will continue in KLASTECH’s German location in Dortmund.”

*Id.*

In accordance with the Agreement, GTK demanded payment of the “Success Fee” from Klastech based upon the Transaction with PTI, which Klastech allegedly refused to pay. Compl. ¶ 19. GTK alleges that Triangle falsely represented to PTI that Klastech had no obligations to any investment bank or other entity in connection with the Transaction, pointing to the “no broker” provision of the Purchase Agreement, which reads as follows:

2.3 *Broker’s Fees.* Neither Sellers [Triangle and others] nor Company [Klastech] has liability or any obligation to pay any fees or commissions to any broker, finder, or agent with respect to the transactions contemplated by this Agreement for which Buyer [PTI] or Company could become liable or obligated. Any fees due to brokers engaged by Sellers, or Sellers’ consultants and advisors shall be paid by Sellers.

Compl. ¶ 27; Burgess Decl., Ex. A. The Purchase Agreement also contains a clause which provides for arbitration in New York and which Klastech references in its Motion to Dismiss for lack of subject matter jurisdiction. *See* Burgess Decl., Ex. A, Section 8.11.

### III. ANALYSIS

#### A. Personal Jurisdiction

##### a. *Legal Standard*

1. *Rule 12(b)(2)*

A party may move for dismissal under [Rule 12\(b\)\(2\) of the Federal Rules of Civil Procedure](#) for lack of personal jurisdiction. The plaintiff bears the burden of establishing personal jurisdiction over the defendant. See *Pebble Beach Co. v. Caddy*, 453 F.3d 1151, 1154 (9th Cir.2006). “Where, as here, the motion is based on written materials rather than an evidentiary hearing, ‘the plaintiff need only make a prima facie showing of jurisdictional facts.’” *Id.* (quoting *Sher v. Johnson*, 911 F.3d 1357, 1361 (9th Cir.1990)). “Although the plaintiff cannot simply rest on the bare allegations of its complaint, ... uncontroverted allegations in the complaint must be taken as true.” *Schwarzenegger*, 374 F.3d at 800 (internal quotations omitted). “Conflicts between parties over statements contained in affidavits must be resolved in the plaintiff’s favor.” *Id.* “Where, as here, there is no applicable federal statute governing personal jurisdiction, the district court applies the law of the state in which the district court sits.” *Dole Food Company, Inc. v. Watts*, 303 F.3d 1104, 1110 (9th Cir.2002). “Because California’s long-arm jurisdictional statute is coextensive with federal due process requirements, the jurisdictional analyses under state law and federal due process are the same.” *Id.* (citing [Cal.Code Civ. Proc. § 410.10](#)).

2. *Standard Governing Exercise of Personal Jurisdiction*

\*6 “For a court to exercise personal jurisdiction over a non-resident defendant, that defendant must have at least ‘minimum contacts’ with the relevant forum such that the exercise of jurisdiction ‘does not offend traditional notions of fair play and substantial justice.’” *Dole Food*, 303 F.3d at 1110–11 (citing *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)). “In judging minimum contacts, a court properly focuses on ‘the relationship among the defendant, the forum, and the litigation.’” *Calder v. Jones*, 465 U.S. 781, 788 (1984) (quoting *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977)).

Personal jurisdiction may be either general or specific. See *Bancroft & Masters, Inc. v. Augusta Nat. Inc.*, 223 F.3d 1082, 1086 (9th Cir.2000). General jurisdiction may be established when a defendant’s contacts with a state are “substantial” or “continuous and systematic” such that the defendant “can be haled into court in that state in any action, even if the action is unrelated to those contacts.” *Id.* “The standard for establishing general jurisdiction is fairly high, and requires that the defendant’s contacts be of the sort that approximate physical presence.” *Id.* “Factors to be taken into consideration are whether the

defendant makes sales, solicits or engages in business in the state, serves the state’s markets, designates an agent for service of process, holds a license, or is incorporated there.” *Id.* “[E]ngaging in commerce with the residents of the forum state is not in and of itself the kind of activity that approximates physical presence within the state’s border.” *Id.*

Nevertheless, “[e]ven if a defendant has not had continuous and systematic contacts with the state sufficient to confer general jurisdiction, a court may exercise specific jurisdiction when the following requirements are met:

- (1) the non-resident defendant must purposefully direct his activities or consummate some transaction with the forum or resident thereof; or perform some act by which he purposefully avails himself of the privileges of conducting activities in the forum, thereby invoking the benefits and protections of its laws;
- (2) the claim must be one which arises out of or relates to the defendant’s forum-related activities; and
- (3) the exercise of jurisdiction must comport with fair play and substantial justice, i.e. it must be reasonable.

*Dole Food*, 303 F.3d at 1111 (internal quotations and citations omitted). “The plaintiff bears the burden of satisfying the first two prongs of the test.” *Id.* (citing *Sher*, 911 F.2d at 1361). If the plaintiff fails to satisfy either of these prongs, personal jurisdiction is not established in the forum state.” *Dole Food*, 303 F.3d at 1111. “If the plaintiff succeeds in satisfying both of the first two prongs, the burden then shifts to the defendant to ‘present a compelling case’ that the exercise of jurisdiction would not be reasonable.” *Id.* (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476–78 (1985)).

“Once it has been established that a defendant purposefully established minimum contacts with a forum, ‘he must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable’ in order to defeat personal jurisdiction.” *Dole Food*, 303 F.3d at 1144 (quoting *Burger King*, 471 U.S. at 477). To determine whether the exercise of jurisdiction is reasonable, and therefore, “comports with fair play and substantial justice,” courts consider seven factors:

- \*7 (1) the extent of the defendants’ purposeful injection into the forum state’s affairs; (2) the burden on the defendant of defending in the forum; (3) the extent of conflict with the sovereignty of the defendant’s state; (4) the forum state’s interest in adjudicating the dispute; (5) the most efficient judicial resolution of the

GT Securities, Inc. v. Klastech GmbH, Not Reported in Fed. Supp. (2014)

controversy; (6) the importance of the forum to the plaintiff's interest in convenient and effective relief; and (7) the existence of an alternative forum.

*Dole Food*, 303 F.3d at 1114.

In *Dole Food*, the Ninth Circuit held that California's exercise of specific, personal jurisdiction over two foreign individuals who allegedly defrauded a California corporation was reasonable. *Dole Food*, 303 F.3d at 1106. Plaintiff Dole U.S., a corporation incorporated with its principal place of business in California, sued two former employees, Watts (a citizen of the U.K.) and Boenneken (a citizen of Germany), for fraudulently inducing Dole to lease warehouse space in the Netherlands on unfavorable terms. *Id.* at 1107. Both employees worked at Dole's European offices, although Watts's direct supervisor worked in Dole's California office. *Id.* at 1107. Dole alleged that Watts pitched the plan that led to Dole's unfavorable lease during a visit to the California office and that both employees communicated frequently with Dole's California office by phone, fax, and mail regarding implementation of the plan. *Id.*

In weighing the seven reasonableness factors, the court emphasized the "heavy burden on both domestic and foreign defendants in proving a 'compelling case' of unreasonableness to defeat jurisdiction." *Id.* at 1117 (citing *Roth v. Garcia Marquez*, 942 F.2d 617 (9th Cir.1991) (finding personal jurisdiction in California over two foreign individual defendants, despite the fact that only two of the reasonableness factors favored plaintiff while three factors favored the defendants, who "ma[d]e a strong argument ... that the exercise of jurisdiction may be unreasonable.")) The court noted that the only two factors that favored defendants—burden on defendants and sovereignty conflicts—"are likely to favor foreign defendants every time personal jurisdiction in the United States is considered." *Id.* Finally, the court found that Watts and Boenneken had several U.S.-based relationships, including employment relationships, and the intended audience for defendants' communications was the plaintiff, headquartered in California. *Id.* Therefore, the court concluded that the balance of the factors established that jurisdiction in California was reasonable. *Id.*

The different outcomes on the exercise of specific jurisdiction in *Dole Food* and *Core-Vent* provide a useful contrast for assessing the weight of various facts in a determination of reasonableness. In *Core-Vent*, the Ninth Circuit held that California's exercise of specific, personal jurisdiction over four doctors in Sweden who allegedly defamed a California corporation in articles published in international medical journals would not comport with

fair play and substantial justice. *Core-Vent Corp.*, 11 F.3d at 1483. Plaintiff Core-Vent, a California corporation that manufactured dental implants, sued four Swedish doctors based on two articles they had published in two journals, both distributed world-wide, that "contained false and misleading comparisons of Core-Vent and Nobelpharma," allegedly at the direction of Nobelpharma, Core-Vent's competitor. *Id.* at 1483–84. Core-Vent also sued Nobelpharma, three individual Americans, and another Swedish citizen, but these defendants were not parties to this appeal of personal jurisdiction. *Id.* at 1484.

\*8 Based on the seven factors, the court found that the Swedish doctors had presented a compelling case that the exercise of personal jurisdiction was unreasonable. *Id.* In reaching this decision, the court put particular emphasis on the defendants' status as individual citizens of a foreign country, noting that "[t]he Supreme Court in *Asahi* indicated that a plaintiff seeking to hale a foreign citizen before a court in the United States must meet a higher jurisdictional threshold than is required when the defendant is a United States citizen." *Id.* It explained that "where the plaintiff [was] an international corporation and where the defendants [were] individual citizens of a foreign country who lack[ed] connections to the United States and whose purposeful interjection into the forum state [was] very limited," the interest of a state in providing a forum for those injured in its borders "must give way." *Id.* The Court found that the defendants' purposeful interjection was limited because California was not the primary audience for the journals, and, in fact, the defendants had no knowledge the journals would be distributed there. *Id.* at 1486. The court also emphasized that the plaintiff's ability to obtain effective relief was not compromised by dismissal of the Swiss doctors because the court maintained jurisdiction over the remaining defendants. *Id.* at 1490.

b. *Klastech is Subject to Personal Jurisdiction*

While GTK contends that Klastech is subject to both specific and general jurisdiction in California, because the Court finds that there are sufficient contacts with the forum related to the claim to support its exercise of specific jurisdiction, the Court need not decide the question of general jurisdiction over Klastech.<sup>5</sup>

1. *Specific Jurisdiction*

GT Securities, Inc. v. Klastech GmbH, Not Reported in Fed. Supp. (2014)

a. Purposeful Availment

“The purposeful availment requirement ensures that a nonresident defendant will not be haled into court based upon “random, fortuitous or attenuated contacts with the forum state.” *Panavision Intern., L.P. v. Toeppen*, 141 F.3d 1316, 1320 (9th Cir.1998) (quoting *Burger King*, 471 U.S. at 475). While a single contract with a resident of the relevant jurisdiction is not necessarily sufficient, the critical issue is whether the contract evidences a substantial relationship with the forum based on prior negotiations, contemplated future consequences, and the terms of the contract. See *Burger King*, 471 U.S. at 475–76. “[W]ith respect to interstate contractual obligations, ... parties who ‘reach out beyond one state and create continuing relationships and obligations with citizens of another state’ are subject to regulation and sanction in the other State for the consequences of their activities.” *Id.* at 473.

\*9 In *Burger King*, despite the defendant’s never having been to Florida, his contract with Florida-based plaintiff, Burger King, to establish a franchise in Michigan demonstrated a substantial connection with Florida where defendant “ ‘reach[ed] out beyond’ Michigan and negotiated with a Florida corporation for the purchase of a long-term franchise and the manifold benefits that would derive from affiliation with a nationwide organization.” *Burger King*, 471 U.S. at 480. The Supreme Court rejected the lower court’s determination that, in light of the supervision emanating from Burger King’s district office in Michigan, defendant believed that office was the embodiment of Burger King and he had no reason to anticipate a suit outside of Michigan. *Id.* Instead, the Supreme Court pointed to evidence that defendant knew he was “affiliating himself with an enterprise based primarily in Florida” in the form of 1) the contract documents specifying that Burger King operated in Florida and that the agreement was made and enforced there and 2) the parties’ course of dealing in which the defendant corresponded with Florida headquarters by mail and phone. *Id.* at 481.

GTK has provided sufficient factual allegations and non-conclusory testimony to establish that Klastech’s conduct pursuant to the Agreement gives rise to a “substantial connection” with California by creating “ ‘continuing obligations’ between [itself] and [a] resident[ ] of the forum.” See *Burger King*, 471 U.S. at 475–76. First, just like the defendant in *Burger King*, Klastech “reached out” to a California corporation to enter into a long-term relationship from which Klastech derived manifold benefits in the form of hundreds of hours of work performed by GTK in California. Compl. ¶¶ 8, 9, 15, 16, 17. Pursuant to the Agreement, GTK prepared

evaluation materials for a potential Transaction, introduced Klastech to potential acquirors (many of them in California), participated in discussions with potential acquirors, and provided advice to Klastech on its interactions with PTI. Compl. ¶ 15, 17.

Second, although Klastech claims it believes GTK performed work for it in Germany, there is sufficient evidence to demonstrate that Klastech knew it was “affiliating [itself] with an enterprise based primarily in [California].” See *Burger King*, 471 U.S. at 481. First, the contract documents demonstrate Klastech’s affiliation with California, albeit less strongly than in *Burger King* by listing GTK’s San Francisco address on every page.<sup>6</sup> Compl., Ex. A (Agreement). Second, the parties’ course of dealing provides evidence that Klastech knew it was establishing a long-term relationship that contemplated continuous contact with California. During negotiations, Langhans met with GTK in San Francisco to discuss the business and sales prospects for Klastech. Tabibian Decl. ¶ 4. Pursuant to the Agreement, Klastech communicated with GTK regularly (several times a week) via telephone and email, just as the parties in *Burger King* did. Tabibian Decl. ¶ 7. Finally, Madin, CEO of Klastech, came to San Francisco to meet with GTK and discuss the status of the work under the Agreement. Tabibian Decl. ¶ 12.

Thus, Plaintiff has demonstrated that Klastech knew it was affiliating itself with a California corporation in a manner that would lead to substantial contacts with California. The Court finds that GTK has made a prima facie showing that Klastech purposefully availed itself of the “privileges of conducting activities in the forum, thereby invoking the benefits and protections of its laws.” See *Dole Food*, 303 F.3d at 1111 (internal quotations and citations omitted).

b. Relatedness of Claim

“The second requirement for specific, personal jurisdiction is that the claim asserted in the litigation arises out of the defendant’s forum related activities.” *Panavision*, 141 F.3d at 1322. The Court must determine if Plaintiff would not have been injured “but for” Defendant’s contacts with California. See *id.* In *Panavision*, the defendant’s registration of plaintiff’s trademarks as his own domain names had the effect of injuring a plaintiff in California. *Id.* Therefore, the court concluded that “but for” the defendant’s conduct, the plaintiff’s injury would not have occurred. *Id.* Similarly, in *Burger King*, the defendant’s refusal to make contractually required payments in the forum state, and

GT Securities, Inc. v. Klastech GmbH, Not Reported in Fed. Supp. (2014)

his continued use of Burger King’s trademarks, “caused foreseeable injuries to the corporation in Florida,” such that plaintiff’s claim arose out of the defendant’s forum-related activities. *Burger King*, 471 U.S. at 480.

\*10 Here, Klastech’s refusal to make contractually required payments in California, and to give GTK the contractually required recognition due in California, has caused foreseeable injuries to GTK in California. *See* Compl. ¶¶ 23–24. “But for” Klastech’s engagement of GTK to perform services in California and its failure to make contractually required payments in California, GTK would not have suffered financial harm in California. Compl. ¶¶ 8, 11. The Court finds that GTK has demonstrated that its claim against Klastech arises out of Klastech’s California-related activities.

c. Reasonableness

Next, the Court examines the seven reasonableness factors in turn. First, the Court considers the extent of Klastech’s purposeful injection into the forum state. The Court finds that the activities which demonstrate that Klastech purposefully availed itself of the privilege of doing business in California are also sufficient in this case to meet the purposeful injection test. Just as in *Dole Food*, where the defendants’ purposeful injection favored jurisdiction, Klastech engaged in repeated communications with GTK manager, Tabibian, in California in furtherance of their contractual relationship, including travelling to California to discuss business with GTK on at least one occasion. *See id.* at 1115. Klastech knew GTK had its principal place of business in California and it knew it was affiliating itself with GTK in a manner that would result in substantial contacts with California.<sup>7</sup> *See id.*

With respect to factor two, burden on the defendant, the fact that Klastech is a German corporation, headquartered in Germany, weighs against jurisdiction. *See Dole Food*, 303 F.3d at 1115. However, Klastech has a designated representative for the USA West with two California telephone numbers, which mitigates Klastech’s burden. *See Burgess Decl.* ¶ 2. Klastech’s burden is further diminished by the fact that Klastech representatives have traveled to California on several occasions in the past for business, including business directly related to the events that gave rise to this suit. *See Dole Food*, 303 F.3d at 1115. Furthermore, as the Supreme Court explained in *Burger King*, “because ‘modern transportation and communications have made it much less burdensome for a party sued to defend himself in a State where he

engages in economic activity,’ it usually will not be unfair to subject him to the burdens of litigating in another forum for disputes relating to such activity.” *Burger King*, 471 U.S. at 474. Therefore, the Court finds that the burden on Klastech of litigating in California only weakly favors Klastech.

The third factor, conflict with the sovereignty of a defendant’s state, requires “an examination of the competing sovereign interests in regulating [the defendant’s] behavior. *Dole Food*, 303 F.3d at 1115. Because Klastech has submitted as uncontroverted evidence the declaration of Burgess that Klastech is headquartered in Germany, the Court must examine the interests of the United States and Germany in adjudicating this dispute. *See Core-Vent*, 11 F.3d at 1489 (stating that the Ninth Circuit focuses on connections to the United States in general, not just to the forum state, in giving weight to the third factor). Klastech currently has an ongoing relationship with the United States because it is a wholly owned and controlled subsidiary of PTI.<sup>8</sup> Compl. ¶ 3. Klastech also had an ongoing relationship with the United States during the events that gave rise to this claim because its employees travelled to the United States to attend trade shows and in connection with the Agreement. Tabibian Decl. ¶¶ 4, 12, 15. During that time, Klastech used an independent contractor to sell some of its products in California, another connection to the United States. Burgess Decl. ¶ 4. Furthermore, the extent of conflict with Germany’s interest in adjudicating this suit is unclear. Although Klastech is headquartered in Germany, GTK has provided affidavits stating that “essentially all of GTK’s work pursuant to the Klastech Engagement was performed in California.” Tabibian Decl. ¶ 17. The Agreement is governed by New York law, not German law. Compl., Ex. A, Section 8 (Agreement). Thus, Klastech has a stronger relationship with the United States than the defendants in *Dole Food*, where the court found this factor to “only weakly favor[ ] the defendants if at all,” and the extent of conflict with a foreign state’s interest is similarly unclear. *See Dole Food*, 303 F.3d at 1115. In light of Klastech’s past and ongoing U.S.-based relationships, this factor favors GTK. *See Dole Food*, 303 F.3d at 1115.

\*11 For factor four, the Court considers the forum state’s interest in adjudicating the suit. California has a “‘manifest interest’ in providing its residents with a convenient forum for redressing injuries inflicted by out-of-state actors.” *See Burger King*, 471 U.S. at 473. GTK is a California corporation with its principal place of business in California so this factor favors GTK. *See Dole Food*, 303 F.3d 1116.

GT Securities, Inc. v. Klastech GmbH, Not Reported in Fed. Supp. (2014)

Factor five, concerning efficiency of the forum, examines the location of the witnesses and the evidence, as well as which substantive law governs the dispute. *See id.; Core-Vent*, 11 F.3d at 1489. New York law governs the Agreement, but there are no other connections with New York that indicate it would be a more efficient forum than California besides Burgess's sworn declaration that Klastech could more effectively handle this dispute in "an arbitration in New York."<sup>9</sup> *See* Burgess Decl. ¶ 6. The Court will not speculate on the location of the relevant Klastech witnesses as neither party has provided evidence on whether they are located in Germany, Arkansas, or California. Likewise, GTK has not made allegations in the Complaint or provided evidence in its affidavits as to the current locations of its witnesses. Therefore, at this stage, this factor cannot be said to favor either party.

Factor six, convenience to plaintiff, favors GTK, which is based in California. "However, in this circuit, the plaintiff's convenience is not of paramount importance." *See Dole Food*, 303 F.3d at 1116.

Finally, the Court considers whether an alternative forum is unavailable. There is a split in the Ninth Circuit regarding which party bears the burden on this issue, although the great weight of Ninth Circuit authority favors putting the burden on the plaintiff. *Id.* Klastech has suggested that Germany or New York would be a valid alternative forum, and GTK has not presented any evidence that it would be precluded from suing Klastech in either jurisdiction. *See* Burgess Decl. ¶ 6. GTK counters that jurisdiction in Germany would be inconvenient and unfair, but this is not the relevant standard. *See Core-Vent*, 11 F.3d at 1490 (citing *Roth*, 942 F.2d at 625) ("Doubtless [plaintiff] would prefer not to [litigate in Germany], but that is not the test."). Without any evidence that GTK could not obtain effective relief in Germany, this factor favors Klastech.

In balancing the reasonableness factors, "a number of our cases emphasize the heavy burden on both domestic and foreign defendants in proving a 'compelling case' of unreasonableness to defeat jurisdiction." *Dole Food*, 303 F.3d at 1117 (citing *Roth*, 942 F.2d 617; *Panavision*, 141 F.3d at 1324; *Ballard*, 65 F.3d at 1502; *Sinatra*, 854 F.2d at 1201.) In finding jurisdiction reasonable, the court in *Dole Food* relied on the nature of the defendants' U.S.-based relationships and the fact that the intended audience of their communications with California was the plaintiff. *Id.* Similarly, Klastech had, and continues to have, ongoing relationships with the U.S., and GTK was the intended audience of all Klastech's communications with California. Of the two factors that favor Klastech, factor two (the burden on the defendant) favors Klastech

only weakly, and, with regards to factor seven, the Ninth Circuit has held that "[w]hether another reasonable forum exists becomes an issue only when the forum state is shown to be unreasonable." Thus, the Court finds that in light of the "heavy burden" on Klastech to make a "compelling case," Klastech's ongoing relationship with the U.S. and California, and Klastech's purposeful injection into California, it is not unreasonable for California to exercise personal jurisdiction over Klastech.

\*12 Having found that Plaintiff established the first two requirements of personal jurisdiction, and that Klastech failed to present compelling evidence that the exercise of jurisdiction would be unreasonable, the Klastech Motion to Dismiss for lack of personal jurisdiction is DENIED.

*c. Triangle is Subject to Specific Jurisdiction*

The Court finds that Triangle does not have sufficient contacts "of the sort that approximate physical presence" for the Court to exercise general jurisdiction, nor does GTK oppose Triangle's assertion that this Court lacks general jurisdiction. *See Bancroft & Masters*, 223 F.3d at 1086. The Court finds that Triangle has sufficient contacts in California related to GTK's claim against it to establish specific jurisdiction. *See Dole Food*, 303 F.3d at 1111.

"Even though there is no general jurisdiction over [Triangle] in California, California courts may still exercise personal jurisdiction if the case arises out of certain forum-related acts." *See Bancroft & Masters*, 223 F.3d at 1086. For the reasons discussed below, the Court finds that GTK has made a prima facie showing that (i) Triangle intentionally committed a "foreign act that is both aimed at and has effect in the forum state," and (ii) GTK's claim arises out of Triangle's forum-related activities. *See id.* at 1086–87. The Court further finds that Triangle has not presented "compelling" evidence that the exercise of jurisdiction is unreasonable. *See id.* Therefore, the Court will exercise specific, personal jurisdiction over Triangle.

*1. Purposeful Direction*

The Ninth Circuit often refers to the first element of specific jurisdiction "in shorthand fashion, as the 'purposeful availment' prong." *Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme*, 433 F.3d 1199, 1206 (9th Cir.2006) (en banc) (per curiam). Nevertheless,

GT Securities, Inc. v. Klastech GmbH, Not Reported in Fed. Supp. (2014)

“[d]espite its label, this prong includes both purposeful availment and purposeful direction.” *Id.* In tort cases, the relevant inquiry is “whether a defendant *purposefully directs* his activities at the forum state[.]” *Id.* (emphasis added) (internal quotations omitted). “[T]he [Supreme] Court has allowed the exercise of jurisdiction over a defendant whose only ‘contact’ with the forum state is the ‘purposeful direction’ of a *foreign* act having *effect* in the forum state.” *Haisten v. Grass Valley Medical Reimbursement Fund*, 784 F.2d 1392, 1397 (9th Cir.1986) (citing *Calder v. Jones*, 465 U.S. 783, 789 (1984)). Under Ninth Circuit precedent, the purposeful direction requirement for tort cases is analyzed under the “effects” test derived from *Calder*. See *Dole Food*, 303 F.3d at 1111; see also *Yahoo!*, 433 F.3d at 1206 (“In tort cases, we typically inquire whether a defendant purposefully directs his activities at the forum state, applying an ‘effects’ test that focuses on the forum in which the defendant’s actions were felt, whether or not the actions themselves occurred within the forum.”).

GTK asserts a claim for tortious interference with contract against Triangle based on its alleged fraudulent representations in the Purchase Agreement and concealment of the existence of the Agreement. Thus, the *Calder* “effects” test applies to determine whether Triangle purposefully directed its conduct at California. See *Panavision*, 141 F.3d at 1321 (stating that because a trademark infringement and unfair competition case was “akin” to a tort case, the court should apply the *Calder* “effects” test). Under *Calder*, “the ‘effects’ test requires that the defendant allegedly have (1) committed an intentional act, (2) expressly aimed at the forum state, (3) causing harm that the defendant knows is likely to be suffered in the forum state.” *Dole Food*, 303 F.3d at 1111. However, courts need not only consider those contacts that involve wrongful acts by the defendant. See *Yahoo!*, 433 F.3d at 1207. The Ninth Circuit has held that *Calder* does not “require in purposeful direction cases that all (or even any) jurisdictionally relevant effects have been caused by wrongful acts.” *Id.* at 1208. Thus, the Court considers the alleged tortious act of Triangle as well as its other alleged contacts with California in considering whether specific jurisdiction is proper.

i. Intentional Act

\*13 The first prong of purposeful direction is easily satisfied and generally glossed over by the courts. See *Dole Food*, 303 F.3d at 1111 (“Because it is clear that [Plaintiff] has sufficiently alleged that [defendants] acted intentionally, we skip to the ‘express aiming

requirement.’ ”). GTK need only allege that Triangle acted intentionally when it represented to PTI that Klastech had no obligations to any investment bank in connection with the Transaction. GTK alleges that despite Triangle’s awareness of the Agreement, Triangle knowingly made false representations to PTI, and wrongfully failed to disclose the Agreement, with the intent to induce Klastech to breach the Agreement and to deprive GTK of the payments and other benefits due it under the Agreement. Compl. ¶¶ 26–27. GTK refers to email communications between Tabibian and Langhans, in which Langhans represents herself as reaching out to GTK on behalf of Triangle for its assistance in “identifying potential M & A possibilities” for Klastech and “mak[ing] [Klastech] attractive for an exit.” Exs. 1, 5. GTK also provides email communications in which Langhans, appearing to represent Triangle, discusses PTI with GTK. Ex. 3. GTK has sufficiently alleged that Triangle acted intentionally when it represented in the Purchase Agreement that Klastech had no obligations to any investment bank or other entity in connection with the Transaction. Compl. ¶ 27.

ii. Express Aiming at Forum State

The “express aiming” requirement “is satisfied when the defendant is alleged to have engaged in wrongful conduct targeted at a plaintiff whom the defendant knows to be a resident of the forum state.” *Bancroft & Masters*, 223 F.3d at 1087; see also *Dole Food*, 303 F.3d at 1112 (“Because [defendants] knew that Dole’s principal place of business was in California, and communicated directly with those California decision makers, we conclude that their actions were ‘expressly aimed’ at the forum state.”); *Data Disc, Inc. v. Sys. Tech. Assoc.*, 557 F.3d 1280, 1288 (9th Cir.1977) (“The inducement of reliance in California is a sufficient act within California to satisfy the requirement of minimum contacts where the cause of action arises out of that inducement.”). However, the Supreme Court recently clarified that the plaintiff cannot be the only link between the defendant and the forum, but rather “the defendant’s suit-related conduct must create a substantial connection with the forum State.” *Walden v. Fiore*, 134 S.Ct. 1115, 1121–22 (2014) (citing *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 417 (1984) (“[The] unilateral activity of another party or a third person is not an appropriate consideration when determining whether a defendant has sufficient contacts with a forum State to justify an assertion of jurisdiction”). The Court explained that “these same principles apply when intentional torts are involved.” *Id.* at 1123.

In *Walden*, the plaintiffs, who were Nevada residents, sought to establish Nevada's personal jurisdiction over defendant Walden, a Georgia police officer, who seized a large amount of cash from the plaintiffs in Georgia and then allegedly submitted a false probable cause affidavit justifying the seizure. *Id.* at 1117. The Ninth Circuit held that Walden's submission of the false affidavit with the knowledge that it would affect persons with significant Nevada contacts demonstrated sufficient minimum contacts with Nevada related to the claim for Nevada to exercise specific, personal jurisdiction. *Id.* at 1120. The Supreme Court reversed, explaining that the Ninth Circuit improperly shifted the focus of its minimum contacts analysis from defendant's contact with the forum to defendant's contact with the plaintiffs. *Id.* at 1124. Despite the plaintiffs' allegations that they suffered the harm in Nevada, the Court found that no part of the defendant's course of conduct occurred in the forum state, and he formed no jurisdictionally relevant contacts with that forum. *Id.* In sum, the plaintiffs' injury occurred in Nevada simply because that is where plaintiffs chose to be when they desired to use the seized funds, but "none of [the defendant's] challenged conduct had anything to do with Nevada itself." *Id.* at 1125.

The Court explained that relevant conduct on the part of a defendant for establishing jurisdiction was conduct in which a defendant "purposefully 'reach[ed] out beyond' [his] State and into another." *Id.* at 1112 (citing *Burger King*, at 471 U.S. at 479–80). The Court emphasized that "although physical presence is not a prerequisite to jurisdiction, physical entry into the State—either by the defendant in person or through an agent, goods, mail, or some other means—is certainly a relevant contact." *Id.* (citations omitted). The Court cited "entering a contractual relationship that 'envisioned continuing and wide-reaching contacts' in the forum State" as an example of a defendant establishing sufficient contact with the forum without physical presence in the state. *Id.* at 1112 (citing *Burger King*, at 471 U.S. at 479–80). The Court also cited a case in which jurisdiction was proper over defendants who "circulat[ed] magazines to 'deliberately exploi[t]' a market in the forum State, despite never physically entering the borders. *Id.* (citing *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 781 (1984)).

\*14 The Court went on to cite with approval *Calder's* application of the principle that "[a] forum State's exercise of jurisdiction over an out-of-state intentional tortfeasor must be based on intentional conduct by the defendant that creates the necessary contacts with the forum." *Id.* at 1123. In *Calder*, the Court held that a libelous article written about an entertainer who lived and

worked in California in a newspaper published in Florida, but with a large circulation in California, was "expressly aimed" at California "based on the 'effects' of their Florida conduct in California." *Calder*, 465 U.S. at 789. Jurisdiction was proper because "California [wa]s the focal point both of the story and of the harm suffered." *Id.* at 789. Specifically, (i) the activities that were the subject of the story took place in California, (ii) the story was drawn from California sources, (iii) the defendants knew the plaintiff lived and worked in California, and (iv) the defendants knew the plaintiff would feel the reputational harm in California. *Id.* at 788–90. According to the Supreme Court in *Walden*, the key to the exercise of personal jurisdiction in *Calder* was that "the 'effects' caused by defendants' article—i.e., the injury to the plaintiff's reputation in the estimation of the California public—connected the defendants' conduct to *California*, not just to a plaintiff who lived there" because the defendants intentionally circulated the article in California. *Walden*, 134 S.Ct. at 1124.

In determining whether Triangle "expressly aimed" its conduct at California, the Court examines whether Triangle's "suit-related conduct" "connects [it] to the forum in a meaningful way." See *id.* at 1121–22, 25. Relevant contacts include physical presence in the state, as well as conduct demonstrating that Triangle "reached out beyond" its borders to create substantial contact with California. See *id.* at 1112.

The Court finds that Triangle's conduct establishes these necessary contacts with California. First, GTK has presented evidence that Triangle "reached out beyond" Germany to GTK in California, after identifying it through a web search, to negotiate the Agreement for services. Tabibian Decl. ¶ 4. Triangle principal, Langhans, then entered California's borders to meet with Tabibian, a decision-maker for GTK, in San Francisco on March 9, 2010 to discuss the business and sale prospects for Klastech. *Id.* This conduct led to a continuing relationship with GTK in California during which GTK provided advice to Klastech and Triangle on approach strategies for potential acquirors, including several California-based corporations and PTI, the company with which Triangle entered the Purchase Agreement. Tabibian Decl. ¶ 12–13; Compl. ¶ 30. Also relevant, although not sufficient on its own, is that Triangle's allegedly fraudulent representations in the Purchase Agreement caused GTK economic injury in California, where Triangle knew that GTK was based. See *Calder*, 465 U.S. at 788–89 (finding as relevant to personal jurisdiction that defendants knew that plaintiff lived and worked in California and would feel the reputational harm in California).

Therefore, the Court finds that GTK's economic injury in California is connected to contacts that "[D]efendant [it]self created with the forum state," by way of reaching out to a California corporation to negotiate a beneficial relationship (including traveling to California to do so) which lead to continuing contacts with Plaintiff in California and ultimately injury, in California, "targeted at a plaintiff whom the defendant knows to be a resident of the forum state." See *Bancroft & Masters*, 223 F.3d at 1087. Therefore, the Court finds that Triangle's "intentional, and allegedly tortious, actions were expressly aimed at California." See *Bancroft & Masters*, 223 F.3d at 1087.

### iii. Causing Harm in the Forum State

The final element of the *Calder* "effects" test is satisfied if Plaintiff can show that "a jurisdictionally sufficient amount of harm is suffered in the forum state." *Yahoo!*, 433 F.3d at 1207 (en banc) (overruling prior decisions which required "the 'brunt' of the harm" to be suffered in the forum state and clarifying that "[i]f a jurisdictionally sufficient amount of harm is suffered in the forum state, it does not matter that even more harm might have been suffered in another state.") The Ninth Circuit has relied on a corporation's principal place of business in determining the location of its economic injury. See *Dole Food*, 303 F.3d at 1114. "[W]hen a forum in which a plaintiff corporation has its principal place of business is in the same forum toward which defendants expressly aim their acts, the 'effect' test permits that forum to exercise personal jurisdiction." *Id.* Accordingly, in *Dole Food*, the Ninth Circuit held that, where the defendants had expressly aimed their conduct at the same forum where plaintiff had its principal place of business, the plaintiff suffered a jurisdictionally sufficient amount of harm in the forum state. *Id.*

\*15 Following *Dole Food*, GTK has suffered a jurisdictionally sufficient amount of harm in California because (i) Triangle's tortious conduct satisfies the "express aiming" requirement and (ii) GTK's principal place of business is in California, which is therefore the location of its economic injury. See Compl. ¶ 5. Specifically, GTK alleges that, as a result of Triangle's harmful conduct, Klastech has refused to pay sums due under the Agreement of not less than \$400,000 and to acknowledge publicly GTK's role in the Transaction per the Agreement. Compl. ¶¶ 19, 24, 29. As a result, GTK asserts that it has been damaged in California in an amount not less than \$400,000 plus the additional costs,

including attorneys' fees, it has been forced to incur to enforce its rights. Compl. ¶ 29.

The Court finds that the foregoing constitutes a "jurisdictionally sufficient" amount of harm that GTK suffered in California and that GTK has established the final element of the *Calder* "effects" test. Accordingly, the Court finds that GTK's allegations demonstrate that Triangle purposefully directed its conduct at California.

### 2. Relatedness of the Claim

"The second requirement for specific, personal jurisdiction is that the claim asserted in the litigation arises out of the defendant's forum related activities." *Panavision*, 141 F.3d at 1322. The Court must determine if GTK would not have been injured "but for" Triangle's conduct directed towards GTK in California. See *id.* Triangle argues GTK cannot establish this element because any alleged conduct would have occurred in Germany and because its claim is "so loosely attenuated" and any contact "so extremely limited" as to make the prospect that Triangle could be haled into court in California unforeseeable. Triangle Motion at 8. This argument fails to take into account the full extent of conduct that GTK alleges caused it harm in California.

GTK alleges that Triangle, through Langhans and Geiger, negotiated a contract between GTK and Klastech in California and then, through false representations in the Purchase Agreement, induced Klastech to deny GTK the payment and recognition due in California under the Agreement. Compl. ¶¶ 19, 24, 29. GTK further presents evidence that, throughout the course of the Agreement, it communicated regularly (several times a week, sometimes daily) with Triangle personnel via telephone and email in the performance of its work. Tabibian Decl. ¶¶ 7, 11, 12. In sum, GTK has sufficiently demonstrated that "but for" Triangle's reaching out to GTK in California, negotiating the Agreement with GTK on behalf of Klastech, continuing to communicate with GTK during the course of its performance of the Agreement, and representing to PTI that Klastech had no obligations to any investment company, GTK would not have suffered harm in California. See *Panavision*, 141 F.3d at 1322. Accordingly, GTK's allegations and affidavits show that its claim against Triangle arises out of Triangle's forum related contacts.

GT Securities, Inc. v. Klastech GmbH, Not Reported in Fed. Supp. (2014)

3. Reasonableness

Next, the Court considers the seven reasonableness factors in turn. For factor one, the Court finds that Triangle's activities, which satisfy the "purposeful direction" prong, demonstrate a sufficient level of purposeful injection into the forum state to support a finding of reasonableness. See *Dole Food*, 303 F.3d at 1114–15. Triangle principals, Langhans and Geiger, knew GTK had its principal place of business in California, reached out and negotiated the Agreement with GTK on behalf of Klastech, repeatedly communicated with GTK pursuant to the Agreement, and allegedly acted with the intent to deprive GTK of the benefits due it under the Agreement. See Tabibian Decl. ¶¶ 3, 4, 6, 7, 13, 17; Compl. ¶ 27.

Factor two, burden on defendant, weighs more strongly in favor of Triangle than it does for Klastech because Triangle has no ongoing presence in the United States or California.<sup>10</sup> See Geiger Decl. ¶ 5. Specifically, Triangle is a German corporation, headquartered in Germany, with no evidence of any connections to California outside of the events that gave rise to this claim. Geiger Decl. ¶¶ 2–10. While Langhans traveled to California once in connection with the events that gave rise to this claim, there is no evidence that Triangle employees regularly travel to the United States. Therefore, while not dispositive in light of "modern advances in communications and transportation," this factor favors Triangle. See *Dole Food*, 303 F.3d at 1115 (citing *Sinatra*, 854 F.2d at 1199).

\*16 For factor three, in its "an examination of the competing sovereign interests in regulating [the defendant's] behavior," the Court finds that Triangle's relationship with the United States is stronger than that of the defendants in *Core-Vent* but weaker than the U.S.-based relationships in *Dole Food*. See *Dole Food*, 303 F.3d at 1115. Unlike the Swedish doctors in *Core-Vent*, who had no U.S.-based relationships and no knowledge that their actions would impact California, Triangle principals, Langhans and Geiger, intentionally initiated a relationship on behalf of Klastech with GTK in California, knowing GTK was based there, and participated in ongoing communications with GTK in the course of that relationship. See Tabibian Decl. ¶¶ 3, 4, 6, 7, 13, 17. According to the Complaint, Triangle also intentionally directed its tortious conduct at California when it entered into a contractual relationship with PTI, another U.S.-based company. Compl. ¶ 27. However, unlike the defendants in *Dole Food*, Triangle has had no employment relationship with the United States. See *Dole Food*, 303 F.3d at 1115. Triangle's connections to Germany are the same as Klastech's, and therefore, the

extent of conflict with Germany's interest in adjudicating this suit is similarly unclear. See Tabibian Decl. ¶ 17. In sum, the sovereignty factor favors Triangle but does not weigh heavily as it did in *Core-Vent*.

Fourth, California has a "manifest interest" in providing its residents with a convenient forum for redressing injuries inflicted by out-of-state actors." See *Burger King*, 471 U.S. at 473. Because GTK is a California corporation with its principal place of business in California, this factor favors GTK. See *Dole Food*, 303 F.3d 1116.

For the fifth factor, it is difficult to determine on the current record whether California would be the most efficient forum for resolution of the dispute. The parties do not offer evidence regarding the location of the witnesses and evidence, but presumably there are some witnesses in Germany (where Triangle is based) and some in California (where GTK is based) so neither forum has a clear efficiency advantage with respect to witnesses. See *id.* Likewise, the parties do not discuss which substantive law should govern GTK's tort claim.<sup>11</sup> Following the lead of the Ninth Circuit in *Dole Food*, we do not determine here whether German or California law applies, as this determination depends upon the jurisdiction's choice of law rules.<sup>12</sup> We note only that there is no evidence in the record as to whether the relevant provisions of German and California law actually conflict, and, if they do, that German law would be applicable in the event of a conflict, based upon a consideration of the competing interests.<sup>13</sup> Therefore, at this time, an analysis based on the substantive law does not clearly favor either party. In *Core-Vent*, the fact that the lawsuit would continue with the other parties in the plaintiff's chosen forum "tip[ped] the efficiency factor in [the plaintiff's] favor." See *Core-Vent*, 11 F.3d at 1489. Accordingly, the fact that this Court will exercise personal jurisdiction over Klastech tips this factor in GTK's favor, though only slightly.

\*17 Factor six, convenience to plaintiff, favors GTK, which is based in California, but is "is not of paramount importance" in this circuit. See *Dole Food*, 303 F.3d at 1116.

Factor seven, unavailability of an alternative forum, follows a similar analysis for Triangle as it did for Klastech. Triangle has not suggested an alternative forum, but presumably it would prefer to adjudicate this dispute in Germany. As mentioned above, GTK has not presented any evidence that it could not obtain effective relief in Germany. Therefore, without deciding which party bears the burden of proving unavailability of an alternative forum, this factor favors Triangle.

GT Securities, Inc. v. Klastech GmbH, Not Reported in Fed. Supp. (2014)

The reasonableness factors weigh slightly in Triangle's favor due to Triangle's lack of ongoing contacts with California or the United States. Nevertheless, Ninth Circuit jurisprudence emphasizes the "heavy burden" of proving a "compelling case" of unreasonableness and has tended to find jurisdiction is reasonable when the factors do not clearly favor either party. *See Dole Food*, 303 F.3d at 1117; *Caruth v. International Psychoanalytical Ass'n*, 59 F.3d 126 (9th Cir.1995) ("[G]iven the closeness of the factors, we conclude that [defendant] has not presented a 'compelling case' that exercising jurisdiction over it would be unreasonable.") Considering all the factors in light of the defendant's burden of presenting a "compelling case," its purposeful injection into California, and its ability to manage travel to and communications with California in the course of the Agreement, the Court concludes that the exercise of jurisdiction over Triangle in California is reasonable.

Having found that GTK established the first two requirements of personal jurisdiction, and that Triangle failed to present compelling evidence that the exercise of jurisdiction would be unreasonable, the Court will assert personal jurisdiction over Triangle. The Triangle Motion to Dismiss for lack of personal jurisdiction is therefore DENIED.

## B. Subject Matter Jurisdiction

### a. Legal Standard

Although section 4 of the Federal Arbitration Act provides for the filing of a motion to compel arbitration, courts have held that a [Rule 12\(b\)\(1\)](#) motion to dismiss for lack of subject matter jurisdiction "is a procedurally sufficient mechanism to enforce [an] [a]rbitration [p]rovision." *Filimex, L.L.C. v. Novoa Investments, L.L.C.*, No. CV 05-3792-PHX-SMM, 2006 WL 2091661, at \*2 (D.Ariz. July 17, 2006) (citing *Choice Hotels Int'l, Inc. v. BSR Tropicana Resort, Inc.*, 252 F.3d 707, 709-10 (4th Cir.2001) (holding that as long as the party made clear that it was seeking enforcement of the arbitration clause in its motion to dismiss, it had sufficiently "invoke[d] the full spectrum of remedies under the FAA")); *see also Interactive Flight Technologies, Inc. v. Swissair Swiss Air Transport Co., Ltd.*, 249 F.3d 1177, 1179 (9th Cir.2001) (citing the Supreme Court's holding in *Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79, 86 (2000), that an order dismissing an action remains a "final decision"

within the traditional understanding of that term, notwithstanding that dismissal was in favor of arbitration); *Lewis v. UBS Financial Services Inc.*, 818 F.Supp.2d 1161, 1165 (N.D.Cal.2011) ("Where the claims alleged in a pleading are subject to arbitration, the Court may stay the action pending arbitration or dismiss the action."). [Rule 12\(b\)\(1\)](#) is appropriate for dismissing claims subject to arbitration because it "is a flexible rule" that often serves as a vehicle for raising residual defenses and the Federal Arbitration Act requires only that a party "petition" the court for an order directing arbitration to proceed. *Id.* Pursuant to the Federal Arbitration Act, arbitration may be compelled if the following three elements are shown: a written agreement to arbitrate, a dispute within the scope of the arbitration agreement, and a refusal to arbitrate. [9 U.S.C. § 4.](#)

\*18 When a defendant moves to dismiss under [Rule 12\(b\)\(1\)](#) of the Federal Rules of Civil Procedure, the plaintiff, as the party seeking to invoke the court's jurisdiction by filing the complaint, bears the burden of establishing subject matter jurisdiction. *See Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377 (1994). A defendant may attack the court's jurisdiction as it appears on the face of the complaint or by presenting affidavits and other evidence. *See White v. Lee*, 227 F.3d 1214, 1242 (9th Cir.2000). For a facial attack, the court must "accept all allegations in the complaint as true and construe them in the light most favorable to the plaintiff[]." *See id.* The plaintiff must plead sufficient facts in the complaint to establish the court's jurisdiction. [Fed.R.Civ.P. 8\(a\)\(1\)](#). In contrast, with a factual challenge, courts do not accept as true all facts in a plaintiff's complaint and may evaluate extrinsic evidence and resolve factual disputes where necessary. *See Roberts v. Corrothers*, 812 F.2d 1173 (9th Cir.1987). In response to a factual challenge, the plaintiff must present sufficient evidence to support the court's subject matter jurisdiction. *See Savage v. Glendale Union High School, Dist. No. 205, Maricopa County*, 343 F.3d 1036, 1040 n.2 (9th Cir.2003). Here, Klastech has presented the Court with evidence of the Purchase Agreement, whose arbitration clause it claims governs the dispute and renders the Court's exercise of subject matter jurisdiction improper. Therefore, the Court will consider extrinsic evidence and resolve factual disputes where necessary.

### b. Claims Not Subject to Arbitration

Klastech challenges the Court's subject matter jurisdiction by asserting that GTK's claim against it is subject to arbitration in New York pursuant to the Purchase

GT Securities, Inc. v. Klastech GmbH, Not Reported in Fed. Supp. (2014)

Agreement. Klastech argues that a nonsignatory may be compelled to arbitrate its claims if they are based on that defendant's breach of an agreement which provides for arbitration, in this case the Purchase Agreement. However, GTK's breach of contract action against Klastech is not based on Klastech's breach of the Purchase Agreement with PTI but rather its breach of the Agreement with GTK, which does not provide for arbitration. Therefore, the arbitration clause of the Purchase Agreement does not bind GTK in the resolution of its claim against Klastech.

While arbitration is contractual in nature, nonsignatories may be obligated to arbitrate a dispute. *Letizia v. Prudential-Bache Sec., Inc.*, 802 F.2d 1185, 1187 (9th Cir.1986). In *Letizia v. Prudential-Bache Sec., Inc.*, the Ninth Circuit explained that "nonsignatories of arbitration agreements may be bound by the agreement under ordinary contract and agency principles," including incorporation by reference, assumption, agency, veil-piercing/alter ego, estoppel, and third-party beneficiaries. *Id.* at 1187–88. Klastech seeks to hold GTK, as a nonsignatory, within the scope of an arbitration clause based upon equitable estoppel, which "precludes a party from claiming the benefits of a contract while simultaneously attempting to avoid the burdens that contract imposes." See *Comer v. Micor, Inc.*, 436 F.3d 1098, 1101 (9th Cir.2006) (quoting *Wash. Mut. Fin. Group, LLC v. Bailey*, 364 F.3d 260, 267 (5th Cir.2004)). "In order to compel a nonsignatory to arbitrate under this theory, the non-signatory party must receive a 'direct benefit' from the contract containing the provisions." *Int'l Ins. Agency Servs., LLC v. Revios Reinsurance U.S., Inc.*, 2007 WL 951943 (N.D.Ill. Mar. 27, 2007). Klastech relies on *Comer* and *Int'l Ins. Agency* in support of its position. The Court finds that its reliance on these cases is misplaced.

In *Comer*, the Ninth Circuit addressed whether an arbitration clause in investment management agreements between trustees of an ERISA plan and defendant Smith Barney, Inc. bound plaintiff Comer, a participant in the ERISA plan, who was sued Smith Barney under ERISA. *Comer*, 436 F.3d at 1100–01. Although the court recognized that nonsignatories to an arbitration agreement may be bound by it when they "knowingly exploit" the agreement, it went on to hold that Comer did *not* "knowingly exploit the agreement containing the arbitration clause despite having never signed the agreement" where he was merely a participant in trusts managed by others for his benefit. *Id.* at 1102 (quoting *E.I. DuPont de Nemours & Co. v. Rhone Poulenc Fiber & Resin Intermediates*, 269 F.3d 187, 195 (3d Cir.2001)). The court pointed to a lack of evidence that Comer sought

to enforce the terms of the management agreements "[or otherwise take advantage of them." *Id.* The court also determined that merely "by bringing [his] lawsuit, which he base[d] entirely on ERISA, and not on the investment management agreements," Comer did not attempt to enforce the agreements. *Id.* The court also rejected Smith Barney's alternate theory that Comer was a third-party beneficiary to the agreement. *Id.* Rather "[t]o sue as a third-party beneficiary of a contract, the third party must show that the contract reflects the express or implied intention of the parties to the contract to benefit the third party." *Id.* (citing *Klamath Water Users Protective Ass'n v. Patterson*, 204 F.3d 1206, 1211 (9th Cir.2000)). The court explained that where the signatories to the investment management agreements did not intend to give Comer, as a beneficiary of the plan, the right to enforce the agreements, he could not be bound to the terms of a contract that he did not sign or otherwise assent to. *Id.*

\*19 In *Int'l Ins. Agency*, the District Court of the Northern District of Illinois estopped the nonsignatory plaintiff from refusing to arbitrate its claims with the defendant. *Int'l Ins. Agency Servs.*, 2007 WL 951943, at 3. The plaintiff alleged that the defendant deliberately attempted to interfere with plaintiff's business relationships by wrongfully seeking to terminate two agreements (one of which plaintiff negotiated on another party's behalf), which earned plaintiff commissions, profits, and agency fees. *Id.* at 2. The plaintiff relied on the agreements, which included arbitration clauses, to prove that defendant wrongfully breached those agreements. *Id.* at 5. Where "[t]he essential issue in [plaintiff]'s claim [was] [defendant]'s compliance with the agreement containing the arbitration clause," the court did not see how the plaintiff could "litigate its claims without proving that [defendant] breached or attempted to breach the agreements containing the arbitration agreements." *Id.*

Here, as in *Comer*, Klastech's invocation of equitable estoppel fails because there is no evidence that GTK "knowingly exploit[ed] the agreement containing the arbitration clause despite having never signed the agreement." See *id.* at 1102 (quoting *E.I. DuPont de Nemours & Co. v. Rhone Poulenc Fiber & Resin Intermediates*, 269 F.3d 187, 195 (3d Cir.2001)). GTK does not seek to enforce the terms of the Purchase Agreement between PTI and Klastech. Rather, like the plaintiff's claim in *Comer* which did not arise from the agreement with the arbitration clause, GTK's claim, based on an entirely separate contract, does not arise from the Purchase Agreement. See *id.* Unlike *Int'l Ins. Agency*, in which the plaintiff's claims were based on the harm it would suffer if the defendant repudiated the agreement, GTK receives no "direct benefit" from the Purchase

GT Securities, Inc. v. Klastech GmbH, Not Reported in Fed. Supp. (2014)

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Agreement, as evidenced by the “no broker” provision. See *Int’l Ins. Agency*, 2007 WL 951943, at 5. Although GTK relies on the existence of the Purchase Agreement to prove its claim, GTK does not seek to enforce the Purchase Agreement by proving Klastech’s lack of compliance with its terms caused GTK harm. See *id.* at 2.

Klastech has failed to show that GTK, as a nonsignatory to the Purchase Agreement, benefits from the agreement in a way that would subject it to the arbitration clause under the theory of equitable estoppel.

#### IV. CONCLUSION

For the foregoing reasons, Defendants’ Motions to Dismiss for Lack of Personal Jurisdiction and Defendant Klastech’s Motion to Dismiss for Lack of Subject Matter Jurisdiction are DENIED.

#### IT IS SO ORDERED.

#### All Citations

Not Reported in Fed. Supp., 2014 WL 2928013

#### Footnotes

- 1 The parties have consented to the jurisdiction of a magistrate judge pursuant to 28 U.S.C. § 636(c).
- 2 Wiebke Langhans is alternatively referred to as Wiebke Langham in the parties’ documents. The Court has chosen to use “Langhans” for consistency.
- 3 At the time Klastech was wholly owned by Triangle. PTI now owns Klastech. Compl. ¶ 4.
- 4 Klastech does not specify which Federal Rule of Civil Procedure is appropriate for its arbitration claim, noting that courts differ. In the Ninth Circuit, motions to dismiss based on arbitration fall under [Rule 12\(b\)\(1\) of the Federal Rules of Civil Procedure](#).
- 5 Although Klastech may have sufficient contacts with California to support specific jurisdiction, it is not clear whether Klastech’s contacts meet the standard of substantiality required for general jurisdiction. Ninth Circuit precedent on general jurisdiction requires courts to “focus upon the ‘economic reality’ of the defendants’ activities rather than a mechanical check list.” See *Gates Learjet Corp. v. Jensen*, 743 F.2d 1325 (9th Cir.1984). While GTK alleges that Klastech has had a sales presence in California through an independent contractor in the past and, currently, through a designated PTI employee for the “USA West,” the record does not contain sufficient evidence on the extent of Klastech’s sales activities in California for the Court to make an informed determination on whether such activity approximates “physical presence.” Furthermore, the Court would need to determine whether Klastech’s use of an independent contractor as a sales representative affects its analysis. The parties disagree on this issue but provide no case law in support of their assertions. Ninth Circuit jurisprudence is ambiguous. See *Ochoa v. J.B. Martin and Sons Farm, Inc.*, 287 F.3d 1182, 1190 (9th Cir.2002) (holding that an independent contractor who is not an employee of a principal can nevertheless still be the principal’s agent, but it depends on the extent of control the principal exercises over the agent); *cf. Eftekhari v. Peregrine Financials & Securities, Inc.*, No. C 00-3594, 2001 WL 1180640, at 5 (N.D.Cal. Sep. 24, 2001) (holding that defendant *might* have had “continuous and systematic” contacts with the forum if plaintiff had continued to work as an independent contractor for defendant in that forum); *Reid-Ashman Mfg., Inc. v. Swanson Semiconductor Service, LLC*, No. C-06-4693, 2006 WL 3290416, at 5 (N.D.Cal. Nov. 13, 2006) (holding that defendant’s suggestion that an independent contractor does not provide a basis for personal jurisdiction is not supported by any authority that distinguishes employees and independent contractors with regards to whether a defendant has directed his activities towards the forum). The parties have not provided evidence on the nature of the relationship between Klastech and its independent contractor.
- 6 GTK argues that by agreeing to comply with the “applicable state ‘blue sky’ and applicable securities laws of other jurisdictions,” Klastech agreed to comply with California law. See Compl., Ex A., Section 11. However, there is no indication that the parties intended this provision to be anything other than a general promise to abide by any relevant laws of any state that might apply in the event of a Transaction.
- 7 See the above discussion on purposeful availment for the facts that also establish Klastech’s purposeful injection into California.
- 8 Although the parties dispute the location of Klastech’s principal place of business, they do not dispute this connection to the United States.
- 9 As discussed below, arbitration in New York is not proper.

GT Securities, Inc. v. Klastech GmbH, Not Reported in Fed. Supp. (2014)

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- 10 Ninth Circuit precedent is split on whether “the corresponding burden on plaintiff in bringing the claims against the defendant in an alternate forum should lessen the impact of this factor on the overall reasonableness determination.” See *Core-Vent*, 11 F.3d at 1488–89 (comparing, e.g., *Pacific Atlantic Trading Co. v. M/V Main Exp.*, 758 F.2d 1325 (9th Cir.1985) with *Sinatra*, 854 F.2d at 1199). The Court does not attempt to reconcile these standards but addresses convenience to plaintiff in factor six, following the court in *Dole Food*. See *Dole Food*, 303 F.3d at 1116.
- 11 “California has jettisoned the relatively predictable choice of law rules based on place where the transaction occurred (lex locus) in favor of a three-part governmental interest test.” *Arno v. Club Med Inc.*, 22 F.3d 1464, 1467 (9th Cir.1994) (citing *Reich v. Purcell*, 432 P.2d 727 (Cal.1967)). “Under this amorphous and somewhat result-oriented approach, we must first consider whether the two states’ laws actually differ; if so, we must examine each state’s interest in applying its law to determine whether there is a ‘true conflict’; and if each state has a legitimate interest we must compare the impairment to each jurisdiction under the other’s rule of law.” *Id.* “[T]he law of the sovereign with the greater interest in having its law applied controls.” See *id.*
- 12 New York law, which governs the Agreement and the Purchase Agreement, does not apply because GTK’s claim against Triangle sounds in tort, not contract.
- 13 “Public interest factors include court congestion, local interest in resolving the controversy, and preference for having a forum apply a law with which it is familiar.” See *Dole Food*, 303 F.3d at 1119 (citing *Lockman Found v. Evangelical Alliance Mission*, 930 F.2d 764, 771 (9th Cir.1991)). Neither party has offered any evidence about relative court congestion in Germany and in California. See *id.* GTK’s claims allege interference with contract perpetrated against GTK in California, and “California has an interest in protecting corporations based in California.” See *id.* Germany’s interest in litigation stems from Triangle’s residency, and thus may be secondary to California’s interest in redressing fraud against its corporations. See *id.*

## Exhibit 10

Herring Networks, Inc. v. AT&T Services, Inc., Not Reported in Fed. Supp. (2016)

**C** KeyCite citing references available

2016 WL 4055636

Only the Westlaw citation is currently available.  
United States District Court, C.D. California.

HERRING NETWORKS, INC.

v.

AT&T SERVICES, INC., et al.

Case No. 2:16-cv-01636-CAS-AGR

|  
Signed 07/25/2016

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**Proceedings:** (IN CHAMBERS) – DEFENDANT AT&T  
SERVICES, INC.’S MOTION TO DISMISS  
PLAINTIFF’S COMPLAINT FOR FAILURE TO  
STATE A CLAIM (Dkt. 14, filed April 25, 2016)

DEFENDANT AT&T INC.’S MOTION TO DISMISS  
PLAINTIFF’S COMPLAINT FOR LACK OF  
PERSONAL JURISDICTION (Dkt. 16, filed April 25,  
2016)

Honorable CHRISTINA A. SNYDER, District Judge

#### I. INTRODUCTION

\*1 On March 9, 2016, plaintiff Herring Networks, Inc.  
 (“Herring”) initiated this action against defendants AT&T

Services, Inc. (“AT&T Services”) and AT&T, Inc.  
 (collectively, “defendants”). Dkt. 1. Plaintiff asserts  
 claims against defendants for: (1) fraud by concealment;  
 (2) intentional misrepresentation; (3) negligent  
 misrepresentation; (4) breach of the implied covenant of  
 good faith and fair dealing; (5) promissory estoppel; (6)  
 breach of oral contract; and (7) breach of implied in fact  
 contract. Id.

On April 25, 2016, defendant AT&T Services filed a  
 motion to dismiss for failure to state a claim upon which  
 relief can be granted, Dkt. 14, and defendant AT&T, Inc.  
 filed a motion to dismiss for lack of personal jurisdiction,  
 Dkt. 16.<sup>1</sup> On May 23, 2016, plaintiff filed oppositions to  
 both of these motions, Dkt. 32, 33, and on June 13, 2016,  
 defendants filed replies in support of their respective  
 motions, Dkt. 37, 38. Having carefully considered the  
 parties’ arguments, the Court finds and concludes as  
 follows.

#### II. BACKGROUND

Plaintiff’s complaint alleges the following facts: Herring  
 is an independent, family-owned television programming  
 company that owns and operates two television  
 networks—a lifestyle entertainment channel called A  
 Wealth of Entertainment (“AWE”) and a news channel  
 called One America News Network (“OAN”). Compl. ¶¶  
 16-19. Herring is a California Corporation with its  
 principal place of business in San Diego, California. Id. ¶  
 8. Defendants AT&T, Inc. and AT&T Services are  
 Delaware corporations with their principal places of  
 business in Dallas, Texas. Id. ¶ 9. AT&T, Inc. is the  
 parent company of AT&T Services. Id. ¶ 10. Collectively,  
 defendants are the second largest provider of mobile  
 telephone services and the largest provider of fixed  
 wireline telephone services in the United States. Id. ¶ 20.  
 Defendants also provide broadband internet and  
 subscription television services. Id. In June 2006,  
 defendants launched AT&T U-verse (“U-verse”), a  
 multi-channel television distribution service. Id. ¶ 21.  
 From its launch, defendants included AWE as one of the  
 channels on the U-verse platform. Id. ¶ 23. Several years  
 thereafter, defendants also began including OAN on the  
 U-verse platform. Id. ¶ 25.

Owners of television networks, such as Herring, generate  
 revenue through carriage (i.e. distribution) agreements  
 with defendants. Id. Defendants’ customers, or  
 subscribers, would pay a fee to obtain access to a variety  
 of networks available on the U-verse platform. Id. In turn,

Herring Networks, Inc. v. AT&T Services, Inc., Not Reported in Fed. Supp. (2016)

defendants would pay the network owners an agreed upon licensing fee to distribute their content. *Id.* In early 2014, Herring and defendants entered into a renewed licensing agreement (the “U-verse Agreement”). *Id.* ¶ 26. Pursuant to the U-verse Agreement, defendants agreed to carry both AWE and OAN for a customary five-year period with one-year renewals and to pay Herring a monthly licensing fee of \$0.18 per subscriber. *Id.*

\*2 According to Herring, when the parties negotiated the U-verse Agreement, defendants led Herring to believe that they were committed to expanding their U-verse platform and increasing its subscriber base. *Id.* ¶ 27. Nonetheless, Herring contends that AT&T’s true intention was to wind down U-verse, acquire a competitor, DirecTV, and move subscribers from the U-verse platform to DirecTV’s platform. *Id.* ¶ 29. Herring alleges that defendants deliberately withheld this information from Herring. *Id.* In particular, Herring alleges that Ryan Smith, Vice President of Content at AT&T Services, made the following representations to Charles Herring, the President of Herring: (1) defendants expected U-verse to challenge and surpass its competitor Time Warner Cable (“TWC”)—at the time U-verse had less than half as many subscribers as TWC (approximately 5.3 million for U-verse compared to 11.4 million for TWC); (2) defendants were continuing U-verse’s expansion to additional markets and capturing a larger market share in the markets where U-verse had already launched; and (3) defendants had ambitious expansion plans. *Id.* ¶ 28. Herring further alleges that these representations were consistent with defendants’ public statements regarding their intention to grow U-verse. *Id.* ¶ 33. For example, in one of their Annual Reports, defendants stated:

As part of Project Velocity IP (VIP), we [AT&T] plan to expand our IP-broadband service to approximately 57 million customer locations, including U-verse services to a total of 33 million customer locations. We expect to be substantially complete in the 2015 and 2016 timeframe.

*Id.* Finally, Herring alleges that defendants misrepresented their plans to grow U-verse in public filings by AT&T, Inc.’s top executives, which Herring relied on. *Id.* ¶¶ 90, 97.

In an early draft of the U-verse agreement, there was a clause that would have required defendants to carry Herring’s networks on any subsequently-acquired platforms. *Id.* ¶ 31. However, towards the end of the parties’ negotiations, new language was inserted into the U-verse agreement, which stated:

For the avoidance of doubt, nothing herein shall obligate AT&T to launch and carry the Services on any

System that AT&T acquires during the Term if such System is not already distributing or obligated to distribute the Services.

Dkt. 17, Smith Decl, Ex. A, “U-verse Agreement” ¶ 4.B. Herring contends that this language effectively excused AT&T from any obligation to carry Herring’s networks on newly-acquired platforms, such as the DirecTV platform. Compl. ¶ 31.

A month after the U-verse Agreement was finalized, defendants announced their plans to acquire DirecTV. *Id.* ¶ 46. In order for defendants to acquire DirecTV they needed to obtain regulatory approval from the Federal Communications Commission (“FCC”). *Id.* ¶ 48. According to Herring, the FCC has a Congressional mandate to foster a diverse, robust, and competitive marketplace for video programming, which includes ensuring fair and equal treatment for independent programmers. *Id.* ¶ 50. Thus, in order to obtain the necessary governmental approvals, defendants needed support and lobbying from independent programmers, such as Herring. *Id.* To this end, shortly after announcing the planned acquisition of DirecTV, executives from Herring and defendants met at AT&T Services’ Los Angeles offices. *Id.* ¶ 55. At this meeting, Aaron Slator, the president of AT&T Services, made the following proposal: If Herring publicly supported defendants throughout its acquisition of DirecTV, including by lobbying the FCC, defendants would ensure that DirecTV carried Herring’s networks on its platform. *Id.* ¶ 56. Slator said that the terms of carriage on DirecTV’s platform would be similar to the U-verse Agreement and that this new agreement would be reduced to writing after the acquisition of DirecTV was completed. *Id.* ¶ 57. He also stated that the new agreement would be for a customary five year term, with automatic one-year renewals—i.e., identical to the U-verse Agreement. *Id.* Finally, Slator informed Herring’s executives that while DirecTV would need to pay Herring less than the \$0.18 per subscriber set forth in the U-verse Agreement, carriage on DirecTV’s platform would still be very lucrative for Herring. *Id.* ¶ 59. Slator told Herring’s executives that he had been authorized to make this proposal by his superiors at AT&T, Inc. *Id.* ¶¶ 55, 58. Herring agreed to this proposal and, thereafter, began advocating on defendants’ behalf and in favor of the DirecTV acquisition. *Id.* ¶¶ 60, 66-69. On July 24, 2015, AT&T’s acquisition of DirecTV was approved by the FCC and the AT&T/DirecTV merger was consummated. *Id.* ¶ 76. Nonetheless, defendants have not made either of Herring’s networks available on the DirecTV platform. *Id.* ¶ 36.

\*3 In addition, Herring contends that, since acquiring DirecTV, defendants have aggressively solicited U-verse

Herring Networks, Inc. v. AT&T Services, Inc., Not Reported in Fed. Supp. (2016)

subscribers to move to DirecTV. *Id.* ¶ 35. AT&T has also publicly announced that it plans to make DirecTV its television service and wind down U-verse. *Id.* ¶ 37. Defendants' efforts to phase out U-verse have been successful. Since the acquisition of DirecTV, U-verse has lost approximately 325,000 subscribers, while DirecTV has gained more than 200,000 during the same time. *Id.* As noted above, under the U-verse Agreement, Herring's licensing fee is based on the number of U-verse subscribers. Accordingly, Herring contends that, by shifting subscribers from U-verse to DirecTV, defendants are undermining Herring's bargained-for benefit under the U-verse Agreement. *Id.* ¶ 36-39.

### III. LEGAL STANDARD

#### A. Motion to Dismiss for Lack of Personal Jurisdiction

When a defendant moves to dismiss for lack of personal jurisdiction under *Federal Rule of Civil Procedure 12(b)(2)*, the plaintiff bears the burden of demonstrating that the court may properly exercise personal jurisdiction over the defendant. *Pebble Beach Co. v. Caddy*, 453 F.3d 1151, 1154 (9th Cir. 2006). Where, as here, a court decides such a motion without an evidentiary hearing, the plaintiff need only make a prima facie showing of jurisdictional facts to withstand the motion to dismiss. *Ballard v. Savage*, 65 F.3d 1495, 1498 (9th Cir. 1995); *Doe v. Unocal Corp.*, 27 F. Supp. 2d 1174, 1181 (C.D. Cal. 1998), *aff'd*, 248 F.3d 915 (9th Cir. 2001). Plaintiff's version of the facts is taken as true for purposes of the motion if not directly controverted, and conflicts between the parties' affidavits must be resolved in plaintiff's favor for purposes of deciding whether a prima facie case for personal jurisdiction exists. *AT & T v. Compagnie Bruxelles Lambert*, 94 F.3d 586, 588 (9th Cir. 1996); *Unocal*, 27 F. Supp. 2d at 1181. If the defendant submits evidence controverting the allegations, however, the plaintiff may not rely on its pleadings, but must "come forward with facts, by affidavit or otherwise, supporting personal jurisdiction." *Scott v. Breeland*, 792 F.2d 925, 927 (9th Cir. 1986) (quoting *Amba Mktg. Servs., Inc. v. Jobar Int'l, Inc.*, 551 F.2d 784, 787 (9th Cir. 1977)).

Generally, personal jurisdiction exists if (1) it is permitted by the forum state's long-arm statute and (2) the "exercise of that jurisdiction does not violate federal due process." *Pebble Beach*, 453 F.3d at 1154-55 (citing *Fireman's Fund Ins. Co. v. Nat'l Bank of Coops.*, 103 F.3d 888, 893

(9th Cir. 1996)). California's long-arm jurisdictional statute is coextensive with federal due process requirements, so that the jurisdictional analysis under state and federal law are the same. *Cal. Civ. Proc. Code § 410.10*; *Roth v. Garcia Marquez*, 942 F.2d 617, 620 (9th Cir. 1991). The Fourteenth Amendment's Due Process Clause requires that a defendant have "minimum contacts" with the forum state so that the exercise of jurisdiction "does not offend traditional notions of fair play and substantial justice." *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). Depending on the nature of the contacts between the defendant and the forum state, personal jurisdiction is characterized as either general or specific.

A court has general jurisdiction over a nonresident defendant when that defendant's activities within the forum state are "substantial" or "continuous and systematic," even if the cause of action is "unrelated to the defendant's forum activities." *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 446-47 (1952); *Data Disc, Inc. v. Sys. Tech. Assocs., Inc.*, 557 F.2d 1280, 1287 (9th Cir. 1977). The standard for establishing general jurisdiction is "fairly high" and requires that the defendant's contacts be substantial enough to approximate physical presence. *Bancroft & Masters, Inc. v. Augusta Nat'l Inc.*, 223 F.3d 1082, 1086 (9th Cir. 2000). "Factors to be taken into consideration are whether the defendant makes sales, solicits or engages in business in the state, serves the state's markets, designates an agent for service of process, holds a license, or is incorporated there." *Id.* (finding no general jurisdiction when the corporation was not registered or licensed to do business in California, paid no taxes, maintained no bank accounts, and targeted no advertising toward California).

\*4 A court may assert specific jurisdiction over a claim for relief that arises out of a defendant's forum-related activities. *Rano v. Sipa Press, Inc.*, 987 F.2d 580, 588 (9th Cir. 1993). The test for specific personal jurisdiction has three parts:

- (1) The non-resident defendant must purposefully direct his activities or consummate some transaction with the forum or resident thereof; or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws;
- (2) the claim must be one which arises out of or relates to the defendant's forum-related activities; and
- (3) the exercise of jurisdiction must comport with fair play and substantial justice, i.e., it must be reasonable. *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797,

Herring Networks, Inc. v. AT&T Services, Inc., Not Reported in Fed. Supp. (2016)

802 (9th Cir. 2004) (citing [Lake v. Lake](#), 817 F.2d 1416, 1421 (9th Cir. 1987)); see also [Burger King Corp. v. Rudzewicz](#), 471 U.S. 462, 475-76 (1985). The plaintiff bears the burden of satisfying the first two prongs, and must do so to establish specific jurisdiction. [Schwarzenegger](#), 374 F.3d at 802.

If the plaintiff establishes the first two prongs, then it is the defendant's burden to "present a compelling case" that the third prong, reasonableness, has not been satisfied. [Schwarzenegger](#), 374 F.3d at 802 (quoting [Burger King](#), 471 U.S. at 477). The third prong requires the Court to balance seven factors: (1) the "extent of the defendant's purposeful injection into the forum"; (2) the burdens on defendant from litigating in the forum state; (3) the "extent of conflict with the sovereignty of the defendant's state," (4) the forum state's "interest in adjudicating the dispute"; (5) the "most efficient judicial resolution of the controversy"; (6) the "importance of the forum to the plaintiff's interest in convenient and effective relief"; and (7) the existence of an alternative forum. [Ziegler v. Indian River County](#), 64 F.3d 470, 475 (9th Cir. 1995).

#### **B. Motion to Dismiss for Failure to State a Claim**

A motion pursuant to [Federal Rule of Civil Procedure 12\(b\)\(6\)](#) tests the legal sufficiency of the claims asserted in a complaint. Under this Rule, a district court properly dismisses a claim if "there is a 'lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory.'" [Conservation Force v. Salazar](#), 646 F.3d 1240, 1242 (9th Cir. 2011) (quoting [Balisteri v. Pacifica Police Dep't](#), 901 F.2d 696, 699 (9th Cir. 1988)). "While a complaint attacked by a [Rule 12\(b\)\(6\)](#) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." [Bell Atlantic Corp. v. Twombly](#), 550 U.S. 544, 555 (2007). "[F]actual allegations must be enough to raise a right to relief above the speculative level." *Id.*

In considering a motion pursuant to [Rule 12\(b\)\(6\)](#), a court must accept as true all material allegations in the complaint, as well as all reasonable inferences to be drawn from them. [Pareto v. FDIC](#), 139 F.3d 696, 699 (9th Cir. 1998). The complaint must be read in the light most favorable to the nonmoving party. [Spewell v. Golden State Warriors](#), 266 F.3d 979, 988 (9th Cir. 2001). However, "a court considering a motion to dismiss can choose to begin by identifying pleadings that, because

they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations." [Ashcroft v. Iqbal](#), 556 U.S. 662, 679 (2009); see [Moss v. United States Secret Service](#), 572 F.3d 962, 969 (9th Cir. 2009) ("[F]or a complaint to survive a motion to dismiss, the non-conclusory 'factual content,' and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief."). Ultimately, "[d]etermining whether a complaint states a plausible claim for relief will ... be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." [Iqbal](#), 556 U.S. at 679.

\*5 Unless a court converts a [Rule 12\(b\)\(6\)](#) motion into a motion for summary judgment, a court cannot consider material outside of the complaint (e.g., facts presented in briefs, affidavits, or discovery materials). [In re American Cont'l Corp./Lincoln Sav. & Loan Sec. Litig.](#), 102 F.3d 1524, 1537 (9th Cir. 1996), *rev'd on other grounds sub nom* [Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach](#), 523 U.S. 26 (1998). A court may, however, consider exhibits submitted with or alleged in the complaint and matters that may be judicially noticed pursuant to [Federal Rule of Evidence 201](#). [In re Silicon Graphics Inc. Sec. Litig.](#), 183 F.3d 970, 986 (9th Cir. 1999); see [Lee v. City of Los Angeles](#), 250 F.3d 668, 689 (9th Cir. 2001).

As a general rule, leave to amend a complaint which has been dismissed should be freely granted. [Fed. R. Civ. P. 15\(a\)](#). However, leave to amend may be denied when "the court determines that the allegation of other facts consistent with the challenged pleading could not possibly cure the deficiency." [Schreiber Distrib. Co. v. Serv-Well Furniture Co.](#), 806 F.2d 1393, 1401 (9th Cir. 1986).

#### **IV. ANALYSIS**

##### **A. AT&T Inc.'s Motion to Dismiss for Lack of Personal Jurisdiction**

Plaintiff has named two defendants in this action—AT&T Services and its parent company, AT&T, Inc. AT&T, Inc. moves to dismiss for lack of personal jurisdiction. In brief, AT&T, Inc. contends that it has not engaged in any of the conduct underlying the claims raised in plaintiff's complaint. Rather, AT&T, Inc. contends that those activities were performed by its subsidiary AT&T

Herring Networks, Inc. v. AT&T Services, Inc., Not Reported in Fed. Supp. (2016)

Services. Accordingly, AT&T, Inc. argues that it lacks the requisite “minimum contacts” to subject it to this Court’s jurisdiction.

As noted above, there are two types of personal jurisdiction—general and specific. However, as an initial matter, plaintiff concedes that general personal jurisdiction is not appropriate over AT&T, Inc. in California. See Opp’n., at 9 n.3 (“Herring has never asserted general jurisdiction as a basis for jurisdiction”). Accordingly, the Court only addresses whether specific personal jurisdiction is appropriate over AT&T, Inc. in California.

### 1. Specific Jurisdiction

A court may assert specific jurisdiction over a claim for relief that arises out of a defendant’s forum-related activities. [Rano](#), 987 F.2d at 588. As noted above, the Ninth Circuit uses the following three-part test to determine whether specific jurisdiction may be exercised over a particular defendant:

- (1) The non-resident defendant must purposefully direct his activities or consummate some transaction with the forum or resident thereof; or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws;
- (2) the claim must be one which arises out of or relates to the defendant’s forum-related activities; and
- (3) the exercise of jurisdiction must comport with fair play and substantial justice, i.e. it must be reasonable.

[Schwarzenegger v. Fred Martin Motor Co.](#), 374 F.3d at 802.

The first prong of this test is, in turn, separated into two distinct concepts: “purposeful direction” and “purposeful availment.” The “purposeful availment analysis is most often used in suits sounding in contract,” where as the “purposeful direction analysis ... is most often used in suits sounding in tort.” *Id.* Here, plaintiff’s claims against AT&T, Inc. sound in both contract and tort (i.e., fraud). Accordingly, both the purposeful direction and purposeful availment tests are applicable and the Court addresses each in turn.

#### a. Whether AT&T Purposefully Directed its Activities

#### Towards California

\*6 In a purposeful direction analysis, courts apply the “effects” test first set forth by the Supreme Court in [Calder v. Jones](#), 465 U.S. 783 (1984). See [Mavrix Photo](#), 647 F.3d at 1228 (9th Cir. 2011) (“In tort cases, we typically inquire whether a defendant ‘purposefully direct[s] his activities’ at the forum state, applying an ‘effects’ test”). This test requires that “the defendant allegedly must have (1) committed an intentional act, (2) expressly aimed at the forum state, (3) causing harm that the defendant knows is likely to be suffered in the forum state.” [Brayton Purcell](#), 606 F.3d at 1128.

Here, the Court finds that plaintiff has identified at least one intentional act committed by AT&T, Inc. Specifically, plaintiff alleges that AT&T, Inc.’s CEO and Chairman, Randall Stephenson (“Stephenson”), expressly authorized the President of AT&T Services, Aaron Slator (“Slator”), to promise plaintiff that if it publicly supported AT&T, Inc.’s acquisition of DirecTV, plaintiff’s networks would be carried on DirecTV’s platform. Plaintiff also alleges that this promise was reiterated several months later by another AT&T Services executive, James Cicconi (“Cicconi”) and that Cicconi stated that his superiors at AT&T, Inc. authorized him to make this promise.<sup>2</sup> And plaintiff alleges Cicconi reported directly to Stephenson and was responsible for leading AT&T, Inc.’s efforts to gain government approval for the DirecTV acquisition. Compl. ¶ 71. In this capacity, Cicconi allegedly directed Herring’s activities to promote the DirecTV acquisition, which included, among other things, lobbying the FCC, the Department of Justice, and members of Congress, filing briefs with the FCC, and soliciting other independent programmers to support AT&T, Inc.’s acquisition of DirecTV. Compl. ¶¶ 66, 68, 74.<sup>3</sup>

\*7 These allegations are uncontroverted by the affidavits submitted by AT&T, Inc. Instead, AT&T, Inc. contends that these intentional acts cannot support personal jurisdiction over AT&T, Inc. because they were committed by employees of AT&T Services. AT&T, Inc. also cites several cases in which courts have held that, as a general matter, parent companies, such as AT&T, Inc., may not be subject to personal jurisdiction based on the contacts of their subsidiaries. See, e.g., [Sonora Diamond Corp. v. Superior Court](#), 83 Cal. App. 4th 523, 540 (Cal. Ct. App. 2000) (“We start with the firm proposition that neither ownership nor control of a subsidiary corporation by a foreign parent corporation, without more, subjects the parent to the jurisdiction of the state where the subsidiary does business.”). Nonetheless, a parent company may still be subject to jurisdiction based on its own contacts with a forum state. And, to the extent AT&T, Inc. directed and/or authorized AT&T Services to

Herring Networks, Inc. v. AT&T Services, Inc., Not Reported in Fed. Supp. (2016)

engage in conduct in California, those actions may be attributed to AT&T, Inc. for purposes of evaluating personal jurisdiction. See also Weaver v. Johnson & Johnson, Ethicon, Inc., 2016 WL 1668749, at \*5 (S.D. Cal. Apr. 27, 2016) (Curiel, J.) (“A parent corporation may be amenable to specific jurisdiction in a forum state, through an agency relationship, if it itself targeted the forum or it ‘purposefully availed itself of a forum by directing its agents or distributors to take action there.’”) (quoting Daimler AG v. Bauman, 134 S. Ct. 746, 759 n.13 (2014)); HealthMarkets, Inc. v. Superior Court, 171 Cal. App. th 1160, 1170 (Cal. Ct. App. 2009) (Croskey, J.) (noting that jurisdiction may be appropriate over a defendant-parent company where a “defendant has purposefully directed its activities at the forum state by causing a separate person or entity to engage in forum contacts.”). Here, plaintiff alleges that executives at AT&T, Inc., including the Chairman and CEO of AT&T, Inc., authorized and instructed both Slator and Cicconi to promise plaintiff that its networks would be carried on DirecTV’s platform. Moreover, plaintiff alleges that it supported the acquisition of DirecTV on AT&T, Inc.’s behalf and at the direction of Cicconi, who reported directly to Stephenson. Accordingly, the Court finds that these intentional acts may fairly be attributed to AT&T, Inc.<sup>4</sup>

Next, the Court finds that AT&T, Inc.’s conduct was expressly aimed at California. Plaintiff alleges that AT&T, Inc. authorized and instructed Slator and Cicconi to make promises to plaintiff—a California corporation. AT&T, Inc. argues that, under recent Supreme Court and Ninth Circuit precedent, the mere fact that a resident of a forum has been injured is insufficient to invoke personal jurisdiction. See, e.g., Walden v. Fiore, 134 S.Ct. 1115, 1125 (2014) (“mere injury to a forum resident is not a sufficient connection to the forum”). However, in those cases the defendant had only attenuated contacts with the forum state, and the courts held that the fact that the plaintiff happened to be from the forum state was insufficient to support the assertion of personal jurisdiction. For example, in Walden v. Fiore, two Nevada residents sued a DEA agent in a Nevada court based on a search the agent had conducted in Georgia. 134 S.Ct. at 1119. The Supreme Court held that the Nevada court lacked jurisdiction over the agent reasoning that “the plaintiff cannot be the only link between the defendant and the forum.” Id. at 1122. Similarly, in Picot v. Weston, 780 F.3d 1206, 1214 (9th Cir. 2015), a California resident brought suit against a Michigan resident for making various threats to stop a business transaction. The Michigan resident had engaged in no conduct in California and the underlying business transaction had been negotiated in Michigan and was expected to be

performed in Michigan. Id. at 1212. Accordingly, relying on Walden, the Ninth Circuit held that the defendant’s out-of-state actions “did not connect him with California in a way sufficient to support the assertion of personal jurisdiction over him.” Id. at 1215.

\*8 By contrast, in this case, plaintiff has not merely alleged that jurisdiction is appropriate because it is a resident of California who suffered harm. Rather, plaintiff alleges that AT&T, Inc. authorized Slator and Cicconi to make promises to plaintiff which envisioned an ongoing business relationship whereby plaintiff’s networks would be carried on DirecTV’s platform for a term of five years. See also Walden, 134 S.Ct. at 1125 (“[W]e have upheld the assertion of jurisdiction over defendants who have purposefully ‘reach[ed] out beyond’ their State and into another by, for example, entering a contractual relationship that ‘envisioned continuing and wide-reaching contacts’ in the forum State.”) (citing Burger King, 471 U.S. at 479–480). And plaintiff alleges that Slator made this promise in the Los Angeles offices of AT&T Services—i.e., in California. Accordingly, the Court finds that Walden and Picot are distinguishable and that AT&T, Inc.’s conduct was expressly aimed at California.

Finally, the Court finds that plaintiff has adequately alleged that AT&T, Inc. knew plaintiff would suffer harm in California. AT&T, Inc. contends that plaintiff has failed to adequately allege that AT&T, Inc. knew its intentional acts would cause harm in California. But, at all times relevant to this action, plaintiff has been a California corporation doing business in San Diego, California. Moreover, AT&T, Inc.’s subsidiary, AT&T Services, had a contractual relationship with plaintiff spanning nearly ten years, and throughout that relationship plaintiff was a California corporation. Lastly, AT&T, Inc. authorized Slator to make promises to plaintiff, and Slator made those promises in California. See also Dole Food Co., Inc. v. Watts, 303 F.3d 1104, 1114 (9th Cir. 2002) (finding effects test satisfied where “[t]he principal place of business of [plaintiff] was California, and [plaintiff’s] managers in California were induced to approve the injurious transactions.”). In light of these allegations, the Court finds that plaintiff has adequately established that AT&T, Inc. was aware that any harm resulting from its conduct would be felt in California.

Accordingly, all three elements of the “effects” test are satisfied and the Court finds that AT&T, Inc. purposefully directed its conduct towards California.

Herring Networks, Inc. v. AT&T Services, Inc., Not Reported in Fed. Supp. (2016)

**b. Whether AT&T Purposefully Availed Itself of California**

The Court also finds that AT&T, Inc. has purposefully availed itself of California. “ ‘Purposeful availment’ requires that the defendant ‘have performed some type of affirmative conduct which allows or promotes the transaction of business within the forum state.’ ” [Sher v. Johnson](#), 911 F.2d 1357, 1362 (9th Cir. 1990) (quoting [Sinatra v. Nat’l Enquirer, Inc.](#), 854 F.2d 1191, 1195 (9th Cir. 1988)). Here, AT&T, Inc. instructed Slator and Cicconi to solicit a California corporation to engage in lobbying efforts on its behalf. In exchange for those lobbying efforts, AT&T, Inc. authorized Slator and Cicconi to promise plaintiff an ongoing contractual relationship whereby plaintiff’s television networks would be carried on DirecTV’s platform. By this conduct, AT&T, Inc. purposefully availed itself of the privilege of conducting business in California. *See also* [Burger King](#), 471 U.S. at 475-76 (“where the defendant ‘deliberately’ has engaged in significant activities within a State or has created ‘*continuing obligations*’ between himself and residents of the forum he manifestly has availed himself of the privilege of conducting business there ...”) (emphasis added) (citations omitted); [Peterson v. Highland Music, Inc.](#), 140 F.3d 1313, 1320 (9th Cir. 1998) (negotiating a contract in California with a California resident satisfies “purposeful availment”).

Again, AT&T, Inc.’s affidavits do not controvert these allegations. Instead, AT&T, Inc. contends that neither Slator nor Cicconi is an employee of AT&T, Inc. However, as already stated, because AT&T, Inc. purportedly instructed and authorized Slator and Cicconi to make promises to plaintiff, their conduct can be imputed to AT&T, Inc.

**c. Whether Plaintiff’s Claims “Arise Out of or Relate” to AT&T, Inc.’s Forum-Related Contacts**

\*9 Under the second prong of the specific personal jurisdiction analysis, the Court must assess whether plaintiff’s claims arise out of or relate to AT&T, Inc.’s forum-related contacts. “[A] lawsuit arises out of a defendant’s contacts with the forum state if a direct nexus exists between those contacts and the cause of action.” [In re Western States Wholesale Nat. Gas Antitrust Litig.](#), 715 F.3d 716, 742 (9th Cir. 2013) (citations omitted).

Here, as explained above, AT&T, Inc.’s contacts with California consist of authorizing and instructing Slator and Cicconi to promise plaintiff that, if plaintiff publicly

supported AT&T, Inc.’s acquisition of DirecTV, defendants would carry plaintiff’s networks on DirecTV’s platform. In the complaint, plaintiff has asserted several claims against AT&T, Inc. directly predicated on this promise. *See also* [Dole](#), 303 F.3d at 1114 (claims arose out of forum-related contacts where contacts were an “integral and essential part[ ]” of the allegations underlying plaintiff’s claims). Accordingly, plaintiff’s claims against AT&T, Inc. “arise out of or relate to” AT&T, Inc.’s forum-related contacts.

**d. Whether it Would be Unreasonable to Subject AT&T, Inc. to Personal Jurisdiction in California**

Finally, the Court must assess whether it would be reasonable to subject AT&T, Inc. to personal jurisdiction in California. The burden is on defendant to present a “compelling case that the exercise of jurisdiction would not be reasonable.” [Menken v. Emm](#), 503 F.3d 1050, 1057 (9th Cir. 2007). In evaluating whether the exercise of personal jurisdiction is reasonable, courts consider the following factors: “(1) the extent of the defendant’s purposeful interjection into the forum state, (2) the burden on the defendant in defending in the forum, (3) the extent of the conflict with the sovereignty of the defendant’s state, (4) the forum state’s interest in adjudicating the dispute, (5) the most efficient judicial resolution of the controversy, (6) the importance of the forum to the plaintiff’s interest in convenient and effective relief, and (7) the existence of an alternative forum.” [In re Western States](#), 715 F.3d at 745 (citing [Bancroft & Masters, Inc. v. Augusta Nat’l Inc.](#), 223 F.3d 1082, 1088 (9th Cir. 2000)). Here, the Court finds that the majority of these factors weigh in favor of exercising personal jurisdiction over AT&T, Inc.

First, as discussed above, plaintiff has alleged that Slator and Cicconi promised plaintiff that, if it publicly supported AT&T, Inc.’s acquisition of DirecTV, defendant would carry plaintiff’s networks on DirecTV’s platform. Moreover, plaintiff alleges that at least one of these promises was made in California. AT&T, Inc. argues that “it is not reasonable to hale AT&T, Inc. into a California court based on the contacts of individuals employed by other AT&T entities”—i.e., Slator and Cicconi. Mot., at 13. But, plaintiff has alleged that AT&T, Inc.’s officers and directors instructed and ratified Slator and Cicconi’s promises to plaintiff that form the basis for this lawsuit. In light of these contacts, the Court finds that the “purposeful interjection” factor weighs in favor of exercising jurisdiction. *See* [Panavision Intern., L.P. v. Toepfen](#), 141 F.3d 1316, 1323 (9th Cir. 1998) (finding

Herring Networks, Inc. v. AT&T Services, Inc., Not Reported in Fed. Supp. (2016)

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“purposeful interjection” factor weighed “strongly in favor of the district court’s exercise of personal jurisdiction” where the defendant knew its conduct would harm plaintiff in California and sent a letter to plaintiff in California.).

\*10 Regarding the next two factors, AT&T, Inc. does not explain how it will be burdened by litigating this case in California, nor does it identify any relevant conflict between the laws of California and Delaware and Texas, where AT&T, Inc. is incorporated and headquartered, respectively. Accordingly, these factors weigh in favor of exercising jurisdiction.

California also has an interest in adjudicating this action, which concerns a California corporation and where at least some of the relevant conduct occurred in California. See also [Burger King](#), 471 U.S. at 474 (“A State generally has a ‘manifest interest’ in providing its residents with a convenient forum for redressing injuries inflicted by out-of-state actors.”). In addition, given that plaintiff is headquartered in California and particularly given that defendants concede that jurisdiction is appropriate in California over AT&T Services, it is arguably most efficient to resolve plaintiff’s claims against AT&T, Inc. in this forum as well. Thus, these two factors also weigh in favor of exercising jurisdiction.

Finally, AT&T, Inc. correctly notes that plaintiff could conceivably pursue its claims against AT&T, Inc. in either Delaware or Texas—the jurisdictions where AT&T, Inc. is incorporated and headquartered. Accordingly, this factor weighs against the exercise of jurisdiction. Nonetheless, given that all of the other factors courts consider weigh in favor of exercising jurisdiction, the Court finds that it is not unreasonable to subject AT&T, Inc. to personal jurisdiction in California.

Thus, plaintiff has satisfied all three prongs of the Ninth Circuit’s personal jurisdiction test. The Court, therefore, DENIES AT&T, Inc.’s motion to dismiss for lack of personal jurisdiction.

#### **B. AT&T Service’s Motion to Dismiss for Failure to State a Claim**

In the complaint, plaintiff asserts seven claims for relief against defendants: (1) fraud by concealment; (2) intentional misrepresentation; (3) negligent misrepresentation; (4) breach of the implied covenant of good faith and fair dealing; (5) promissory estoppel; (6) breach of oral contract; and (7) breach of implied in fact

contract. These claims roughly divide into three legal theories. First, plaintiff contends that defendants fraudulently represented that they intended to grow their U-verse platform when, in reality, they intended to wind-down the platform. Second, plaintiff contends that AT&T Services breached the covenant of good faith and fair dealing implicit in the U-verse Agreement by deliberately shifting customers away from the U-verse platform. And third, plaintiff alleges that defendants entered into an oral agreement—which they subsequently breached—to place plaintiff’s network on DirecTV in exchange for plaintiff’s assistance lobbying the government to approve AT&T’s acquisition of DirecTV. Defendants contend that none of these theories states a viable basis for relief. For the following reasons the Court disagrees.

#### **1. Plaintiff’s Fraud Claims**

Plaintiff asserts claims for fraud by concealment (claim one), intentional misrepresentation (claim two), and negligent misrepresentation (claim three). In each of these claims, plaintiff alleges that defendants intentionally or negligently misrepresented that they were committed to and intended to grow their U-verse platform. Nonetheless, plaintiff alleges that defendants true intention was to acquire DirecTV, wind down the U-verse platform, and transition customers to DirecTV’s platform. Plaintiff alleges that, in reliance on defendants’ allegedly false representation that it intended to grow the U-verse platform, it entered into the U-verse Agreement. Defendants now move to dismiss each of plaintiff’s fraud claims. Because these claims raise similar issues the Court addresses them together.

\*11 Defendants’ first argue that plaintiff has failed to allege actionable misrepresentations of fact. “It is hornbook law that an actionable misrepresentation must be made about past or existing *facts*.” [Samica Enters., LLC v. Mail Boxes Etc., USA, Inc.](#), 637 F. Supp. 2d 712, 726 (C.D. Cal. 2008) (emphasis added). As such, statements and predictions about future events are generally considered to be mere opinions that are not actionable. See [In re West Seal, Inc. Sec. Litig.](#), 518 F. Supp. 2d 1148, 1168 (C.D. Cal. 2007) (“Predictions and forecasts which are not of the type subject to objective verification are rarely actionable.”). Nonetheless, misrepresentations about future events are actionable “if they were intended and accepted as a representations of fact and involved matters peculiarly within the speaker’s knowledge.” [Eade v. Reich](#), 120 Cal. App. 32, 35 (1932).

Herring Networks, Inc. v. AT&T Services, Inc., Not Reported in Fed. Supp. (2016)

Here, plaintiff alleges that defendants represented, among other things: (1) that they intended to expand U-verse to additional markets and capture a larger market share in existing markets; (2) that they intended to exceed the market share of their competitor, TWC; and (3) that they had “ambitious expansion plans” for U-verse. Defendants argue that these statements constitute mere opinions or puffery about U-verse’s potential for future growth. Defendants also cite several cases finding that similar statements constituted mere statements of opinion that were not actionable. See, e.g., [In re Energy Recovery Inc. Sec. Litig.](#), 2016 WL 324150, at \*19 (N.D. Cal. Jan. 27, 2016) (statement such as “projecting excellent results,” “blowout winner product,” and “significant sales gains” are not actionable); [In re Wet Seal](#), 518 F. Supp. 2d at 1168 (statements such as “growth that positions us beautifully,” “measurable progress,” “continuing improvements,” “a sizable lead over our competition,” and “resilience in the face of mounting debt” are not actionable). However, plaintiff does not merely contend that it relied on defendants’ predictions about U-verse’s potential growth. Rather, implicit in each of these statements was a representation that defendants were, at a minimum, committed to their U-verse platform and intended to take steps to grow U-verse’s market share. Indeed it is unclear how defendants could have expected to exceed their competitor TWC’s market share, a feat that would have apparently required more than doubling U-verse’s subscriber base, if they did not have at least some intention of growing the U-verse platform. In short, while defendants’ predictions regarding the potential growth of U-verse may not be actionable, to the extent those statements indicated a commitment to growing the U-verse platform and taking steps to expand U-verse’s market share, they may form the basis of an actionable fraud claim. See also [Jolley v. Chase Home Fin., LLC](#), 213 Cal. App. 4th 872, 892 (Cal. Ct. App. 2013) (“well recognized is that there may be liability for an opinion where it is expressed in a manner implying a factual basis which does not exist.”) (citations omitted); [Brakke v. Economic Concepts, Inc.](#), 213 Cal. App. 4th 761, 769 (Cal. Ct. App. 2013) (statements of opinion may be actionable “where a party states his opinion as an existing fact or as implying facts which justify a belief in the truth of the opinion.”).

Second, defendants argue that plaintiff’s have failed to plausibly plead reliance. Specifically, they contend that the U-verse Agreement contained several provisions expressly stating that defendants might acquire a new television distribution platform upon which plaintiff would have no right to air its programming. Defendants point to the Acquired Systems Clause, paragraph 4.B. of the U-verse Agreement, which states that defendants

might acquire a new platform and that defendants would have no obligation to carry plaintiff’s networks on such a platform:

\*12 For the avoidance of doubt, nothing herein shall obligate AT&T to launch and carry the Services on any System that AT&T acquires during the Term if such System is not already distributing or obligated to distribute the Services.

Smith Decl, Ex. A, “U-verse Agreement” ¶ 4.B. And defendants point to paragraph 3.C. of the U-verse Agreement in which defendants reserved the right to shut down U-verse in whole or in part at any point in the future:

Upon sixty (60)-days advance written notice to Network, AT&T may terminate this Agreement in full if AT&T ceases operation of the System(s) as a whole, or if AT&T discontinues its delivery of video programming in any geographic area(s) being served by the System(s), then AT&T can terminate this Agreement as to such geographic area(s)

Id. ¶ 3.C. However, regardless of what the U-verse Agreement states regarding defendants’ obligations to carry plaintiff’s network on later-acquired platforms or their ability to terminate the U-verse Agreement, plaintiff still could have relied upon defendants’ representation that they were committed to and intended to grow the U-verse platform. Indeed, plaintiff contends that it agreed to sign an agreement containing disclaimers regarding later-acquired platforms *because* of defendants’ representation that they intended to grow the U-verse platform. See, e.g., Compl. ¶ 91 (“AT&T made these fraudulent statements with the intent to induce Herring to sign the [U-verse] Agreement with language that excused AT&T from any obligation to carry Herring’s networks on [a platform] that AT&T acquires, such as DirecTV.”). Moreover, given that under the U-verse Agreement plaintiff’s licensing fees were directly tied to U-verse’s subscriber base, it is at least plausible that plaintiff would have relied on defendants’ statements that they intended to grow U-verse’s market share (i.e., the number of U-verse subscribers). Lastly, the Court notes that reliance is generally considered to be a question of fact rarely amenable to resolution at the pleadings stage. See [Alliance Mortg. Co. v. Rothwell](#), 10 Cal. th 1226, 1239 (1995) (“Except in the rare case where the undisputed facts leave no room for a reasonable difference of opinion, the question of whether a plaintiff’s reliance is reasonable is a question of fact.”) (citations omitted).

Third, defendants contend that plaintiff has failed to plead with requisite particularity that defendants’ alleged statements were false when made. To plead a claim for fraud, a plaintiff “must allege facts sufficient to plausibly

Herring Networks, Inc. v. AT&T Services, Inc., Not Reported in Fed. Supp. (2016)

establish that the statement was false when made.” [Muse Brands, LLC v. Gentil](#), 2015 U.S. Dist. LEXIS 99143, \*13, 2015 WL 4572975 (N.D. Cal. July 28, 2015). Here, defendants argue that plaintiff has failed to plausibly allege that when defendants made their purportedly false statements regarding the future of U-verse in 2014, they knew or should have known that they intended to wind down U-verse’s business and transition U-verse subscribers to DirecTV’s platform. Defendants note that the acquisition of DirecTV was uncertain and required government approval—a process that ultimately lasted more than one year. And defendants contend that there is an obvious alternative explanation for defendants’ alleged misrepresentation; namely, that defendants “intended to do precisely what [they] said with respect to U-verse in early 2014, but changed [their] minds over a year later once the DirecTV acquisition became a reality.” Mot., at 14.

\*13 Nonetheless, the Court finds that plaintiff has adequately alleged falsity. Plaintiff alleges that in early 2014 and up and until plaintiff signed the U-verse Agreement with AT&T Services, defendants continued to represent that they intended to grow the U-verse platform. Nonetheless, in May 2014, only a month after plaintiff signed the U-verse Agreement, defendants announced their plan to acquire DirecTV for \$65 billion. As both parties acknowledge, this was a massive undertaking, involving extensive lobbying efforts by defendants as well as numerous third parties. It is simply implausible that this planned acquisition first arose in the weeks after the U-verse Agreement was finalized. Rather, based on the allegations in the complaint, it seems far more plausible that, throughout the period in which the parties were negotiating the U-verse Agreement, during which time defendants continued to represent that they planned to grow the U-verse platform, defendants were preparing for and planning to acquire DirecTV. Moreover, given the magnitude of the DirecTV acquisition and the considerable efforts purportedly required to make the acquisition a reality, it also seems plausible that defendants could have formulated a plan to wind down their U-verse platform in order to take advantage of DirecTV’s existing platform in advance of announcing the planned acquisition of DirecTV.

With respect to defendants’ “obvious alternative explanation,” defendants contend that plaintiff has failed to plead facts tending to exclude this explanation. However, plaintiff has alleged that defendants engaged in conduct that was arguably inconsistent with their “alternative explanation.” Specifically, plaintiff’s allegation that defendants took steps to acquire an alternative television distribution platform (DirecTV) is

arguably inconsistent with defendants’ contemporaneous statements that they intended to grow their existing platform (U-verse). Indeed, even defendants concede that acquisition of an alternative platform could detrimentally affect their U-verse platform. Reply, at 10 (“It goes without saying that, if AT&T acquired an alternative platform, the acquisition could impede U-verse.”). Thus, by alleging facts that are arguably inconsistent with defendants’ “alternative explanation,” the Court finds that plaintiff’s have adequately addressed this claimed alternative explanation for purposes of a motion to dismiss. See also [Muse Brands, LLC v. Gentil](#), 2015 WL 4572975, at \*4 (N.D. Cal. Jul 29, 2015) (“[T]o plead falseness, the plaintiff must provide an explanation as to why the disputed statement was untrue or misleading when made[,] which may be done by pointing to inconsistent contemporaneous statements or information ...”) (citation omitted). Lastly, as with reliance, the Court finds that falsity is an issue better decided either on a motion for summary judgment or by the trier of fact at trial. See also [Starr v. Baca](#), 652 F.3d 1202, 1216 (9th Cir. 2011) (where there are “two alternative explanations, one advanced by defendant and the other advanced by plaintiff, both of which are plausible, plaintiff’s complaint survives a motion to dismiss under rule 12(b)(6).”).

Fourth, defendants allege that plaintiff has failed to adequately allege that it suffered any harm as a result of defendants’ purportedly false statements. Defendants argue that, at most, plaintiff has alleged that, had it known defendant’s true intentions regarding the U-verse platform, it would not have entered into the U-verse Agreement in the first place or, at a minimum, would have insisted on an agreement with better terms, such as an obligation to place plaintiff’s networks on later-acquired platforms. Defendants’ argue that, had plaintiff not entered into the U-verse agreement at all, it would have been in a worse position than it is purportedly in now—having lost out on the subscriber fees that were generated by the U-verse Agreement. And defendants argue that the potential that plaintiff would have been able to negotiate a different agreement with better terms is pure speculation that cannot support a claim for damages. However, the issue of what profits plaintiff may have foregone or what losses it may have avoided by not agreeing to the U-verse Agreement is again a question of fact to be decided at a later stage in this litigation. See also [Qwest Commc’n v. Herakles, LLC](#), 2008 WL 3864826, at\*6 (E.D. Cal. Aug. 19, 2008) (finding allegations of harm and damages to be proven at trial were sufficient to survive a motion to dismiss pursuant to [Federal Rule of Civil Procedure 12\(b\)\(6\)](#)). And the Court cannot find that it is implausible that had plaintiff known about defendants’ intentions regarding U-verse it would

Herring Networks, Inc. v. AT&T Services, Inc., Not Reported in Fed. Supp. (2016)

not have been able to negotiate an agreement with different or more favorable terms. Indeed it seems unlikely that, had plaintiff known that defendants intended to wind down their U-verse platform, it would have agreed to an agreement that excused defendants from any obligation to carry plaintiff's networks on later-acquired platforms. Moreover, defendants fail to acknowledge all of the purported harms identified in the complaint. For example, plaintiff alleges that, in reliance on defendants' representations, it expended substantial resources strengthening its program offerings on OAN and AWE. Thus, the Court finds that plaintiff has adequately alleged harm.

\*14 Finally, defendants argue that plaintiff's fraud claims are barred by the economic loss rule. Specifically, defendants argue that plaintiff's fraud claims are based on the same conduct underlying their claim for breach of the implied covenant of good faith and fair dealing and thus impermissibly conflate a claim for fraud with a claim for breach of contract. In short, the economic loss rule states "that no tort cause of action will lie where the breach of duty is nothing more than a violation of a promise which undermines the expectations of the parties to an agreement." [Oracle USA, Inc. v. XL Global Services, Inc.](#), 2009 WL 2084154, at \*4 (N.D. Cal. July 13, 2009); see also [JMP Securities LLP v. Altair Nanotechnologies, Inc.](#), 880 F. Supp. 2d 1029, 1042 (N.D. Cal. Jul. 23, 2012) ("This rule serves to prevent every breach of a contract from giving rise to tort liability and the threat of punitive damages").

However, the economic loss rule does not apply where, as here, the defendants' tortious conduct is separate and apart from the alleged breach of contract. Here, plaintiff has asserted distinct claims for fraud and for breach of the implied covenant of good faith and fair dealing. In the fraud claims, plaintiff alleges that defendants falsely represented that they intended to grow the U-verse platform. In reliance on these representations, plaintiff contends that it agreed to enter into the U-verse Agreement and took efforts to expand its existing networks. By contrast, in plaintiff's implied covenant claim, it alleges that, *after* agreeing to the U-verse Agreement, defendants breached that agreement by failing to make a good faith effort to grow their U-verse platform and, in fact, taking steps to shrink the platform. Thus plaintiff's fraud claims are based on separate and distinct conduct from their breach of contract claims and the economic loss rule does not apply. See also [Silver v. Goldman Sachs Grp., Inc.](#), 2011 WL 1979241, at \*5 (C.D. Cal. May 19, 2011) ("a plaintiff can separately allege a claim for negligent misrepresentation stemming from a contract, as courts have held that the claim for negligent

misrepresentation is a traditional common law tort claim, and that by alleging this tort, a plaintiff allege[s][a] violation [ ] of duties independent of the contract.") (citations omitted); [Rejects Skate Magazine, Inc. v. Acutrack, Inc.](#), 2006 WL 2458759, at\*5 (N.D. Cal. Aug. 22, 2006) (finding that claims for negligent and intentional misrepresentation alleged "violations of duties independent of the contract" and therefore the economic loss rule did not apply).

Accordingly, the Court finds that plaintiff's fraud claims are sufficiently alleged in the complaint and, therefore, DENIES defendants' motion to dismiss these claims.

## 2. Plaintiff's Claim for Breach of the Implied Covenant of Good Faith and Fair Dealing

Plaintiff asserts a claim, solely against AT&T Services, for breach of the implied covenant of good faith and fair dealing. In this claim, plaintiff alleges that AT&T Services breached the covenant of good faith and fair dealing implied in the U-verse Agreement by engaging in conduct to deliberately shift customers away from the U-verse platform thereby undermining its own U-verse platform.

"Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement." [Carma Developers \(Cal.\), Inc. v. Marathon Dev. Cal., Inc.](#), 2 Cal. 4th 342, 371-72 (1992). "The implied covenant imposes on contracting parties the duty to refrain from unfair dealing, whether or not it also constitutes breach of a consensual contract term, ... that unfairly frustrates the agreed common purposes and disappoints the reasonable expectations of the other party." [Celador Intern. Ltd. v. Walt Disney Co.](#), 347 F. Supp. 2d 846, 852 (C.D. Cal. 2004) (citations omitted).

\*15 Here, AT&T Services argues that plaintiff's implied covenant claim improperly attempts to expand plaintiff's contractual rights and preclude AT&T Services from exercising rights it expressly reserved under the U-verse Agreement. In particular, AT&T Services notes that the U-verse Agreement places no obligations on it to maintain a certain number of subscribers or to take efforts to expand U-verse's subscriber base. AT&T Services also notes that, under the U-verse agreement, AT&T Services reserves the right to shut down the U-verse platform, in whole or in part, at any time. See also [Guz v. Bechtel Nat'l, Inc.](#), 24 Cal. 4th 317, 349-50 (2000) (the implied covenant "cannot impose substantive duties or limits on the contracting parties beyond those incorporated in the

Herring Networks, Inc. v. AT&T Services, Inc., Not Reported in Fed. Supp. (2016)

specific terms of their agreement.”).

However, plaintiff does not merely allege that AT&T Services failed to take adequate steps to expand U-verse’s subscriber base or maintain existing subscribers; rather, plaintiff alleges that AT&T Services is deliberately taking steps to *reduce* the number of U-verse subscribers. See Compl. ¶ 35 (“AT&T is now aggressively soliciting U-verse subscribers to move to DirecTV.”). For example, plaintiff contends that “using AT&T’s logo, DirecTV sent U-verse TV customers a solicitation offering money to move to DirecTV.” *Id.* And plaintiff asserts that “AT&T has told U-verse subscribers that the networks or channels they have on U-verse will be available on DirecTV”—despite the fact that plaintiff’s networks are not on DirecTV. *Id.* While this conduct may not be expressly forbidden by the terms of the U-verse Agreement, the implied covenant exists to “supplement[ ] the express contractual terms ‘to prevent a contracting party from engaging in conduct which (while not technically transgressing the express covenants) frustrates the other party’s rights to the benefits of the contract.’ ” [Americanwest Bank v. Banc of California](#), 2014 WL 1347166, at \*6 (C.D. Cal. Apr. 4, 2014) (citing [Racine & Laramie, Ltd. v. Dep’t of Parks & Recreation](#), 11 Cal. App. 4th 1026, 1031–32 (Cal. Ct. App. 1992)). Per the U-verse Agreement, plaintiff’s right to compensation is based entirely on the number of U-verse subscribers. See Compl. ¶¶ 26, 108. Thus, by taking steps to reduce the total number of U-verse subscribers—including by actively soliciting existing subscribers to move to a different platform—AT&T Services is frustrating plaintiff’s rights to its per-subscriber license fees. Accordingly, the Court finds that plaintiff has adequately stated a claim for breach of the implied covenant of good faith and fair dealing. See also [Fortaleza v. PNC Fin. Servs. Grp., Inc.](#), 642 F. Supp. 2d 1012, 1021–22 (N.D. Cal. 2009) (in order to plead breach of the implied covenant, “a plaintiff must establish the existence of a contractual obligation, along with conduct that frustrates the other party’s rights to benefit from the contract.”). The Court, therefore, DENIES AT&T Services’ motion to dismiss this claim.<sup>5</sup>

### 3. Plaintiff’s Lobbying Claims

\*16 Plaintiff asserts three claims against defendants predicated on defendants’ alleged promise that, if plaintiff publicly supported AT&T, Inc.’s acquisition of DirecTV, defendants would carry plaintiff’s networks on DirecTV’s platform (“the DirecTV Promise”). In particular, plaintiff asserts claims against defendants for: (1) promissory

estoppel (claim five); (2) breach of oral contract (claim six); and (3) breach of implied in fact contract (claim seven).<sup>6</sup> Defendants contend that all three of these claims fail to state a claim upon which relief can be granted.

First, defendants argue that the Lobbying Claims are barred by a provision in the U-verse Agreement which states that the agreement “may only be amended or modified by a written agreement of both Parties.” Dkt. 17, Smith Decl, Ex. A, “U-verse Agreement”, at 36 ¶ P. Defendants contend that the Lobbying Claims attempt to modify the U-verse Agreement, which expressly states that defendants have no obligation to carry plaintiff’s networks on later acquired platforms, such as DirecTV. Defendants’ further contend that, because the DirecTV Promise was, if anything, an oral agreement, it violates the provision of the U-verse Agreement requiring that all amendments or modification be in writing. This argument mischaracterizes plaintiff’s allegations. Plaintiff does not contend that, in making the DirecTV Promise, defendants were proposing a modification of plaintiff’s existing agreement. Rather, plaintiff is alleging that defendants were proposing a *new* agreement, distinct from the U-verse Agreement. See also [Performance Plastering v. Richmond Am. Homes of Cal., Inc.](#), 153 Cal. App. 4th 659, 671 (Cal. Ct. App. 2007) (contractual provision requiring that modifications be in writing was inapplicable where oral agreement was not a modification, but rather a separate contract); [Bing Ting Ren v. Wells Fargo Bank, N.A.](#), 2013 WL 2468368, at \*4 (N.D. Cal. Jun. 7, 2013) (oral promise separate from any contractual provision was not a modification to written contract). As such, the provision of the U-verse Agreement defendants rely upon is inapplicable.<sup>7</sup>

Second, defendants argue that, to the extent any agreement was formed by the DirecTV Promise, it is barred by California’s statute of frauds. [California Civil Code section 1624\(a\)\(1\)](#) provides that “[a]n agreement that by its terms is not to be performed within a year from the making thereof” is invalid unless made in writing. [Cal. Civ. Code § 1624\(a\)\(1\)](#). Here, plaintiff alleges that, pursuant to the DirecTV Promise, defendants agreed that “DirecTV would carry both of Herring’s networks, OAN and AWE ... [for] a customary five-year term.” Compl. ¶ 81. Thus, the statute of frauds applies to this agreement because, by its terms, it would require five years to complete. Nonetheless, Courts have recognized several exceptions to the statute of frauds. And, as relevant here, one of those exceptions applies when a party has rendered full performance under an oral agreement. See, e.g., [Corvello v. Wells Fargo Bank, NA](#), 728 F.3d 878, 885 (9th Cir. 2013) (“Wells Fargo separately contends that the Lucias’ breach of contract claim cannot survive the statute

Herring Networks, Inc. v. AT&T Services, Inc., Not Reported in Fed. Supp. (2016)

of frauds because it is an oral agreement to modify a mortgage. The Lucias, however, have alleged full performance of their obligations under the contract. They therefore may enforce the remaining promises.”); [Griffin v. Green Tree Servicing, LLC](#), 2015 WL 10059081, at \*8 (C.D. Cal. Oct. 1, 2015) (“Under California law, full performance by the party seeking enforcement of an oral contract removes the contract from the statute of frauds.”) (Morrow, J.). Here, plaintiff alleges that it fully performed its obligations under its agreement with defendants. Specifically, plaintiff alleges that it lobbied the FCC, the DOJ, and members of Congress, that it solicited other independent programmers to support the acquisition of DirecTV, and that it filed briefs in support of the acquisition, amongst many other activities. Plaintiff further alleges that it reported to one of AT&T Services’ executives, James Cicconi, who gave plaintiff instructions on how it should support the acquisition, and plaintiff alleges that, ultimately, AT&T, Inc.’s acquisition of DirecTV was approved by the requisite regulatory bodies. Accordingly, under the terms of the parties’ agreement, as alleged in the complaint, plaintiff has fulfilled its side of the bargain and thus the statute of fraud does not prevent plaintiff from enforcing the DirecTV Promise.<sup>8</sup> Finally, defendants allege that plaintiff has failed to adequately allege a clear and enforceable promise. Under each of the Lobbying Claims, plaintiff must allege the existence of a promise that is clear and unambiguous in its terms. See, e.g., [US Ecology, Inc. v. State](#), 129 Cal. App. 4th 887, 901 (Cal. Ct. App. 2005) (elements of a promissory estoppel claim include “a promise clear and unambiguous in its terms”); [Weddington Prods., Inc. v. Flick](#), 60 Cal. App. 4th 793, 811(1998) (“In order for acceptance of a proposal to result in the formation of a contract, the proposal must be sufficiently definite, or must call for such definite terms in the acceptance, that the performance promised is reasonably certain.”). Defendants contend that plaintiff has failed to allege the existence of a promise with the requisite specificity. The Court disagrees. In the complaint, plaintiff alleges that defendants “made a clear and unambiguous promise to Herring” that:

\*17 if Herring used its status as an owner of two independent cable television networks to lobby in support of AT&T’s acquisition of DirecTV, AT&T would provide Herring’s networks with carriage on

DirecTV post-Acquisition. AT&T promised that Herring would receive \$20 to \$25 million per year, i.e., \$0.12 per subscriber for 85% of DirecTV’s subscribers, in licensing fees from DirecTV, including a five year term, as with Herring’s existing [U-verse] Agreement with AT&T.

Compl. 112. Thus, plaintiff has alleged the existence of a promise that clearly sets forth plaintiff’s own obligations (to support AT&T’s acquisition of DirecTV), the obligations of defendants (to provide plaintiff’s networks with carriage on DirecTV), the time for defendants’ performance (post-acquisition of DirecTV), the method by which plaintiff would be compensated (\$0.12 per subscriber for 85% of DirecTV’s subscribers), and the length of the agreement (five years). This is more than sufficient at the pleading stage. See [Alvarado v. Aurora Loan Servs, LLC](#), 2012 WL 4475330, at \*3 (C.D. Cal. Sep. 20, 2012) (“[A] plaintiff can successfully plead a breach of contract claim by alleging the substance of its relevant terms.”); see also 1 [Witkin, Summary of Cal. Law, Contracts, § 137](#) (2005 10th ed.) (“The terms of a contract are reasonably certain if they provide a basis for determining the existence of a breach and for giving an appropriate remedy.”) (quoting [Rest. 2d Contracts, § 33](#)).

Accordingly, the Court finds that plaintiff has adequately pleaded its Lobbying Claims and DENIES defendants motion to dismiss these claims.

## V. CONCLUSION

In accordance with the foregoing, the Court DENIES AT&T, Inc.’s motion to dismiss for lack of personal jurisdiction and DENIES AT&T Services motion to dismiss for failure to state a claim upon which relief can be granted.

IT IS SO ORDERED

## All Citations

Not Reported in Fed. Supp., 2016 WL 4055636

## Footnotes

- <sup>1</sup> To the extent the Court denies AT&T, Inc.’s motion to dismiss for lack of personal jurisdiction, AT&T, Inc. states that it joins AT&T Services’ motion to dismiss for failure to state a claim upon which relief can be granted. Dkt. 14, at 3 n.3.
- <sup>2</sup> AT&T, Inc. argues that Cicconi’s statements do not support jurisdiction in California because he met with plaintiff in Washington, D.C., not California. This argument misses the mark. For jurisdictional purposes, physical presence in the forum is not required.

Herring Networks, Inc. v. AT&T Services, Inc., Not Reported in Fed. Supp. (2016)

See [Burger King](#), 471 U.S. at 476 (“So long as a commercial actor’s efforts are ‘purposefully directed’ toward residents of another State, we have consistently rejected the notion that an absence of physical contacts can defeat personal jurisdiction there.”).

- 3 Plaintiff identifies a number of other purported intentional acts committed by AT&T, Inc. Specifically, plaintiff alleges: (1) AT&T, Inc. “set company-wide corporate policies and practices” for its subsidiaries, including AT&T Services; (2) AT&T, Inc.’s CEO and Chairman of the Board, Randall Stephenson, made false statements to the public regarding AT&T’s intent to expand U-verse; (3) AT&T, Inc. “planned, orchestrated and ultimately consummated” the acquisition of DirecTV; and (4) AT&T, Inc. expressed an interest in acquiring a stake in plaintiff. Nonetheless, the Court finds that these acts do not support the exercise of specific personal jurisdiction over AT&T, Inc. With respect to the allegations that AT&T, Inc. set corporate policies for its subsidiaries, that its CEO and Chairman made false statements to the public, and that AT&T, Inc. planned the acquisition of DirecTV, plaintiff cannot establish that these acts were “expressly aimed” at California, let alone plaintiff. Indeed, it does not appear that these acts were directed at *any* state in particular. See also James M. Wagstaffe, [Federal Civil Procedure Before Trial Ch. 3](#), Personal Jurisdiction (The Rutter Group 2016) ¶ 3:172.5 (“[T]he ‘expressly aimed’ requirement distinguishes cases where plaintiff fortuitously lives in the forum state with the conduct directed, e.g., to the nation as a whole, from those in which the intentional conduct is directed uniquely to the forum itself.”) (citing [Clemens v. McNamee](#), 615 F.3d 374, 380 (5th Cir. 2010) (defamatory statements made in New York to national publication about a Texas resident insufficient)). And, as for AT&T, Inc.’s purported interest in acquiring a stake in plaintiff, while arguably directed towards California, this act is unrelated to plaintiff’s claims in this action—i.e., plaintiff’s claims do not “arise out of” this alleged contact with California.
- 4 Additionally, under principles of California agency law, Slator and Cicconi’s conduct can be attributed to AT&T, Inc. under the theory that they acted with actual—or at least apparent—authority from AT&T, Inc. Plaintiff alleges that Slator and Cicconi had express instructions from AT&T, Inc. to promise plaintiff that its networks would be carried on DirecTV’s platform. Moreover, plaintiff alleges that Slator and Cicconi categorically represented to plaintiff that they were acting on behalf of their superiors at AT&T, Inc. Under California law, when an agent acts under actual or ostensible (i.e., apparent) authority, the principal is bound by the agent’s actions. [Cal. Civ. Code. §§ 2330, 2334](#). Moreover, an agency relationship may be created by either “precedent authorization or a subsequent ratification.” [Cal. Civ. Code § 2307](#). Here, accepting plaintiff’s uncontroverted allegations as true, AT&T, Inc. conferred actual authority upon Slator and Cicconi to promise plaintiff that its networks would be carried on DirecTV’s platform. See also [Penthouse Int’l, Ltd. v. Barnes](#), 792 F.2d 943, 947-48 (9th Cir. 1986) (photographer acted within actual implied authority per Penthouse magazine’s instructions to present contracts to models); [In re Nelson](#), 761 F.2d 1320, 1322 (9th Cir. 1985) (husband had actual implied authority to encumber wife’s interest in property where wife knew he signed her name to loan documents and husband reasonably believed he had authority to do so). Furthermore, it is appropriate for the Court to consider California agency law in evaluating personal jurisdiction. See James M. Wagstaffe, [Federal Civil Procedure Before Trial Ch. 3](#), Personal Jurisdiction (The Rutter Group 2016) ¶ 3:83.3 (“Whether the person whose forum-related acts give rise to jurisdiction was acting as an agent of the nonresident defendant, or as an independent contractor, is determined in accordance with applicable state law.”) (citing [Ochoa v. J.B. Martin and Sons Farms, Inc.](#), 287 F.3d 1182, 1189 (9th Cir. 2002) (looking to Arizona law to determine whether personal jurisdiction existed based on contacts of purported agent); [Vazquez-Robles v. CommoLoCo, Inc.](#), 757 F.3d 1, 3 (1st Cir. 2014) (same applying Puerto Rican law)); [Cf. Daimler](#), 134 S.Ct. 746, 759 n.13 (2014) (“Agency relationships, we have recognized, may be relevant to the existence of specific jurisdiction ... As such, a corporation can purposefully avail itself of a forum by directing its agents or distributors to take action there.”).
- 5 AT&T Services also contends that plaintiff’s implied covenant claim violates the parol evidence rule. The parol evidence rule bars a plaintiff from using extrinsic evidence “to alter or add to the terms of [a fully integrated] writing.” [Riverisland Cold Storage, Inc. v. Fresno-Madera Prod. Credit Ass’n](#), 55 Cal. 4th 1169, 1174 (2013) (citing [Cal. Code Civ. Proc. § 1856](#); [Cal. Civ. Code § 1625](#)); see also [Masterson v. Sine](#), 68 Cal. 2d 222, 225 (1968) (“When the parties to a written contract have agreed to it as an ‘integration’—a complete and final embodiment of the terms of an agreement—parol evidence cannot be used to add to or vary its terms.”) (citations omitted). However, the parol evidence rule is inapplicable here. Plaintiff does not seek to add additional terms or alter the existing terms of the U-verse Agreement through its implied covenant claim; rather, the implied covenant is already implied into the U-verse Agreement as a matter of California law. See also [Amloc Companies, Inc. v. Cypress Abbey Co.](#), 2006 WL 1462908, at \*7 (Cal. Ct. App. 2006) (unpublished) (parol evidence rule inapplicable where evidence was “not used to supplement or vary the terms of the [agreements].”). Moreover, the fact that the implied covenant may impose obligations on parties that are not expressly stated in their agreement does not change this analysis. Courts recognize that implied covenant imposes on contracting parties an obligation to refrain from conduct which, while not expressly prohibited by the terms of a contract, nonetheless frustrates the other parties’ bargained for expectations. See, e.g., [Americanwest Bank](#), 2014 WL 1347166, at \*6. This argument is, therefore, unavailing.
- 6 For simplicity and because these claims raise similar issues, the Court refers to these claims collectively as plaintiff’s “Lobbying Claims.”
- 7 Defendants argue that plaintiff’s are improperly characterizing the DirecTV Promise as a “new” contract when in reality it is nothing more than an attempted oral modification of the U-verse Agreement. However, plaintiffs have alleged that their new DirecTV contract contained materially distinct terms from the U-verse Agreement. For example, while as plaintiff received \$0.18

Herring Networks, Inc. v. AT&T Services, Inc., Not Reported in Fed. Supp. (2016)

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per subscriber under the U-verse Agreement, it allegedly would have received \$0.12 per subscriber under a DirecTV contract. See Compl. ¶ 118. Moreover, given that the U-verse Agreement expressly excused defendants from any obligation to carry plaintiff's networks on later acquired platforms, such as DirecTV, it arguably makes sense that the parties would need to form a new agreement providing carriage on DirecTV's platform. Accordingly, the Court finds that plaintiff has plausibly alleged that the parties intended the DirecTV Promise as a distinct contract from the U-verse Agreement.

- 8 Defendants contend that plaintiff has not fully performed under the parties purported agreement. Specifically, defendants contend that, in order to fully perform, plaintiff was required to tender its channels to defendants for carriage on DirecTV. However, as alleged in the complaint, the parties' agreement did not require plaintiff to tender its channels to defendants in order for defendants to become obligated to carry those channels on DirecTV. Rather, plaintiff alleges that, pursuant to the DirecTV Promise, plaintiff agreed that in exchange for *lobbying* on defendants' behalf defendants would carry plaintiff's channels on DirecTV. Here, plaintiff alleges that it fully performed its lobbying obligations under the DirecTV Promise. Moreover, even assuming that plaintiff was required to tender its channels to defendants, there is no indication that plaintiff did not attempt to tender those channels—indeed, plaintiff alleges that it desired to place its channels on DirecTV and only engaged in the lobbying efforts alleged in the complaint so that it could place those channels on DirecTV. And, in any event, defendants arguably frustrated plaintiff's ability to tender its channels by allegedly renegeing on the DirecTV Promise and refusing to carry plaintiff's networks. Accordingly, this argument is unavailing.

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## Exhibit 11

Hyperion Fund, L.P. v. Samarium Technology Group, Ltd., Not Reported in Fed. Supp....

**H**KeyCite history available

2009 WL 10699441

Only the Westlaw citation is currently available.  
United States District Court, C.D. California.

HYPERION FUND, L.P., Plaintiff,  
v.  
SAMARIUM TECHNOLOGY GROUP,  
LTD.; Samarium Capital, Ltd.; Volkmar  
G. Hable, Defendants.

2:07-cv-07505-FMC-RCx

Signed 01/29/2009

#### Attorneys and Law Firms

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Volkmar G. Hable, Austria, Europe, pro se.

Rebecca Forman, Brandon S. Reif and Attorneys APC, Los Angeles, CA, for Defendants.

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION TO DISMISS THE THIRD AMENDED COMPLAINT

FLORENCE-MARIE COOPER, UNITED STATES DISTRICT JUDGE

\*1 This matter is before the Court on Defendant Volkmar G. Hable's Motion to Dismiss the Third Amended Complaint (docket no. 89), filed December 16, 2008. The Court has read and considered the moving, opposition, and reply documents filed in connection with this motion. The Court deems this matter appropriate for decision without oral argument. See Fed. R. Civ. P. 78(b); Local Rule 7-15. Accordingly, the hearing set for February 2, 2009, is removed from the Court's calendar. For the

reasons and in the manner set forth below, the Court hereby GRANTS IN PART AND DENIES IN PART Defendants' Motion to Dismiss the Third Amended Complaint.

#### I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Plaintiff Hyperion Fund, L.P. ("Hyperion") is a Colorado limited partnership doing business in Santa Monica, California. (3d Compl. ¶ 1.) On January 26, 2007, Hyperion entered into a Stock Purchase Agreement with Defendant Samarium Technology Group, Ltd. ("Samarium Tech"). (3d Compl., Ex. 1.) Samarium Tech and a related entity, Samarium Capital, Ltd. ("Samarium Capital"), are both British Virgin Islands companies headed by Chairman and Chief Executive Officer Volkmar G. Hable ("Dr. Hable"). (3d Compl. ¶¶ 2-4.) Under the terms of the agreement, Plaintiff agreed to sell 18 million shares of a third company, called BioStem, Inc., to Samarium Tech for \$14.4 million. (*Id.*, Ex. 1.) Within five days of the execution of the agreement, Samarium Tech was to wire \$9 million to an attorney-client trust account of a fourth company, called Corporate Legal Services, LLP, in Santa Monica. (*Id.* at 1.) In addition, Samarium Tech was to deliver (by overnight courier) \$5.4 million worth of Samarium Tech "Preference Shares Class AAA" to Corporate Legal Services. (*Id.* at 2.) Once Corporate Legal Services received Samarium Tech's payments, it would send Samarium Tech share certificates for the BioStem stock. (*Id.*) Although the agreement states that it is between Hyperion as "the Seller" and Samarium Tech as "the Purchaser," it is signed by one Reid Breitman as both President of Hyperion and as Managing Member/President of Caladan Holdings, LLC.<sup>1</sup> (*Id.* at 11.) There is also a (rather illegible) signature on behalf of Samarium Tech, but no name or title of this signatory is printed on the document. (*Id.* at 11.)

Samarium Tech did not wire the \$9 million. (3d Compl. ¶ 36.) On March 22, 2007, Samarium Tech transferred 312,138.8283 shares of Samarium Tech preferred stock to Hyperion, apparently in satisfaction of the \$5.4 million stock transfer term in the agreement. (*Id.* ¶ 37.) Samarium Tech also sent Hyperion a share certificate for 832,369.9421 shares as collateral to persuade Hyperion to give Samarium Tech more time to come up with the \$9 million cash payment. (*Id.*) In July 2007, Dr. Hable allegedly caused Samarium Tech and/or Samarium Capital to liquidate its assets (worth over \$880 million),

Hyperion Fund, L.P. v. Samarium Technology Group, Ltd., Not Reported in Fed. Supp....

and distributed these assets to shareholders of the two entities, but excluded Hyperion. (*Id.* ¶ 40.) On August 20, 2007, Dr. Hable e-mailed Mr. Breitman to inform him that Samarium Tech would not purchase the BioStem stock. (*Id.* ¶ 39.)

\*2 On October 18, 2007, Plaintiff filed suit in Los Angeles Superior Court, alleging causes of action for breach of contract, breach of fiduciary duties, negligence, conspiracy, and avoidance of fraudulent transfer. Defendants Samarium Tech and Dr. Hable removed the suit to this court and filed a motion to dismiss for failure to join indispensable parties (Fed. R. Civ. P. 12(b)(7)) and for failure to state a claim upon which relief can be granted (Fed. R. Civ. P. 12(b)(6)). The Court dismissed Plaintiff's conspiracy claim pursuant to Rule 12(b)(6) and denied the motion to dismiss in all other respects. (Order dated March 25, 2008.) On August 20, 2008, the Court granted the Law Offices of Brandon S. Reif's motion to withdraw as counsel for Samarium Tech.<sup>2</sup> On November 4, 2008, the Court granted Plaintiff leave to file a third amended complaint. Plaintiff filed its Third Amended Complaint on November 17, 2008, which joined Samarium Capital as an additional Defendant, contained additional alter ego allegations directed at all three Defendants, and asserted an additional promissory fraud claim. Defendant Dr. Hable now moves to dismiss Plaintiff's Third Amended Complaint.

## II. LEGAL STANDARD

Rule 12(b)(6) of the Federal Rules of Civil Procedure permits a defendant to seek dismissal of a complaint that "fail[s] to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). All material factual allegations in the complaint are assumed to be true and construed in the light most favorable to the plaintiff. *Nursing Home Pension Fund, Local 144 v. Oracle Corp.*, 380 F.3d 1226, 1229 (9th Cir. 2004) ("The general rule for 12(b)(6) motions is that allegations of material fact made in the complaint should be taken as true and construed in the light most favorable to the plaintiff.") (citing *Burgert v. Lokelani Bernice Pauahi Bishop Trust*, 200 F.3d 661, 663 (9th Cir. 2000)). However, the Court "is not required to accept legal conclusions cast in the form of factual allegations if those conclusions cannot be reasonably drawn from the facts alleged." *Clegg v. Cult Awareness Network*, 18 F.3d 752, 755 (9th Cir. 1994) (internal citations omitted); see also *Bell Atl. Corp. v. Twombly*, —U. S.—, 127 S. Ct. 1955, 1964–1965, 167 L.Ed. 2d 929 (2007) ("While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed

factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.")

In ruling on a 12(b)(6) motion, a court generally cannot consider material outside of the complaint (e.g., facts presented in briefs, affidavits, or discovery materials). See, e.g., *Knievel v. ESPN*, 393 F.3d 1068, 1076 (9th Cir. 2005). A court may, however, consider exhibits submitted with the complaint, as well as documents that are referred to in the complaint whose authenticity no party questions. *Id.*; *Shwarz v. United States*, 234 F.3d 428, 435 (9th Cir. 2000) (citing *Branch v. Tunnell*, 14 F.3d 449, 453–54 (9th Cir. 1994)).

If the Court dismisses the complaint, it must decide whether to grant leave to amend. Denial of leave to amend is "improper unless it is clear that the complaint could not be saved by any amendment." *Livid Holdings Ltd. v. Salomon Smith Barney, Inc.*, 416 F.3d 940, 946 (9th Cir. 2005) (citation omitted).

## III. DISCUSSION

Defendant Dr. Volkmar G. Hable moves to dismiss Plaintiff's Third Amended Complaint for failing to plead its claims pursuant to the heightened pleading requirement for averments of fraud, and for failing to sufficiently plead an alter ego theory of liability against Dr. Hable.<sup>3</sup>

### A. Averments of Fraud

\*3 Defendant Dr. Hable argues that each claim in the Third Amended Complaint must be pleaded with the heightened pleading requirement for averments of fraud. This includes Plaintiff's claims for breach of contract, breach of fiduciary duties, negligence, and allegations of alter ego. Defendant argues that the entire Third Amended Complaint, along with these claims, is "grounded in fraud" or "sounds in fraud," and as such, each claim must be pleaded with particularity.

Defendant's argument is misplaced. A claim or complaint is grounded in fraud only if a claim alleges fraudulent conduct and relies entirely on that fraudulent conduct as the basis of the claim. *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1103–04 (9th Cir. 2003) ("In cases where

fraud is not a necessary element of a claim, a plaintiff may choose nonetheless to allege in the complaint that the defendant has engaged in fraudulent conduct. In some cases, the plaintiff may allege a unified course of fraudulent conduct and rely entirely on that course of conduct as the basis of a claim. In that event, the claim is said to be ‘grounded in fraud’ or to ‘sound in fraud,’ and the pleading of that claim as a whole must satisfy the particularity requirement of Rule 9(b).” Only specific allegations of fraudulent conduct must be pleaded with particularity. *Id.* (“In other cases, however, a plaintiff may choose not to allege a unified course of fraudulent conduct in support of a claim, but rather to allege some fraudulent and some non-fraudulent conduct. In such cases, only the allegations of fraud are subject to Rule 9(b)’s heightened pleading requirements.”).

In this case, Plaintiff’s first three causes of action for breach of contract, breach of fiduciary duties, and negligence, each allege non-fraudulent conduct that is sufficient to support these claims. Plaintiff’s breach of contract claim alleges a contract between Plaintiff and Defendants (3d Compl. ¶ 31), Plaintiff’s ability to tender performance on the contract (3d Compl. ¶¶ 34–35), non-fraudulent conduct resulting in Defendants’ breach of the contract (3d Compl. ¶¶ 36, 40), and Defendants’ repudiation of the contract (3d Compl. ¶ 39). Plaintiff’s breach of fiduciary duties claim alleges a fiduciary duty owed to Plaintiff as a shareholder and lienholder (3d Compl. ¶ 44), and non-fraudulent conduct resulting in a breach of fiduciary duties by Defendants (3d Compl. ¶¶ 45–46). Plaintiff’s negligence claim alleges a duty of care owed to Plaintiff (3d Compl. ¶ 50), non-fraudulent conduct resulting in Defendants’ breach of that duty (3d Compl. ¶ 51), causation, and damages (3d Compl. ¶ 47). Plaintiff’s alter ego allegations similarly do not contain any reference to fraudulent conduct.

The Court acknowledges that the underlying non-fraudulent conduct alleged in the breach of fiduciary duties and negligence claims is similar and likely the same underlying conduct alleged to be fraudulent in Plaintiff’s fourth cause of action for avoidance of fraudulent transfer. However, Plaintiff has characterized this conduct as non-fraudulent in its breach of fiduciary duties and negligence claims, and therefore need not plead them with particularity. *See Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1103–04 (9th Cir. 2003) (“To require that non-fraud allegations be stated with particularity merely because they appear in a complaint alongside fraud averments, however, serves no similar reputation-preserving function, and would impose a burden on plaintiffs not contemplated by the notice pleading requirements of Rule 8(a).”)<sup>4</sup>

\*4 On the other hand, Plaintiff’s fourth and fifth causes of action for “avoidance of fraudulent transfer” and promissory fraud are grounded in allegations of fraudulent conduct.<sup>5</sup> Defendant contends that these claims also have not been pleaded with sufficient particularity. **Federal Rule of Civil Procedure 9(b)** provides that, “in all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.” **Fed. R. Civ. P. 9(b)**. To satisfy the Rule, a complaint must set forth such facts as “the times, dates, places, benefits received, and other details of the alleged fraudulent activity.” *Neubronner v. Milken*, 6 F.3d 666, 672 (9th Cir. 1993); *see also Edwards v. Marin Park, Inc.*, 356 F.3d 1058, 1066 (9th Cir. 2004) (“To avoid dismissal for inadequacy under **Rule 9(b)**, [the] complaint would need to state the time, place, and specific content of the false representations as well as the identities of the parties to the misrepresentation.”) (internal quotations omitted).

Essentially, the Rule “demands that, when averments of fraud are made, the circumstances constituting the alleged fraud ‘be specific enough to give defendants notice of the particular misconduct ... so that they can defend against the charge and not just deny that they have done anything wrong.’” *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003) (quoting *Bly-Magee v. California*, 236 F.3d 1014, 1019 (9th Cir. 2001)) (additional quotations omitted); *see also Wool v. Tandem Computers, Inc.*, 818 F.2d 1433, 1439 (9th Cir. 1987) (“[A] pleading is sufficient under **Rule 9(b)** if it identifies the circumstances constituting fraud so that the defendant can prepare an adequate answer from the allegations.”) (internal citations omitted). However, “**Rule 9(b)** may not require [a plaintiff] to allege, in detail, all facts supporting each and every instance of false testing over a multi-year period.” *U.S. ex rel. Lee v. SmithKline Beecham, Inc.*, 245 F.3d 1048, 1051 (9th Cir. 2001).

Here, Plaintiff’s fourth and fifth causes of action fail to provide sufficient detail to satisfy the **Rule 9(b)** particularity requirement. The bulk of Plaintiff’s fourth claim for avoidance of fraudulent transfer is based upon Plaintiff’s information and belief. Courts have recognized that such allegations are not sufficient unless supported by allegations of facts on which the belief is founded. *Comwest, Inc. v. American Operator Services, Inc.*, 765 F. Supp. 1467, 1471 (C.D. Cal. 1991) (“Plaintiff’s fraud claim is fundamentally defective because all of plaintiff’s fraud allegations are based ‘upon information and belief.’ ... It is well settled that fraud ‘allegations based on ‘information and belief’ do not satisfy the particularity

Hyperion Fund, L.P. v. Samarium Technology Group, Ltd., Not Reported in Fed. Supp....

requirement of Rule 9(b) unless the complaint sets forth the facts on which the belief is founded.’ ”) (citing *In re Worlds of Wonder Securities Litigation*, 694 F. Supp. 1427, 1432–33 (N.D. Cal. 1988) ). Furthermore, Plaintiff’s fourth claim fails to identify the time at which the fraudulent transfers allegedly occurred, or to whom Defendants allegedly transferred the proceeds of Samarium Tech and Samarium Capital’s liquidated assets. (See 3d Compl. ¶¶ 56–57.) Plaintiff’s fourth claim for avoidance of fraudulent transfer therefore fails to satisfy Rule 9(b) and is hereby DISMISSED without prejudice.

\*5 Plaintiff’s fifth claim for promissory fraud avers that “Defendants made clear and unambiguous promises to Hyperion that they would perform under the Stock Purchase Agreement, including a written promise that Samarium Tech would pay \$14.4 million to Hyperion.” (3d Compl. ¶ 61.) The Court finds the reference to “Defendants” to be ambiguous, as Plaintiff has brought its promissory fraud claim against Defendants Hable, Samarium Tech and Samarium Capital. It is not clear who made the promise to pay. The claim also fails to specify the time, date, or place at which the promise was made.<sup>6</sup> Plaintiff’s fifth claim for promissory fraud therefore fails to satisfy Rule 9(b) and is hereby DISMISSED without prejudice.

#### B. Alter Ego

In the alternative, Defendant moves to dismiss each claim of the Third Amended Complaint against Dr. Hable for failing to sufficiently allege an alter ego theory of liability against him. Defendant argues that Plaintiff’s alter ego allegations are conclusory and not sufficient to “pierce the corporate veil.” Defendant contends that Plaintiff’s breach of contract, breach of fiduciary duties, negligence, avoidance of fraudulent transfer and promissory fraud claims should be dismissed because Dr. Hable acted on behalf of Samarium Tech or Samarium Capital and not on behalf of himself. Defendant’s arguments hinge on a determination that the allegations in the Third Amended Complaint are not sufficient to “pierce the corporate veil” and expose Dr. Hable to liability.

Determining whether alter ego exists depends on the circumstances of each particular case and is considered an issue for the trier-of-fact. *Mid-Century Ins. Co. v. Gardner*, 9 Cal. App. 4th 1205, 1212 (1992). Under California law, “[i]ssues of alter ego do not lend themselves to strict rules and prima facie cases. Whether the corporate veil should be pierced depends upon the innumerable individual equities of each case.” *United*

*States v. Standard Beauty Supply Stores, Inc.*, 561 F.2d 774, 777 (9th Cir. 1977). However, there are two general requirements to be satisfied before such a determination can be made: “(1) That there be such unity of interest and ownership that the separate personalities of the corporation and the individuals no longer exist, and (2) if the acts are treated as those of the corporation alone, an inequitable result will follow.” *Platt v. Billingsley*, 234 Cal. App. 2d 577, 582 (1965); *First W. Bank and Trust Co. v. Bookasta*, 267 Cal. App. 2d 910, 915 (1968); *Automotriz Del Golfo De Cal. v. Resnick*, 47 Cal.2d 792, 796, 306 P.2d 1, 3 (1957).

A bare “allegation that a corporation is the alter ego ... is insufficient to justify the court in disregarding the corporate entity in the absence of allegations of facts from which it appears that justice cannot otherwise be accomplished.” *Vasey v. Cal. Dance Co.*, 70 Cal. App. 3d 742, 749 (1977). The Court may consider a variety of factors to help determine whether both prongs of this test have been satisfied. *Associated Vendors, Inc. v. Oakland Meat Co., Inc.*, 210 Cal. App. 2d 825, 838 (1962); *Bookasta*, 267 Cal. App. 2d at 915. Unity of interest, ownership and dominance of the corporation, though not dispositive, have been shown as factors that favor the piercing of the corporate veil. *U.S. v. Healthwin–Midtown Convalescent Hospital and Rehabilitation Center, Inc.*, 511 F. Supp. 416 (C.D. Cal. 1981); *Associated Vendors, Inc. v. Oakland Meat Co.*, 210 Cal. App. 2d 825, 837 (1963). Other factors include: “commingling of funds and other assets ... the treatment by an individual of the assets of the corporation as his own ... sole ownership of all of the stock in a corporation by one individual or the members of a family ... [and] the use of a corporation as a mere shell, instrumentality or conduit for a single venture or the business of an individual.” *Associated Vendors*, 210 Cal. App. 2d at 838–39.

\*6 As to the second ‘inequitable result’ factor, the alter ego doctrine is in essence an equitable doctrine where the basic motivation is to assure a just and equitable result. *Alexander v. Abbey of the Chimes*, 104 Cal. App.3d 39, 48 (1980). In *Alexander*, the court found that the net effect of the transaction was to leave the company as “a hollow shell without means to satisfy its existing and potential creditors.” *Id.* In *Bookasta*, allegations sufficient to state a cause of action on the alter ego theory included allegations that “the individuals ... ‘dominated’ the affairs of the corporation; that a ‘unity of interest and ownership’ existed ... that the corporation [was] a ‘mere shell and naked framework’ for individual manipulations; that its income was diverted to the use of the individuals; that the corporation was ... inadequately capitalized ... and that adherence to the fiction of separate corporate existence

Hyperion Fund, L.P. v. Samarium Technology Group, Ltd., Not Reported in Fed. Supp....

would, under the circumstances, promote injustice.”  
*Bookasta*, 267 Cal. App. 2d at 915–16.

Here, for purposes of the instant Motion to Dismiss, Plaintiff’s Third Amended Complaint has pleaded sufficient allegations of a unity of interest and ownership between Defendants Samarium Tech, Samarium Capital, and Dr. Hable. Specifically, the Complaint alleges that Dr. Hable is believed to be the CEO and sole director of Samarium Tech and Samarium Capital (3d Compl. ¶¶ 4, 11–12), owns over 10% of the common stock of these two entities (3d Compl. ¶¶ 13–14), executed the Stock Purchase Agreement between Plaintiff and Samarium Tech (3d Compl. ¶ 20), and showed Plaintiff certain Merrill Brokerage Account statements of Samarium Capital reflecting over \$880 million in securities (3d Compl. ¶ 21). In addition, Samarium Tech and Samarium Capital shared the same British Virgin Islands registration number of 654541 (3d Compl. ¶ 15–16), Samarium Tech changed its name to Samarium Capital on June 27, 2007 (3d Compl. ¶ 17), Samarium Tech failed to maintain board minutes or separate bank accounts from Samarium Capital and Dr. Hable (3d Compl. ¶ 19), and Samarium Tech was undercapitalized and its finances were practically indistinguishable from Samarium Capital or Dr. Hable (3d Compl. ¶¶ 22–23). All three Defendants are also alleged to conduct the same business and share the same office space, auditors, attorneys, bookkeepers, and computer server. (3d Compl. ¶¶ 24–29.)

The Court finds that based upon these allegations of the Third Amended Complaint, if any of the three Defendants were allowed to escape liability, an inequitable result

would follow. Accordingly, Plaintiff has set forth “a short and plain statement of the claim showing that the pleader is entitled to relief” under an alter ego theory of liability. *Fed. R. Civ. P. 8(b)*. Therefore, Defendant’s Motion to Dismiss is DENIED to the extent that it seeks dismissal of any or all claims on the theory that the alter ego allegations are insufficient to state a claim against Dr. Hable.

#### IV. CONCLUSION

For the foregoing reasons and in the manner set forth above, Defendant’s Motion to Dismiss the Third Amended Complaint (docket no. 89) is GRANTED to the extent Plaintiff’s fourth and fifth claims for avoidance of fraudulent transfer and promissory fraud have failed to satisfy *Fed. R. Civ. P. 9(b)*. Plaintiff’s fourth and fifth claims in the Third Amended Complaint are hereby DISMISSED WITHOUT PREJUDICE. Plaintiff may file an amended complaint within twenty (20) days from the date of this order to plead those claims with specificity, if it can do so. In all other respects, Defendant’s Motion to Dismiss is hereby DENIED.

#### IT IS SO ORDERED.

#### All Citations

Not Reported in Fed. Supp., 2009 WL 10699441

#### Footnotes

- 1 Plaintiff also refers to Mr. Breitman as Hyperion’s counsel. (Compl. ¶ 15.)
- 2 To date, Defendants Samarium Tech and Samarium Capital are not represented by counsel.
- 3 Plaintiff has filed a Request for Judicial Notice in Support of Plaintiff’s Opposition. The Court finds the contents of Plaintiff’s Request to be inappropriate for judicial notice and unnecessary to the disposition of the instant Motion. The Court denies Plaintiff’s Request for Judicial Notice.
- 4 In seeking an award of punitive and exemplary damages in connection with Plaintiff’s claim for breach of fiduciary duties, the last paragraph of the claim alleges, “duplicitous, malicious and deceitful strategem applied by Defendants to convert and distribute Hyperion’s beneficial and equitable interests.” (3d Compl. ¶ 48.) Although this avers fraudulent behavior, the remainder of the claim is not rendered insufficient for not having been pleaded with particularity. *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1105 (9th Cir. 2003) (“Where averments of fraud are made in a claim in which fraud is not an element, an inadequate averment of fraud does not mean that no claim has been stated. The proper route is to disregard averments of fraud not meeting Rule 9(b)’s standard and then ask whether a claim has been stated.”) (citing *Lone Star Ladies Inv. Club v. Schlotzsky’s Inc.*, 238 F.3d 363, 368 (5th Cir. 2001)).
- 5 For example, Plaintiff’s fourth claim asserts that Dr. Hable’s distribution of assets “were actions taken ... with actual intent to hinder, delay or defraud Hable’s, Samarium Tech’s, and Samarium Capital’s creditors, including, in particular, Plaintiff Hyperion.”

Hyperion Fund, L.P. v. Samarium Technology Group, Ltd., Not Reported in Fed. Supp....

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(3d Compl. ¶ 56.) Plaintiff's averment of actual fraud must comply with the specificity requirements of Fed. R. Civ. P. 9(b). See *In re Stac Electronics Sec. Litig.*, 89 F.3d 1399, 1405 n.2 (9th Cir. 1996).

- 6 The only reference to time is provided in paragraph 63: “[a]t the time that such promises were made to Hyperion by Hable, Samarium Capital, and Samarium Tech, in and after January 2007, Hable Samarium Tech, and Samarium Capital knew that such promises were false ...” (3d Compl. ¶ 63.)

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## Exhibit 12

Independent Electric Supply Inc. v. Solar Installs, Inc., Not Reported in Fed. Supp. (2018)

**H** KeyCite history available

2018 WL 6092800

Only the Westlaw citation is currently available.  
United States District Court, N.D. California.

INDEPENDENT ELECTRIC SUPPLY  
INC., Plaintiff,  
v.  
**SOLAR INSTALLS, INC.**, et al.,  
Defendants.

Case No. 4:18-cv-01435-KAW

Signed 11/21/2018

**Attorneys and Law Firms**

**Matthew Patrick James**, Hopkins Carley, San Jose, CA,  
for Plaintiff.

**Cole Smith Cannon**, Cannon Law Group, PLLC, Salt  
Lake City, UT, for Defendants.

**RE: ORDER DENYING DEFENDANTS' SECOND  
MOTION TO DISMISS OR TRANSFER VENUE**

Re: Dkt. Nos. 34

**KANDIS A. WESTMORE**, United States Magistrate  
Judge

\*1 On March 5, 2018, Plaintiff Independent Electric Supply, Inc. filed the instant case against Defendants Solar Installs, Inc. ("Solar Installs"), Clear Solar Co. ("Clear Solar"), David Southam, and Paul Southam. (Compl. at ¶¶ 18, 20, Dkt. No. 1.) Pending before the Court is Defendants' second motion to dismiss based on lack of personal jurisdiction or forum non conveniens, or in the alternative, to transfer venue to the District of Utah. (Defs.' Sec. Mot. to Dismiss ("Defs.' Mot. to Dismiss"), Dkt. No. 34.)

Upon consideration of the parties' filings, as well as the arguments presented at the November 15, 2018 hearing, Defendant's second motion to dismiss, or in the alternative, to transfer venue is DENIED.

**I. BACKGROUND**

Plaintiff sells solar panels and other components. (Plf.'s First Amend. Compl. ("FAC") ¶¶ 27-28, Dkt. No. 33; see also Chow Decl. ¶ 1, Dkt. No. 18.) On June 24, 2016, Plaintiff opened an account to provide materials to Defendant Clear Solar, typically on a cash on delivery ("COD") basis. (Chow Decl. ¶ 5.) Defendant Clear Solar's President was Defendant Paul Southam. (FAC ¶ 7.)

In 2016, Defendant Clear Solar requested that an account be opened for Defendant Solar Installs. (Chow Decl. ¶ 7.) Because Defendant Clear Solar's orders had been on a COD basis, Plaintiff required that Defendant Solar Installs submit a written credit application, providing financial information. (Chow Decl. ¶ 7.) On July 15, 2016, Defendant Solar Installs submitted the credit application, which was executed and signed by Defendant David Southam. (Chow Decl. ¶ 8, Exh. B at 2.) The credit application listed Defendant David Southam as the President, and as the only owner and officer of Defendant Solar Installs. (Chow Decl., Exh. B at 1.) Defendant David Southam had also represented himself to Plaintiff as the President of Clear Solar. (FAC at ¶ 19.)

Based on the financial information provided in the credit application, Plaintiff extended credit to Defendant Solar Installs and shipped materials. (Chow Decl. ¶ 9.) Defendant Solar Installs's orders included approximately 34 orders for materials that were shipped throughout California and picked up by Defendant Solar Installs for use in Defendant Solar Installs's projects in California. (Chow Decl. ¶ 10.)

At an unknown time, Defendants Clear Solar and Solar Installs entered into an agreement that allowed for Defendant Solar Installs to perform installation services for all of the contracts entered into by Defendant Clear Solar. (Kershner Decl., Exh. A at 7, Dkt. No. 38.) Plaintiff alleges that through this contract, Clear Solar would market and sell the products, Solar Installs would order the materials and provide the installation services, Clear Solar would be paid by the consumer but not pay Solar Installs, and then Solar Installs would not be able to pay

Independent Electric Supply Inc. v. Solar Installs, Inc., Not Reported in Fed. Supp. (2018)

for the materials. (FAC ¶ 20.) According to Plaintiff, “[t]his allowed Clear Solar to collect payment from the owners of the solar installation projects without having any contractual liability to pay for the materials used on the same solar installation projects.” (FAC ¶ 20.)

\*2 Plaintiff’s communications regarding payment of Defendant Solar Installs’s account was with Ms. Lynda Eads, who represented herself as the controller of both Defendant Clear Solar and Defendant Solar Installs. (Chow Decl. ¶ 12.) On July 25, 2016, Defendant Clear Solar made a \$153,163.37 payment to Plaintiff for materials ordered under Defendant Solar Installs’s account. (Chow Decl. ¶ 13, Exh. C.)

On July 18, 2017, Ms. Eads, using the e-mail address lynda.eads@clearsolar.us, requested that Plaintiff provide copies of invoices for materials Plaintiff had shipped to Defendant Solar Installs. (Chow Decl. ¶ 14, Exh. D.) On August 3, 2017, in an e-mail with the subject “Solar Installs/Clear Solar,” Plaintiff’s director of credit asked Ms. Eads about the status of payments to Plaintiff. (Chow Decl. ¶ 15, Exh. E.) Ms. Eads responded that they were working on getting a payment to Plaintiff. (*Id.*) Ms. Eads also informed Plaintiff’s credit manager, Mr. Jeff Chow, that Defendant Paul Southam (President of Defendant Clear Solar) was the only person with authority to authorize payments for the outstanding balance owed by Defendant Solar Installs. (Chow Decl. ¶ 16; FAC ¶¶ 17, 22, 24.) For example, in a September 18, 2017 e-mail, Ms. Eads told Mr. Chow that “[w]e need to get all payment plans approved by Paul [Southam].” (Chow Decl. ¶ 17, Exh. F.) In an October 2, 2017 e-mail, Mr. Chow informed Ms. Eads that Defendant Solar Installs had a \$101,074.98 balance past due. (Chow Decl. ¶ 18, Exh. G at 2.) Mr. Chow asked if Ms. Eads had discussed a payment plan with Defendant Paul Southam. (*Id.*) Ms. Eads replied that Defendant Paul Southam had been out of the office and that he had not been able to meet about the materials. (Chow Decl., Exh. G at 1.)

On October 24, 2017, Mr. Chow asked Ms. Eads for an update on Defendant Solar Installs’s outstanding balance of \$322,395.13. (Chow Decl. ¶ 19.) After the outstanding balance was not paid, Plaintiff filed the instant suit, asserting various claims related to the breach of contract. (FAC ¶¶ 26-65.) Plaintiff alleges that Defendant Clear Solar held over \$2 million of Defendant Solar Installs’s assets, approximately 50% of Defendant Solar Installs’s total assets, as a way of making Defendant Solar Installs insolvent and unable to pay their debt to Plaintiff. (FAC ¶¶ 21, 24.) Plaintiff asserts that Defendants David Southam and Paul Southam are brothers. (FAC ¶ 8.) Plaintiff also asserts that Defendant Paul Southam

invested approximately \$1 million of his personal money into Solar Installs. (FAC ¶¶ 16, 18.)

On July 9, 2018, the Court ruled on Defendant’s first motion to dismiss pursuant to [Federal Rule of Civil Procedure 12\(b\)\(2\)](#) based on lack of personal jurisdiction and for forum non conveniens, or in the alternative, to transfer venue to Utah. (Order Granting in Part and Denying in Part Defs.’ Mot. to Dismiss (“Order”), Dkt. No. 30.) The Court found, as the facts were alleged in the original complaint, that it did not have jurisdiction over Defendants Clear Solar and Paul Southam, but did have jurisdiction over Defendants Solar Installs and David Southam. (*Id.* at 7-14.) The Court dismissed the causes of action against Defendants Clear Solar and Paul Southam without prejudice. (*Id.* at 15.) Plaintiff filed its first amended complaint on August 8, 2018.

On April 16, 2018, Defendants filed the instant motion to dismiss Defendants Clear Solar and Paul Southam pursuant to [Federal Rule of Civil Procedure 12\(b\)\(2\)](#) for lack of personal jurisdiction and for forum non conveniens, or in the alternative, to transfer venue to Utah. (Defs.’ Mot. to Dismiss, Dkt. No. 34.) Plaintiff filed its opposition on September 12, 2018. (Plf.’s Opp’n, Dkt. No. 37.) On September 19, 2018, Defendants filed their reply. (Defs.’ Reply, Dkt. No. 39.)

## II. LEGAL STANDARD

### A. Motion to Dismiss Pursuant to [Rule 12\(b\)\(2\)](#)

\*3 Under [Federal Rule of Civil Procedure 12\(b\)\(2\)](#), a defendant may move to dismiss a claim for lack of personal jurisdiction. The plaintiff bears the burden of demonstrating that the court has jurisdiction over the defendant. [Schwarzenegger v. Fred Martin Motor Co.](#), 374 F.3d 797, 800 (9th Cir. 2004). “Where, as here, a motion to dismiss is based on written materials rather than an evidentiary hearing, the plaintiff need only make a prima facie showing of jurisdictional facts.” [Love v. Associated Newspapers, Ltd.](#), 611 F.3d 601, 608 (9th Cir. 2010). To make a prima facie showing, “the plaintiff need only demonstrate facts that if true would support jurisdiction over the defendant.” [Ballard v. Savage](#), 65 F.3d 1495, 1498 (9th Cir. 1995). “Uncontroverted allegations in the complaint must be taken as true, and conflicts over statements contained in affidavits must be resolved in [the plaintiff’s] favor.” [Love](#), 611 F.3d at 608.

### **B. Motion to Dismiss for Forum Non Conveniens or Transfer Venue**

Generally, “[a] district court has discretion to decline to exercise jurisdiction in a case where litigation in a foreign forum would be more convenient for the parties.” *Lueck v. Sundstrand Corp.*, 236 F.3d 1137, 1142 (9th Cir. 2001). The party moving to dismiss based on forum non conveniens has the burden of showing that there is an adequate alternative forum and that the balance of private and public interest factors favors dismissal. *Id.* at 1142-43. “A plaintiff’s choice of forum will not be disturbed unless the private and public interest factors strongly favor trial in the foreign [forum].” *Dardengo v. Honeywell Int’l, Inc. (In re Air Crash Over the Midatlantic)*, 792 F. Supp. 2d 1090, 1094 (N.D. Cal. 2011).

Factors relating to the parties’ private interests include relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive. Public-interest factors may include the administrative difficulties flowing from court congestion; the local interest in having localized controversies decided at home; [and] the interest in having the trial of a diversity case in a forum that is at home with the law. The Court must also give some weight to the plaintiffs’ choice of forum.

*Atl. Marine Constr. Co. v. U.S. Dist. Ct. for W. Dist. of Tex.*, 134 S. Ct. 568, 581 n.6 (2013) (internal quotations and citations omitted). Thus:

The standard to be applied is whether, in light of these factors, defendants have made a clear showing of facts which either (1) establish such oppression and vexation of a defendant as to be out of proportion to the plaintiff’s convenience, which may be shown to be slight or nonexistent, or (2) make trial in the chosen forum inappropriate because of considerations affecting the court’s own administrative and legal problems.

*Cheng v. Boeing Co.*, 708 F.2d 1406, 1410 (9th Cir. 1983) (internal quotations omitted).

Section 1404(a) provides: “For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented.” As with a motion to dismiss for forum non conveniens, a

district court considering a § 1404(a) motion to transfer in the absence of a forum-selection clause “must evaluate both the convenience of the parties and various public-interest considerations.” *Atl. Marine Constr. Co.*, 134 S. Ct. at 581. Thus, the district court must “weigh the relevant factors and decide whether, on balance, a transfer would serve the convenience of the parties and witnesses and otherwise promote the interest of justice.” *Id.* (internal quotations omitted).

### **III. DISCUSSION**

#### **A. Motion to Dismiss Pursuant to Rule 12(b)(2)**

\*4 Plaintiff argues that Defendants Clear Solar and Paul Southam are alter egos of Defendant Solar Installs, and therefore, Defendant Solar Installs’s contacts with California may be imputed to Defendants Clear Solar and Paul Southam for purposes of specific jurisdiction. (Plf.’s Opp’n at 5.) “To satisfy the alter ego test, a plaintiff must make out a prima facie case (1) that there is such unity of interest and ownership that the separate personalities of the two entities no longer exist and (2) that failure to disregard their separate identities would result in fraud or injustice.” *Ranza v. Nike, Inc.*, 793 F.3d 1059, 1073 (9th Cir. 2015) (citing *Doe v. Unocal*, 248 F.3d 915, 926 (9th Cir. 2001) ) (internal quotation and modifications omitted) (hereinafter “*Unocal* test”). While “[t]he standard for personal jurisdiction under an alter ego theory is lower than the standard for liability under an alter ego theory ... courts have [required] that plaintiffs make more than just ‘conclusory allegations’ to support personal jurisdiction under alter ego theory.” *Television Events & Mktg., Inc. v. Amcom Distrib. Co.*, 416 F. Supp. 2d 948, 962-63 (D. Haw. 2006).

Under the “unity of interest” prong, Plaintiff must make “a showing that [one entity] controls the subsidiary to such a degree as to render the latter the mere instrumentality of the former.” *Ranza*, 793 F.3d at 1073 (internal quotation omitted). For example, with respect to a parent and subsidiary, “[t]he test envisions pervasive control over the subsidiary, such as when a parent corporation dictates every facet of the subsidiary’s business—from broad policy decisions to routine matters of day-to-day operations.” *Id.* (internal quotations omitted). Total ownership and shared management personnel, however, “are alone insufficient to establish the requisite level of control.” *Id.* When assessing whether there is unity of interest, courts consider:

Independent Electric Supply Inc. v. Solar Installs, Inc., Not Reported in Fed. Supp. (2018)

the commingling of funds and other assets of the entities, the holding out by one entity that it is liable for the debts of the other, identical equitable ownership of the entities, use of the same offices and employees, use of one as a mere shell or conduit for the affairs of the other, inadequate capitalization, disregard for corporate formalities, lack of segregation of corporate records, and identical directors and officers.

*Stewart v. Screen Gems-EMI Music, Inc.*, 81 F. Supp. 3d 938, 954 (N.D. Cal. 2015).

**i. Clear Solar**

a. Unity of Interest

*1. Commingling of Assets*

The first unity of interest factor is whether the entities have commingled their assets. “Courts find that a plaintiff has sufficiently demonstrated commingling where the evidence shows that the related companies transfer assets among themselves for no ascertainable reason.” *Stewart*, 81 F. Supp. 3d at 954-56 (finding that there was no commingling of assets where several related companies used the same bank accounts but kept meticulous records to ensure that “each entity [was] liable only for payments it was contractually obligated to pay.”) Courts generally are not concerned when one employee of two companies has access to and control over the bank accounts of both companies *if* that employee is in a managerial position at *both* companies. *Vacless Sys. v. Vac-Alert Ip Holdings, LLC*, No. 2:10-cv-09284-SVW, 2011 WL 13217924, at \*5 (C.D. Cal. June 24, 2011).

Plaintiff makes various arguments that Defendants Clear Solar and Solar Installs commingled their assets. Specifically, Plaintiff alleges that Defendant Clear Solar held \$2 million of Defendant Solar Install’s assets, equaling more than half of Defendant Solar Install’s alleged current assets as of June 30, 2017. (FAC at ¶ 16.) Plaintiff further alleges that a portion of Defendant Solar Install’s assets included “alleged contracts with Clear Solar for the installation of solar equipment and components.” (*Id.*) Finally, Plaintiff asserts that Defendant Clear Solar represented to Plaintiff that “Paul Southam of Clear Solar had sole authority to pay Plaintiff on behalf of Solar Installs and effectively controlled the funds that significantly compromised [S]olar Installs assets.” (*Id.*)

\*5 The Court disagrees that Defendant Clear Solar’s holding of over \$2 million of Defendant Solar Installs’s assets is commingling. Instead, the alleged holding shows a separation of assets between the companies because the act of one entity withholding money from another denotes an independence and detachment between the entities. If the assets were indeed commingled, Defendant Solar Installs would have access to the \$2 million being “held” by Defendant Clear Solar; it would not be separately held. This fact, therefore, does not show a commingling of assets.

Likewise, any alleged contracts between Defendants Clear Solar and Solar Installs does not show commingled assets because a contract, by its nature, gives an ascertainable reason for the transfer of assets between the companies—in this case, Clear Solar allegedly sold the solar panels to consumers, then contracted with Solar Installs to perform the installation of those panels. (FAC at ¶ 20.) This fact does not show a commingling of assets.

The Court, however, finds that the allegation that “Paul Southam of Clear Solar had sole authority to pay Plaintiff on behalf of Solar Installs and effectively controlled the funds that significantly comprised [S]olar Installs assets” shows a commingling of assets between the two entities. The President of one company controlling the purse strings of another allegedly separate company does not show a separation of funds, particularly when Defendant Paul Southam has no position at Solar Installs. *Contrast with Vacless Sys. v. Vac-Alert Ip Holdings, LLC*, 2011 WL 13217924, at \*5 (finding that a managerial employee’s control over bank accounts for two companies was of little consequence because the employee held a managerial position at *both* companies). This factor, thus, weighs in favor of finding a unity of interest between Defendants Solar Installs and Clear Solar, as it appears the Defendant Clear Solar controlled the finances of Defendant Solar Installs.

*2. Holding of One Entity as Liable for Debts of Another*

Under the second factor, courts consider evidence that one entity is holding itself out as responsible for the debts of the other entity. The Court previously found that “Defendant Clear Solar appears to have held itself out as responsible for Defendant Solar Installs’s debts, as it paid for its account.” (Order at 12.) In the first amended complaint, Plaintiff alleges that Defendant Clear Solar held itself out as being liable for the debts of Defendant Solar Installs by “Clear Solar paying Plaintiff at least

Independent Electric Supply Inc. v. Solar Installs, Inc., Not Reported in Fed. Supp. (2018)

\$153,163.37 for materials ordered by Solar Installs” and by alleging that Clear Solar’s President was the “only individual authorized to issue payments to Plaintiff” under the alleged contract between the two related entities. (Plf.’s Opp’n at 15.) The Court again finds that this factor weighs in favor of finding a unity of interest between the corporate Defendants.

### 3. Identical Equitable Ownership

The third factor is identical equitable ownership. Control over a corporation can be an indication of equitable ownership, but there must be more, such as an “expectation that he would receive[ ] shares of a corporation.” *In re Schwarzkopf*, 626 F.3d 1032, 1039 (9th Cir. 2010). If there is no evidence of common ownership between the companies, and the only relationship is that the president of one company is signing checks to pay for the expenses of the other company, there can be no finding of identical equitable ownership. *21 Century Fin. Servs., LLC v. Manchester Fin. Bank*, 225 F. Supp. 3d 1012, 1029-30 (S.D. Cal. 2017).

\*6 For this factor, Plaintiff alleges that Defendants Solar Installs and Clear Solar are owned by family members—brothers Paul and David Southam. (FAC at ¶¶ 6-8.) Plaintiff also alleges that Paul and David Southam each represented authority to act on behalf of Clear Solar and Solar Installs. (*Id.*) And finally, Plaintiff alleges that “Clear Solar has retained at least \$2 million that belongs to Solar Installs.” (*Id.*) Defendants’ only rebuttal to this point is to restate Plaintiff’s allegations stated above, without any denial. (Defs.’ Reply at 3.)

Even assuming Paul and David Southam are brothers, however, they are still two distinct individuals who, according to the pleadings, own different companies. (FAC at ¶ 18.) Equal ownership requires that *both* companies are owned by the same individual or individuals, which Plaintiff does not allege.

As to Plaintiff’s second assertion that Paul and David Southam have each represented authority to act on behalf of both companies, while authority to act on behalf of a company shows control, control does not necessarily equate ownership. *See 21 Century Fin. Servs., LLC*, 225 F. Supp. 3d at 1029-30 (finding no identical ownership and control where there was no evidence of common ownership between the companies even though the president of one company signed checks to pay for the expenses of the other company). Defendant Paul Southam

had authority to sign checks to pay for the expenses of Defendant Solar Installs, but that only demonstrates control; Plaintiff has not alleged any facts showing actual *ownership* of both companies by the same person or entity. An allegation that two people from separate companies have represented authority to act on behalf of both companies, absent a showing of actual common ownership, does not show identical equitable ownership.

Lastly, Plaintiff’s allegation that Defendant Clear Solar held at least \$2 million of Defendant Solar Install’s assets does not show identical equitable ownership. Although this \$2 million equated approximately fifty percent of Defendant Solar Install’s assets as of June 2017, the holding of this money appears to be unpaid billables to Defendant Solar Installs. On Defendant Solar Installs’s Accountant’s Report, this \$2 million sum is labeled as “Due from related parties,” and “related parties” is further clarified as meaning Defendant Clear Solar. (Kernsher Decl., Exh. A at 2, 7.) Plaintiff cites no authority that unpaid billables constitutes an ownership interest. Therefore, this allegation does not show identical equitable ownership.

Therefore, this factor weighs against finding a unity of interests between Defendants Clear Solar and Solar Installs.

### 4. Use of the Same Offices and Employees

The fourth factor pertains to whether the entities use the same offices and employees. The Court previously found that that Defendants Clear Solar and Solar Installs “use the same address, and have at least one employee in common, which weighs somewhat in favor of an alter ego finding.” (Order at 13.) In the first amended complaint, Plaintiff alleges that Defendants Solar Installs and Clear Solar are both located at 135 South Mountain Way Drive in Orem, Utah. (FAC at ¶ 19.) Plaintiff further alleges that David Southam represented himself as the President of both Clear Solar and Solar Installs, and that Lynda Eads is the Controller of both companies. (*Id.*) Defendants respond that Plaintiff’s assertions are incorrect and untrue, but provide no evidence in support of their denial. (Defs.’ Reply at 3.) (*Id.*)

Without any countering assertions by Defendants, it appears that Defendants Solar Installs and Clear Solar share an office. As to the shared employees, Lynda Eads is a shared employee as the Controller of both companies. In their second motion to dismiss, however, Defendants refute the assumption that David Southam continually

Independent Electric Supply Inc. v. Solar Installs, Inc., Not Reported in Fed. Supp. (2018)

represented himself as the President of Clear Solar. (Def.'s Mot. to Dismiss at 10.) They assert that "David Southam was temporarily President of Clear Solar, Co. for approximately 3-4 months in 2016." (*Id.*) During the hearing, Plaintiff clarified that it is not asserting that David Southam has *continually* represented himself as the President of both Clear Solar and Solar Installs concurrently, only that there was the brief overlap in 2016, allegedly at the time the contract was made.

\*7 The Court again finds that a continually shared employee, a briefly shared employee, and a common place of business weighs somewhat in favor of an alter ego finding, though not heavily.

#### 5. Use as a Shell or Conduit for Affairs of the Other

Under the fifth factor, courts must assess whether one entity is merely the shell or conduit for the other. The Court previously found that Plaintiff's theory that "Defendant Solar Installs 'was being used as a conduit to obtain materials which would be used, but not paid for, but its related company Clear Solar,' ... present[ed] no actual facts or evidence in support." (Order at 13.) In the first amended complaint, Plaintiff makes the following allegation:

Clear Solar marketed and sold its services to end users as an experienced solar installer and would collect payment from property owners for such work, but Clear Solar would not perform the solar installation work. Instead, Clear Solar entered into an agreement with Solar Installs whereby Solar Installs would provide the installation of contracts entered into by Clear Solar. As a result, Solar Installs would be responsible for the ordering and payment of materials for the jobs, but no control over the monies recovered from those contracts. This allowed Clear Solar to collect payment from the owners of the solar installation projects without having any contractual liability to pay for the materials used on the same solar installation projects.

(FAC at ¶ 20.) Plaintiff provides further evidence of the contract between Solar Installs and Clear Solar by way of Solar Installs's Accountant's Report, which states that Clear Solar would "provide for all the installation of contracts entered into by Clear Solar, Inc." (Kershner Decl., Exh. A at 7.) Defendants do not address this allegation, let alone deny it.

Taken as true, this allegation shows that Defendant Solar Installs was being used to allow Defendant Clear Solar to

avoid paying for the materials it used to fulfill its contractual obligations, *i.e.*, using Defendant Solar Installs to purchase and install materials for contracts that Defendant Clear Solar entered into. This strongly suggests Defendant Solar Installs was being used as a shell for Defendant Clear Solar to fulfill its obligations while avoiding liability. Without any rebuttal from Defendants, this factor weighs in favor of finding a unity of interest.

#### 6. Inadequate Capitalization

The next factor considers whether the entity from which Plaintiff seeks to recover is inadequately capitalized. "Adequate capitalization means capital reasonably regarded as adequate to enable the corporation to operate its business and pay its debts as they mature." *Laborers Clean-up Contract Admin. Trust Fund v. Uriarte Clean-up Serv., Inc.*, 736 F.2d 516, 524 (9th Cir. 1984) (quotations omitted). The Court previously found that Plaintiff conclusorily alleged that Defendant Solar Installs was insolvent. In the first amended complaint, Plaintiff provides new facts to support this allegation, specifically that by November 2017, Defendant Solar Installs was insolvent, as it had indicated to Plaintiff that "any attempts to collect the amounts due from Solar Installs 'will prove useless.'" (FAC ¶ 21.) Defendant Solar Installs did not have "capital reasonably regarded as adequate to enable the corporation to ... pay its debts as they mature[d]." (*Id.*) Additionally, it appears Defendant Solar Installs did not pay for its own debts; rather, Defendant Clear Solar paid for at least \$153,163.37 in materials ordered from Plaintiff by Solar Installs, further suggesting that Defendant Solar Installs itself did not have the resources needed to pay its own debts. (Chow Decl. ¶ 13.) These facts, unrefuted by Defendant, shows that Defendant Solar Installs was unable to pay for the product it obtained. The Court concludes that this factor weighs in favor of a finding of unity of interests and a level of control between Defendants Solar Installs and Clear Solar.

#### 7. Disregard for Corporate Formalities

\*8 The seventh factor looks to any disregard of corporate formalities. To show a disregard for corporate formalities, the Ninth Circuit has looked at facts as proper documentation of transactions between the entities, adequate capitalization of each related company, individual contracts entered into by each company, and if

Independent Electric Supply Inc. v. Solar Installs, Inc., Not Reported in Fed. Supp. (2018)

each company pays its own taxes. *Ranza*, 793 F.3d at 1074. The sharing of some employees is less important to this factor, as that “does not undermine the entities’ formal separation.” *Id.* Additionally, it is appropriate for a parent company to be heavily involved in the subsidiary’s operations, including exercising control over budget and retaining approval authority for large purchases, as long as the parent company is not dictating “every facet” of the subsidiary’s “routine matters of day-to-day operation.” *Id.* (quoting *Unocal*, 248 F.3d at 926.) The appropriateness of the above described level of control comes from the inherent relationship between the two entities as being corporately related. *Id.*

Plaintiff states that Defendants shared corporate officers and employees, that David Southam represented himself as president of both companies, and that Paul Southam, as the President of Clear Solar, claimed sole authority to authorize payments from Solar Installs to Plaintiff. (FAC at ¶ 22.) Plaintiff does not, however, allege any facts relating to either company’s record-keeping.

Plaintiff’s allegations regarding shared employees and officers alone “do[ ] not undermine the entities’ formal separation.” As the Controller of both companies, Ms. Eads could manage the finances of both companies. Notably, however, Ms. Eads did not regard corporate formalities when she was communicating via email with Plaintiff—she used her Clear Solar email address to communicate with Plaintiff regarding payments owed by Solar Installs. (Chow Decl. ¶ 14, Exh. D.) As a shared employee/officer between the corporations, it appears Ms. Eads did not show regard for corporate formalities.

More importantly, the uncontested allegation that Paul Southam, as the President of Clear Solar, had sole authority to approve of payments from Solar Installs to Plaintiff shows a lack of corporate formality. To have the President of one company control the purse strings of another company that he is not associated with suggests a disregard for corporate formalities. While the courts permit this kind of authority when there is a clear corporate relationship between the two entities (such as parent-subsidiary or sister corporations), no such relationship exists here. See *Ranza*, 793 F.3d at 1074. This factor weighs in favor of finding a unity of interest.

#### 8. Identical Officers and Directors

The last relevant factor considers whether the entities have identical officers and directors. Courts have typically found that even multiple overlapping officers and

directors do not provide a sufficient basis for piercing the corporate veil, absent other indicia of a unity of interest. See *Corcoran v. CVS Health Corp.*, 169 F. Supp. 3d 970, 984 (N.D. Cal. 2016) (finding allegations insufficient where parent and wholly owned subsidiary had overlapping officers and directors); *Eagle Canyon Owners’ Ass’n v. Waste Mgmt., Inc.*, No. 16-CV-2811-LAB (WVG), 2017 WL 3017501, at \*2 (S.D. Cal. July 13, 2017) (same).

Again, Plaintiff points to David Southam’s representing himself as President of both companies, and Lynda Eads being the Controller of both companies.<sup>1</sup> (FAC at ¶ 6.) Defendants do not dispute these allegations, nor suggest that there are other directors and officers of each company that do not overlap. While there is one definitive overlapping officer, Ms. Eads, David Southam’s representation as the President of both companies appears to have been a mere three to four months. (Def.’s Mot. to Dismiss at 10.) The Court finds that based on this limited overlap, this factor weighs only slightly in favor of a unity of interest. cv

#### 9. Balancing the Factors

\*9 Here, seven of the eight applicable factors weigh in favor of finding a unity of interest: commingling, liability for another, mere shell or conduit, shared offices and employees, inadequate capitalization, disregard for formalities, and overlapping officers. These factors combined show that Defendant Clear Solar had control over Defendant Solar Installs, such that the two corporations did not have separate personalities. The fact that Plaintiff did not plead sufficient facts to show identical equitable ownership does not outweigh the remaining factors that show unity of interest. As the majority of the factors weigh in favor of finding a unity of interest, the first prong of the *Unocal* test is satisfied—finding a unity of interest between Defendants Solar Installs and Clear Solar sufficient to proceed to the second prong of the *Unocal* test.

#### b. Adherence to Fiction of Separate Entities Would Promote Injustice or Fraud

The second prong of the *Unocal* test asks whether failure to disregard the separate identities would result in fraud or injustice. *Ranza*, 793 F.3d at 1073. Here, Plaintiff argues that failing to find that Defendants Solar Installs and

Independent Electric Supply Inc. v. Solar Installs, Inc., Not Reported in Fed. Supp. (2018)

Clear Solar are alter egos of one another would promote injustice and fraud due to the payment authorization scheme between Clear Solar and Solar Installs, that left Solar Installs “insolvent and unable to pay its obligations, including the debt due to Plaintiff in this lawsuit.” (FAC at ¶ 24.) Defendant does not address these arguments in their motion or reply brief.

If Defendant Clear Solar is dismissed once again from this case, Plaintiff will be left with one insolvent corporate defendant unable to pay damages even if found liable. With Defendant Solar Installs unable to pay, injustice will be promoted, especially in light of Defendants’ alleged plan to have Defendant Solar Installs be responsible for ordering and payment of material for jobs entered into by Defendant Clear Solar, while Defendant Clear Solar collected payments for those jobs without being liable for the payment of the materials used in those jobs. (FAC ¶ 20.)

The Court concludes that Defendant Clear Solar is an alter ego for Defendant Solar Installs, and Defendant Solar Installs’s contacts may be imputed to Defendant Clear Solar. As the Court previously found sufficient contacts to support personal jurisdiction regarding Defendant Solar Installs, the Court finds that there is personal jurisdiction over Defendant Clear Solar.

## ii. Paul Southam

The Court previously found that the original complaint did not allege facts sufficient to find personal jurisdiction over Defendant Paul Southam because he did not have direct California contacts relating to this case and his role in approving payments on Defendant Solar Installs’s accounts, as pled, did not establish personal jurisdiction. (Order at 14.) Plaintiff now alleges that Defendant Paul Southam had sole authority to authorize payments on behalf of Defendant Solar Installs, even though he seemingly had no corporate connections to Solar Installs, inter alia. (FAC at 5-7.)

A person’s association with a corporation who causes harm in the forum state is not sufficient to find personal jurisdiction over that person. *Davis v. Metro Prods., Inc.*, 885 F.2d 515, 520 (9th Cir. 1989). The corporate form may be ignored only if the harm comes about “by virtue of the individual’s control of, and direct participation in the alleged activities.” *Wolf Designs, Inc., v. DHR & Co.*, 322 F. Supp. 2d 1065, 1072 (C.D. Cal. 2004) (finding personal jurisdiction over a corporate officer who “made the final decisions” for the corporation which caused the

alleged harm). “[M]ere knowledge of tortious conduct by the corporation is not enough to hold a director or officer liable for the torts of the corporation.” *Id.* The corporate officer must be the “guiding spirit” or “central figure” behind the challenged corporate activity. *Davis*, 885 F.2d at 524. In other words, the corporate officer must be a “primary participant in the alleged wrongdoing” and have “control of, and direct participation in the alleged activities.” *Winery v. Graham*, No. C 06-3618 MHP, 2007 WL 963252, at \*5 (N.D. Cal. Mar. 29, 2007).

\*10 Conclusory allegations of wrongdoing by the corporate officer are not sufficient to pierce the corporate veil and establish personal jurisdiction. *Clerkin v. MyLife.com, Inc.*, No. C 11-00257 CS, 2011 WL 3607496, at \* 1-2, 4 (N.D. Cal. Aug. 16, 2011). The allegations must include *how* the corporate officer “controlled or directly participated in the alleged fraudulent scheme.” *Id.* Additionally, courts have considered whether the corporate officer had control over the company’s assets in determining personal jurisdiction. For example, in *Johnston Farms v. Yusufov*, the plaintiff brought a breach of contract claim against a company and its president for failure to pay for product that had been shipped. No. 1:17-cv-00016-LJO-SKO, 2017 WL 6571527, at \*1 (E.D. Cal. Dec. 26, 2017). Although the individual defendant lived in New York, the district court found that the exercise of specific personal jurisdiction was appropriate because in his capacity as president, the defendant “controlled or was in a position to control the disposition of [the company’s] assets to satisfy all outstanding ... obligations such as the obligation allegedly owed to [the p]laintiff.” *Id.* at 5 n.3.

Like the defendant in *Johnston Farms*, Defendant Paul Southam was the individual who “controlled or was in a position to control the disposition of” assets to satisfy the obligations of Defendant Solar Installs. Specifically, Ms. Eads had informed Plaintiff’s credit manager that Defendant Paul Southam was the only person with authority to authorize payments for the outstanding balance owed by Defendant Solar Installs. (FAC ¶¶ 17, 22, 24.) By making the prior \$153,163.37 payment, then being the only person with authority to authorize future payments on behalf of Defendant Solar Installs and refusing to make the payment that ultimately breached the contract between Defendant Solar Installs and Plaintiff, Defendant Paul Southam voluntarily interjected himself into this controversy. Thus, Defendant Paul Southam was a direct participant in the alleged actions that are the foundation of this case.

Defendants argue that because Defendant Paul Southam acted in his corporate capacity, not his individual

Independent Electric Supply Inc. v. Solar Installs, Inc., Not Reported in Fed. Supp. (2018)

capacity, he cannot be held liable. Again, the Court disagrees. As stated in the prior order, “[t]he Ninth Circuit has rejected the argument that, for purposes of personal jurisdiction, ‘employees who act in their official capacity are somehow shielded from suit in their individual capacity.’ ” *Rimes v. Notewar Dev. LLC*, Case No. 09-cv-281-EMC, 2010 WL 3069250, at \*2 (N.D. Cal. Aug. 4, 2010) (quoting *Davis v. Metro Prods., Inc.*, 885 F.2d 515, 521 (9th Cir. 1989)).

Defendants’ cited cases are not to the contrary. In those cases, the courts found no personal jurisdiction over corporate officers where the plaintiffs failed to allege specific facts that the corporate officer controlled or directly participated in the alleged fraudulent scheme. See *Clerkin*, 2011 WL 3607496, at \*4 (finding no personal jurisdiction where the plaintiffs “ma[d]e only broad, general allegations against [the corporate officer],” and provided no specific facts to suggest that the corporate officer “controlled or directly participated in the alleged fraudulent scheme”); *Just Film, Inc. v. Merchant Servs., Inc.*, No. C 10-1993 CW, 2010 WL 4923146, at \*6 (N.D. Cal. Nov. 29, 2010) (finding no personal jurisdiction over corporate officers where the plaintiff did not allege how the individual defendants directed and controlled the entities alleged to have engaged in wrongful conduct, only that they did); *Marsh v. Zaazon Solutions, LLC*, No. C-11-05226 YGR, 2012 WL 952226, at \*9 (N.D. Cal. Mar. 20, 2012) (same). Those cases are therefore distinguishable, as here, Plaintiff has specifically alleged that Defendant Paul Southam was the only individual who could pay Defendant Solar Installs’s debts, such that his refusal to authorize payment directly caused Defendant Solar Installs to breach its contract with Plaintiff. By withholding the payment that he was solely authorized to make, Defendant Paul Southam was a “primary participant in the alleged wrongdoing” and “had control of, and direct participation in the alleged activities.” *Winery*, 2007 WL 963252, at \*5.

\*11 At the hearing, Defendants appeared to argue that the Court should not find jurisdiction over Defendant Paul Southam unless he was an alter ego of the companies. This conflates the alter ego theory with the primary participant theory.<sup>2</sup> Under the primary participant theory, the Court need not conclude that Defendant Paul Southam was an alter ego of either company; rather, jurisdiction is based on his specific actions, namely being the only person who could authorize payments on Defendant Solar Installs’s debts, and then failing to do so. Accordingly, this Court finds specific personal jurisdiction over Defendant Paul Southam.

**B. Motion to Dismiss for Forum Non Conveniens or Transfer Venue**

Having found jurisdiction over Defendants Clear Solar and Paul Southam, the Court DENIES the motion to dismiss based on forum non conveniens or to transfer venue. Defendants raise nearly identical arguments in their second motion to dismiss as they did in their first. (Defs.’ Mot. to Dismiss at 11-13.)

In its prior order, the Court found:

First, the evidence and witnesses are located in both California and Utah, rendering this factor neutral. Second, Defendants do not suggest that compulsory process for attendance of unwilling witnesses is unavailable in California or prohibitively expensive; while Defendants would have to pay to fly witnesses out to California, Plaintiff would bear similar costs if the case was transferred to Utah. Third, while Defendants argue that a judgment obtained in Utah would be enforceable in Utah, they make no argument that a judgment obtained in California would not also be enforceable in Utah. (See Defs.’ Mot. at 7.) Fourth, the Court disagrees with Defendants’ conclusory argument that practical considerations make trial more efficient and less expensive in Utah instead of California, particularly where Plaintiff’s evidence and witnesses are primarily located in California. Fifth, Defendants cite to no administrative difficulties flowing from court congestion.... Sixth, California has an interest in this localized controversy, as the case involves misrepresentations made in a contract performed and executed in California, as well as the failure to pay for product bought and used in California pursuant to that same contract. Seventh, this Court is capable of hearing the common law claims that are brought in the case. Finally, the Court must give some weight to Plaintiff’s choice of forum.

For these same reasons, the Court finds that Defendants do not make a clear showing of oppression and vexation disproportionate to Plaintiff’s convenience, or that trial is inappropriate because of considerations affecting the Court’s administration. As Defendants raise no new arguments, the Court again concludes that dismissal based on forum non conveniens or transfer to Utah is not warranted.

**IV. CONCLUSION**

**Independent Electric Supply Inc. v. Solar Installs, Inc., Not Reported in Fed. Supp. (2018)**

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For the reasons stated above, the Court DENIES the motion to dismiss for lack of personal jurisdiction as to Defendants Clear Solar and Paul Southam, and DENIES the motion to dismiss based on forum non conveniens or to transfer venue.

IT IS SO ORDERED.

**All Citations**

Not Reported in Fed. Supp., 2018 WL 6092800

Footnotes

- 1 In the absence of the Controller reporting to a higher financial officer or director such as a Chief Financial Officer or some superior controller, the Court may find that Lynda Eads, as the Controller of both companies was an officer of both companies. See *Kyung Cho v. UCBH Holdings, Inc.*, No. C 09-4208 JSW, 2011 3809903, at \*11 (N.D. Cal. May 17, 2011) (viewing a corporate controller as a corporate officer for purposes of scienter analysis).
- 2 While the Court finds jurisdiction over Defendant Paul Southam under the primary participant theory, the same conclusion could be drawn if the Court applied alter ego theory as to Defendant Paul Southam.

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## Exhibit 13

Kayne v. Ho, Not Reported in F.Supp.2d (2010)

**H** KeyCite history available

2010 WL 4794824

Only the Westlaw citation is currently available.  
United States District Court,  
C.D. California.

Fred KAYNE, et al.

v.

Christopher HO, et al.

No. CV 09–6816 CAS (CWx).

|  
Nov. 15, 2010.

#### Attorneys and Law Firms

Judith Sethna, for Plaintiffs.

Gregory Bordo, Jared A. Barry, for Defendants.

**Proceedings: DEFENDANTS’ MOTION TO  
DISMISS FOR LACK OF PERSONAL  
JURISDICTION** (filed 11/16/09)

CHRISTINA A. SNYDER, Judge.

\*1 Catherine Jeang, Deputy Clerk.

Laura Elias, Court Reporter / Recorder.

#### I. INTRODUCTION

On August 14, 2009, a group of then-current and former shareholders of MTC Electronic Technologies Co. Ltd. (“MTC”) (collectively, “plaintiffs”) filed the instant action against Christopher Ho (“Ho”), the Grande Holdings Limited (“Grande”), the Grande International Holdings Limited (“GIHL”), the Ho Family Trust Limited (“HFTL”), Barrican Investments Corporation (“Barrican”), Accolade Inc. (“Accolade”), Airwave Capital Limited (“Airwave”), Clarendon Investments Capital Limited (“Clarendon”), Lafe Corporation Limited

(“Lafe”), and Does 1 through 100 (collectively, “defendants”) in the Los Angeles County Superior Court alleging claims for: (1) alter ego relief; (2) fraudulent transfer; and (3) violation of 18 U.S.C. § 1962 *et seq.*, the federal Racketeer Influenced and Corrupt Organizations Act (“RICO”).

On September 18, 2009, defendants removed the action to this Court based on federal question jurisdiction. *See* 28 U.S.C. §§ 1331, 1441(b).

On November 16, 2009, defendants filed the instant motion to dismiss for lack of personal jurisdiction. On October 18, 2010, after conducting limited jurisdictional discovery, plaintiffs filed a revised opposition, along with revised evidentiary objections to declarations filed by defendants.<sup>1</sup> Defendants filed their reply and evidentiary objections to the Declaration of David F. Berry on November 1, 2010. On November 4, 2010, plaintiffs filed evidentiary objections to the reply declaration of Christopher Ho and a response to defendants’ evidentiary objections.<sup>2</sup> After carefully considering the arguments set forth by both parties, the Court finds and concludes as follows.

#### II. BACKGROUND

##### A. Procedural Background

On January 23, 1995, plaintiffs or their assignors filed an action in the United States District Court for the Central District of California, captioned *Kayne, et al. v. MTC Electronic Technologies, Co., Ltd. et al.*, CV–95–0422 (the “Kayne Action”), alleging that MTC and others violated federal and state laws by, among other things, misrepresenting and failing to disclose material facts in connection with plaintiffs’ purchase of MTC securities and the proxy contest for control of MTC. Complaint ¶ 25; Revised Declaration of David F. Berry (“Berry Decl.”), Ex. 5. The Judicial Panel on Multidistrict Litigation transferred the Kayne Action to the Eastern District of New York for coordinated proceedings with class action litigation against MTC. Complaint ¶ 25; Berry Decl. ¶ 8.

Plaintiffs allege that Grande, who took control of MTC in 1994, actively defended MTC in the Kayne Action for more than eight years. Complaint ¶¶ 25, 27–28. Plaintiffs further allege that Grande actively sought ways to limit

**Kayne v. Ho, Not Reported in F.Supp.2d (2010)**

those MTC assets that would be available to satisfy the claims in the coordinated Kayne Action. Complaint ¶ 28. Plaintiffs allege that, ultimately, Grande siphoned all of MTC's funds rendering MTC a judgment-proof shell, and advised MTC's counsel to withdraw from the Kayne Action. Complaint ¶ 28; Berry Decl., Exs. 9, 10. Plaintiffs eventually settled with the majority of defendants in the Kayne Action, and obtained a default judgment against MTC in the amount of \$37,562,122 .09. Complaint ¶ 25; Berry Decl., Ex. 12.

\*2 Plaintiffs then brought an action in the Los Angeles Superior Court on December 20, 2006, captioned *Kayne, et al. v. The Grande Holdings Limited*, No. BC363764 (the "Superior Court Action"), to enforce the default judgment against MTC on the theory that Grande was MTC's alter ego. Complaint ¶ 37; Berry Decl., Ex. 13. On November 13, 2007, Los Angeles Superior Court Judge Mary Ann Murphy found that the Superior Court had personal jurisdiction over Grande on the grounds that there was reason to believe that Grande was an alter ego of MTC. Berry Decl., Ex. 14. Trial in the Superior Court Action is currently set for November 29, 2010. Opp'n at 2.

**B. The Instant Case**

The gravamen of plaintiffs' complaint in the instant action is that defendants have undertaken a series of wrongful acts designed to render Grande incapable of satisfying any judgment plaintiffs might obtain against Grande in the Superior Court Action. Complaint ¶ 1. Grande is a Bermuda corporation, whose principal place of business is in Hong Kong. Declaration of Law Kwok Fai Paul ¶ 2. Plaintiffs allege that Ho exercises complete control over Grande, serving as Grande's chairman and controlling shareholder. Complaint ¶ 29; Berry Decl., Ex. 1. Plaintiffs allege that Ho owns a majority of Grande's shares through a complex web of companies incorporated in the British Virgin Islands ("BVI") that ultimately trace back to Ho or HFTL.<sup>3</sup> Complaint ¶ 29; Berry Decl., Ex. 2.

Plaintiffs allege that after they filed the Superior Court Action against Grande, and with greater haste after Judge Murphy ruled that the Superior Court could exercise personal jurisdiction over Grande in California, defendants engaged in a scheme to misappropriate Grande's cash and other assets. Complaint ¶ 37. First, plaintiffs allege that in 2007, Grande began transferring its assets to Lafe, a company in which Grande owned greater than a fifty percent interest.<sup>4</sup> Complaint ¶¶ 37, 72–73; Berry Decl., Exs. 26–28. Specifically, plaintiffs

allege that Grande sold its building in Hong Kong to Lafe, and that Grande transferred its property and management companies to Lafe. Complaint ¶¶ 37, 72. Second, plaintiffs allege that in January 2008, Grande distributed its entire shareholding in Lafe, then valued in excess of \$90 million, to Grande's shareholders as a dividend *in specie*. Complaint ¶¶ 37, 72; Berry Decl., Exs. 21, ¶¶ 58(ii), 31 and 32. Plaintiffs allege that Barrican received title to approximately seventy percent of Grande's Lafe shares, which it then transferred to Clarendon.<sup>5</sup> Berry Decl., Ex. 33. Plaintiffs allege that the net result of Grande's distribution of its Lafe shares was that Ho, HFTL, GIHL, and Clarendon ended up with majority control of Lafe, and Grande had no further ownership interest in Lafe. Complaint ¶¶ 37, 72. Third, plaintiffs allege that Grande entered into a number of other transactions designed to transfer its tangible assets for little or no value. Complaint ¶¶ 37, 72; Berry Decl., Exs. 34, 21 ¶¶ 58(iii)-(v). Plaintiffs allege that defendants, at Ho's direction, engaged in this conduct in order to shield Grande's assets, at least in part, from any potential adverse judgment in the Superior Court Action. *See, e.g.*, Complaint ¶¶ 69, 78.

\*3 Plaintiffs bring the instant motion to dismiss on the grounds that the Court lacks personal jurisdiction over defendants because none of them have sufficient contacts in the United States or California to support personal jurisdiction. Mot. at 2.

**III. LEGAL STANDARD**

California's long-arm jurisdictional statute is coextensive with federal due process requirements, so that the jurisdictional analysis under state law and federal due process are the same. *Cal.Civ.Proc.Code* § 410.10; *Roth v. Garcia Marquez*, 942 F.2d 617, 620 (9th Cir.1991). In order for a court to exercise personal jurisdiction over a nonresident defendant, that defendant must have "minimum contacts" with the forum state so that the exercise of jurisdiction "does not offend traditional notions of fair play and substantial justice." *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). Depending on the nature of the contacts between the defendant and the forum state, personal jurisdiction is characterized as either general or specific. A court has general jurisdiction over a nonresident defendant when that defendant's activities within the forum state are "substantial" or "continuous and systematic," even if the cause of action is "unrelated to the defendant's forum activities." *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 446–47 (1952); *Data Disc, Inc. v. Sys. Tech. Assocs., Inc.*, 557 F.2d 1280, 1287

Kayne v. Ho, Not Reported in F.Supp.2d (2010)

(9th Cir.1977).

The standard for establishing general jurisdiction is “fairly high” and requires that the defendant’s contacts be substantial enough to approximate physical presence. *Bancroft & Masters, Inc. v. Augusta Nat’l Inc.*, 223 F.3d 1082, 1086 (9th Cir.2000). “Factors to be taken into consideration are whether the defendant makes sales, solicits or engages in business in the state, serves the state’s markets, designates an agent for service of process, holds a license, or is incorporated there.” *Id.* (finding no general jurisdiction when the corporation was not registered or licensed to do business in California, paid no taxes, maintained no bank accounts, and targeted no advertising toward California). Occasional sales to residents of the forum state are insufficient to create general jurisdiction. See *Brand v. Menlove Dodge*, 796 F.2d 1070, 1073 (9th Cir.1986).

A court may assert specific jurisdiction over a claim for relief that arises out of a defendant’s forum-related activities. *Rano v. Sipa Press, Inc.*, 987 F.2d 580, 588 (9th Cir.1993). The test for specific personal jurisdiction has three parts:

(1) The defendant must perform an act or consummate a transaction within the forum, purposefully availing himself of the privilege of conducting activities in the forum and invoking the benefits and protections of its laws;

(2) The claim must arise out of or result from the defendant’s forum-related activities; and

(3) Exercise of jurisdiction must be reasonable.

*Id.*; see also *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475–76 (1985). The plaintiff bears the burden of satisfying the first two prongs, and if either of these prongs is not satisfied, personal jurisdiction is not established. *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 802 (9th Cir.2004).

\*4 If the plaintiff establishes the first two prongs regarding purposeful availment and the defendant’s forum-related activities, then it is the defendant’s burden to “present a compelling case” that the third prong, reasonableness, has not been satisfied. *Schwarzenegger*, 374 F.3d at 802 (quoting *Burger King*, 471 U.S. at 477). The third prong requires the Court to balance seven factors: (1) the extent of the defendant’s purposeful availment, (2) the burden on the defendant, (3) conflicts of law between the forum state and the defendant’s state, (4) the forum’s interest in adjudicating the dispute, (5) judicial efficiency, (6) the plaintiff’s interest in convenient and effective relief, and (7) the existence of an

alternative forum. *Roth v. Garcia Marquez*, 942 F.2d 617, 623 (9th Cir.1991).

Where, as here, a court decides a motion to dismiss for lack of personal jurisdiction without an evidentiary hearing, the plaintiff need only make a prima facie showing of jurisdictional facts to withstand the motion to dismiss. *Ballard v. Savage*, 65 F.3d 1495, 1498 (9th Cir.1995); *Doe v. Unocal Corp.*, 27 F.Supp.2d 1174, 1181 (C.D.Cal.1998), *aff’d*, 248 F.3d 915 (9th Cir.2001). Plaintiff’s version of the facts is taken as true for purposes of the motion if not directly controverted, and conflicts between the parties’ affidavits must be resolved in plaintiff’s favor for purposes of deciding whether a prima facie case for personal jurisdiction exists. *AT & T v. Compagnie Bruxelles Lambert*, 94 F.3d 586, 588 (9th Cir.1996); *Unocal*, 27 F.Supp.2d at 1181.

#### IV. DISCUSSION

Defendants argue that the Court does not have general jurisdiction over any of the defendants. Mot. at 7–10. Plaintiffs appear to concede that the Court does not have general jurisdiction over defendants, and instead assert that the Court may exercise specific jurisdiction under the “*Calder-effects*” test. Opp’n at 6.

##### A. Specific Jurisdiction Over Grande, Lafe and Clarendon

###### 1. Purposeful Availment or Direction

“The first prong is satisfied by either purposeful availment or purposeful direction, which, though often clustered together under a shared umbrella, ‘are, in fact, two distinct concepts.’ “ *Brayton Purcell LLP v. Recordon & Recordon*, 606 F.3d 1124, 1128 (9th Cir.2010) (quoting *Pebble Beach Co. v. Caddy*, 453 F.3d 1151, 1155 (9th Cir.2006)). Courts usually invoke the purposeful availment analysis in cases sounding in contract and the purposeful direction analysis in cases sounding in tort. See *Schwarzenegger*, 374 F.3d at 802. In this case, the underlying action sounds in fraud, which is a tort. Thus, purposeful direction is the appropriate analytical framework. See *id.*

The Court evaluates purposeful direction under the

Kayne v. Ho, Not Reported in F.Supp.2d (2010)

three-part “effects” test set forth in *Calder v. Jones*, 465 U.S. 783 (1984). See *Brayton Purcell*, 606 F.3d at 1128; *Schwarzenegger*, 374 F.3d at 802. “Under this test, ‘the defendant allegedly must have (1) committed an intentional act, (2) expressly aimed at the forum state, (3) causing harm that the defendant knows is likely to be suffered in the forum state.’” *Brayton Purcell*, 606 F.3d at 1128 (quoting *Yahoo! Inc. v. La Ligue Contre Le Racisme Et L’Antisemitisme*, 433 F.3d 1199, 1206 (9th Cir.2006) (en banc) (internal quotation marks omitted)). Defendants need not have any physical contacts with the forum. See *Schwarzenegger*, 374 F.3d at 803.

**a. Intentional Act**

\*5 An intentional act, is the “intent to perform an actual, physical act in the real world, rather than an intent to accomplish a result of consequence of that action.” *Brayton Purcell*, 606 F.3d at 1128 (internal quotations and alterations omitted). Defendants argue that plaintiffs fail to show conduct by each defendant constituting an intentional act. Reply at 11 (citing *Calder*, 465 U.S. at 790) (“[e]ach defendant’s contacts with the forum State must be assessed individually.”). Defendants contend that with the exception of Grande, none of the defendants is alleged to have committed any intentional act.<sup>6</sup> *Id.* at 12. Plaintiffs argue that the intentional act prong is satisfied because Grande and the other defendants intentionally transferred Grande’s Lafe shares to Barrican and then to Clarendon, as well as engaged in other transfers of Grande’s assets. Opp’n at 14.

Defendants appear to concede that the intentional act requirement is satisfied for Grande. Indeed, plaintiffs allege that Grande commenced a series of transactions designed to strip itself of its tangible assets which could be used to satisfy a potential judgment in the Superior Court Action. See, e.g., Complaint ¶¶ 37, 45. The Court further concludes that plaintiffs sufficiently allege that Lafe and Clarendon engaged in intentional acts. Plaintiffs allege that Lafe purchased companies from Grande for less than fair value. Complaint ¶ 37. Specifically, plaintiffs allege that Lafe purchased The Grande Properties Limited and Vigers International Properties Pte Ltd., and that Lafe had not previously been involved in the business of owning properties that were not for its own use. Complaint ¶ 72. Plaintiffs further allege that Lafe purchased Grande’s office building in Hong Kong and subsequently became Grande’s landlord. Complaint ¶ 37; Berry Decl., Exs. 27–30. With respect to Clarendon, plaintiffs allege that through a series of suspicious transactions, Clarendon acquired title to approximately

seventy percent of Grande’s Lafe shares.<sup>7</sup> Complaint ¶ 37; Berry Decl., Ex. 33. These are intentional acts.

**b. Expressly Aimed**

The second prong of the “*Calder-effects*” test requires that Grande’s conduct be expressly aimed at the forum. See *Brayton Purcell*, 606 F.3d at 1129. “Something more” than mere foreseeability is required to justify personal jurisdiction over an out-ofstate defendant, and that “something more” means conduct expressly aimed at the jurisdiction. *Id.* This element is satisfied when a defendant is alleged to have engaged in wrongful conduct targeting a plaintiff who the defendant knows to reside in the forum state. See *Bancroft & Masters*, 233 F.3d at 1087.

Defendants argue that plaintiffs have failed to show or present evidence that any alleged conduct was expressly aimed at California or California residents. Mot. at 11; Reply at 14. Defendants argue that plaintiffs complaint centers on transactions by Grande—one the alleged sale of a building in Hong Kong to Lafe, and the other an alleged dividend distribution of Lafe stock held by a Grande subsidiary—that involve solely foreign entities, and were executed entirely outside the United States. Mot. at 11. Defendants further contend that plaintiffs’ allegation that the purpose of these transactions was to render Grande incapable of satisfying a potential judgment is speculative and not based in fact. *Id.* at 11–12.

\*6 Plaintiffs respond that they have alleged, and the circumstantial evidence suggests, that the transactions at issue were specifically targeted at interfering with a prospective California judgment against Grande.<sup>8</sup> Opp’n at 15 (citing *Gutierrez v. Givens*, 1 F.Supp.2d 1077, 1083 (S.D.Cal.1998) (the “*Calder-effects*” test is satisfied where the acts alleged “were deliberate and intentional acts in furtherance of an illegal conspiracy to purposefully defraud 29,000 Californians of a judgment duly awarded by a California state court,” even though “most transactions were committed prior to the entry of judgment in that case.”)). Plaintiffs argue that even if defendants’ motivation for siphoning Grande’s tangible assets was only partially to interfere with the Superior Court Action, and was also partially intended to shield Grande’s assets from liability in another action in Hong Kong, there is no requirement that the alleged conduct be solely aimed at the forum. *Id.* (citing *Nw. Aluminum Co. v. Hydro Aluminum Deutschland GMBH*, No. 02–398–JE, 2003 WL 23571743, at \*4 (D.Or. July 3, 2003) (“[t]hat the alleged conspiracy may have affected markets outside

Kayne v. Ho, Not Reported in F.Supp.2d (2010)

the United States as well does not lessen its effect on the relevant United States forum, or undermine the implication that the conspiracy was ‘expressly aimed’ at United States purchasers of carbon cathode block.”).

The Court finds that plaintiffs allege sufficient facts to establish that Grande’s conduct was specifically targeted at interfering with a prospective California judgment against it in the Superior Court Action.<sup>9</sup> Here, plaintiffs allege facts which go beyond “conclusory assertions” to support their claims.

### c. Foreseeable Harm

Plaintiffs have satisfied two of the three requirements necessary to establish purposeful direction. In order to satisfy the third requirement, plaintiffs must demonstrate that Grande “caused harm that it knew was likely to be suffered in the forum.” *Brayton Purcell*, 606 F.3d at 1131. It is not necessary that the brunt of the harm be suffered in the forum, and the element may be satisfied even if “the bulk of the harm” occurs outside the state. *Yahoo!*, 433 F.3d at 1207. It is true that plaintiffs have not yet obtained a judgment in the Superior Court Action. See Mot. at 12. However, plaintiffs have sustained a serious harm by once again having to pursue a series of shadow corporations in order to collect on a \$35 million final judgment entered nearly five years ago in the Kayne Action. It is also of no consequence that Grande has sufficient listed assets to satisfy a possible judgment against it in the Superior Court Action. See Reply at 14. As plaintiffs point out, according to Grande’s 2009 Annual Report, the vast majority of Grande’s listed assets are intangible assets such as trademarks and goodwill, that compromise plaintiffs ability to collect a prospective judgment in the Superior Court Action. Opp’n at 9; Berry Decl., Exs. 2, 21. Furthermore, if in fact Grande, Lefe and Clarendon engaged in the transactions to frustrate plaintiffs ability to enforce a judgment in the Superior Court Action, clearly they knew that their actions were likely to injure plaintiffs in California.

### 2. Claim Arises Out of Forum–Related Activities

\*7 The Court finds that plaintiffs’ claims arise out of defendants’ forum-related activities. In this case, “the contacts constituting purposeful availment [are] the ones that give rise to the current suit.” *Pyle v. Hatley*, 239 F.Supp.2d 970, 979 (C.D.Cal.2002) (internal quotations

omitted). The Ninth Circuit applies a “but for” test to determine whether a claim arises from forum-related activities. *Metro–Goldwyn–Mayer Studios Inc. v. Gorkster, Ltd.*, 243 F.Supp.2d 1073, 1085 (C.D.Cal.2003). This test asks whether, “but for” a defendant’s contacts with the forum state, would the plaintiff’s claims against the defendant have arisen. *Id.* Here, the “but for” test is satisfied because, but for the dispersal of Grande’s tangible assets through the transactions alleged, there would be no interference with plaintiffs’ prospective judgment in the Superior Court Action.

### 3. Reasonableness

Finally, in order for the Court to exercise specific jurisdiction, the exercise of jurisdiction must be reasonable. *Rano*, 987 F.2d at 588. This third prong requires the Court to balance seven factors: (1) the extent of the defendant’s purposeful availment, (2) the burden on the defendant, (3) conflicts of law between the forum state and the defendant’s state, (4) the forum’s interest in adjudicating the dispute, (5) judicial efficiency, (6) the plaintiff’s interest in convenient and effective relief, and (7) the existence of an alternative forum. *Roth*, 942 F.2d at 623. Because plaintiffs have established purposeful direction and forum-related activities, it is defendants’ burden to “present a compelling case” that the third prong, reasonableness, has not been satisfied. See *Schwarzenegger*, 374 F.3d at 802 (quoting *Burger King*, 471 U.S. at 477).

Defendants assert that the Court’s exercise of jurisdiction over them would not be reasonable. Mot. at 13–15. Defendants argue that the first two factors weigh in their favor because none of the defendants advertise or do business in California, and all of the transactions at issue involve foreign entities and were executed entirely outside the United States. *Id.* at 13–14. Defendants argue that because the foreign defendants have absolutely no physical contact with the United States, it would place an enormous burden on them to defend a lawsuit here. *Id.* at 14 (citing *Amoco Egypt Oil Co. v. Leonis Navigation Co.*, 1 F.3d 848, 851–52 (9th Cir.1993); *Core–Vent Corp. v. Nobel Indus. AB*, 11 F.3d 1482, 1488–90 (9th Cir.1993)).

Defendants argue that the third and fourth factors also weigh against a finding of reasonableness because California has little interest in adjudicating a dispute regarding transactions that allegedly took place between solely foreign entities. *Id.* Rather, defendants argue that the countries in which defendants are incorporated and

Kayne v. Ho, Not Reported in F.Supp.2d (2010)

reside have a stronger interest in determining whether its citizens acted properly. *Id.*

\*8 Finally, defendants argue that the final three factors support a finding of unreasonableness because there is no reason to believe that plaintiffs' claims could not be asserted, and adjudicated efficiently, in Hong Kong or Singapore. *Id.* Defendants argue that most of the witnesses and documentary evidence in this case are likely to be outside of California and the United States. *Id.* at 14–15. According to defendants, any convenience to plaintiffs in trying this action in California is offset by the fact that even if plaintiffs were to obtain a judgment against defendants in this action, they would be required to collect the judgment from entities outside the United States. *Id.* at 15.

Plaintiffs respond that the exercise of personal jurisdiction over defendants in California is reasonable. Opp'n at 16–18. Plaintiffs contend that the first factor weighs in their favor because it is essentially coextensive with purposeful direction. *Id.* at 17 (citing *Brainerd v. Governors of the University of Alberta*, 873 F.2d 1257, 1260 (9th Cir.1989)). Plaintiffs argue that the second factor is either neutral or weighs in their favor because Ho, an individual defendant and the majority shareholder (either actually or beneficially) of all defendants, is fluent in English, which is a mitigating factor. *Id.* at 17 (citing *Berry Decl.* ¶ 38; *Dole Food Co., Inc. v. Watts*, 303 F.3d 1104, 1115 (9th Cir.2002)). Moreover, plaintiffs argue that the burden on defendants of litigating in California is minimized by the fact that Grande is already participating in related litigation in California, and is represented by the same law firm in this action that is representing defendants in the Superior Court Action. *Id.*

Plaintiffs further respond that the third and fourth factors support a finding of reasonableness because defendants have a series of connections to the United States, and because California has a strong interest in providing a forum for its residents and citizens who are tortiously injured. *Id.* at 17–18 (citing *Dole*, 303 F.3d at 1115–16). Plaintiffs argue that the remaining factors also weigh in their favor because, in light of the fact that this action relates to the ongoing Superior Court Action, California is the most efficient forum for judicial resolution of this controversy. *Id.* at 18. Plaintiffs assert that if California is not the proper forum, plaintiffs may be forced to litigate in a multitude of foreign jurisdictions because all defendants are not necessarily subject to jurisdiction in any one foreign forum. *Id.*

On balance, the Court concludes that these factors weigh in favor of exercising personal jurisdiction in this case. As

discussed *supra*, Grande, Lafe and Clarendon purposefully directed their activities toward this forum by allegedly engaging in a series of transactions designed to prevent California plaintiffs from recovering a prospective judgment in the Superior Court Action. Moreover, while it may be more convenient for defendants to litigate in certain foreign jurisdictions, the burden on defendants to maintain this litigation in California is not any greater—and most likely substantially less—than plaintiffs' burden in litigating in Singapore or Hong Kong. The fact that the transactions at issue were consummated overseas is not dispositive. California has a strong interest in protecting its citizens from fraud and ensuring that its citizens can collect enforceable judgments. Finally, judicial efficiency is best served by California's exercise of jurisdiction in this action because it is directly related to the Superior Court Action, which is also pending in California. Accordingly, the Court finds that jurisdiction over Grande, Lafe and Clarendon is reasonable.

\*9 Because the required elements have been met, the Court finds that it has personal jurisdiction over Grande, Lafe and Clarendon.<sup>10</sup>

**B. Jurisdiction Over Barrican, Airwave, Accolade, GIHL, HFTL, and Ho as Alter Egos of Grande**

Plaintiffs contend that Grande's contacts may be attributed to Barrican, Airwave, Accolade, GIHL, HFTL, and Ho as alter egos of Grande. Opp'n at 6. The Court has already concluded that Grande is subject to the Court's exercise of personal jurisdiction. It follows that if Barrican, Airwave, Accolade, GIHL, HFTL, and Ho are alter egos of Grande, then those entities are also subject to the Court's exercise of personal jurisdiction.

As a general rule, a parent-subsidiary relationship is not enough to attribute the contacts of the subsidiary to the parent for jurisdictional purposes. *Unocal*, 248 F.3d at 925. However, "a subsidiary's contacts may be imputed to the parent where the subsidiary is the parent's alter ego, or where the subsidiary acts as the general agent of the parent." *Harris Rutsky & Co. Ins. Servs., Inc. v. Bell & Clements Ltd.*, 328 F.3d 1122, 1134 (9th Cir.2003). Thus, where a corporation is the alter ego of an individual defendant, the Court may "pierce the corporate veil" jurisdictionally and attribute contacts accordingly. See William W. Schwarzer, A. Wallace Tashima & James M. Wagstaffe, California Practice Guide: Federal Civil Procedure Before Trial § 3:86, at 3–34.1 (The Rutter Group 2010). To establish alter ego liability, plaintiffs

Kayne v. Ho, Not Reported in F.Supp.2d (2010)

must make out a prima facie case “(1) that there is such unity of interest and ownership that the separate personalities [of the two entities] no longer exist and (2) that failure to disregard [their separate identities] would result in fraud or injustice.” *Unocal*, 248 F.3d at 926 (alterations in original) (quoting *AT & T*, 94 F.3d at 591).

Plaintiffs contend that GIHL, Barrican, Airwave, Accolade and HFTL are the alter egos of Grande because they are “instrumentalities through which Ho has acted as the alter ego of Grande.” Complaint ¶ 69. In particular, plaintiffs assert the following facts to support that there is a unity of interest among the corporate entities: Barrican owns more than sixty percent of Grande’s stock, Berry Decl., Ex. 1; in 2008, all of Barrican’s stock was transferred from GIHL to Airwave, Berry Decl., Exs. 1, 2; both GIHL and Airwave were owned by HFTL during the pertinent period, Berry Decl., Exs. 1, 20, 56; Accolade is the sole shareholder of HFTL, and the nominal trustee of the Ho Family Trust (of which Ho is the beneficiary and which holds Ho’s assets), Opp’n at 13; Ho has been director of GIHL, HFTL, Barrican and Airwave, Berry Decl., Exs. 1, 17, 19, 20; and Ho is Grande’s chairman and controlling shareholder, Berry Decl., Exs. 1, 16. Thus, plaintiffs assert that through these alter egos, Ho transferred Grande’s liquid assets, including Lafe stock and other valuable assets, to Clarendon, another entity of which Ho is the sole beneficial owner. Opp’n at 13; Berry Decl., Exs. 3, 31–33. Plaintiffs contend that the inequitable results prong is fulfilled because, as a result of the fraudulent conduct alleged, Grande lacks the tangible assets to satisfy any potential judgment in the Superior Court Action. Opp’n at 7–10, 14 (delineating the network of connections between the various corporate entities, and how those connections ultimately trace back to Ho).

\*10 Defendants contend that plaintiffs’ alter ego argument contains only conclusory allegations and lacks evidentiary support. Mot. at 16; Reply at 7. Defendants argue that the circumstances plaintiffs allege “show nothing more than instances of common ownership, management, shared employees and typical relationships of corporate affiliates.” Reply at 9. Defendants further assert that the inequitable results prong is not satisfied because Grande still possesses net assets worth many times the amount of plaintiffs claim against Grande in the Superior Court Action. *Id.* at 10.

The Court finds that plaintiffs allege sufficient facts to support a finding that Barrican, Airwave, Accolade, GIHL, HFTL, and Ho are Grande’s alter egos. As a preliminary matter, the Court finds that plaintiffs allege sufficient facts to assert personal jurisdiction over Ho as an alter ego of Grande. The “fiduciary shield” doctrine

generally holds that “a person’s mere association with a corporation that causes injury in the forum state is not sufficient in itself to permit that forum to assert jurisdiction over the person.” *Ind. Plumbing Supply, Inc. v. Standard of Lynn, Inc.*, 880 F.Supp. 743, 750 (C.D.Cal.1995). However, corporate agents may be subject to the Court’s personal jurisdiction “where the defendant was the ‘guiding spirit’ behind the wrongful conduct ... or the ‘central figure’ in the challenged corporate activity .” *Id.* (quoting *Davis v. Metro Prods., Inc.*, 885 F.2d 515, 524 (9th Cir.1989) (alterations in original)). Here, plaintiffs allege that Ho transferred Grande’s assets through a series of alter egos in an effort to avoid satisfying a prospective judgment in the Superior Court Action. In support of their theory, plaintiffs allege that Ho exercises nearly unitary control over the various corporate entities, that Ho ultimately stands to gain from the suspicious transfer of Grande’s assets, that the corporate entities share resources and office space, and that there is no legitimate business justification for the transfer of Grande’s assets. Thus, plaintiffs sufficiently allege that Ho was the guiding spirit behind the actions that give rise to their claims, and that those activities are intended to have an effect in California. *See, e.g.* , Complaint ¶¶ 48–51, 56–69.

For the same reasons, the Court finds that plaintiffs allege sufficient facts to support their theory that a unity of interest exists such that the separate personalities of the corporations at issue no longer exist. *Cf. Rae Sys., Inc. v. TSA Sys., Ltd.*, No. C 04–2030 FMS, 2005 WL 1513124, at \*4 (N.D. Cal. June 24, 2005) (finding unity of interest under comparable circumstances). Furthermore, plaintiffs sufficiently allege intent on the part of defendants to defraud plaintiffs by concealing and shielding Grande’s assets from a potential judgment in the Superior Court Action by misusing the entities’ corporate structure. The Court finds that under these circumstances, a failure to disregard the separate identities of Barrican, Airwave, Accolade, GIHL, and HFTL may result in fraud or injustice. *See Oddenino & Gaule v. United Fin. Group*, No. CV–96–07345–RSWL, 1999 WL 1011910, at \*2 (9th Cir. Nov. 4, 1999) (“the purpose of the alter ego doctrine is to afford such creditors protection where some conduct amounting to bad faith makes it inequitable for the equitable owner of a corporation to hide behind its corporate veil.”) (internal quotations omitted).

\*11 Accordingly, the Court concludes that it has personal jurisdiction over Barrican, Airwave, Accolade, GIHL, HFTL, and Ho as potential alter egos of Grande.

Kayne v. Ho, Not Reported in F.Supp.2d (2010)

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## V. CONCLUSION

In accordance with the foregoing, the Court hereby DENIES defendants' motion to dismiss for lack of personal jurisdiction.

### All Citations

Not Reported in F.Supp.2d, 2010 WL 4794824

IT IS SO ORDERED.

### Footnotes

- 1 Plaintiffs filed their initial opposition and evidentiary objections on December 23, 2009.
- 2 The Court overrules Defendants' Evidentiary Objections to the Declaration of David F. Berry Nos. 1, 2, 6, 7, 11, 16, 18, 19, 25, 29. The Court overrules Plaintiffs' Evidentiary Objections to the Declaration of Christopher Ho Nos. 1, 2, 3, 4, 8, 9, 10, 11, 12, 13, 14. Because the Court does not rely on the evidence to which the remainder of defendants' or plaintiffs' objections are addressed, the Court denies those objections as moot.
- 3 Plaintiffs allege that Barrican, incorporated in the BVI, is an investment holding company whose sole function is to own Ho's Grande stock. Complaint ¶ 32; Declaration of Eleanor Crosthwaite on Behalf of Barrican ¶¶ 2–3; Berry Decl., Ex. 2. Until September 2008, Barrican was a wholly owned subsidiary of GIHL, then a BVI company that redomiciled in Luxembourg in 2009. Berry Decl., Ex. 2. In September 2008, GIHL apparently transferred its interest in Barrican to Airwave, another investment holding company incorporated in the BVI. Declaration of Eleanor Crosthwaite on Behalf of Airwave ¶¶ 2–3. Plaintiffs allege that during the relevant time, Airwave and GIHL were both wholly owned by HFTL. Berry Decl., Exs. 1, 20, 56. HFTL is an investment holding company whose shares are wholly owned by Accolade, another company incorporated in the BVI. Declaration of Eleanor Crosthwaite on Behalf of Accolade ("Accolade Decl.") ¶ 3. Accolade is owned by the Ho Family Trust (not to be confused with HFTL), of which Ho has been described as the "beneficiary" and "sole beneficiary." Accolade Decl. ¶ 3; Berry Decl., Exs. 18, 20. Thus, plaintiffs contend that Airwave and Barrican have no other purpose but to remove Ho and HFTL from direct ownership of Grande's stock. Opp'n at 2.
- 4 Lafe is a public company organized under the laws of Bermuda, whose shares are traded on the Singapore stock exchange. Declaration of Adrian Ma ¶ 2. Ho is the Chairman of Lafe. Berry Decl., Ex. 3.
- 5 Clarendon is an investment company incorporated in the BVI, where it maintains its only place of business. Declaration of Eleanor Crosthwaite on Behalf of Clarendon ("Clarendon Decl.") ¶ 2. Clarendon is a wholly owned subsidiary of GIHL. Clarendon Decl. ¶ 3.
- 6 Defendants are correct that generally the Court must examine each individual defendants' connection with the forum state independently to determine jurisdiction. *See Calder*, 465 U.S. at 790. As set forth *infra*, however, the Court concludes that plaintiffs allege sufficient facts to support a finding that Barrican, Airwave, Accolade, GIHL, HFTL, and Ho are Grande's alter egos.
- 7 Plaintiffs allege that in January 2008, Grande distributed its entire shareholding in Lafe to Grande's shareholders as a dividend *in specie*. Complaint ¶ 37. Plaintiffs aver that as a result, Barrican received title to approximately seventy percent of Grande's Lafe shares, which it then transferred to Clarendon. Berry Decl., Ex. 33. Plaintiffs allege that these transactions left Ho with a majority beneficial interest in Lafe because Clarendon is a wholly-owned subsidiary of GIHL and because Ho controls Clarendon. Complaint ¶¶ 35, 63.
- 8 Plaintiffs allege that the transfer of Grande's assets to Lafe and the subsequent distribution of Grande's Lafe shares to Clarendon was done to intentionally deprive plaintiffs, creditors of Grande in California, of valuable assets. Complaint ¶¶ 73, 74.
- 9 The Court observes that defendants offer legitimate business explanations for the transactions at issue. *See* Declaration of Christopher Ho Wing On ¶¶ 3–9. At this stage, however, the Court does not pass upon the propriety of defendants' actions. In deciding whether a prima facie case for personal jurisdiction exists, the Court resolves conflicts between the parties' affidavits in plaintiffs' favor. *See Brayton Purcell*, 606 F.3d at 1127 (in the absence of an evidentiary hearing, "uncontroverted allegations in plaintiff's complaint must be taken as true, and conflicts between the facts contained in the parties' affidavits must be resolved in plaintiff's favor.") (internal quotations and alterations omitted).
- 10 The parties also dispute whether the Court has specific jurisdiction over Grande on the theory that the instant action is a continuation of the Superior Court Action. Plaintiffs assert that given Judge Murphy's finding of personal jurisdiction over Grande, this Court has jurisdiction over Grande because the instant action arises in order to protect plaintiffs from Grande's actions that are

**Kayne v. Ho, Not Reported in F.Supp.2d (2010)**

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allegedly aimed at interfering with a prospective judgment in the Superior Court Action. Opp'n at 7, 11–12. Defendants reply that Judge Murphy's finding of personal jurisdiction over Grande in the Superior Court Action is not an independent basis for this Court's exercise of personal jurisdiction over Grande because plaintiffs allege entirely different grounds for liability against Grande than the grounds alleged in the Superior Court Action. Reply at 5. Because the Court finds that it has personal jurisdiction over Grande under the "*Calder-effects*" test, the Court declines to reach this dispute on the present record.

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## Exhibit 14

Kayne v. Ho, Not Reported in Fed. Supp. (2013)

**H** KeyCite history available

2013 WL 12120081

Only the Westlaw citation is currently available.  
United States District Court, C.D. California.

Fred KAYNE, et al.

v.

Christopher HO, et al.

Case No. LA CV09-06816 JAK (CWx)

Filed 11/04/2013

#### Attorneys and Law Firms

Charles Avrith, David F. Berry, Lawrence H. Nagler,  
Nagler and Associates, Los Angeles, CA, for Fred Kayne,  
et al.

**Proceedings: (IN CHAMBERS) ORDER RE  
MOTION FOR JUDGMENT ON THE PLEADINGS  
(DKT. 647)**

JOHN A. KRONSTADT, UNITED STATES DISTRICT  
JUDGE

#### I. Introduction

\*1 A group of Plaintiffs brought this action against Christopher Ho and various associated corporations and individuals (“Defendants”) advancing three causes of action: (i) Alter Ego Relief; (ii) Fraud in Connection with a Bankruptcy and Laundering of Monetary Instruments in Violation of 18 U.S.C. §§ 152 and 1956; and (iii) Intentional Interference with Prospective Economic Advantage. The operative complaint is the Third Amended Complaint (“TAC”). Dkt. 362. The Court has addressed this matter in detail in numerous prior orders. Therefore, this Order does not contain a detailed description of all the claims that have been advanced by Plaintiffs, the responses to them by one or more of the

Defendants, the procedural history of this matter, or the prior substantive rulings that are not germane to the issues addressed in this Order.

In December 2005, Plaintiffs obtained a default judgment of more than \$30 Million against MTC Electronic Technologies, Co. (“MTC”). Subsequently, in December 2006, Plaintiffs brought a separate action against Grande Holdings Limited (“Grande”) in the Los Angeles County Superior Court. There, Plaintiffs sought to impose alter ego liability on Grande with respect to the judgment entered against MTC. In that action, Plaintiffs alleged that Grande had siphoned assets from MTC, thereby making MTC judgment-proof. In June 2011, Plaintiffs obtained a judgment against Grande in the amount of \$47,598,589.60 (the “Grande Judgment”). Dkt. 362-1, Exh. A.

Plaintiffs filed this action in August 2009, while the Grande action was still pending, seeking to impose on Defendants liability for the judgment against MTC, as the alter egos of Grande. Plaintiffs contend that Defendants have stripped Grande of its assets and that, as a result, it too has become judgment-proof. In the TAC, which was filed on September 17, 2012, after the Grande Judgment was entered, Plaintiffs seek to hold Defendants liable for that judgment, which is now valued at \$47,598,389.60, plus interest, accruing at the annual rate of 10%, beginning June 14, 2011. Dkt. 362, p. 50.

On May 9, 2013, the Court dismissed Plaintiffs’ second cause of action. Dkt. 436. On August 28, 2013, the Court granted defendants’ Motion for Summary Judgment as to the third cause of action. Dkt. 635. On September 9, 2013, Ho filed a Motion for Judgment on the Pleadings (“the Motion”) with respect to the remaining cause of action for alter ego relief. Dkt. 647. The Court heard argument on the Motion on October 17, 2013 and took the matter under submission. For the reasons set forth in this Order, the Motion is DENIED.

#### II. Analysis

##### A. Legal Standard

“After the pleadings are closed—but early enough not to delay trial—a party may move for judgment on the pleadings.” Fed. R. Civ. P. 12(c). “A judgment on the pleadings is properly granted when, taking all the allegations in the non-moving party’s pleadings as true,

**Kayne v. Ho, Not Reported in Fed. Supp. (2013)**

the moving party is entitled to judgment as a matter of law.” *Fajardo v. Cnty. of Los Angeles*, 179 F.3d 698, 699 (9th Cir. 1999). Thus, a motion for judgment on the pleadings is “functionally identical” to a motion to dismiss and is governed by essentially the same standard as a motion brought pursuant to Rule 12(b)(6). *Dworkin v. Hustler Magazine Inc.*, 867 F.2d 1188, 1192 (9th Cir. 1989).

**B. Application**

1. Timeliness of the Motion

a. Failure to Seek Modification of Scheduling Order

\*2 On May 15, 2013, the Court issued an Order setting July 22, 2013 as the “Last Date To Hear Motions.” Dkt. 437. Ho filed the Motion on September 9, 2013. Dkt. 647. Fed. R. Civ. P. 16(b) states that scheduling orders “may be modified only for good cause and with the judge’s consent.” Ho did not obtain the Court’s consent to modify the scheduling order prior to filing the Motion. The Ninth Circuit has held that an untimely motion may be denied on that basis alone. *Johnson v. Mammoth Recreations*, 975 F.2d 604 (9th Cir. 1992). In *Johnson*, the Ninth Circuit held that, although other circuits have considered untimely motions as motions “to amend the scheduling order ... [w]e have suggested the contrary.... We see no reason to deviate from that approach here.” 975 F.2d 604 at 608-09 (citing *Jauregui v. City of Glendale*, 852 F.2d 1128, 1133-34 (9th Cir. 1988) (party bound by facts stipulated to in pretrial order when party failed to seek a modification of order from the district court); *U.S. Dominator, Inc. v. Factory Ship Robert E. Resoff*, 768 F.2d 1099, 1104 (9th Cir. 1985) (court may deny as untimely a motion filed after the scheduling order cut-off date where no request to modify the order has been made)). Because Ho failed to seek leave to amend the scheduling order, the Motion may be denied for this procedural deficiency. Nevertheless, for the reasons discussed below, “the result would not change if [Ho’s] motion ... were treated as a *de facto* motion to amend the scheduling order.” *Id.* at 608-09.

b. No Good Cause to Modify Scheduling Order

“Rule 16(b)’s ‘good cause’ standard primarily considers the diligence of the party seeking the amendment.” *Johnson*, 975 F.2d at 609. Thus, “[t]he pretrial schedule may be modified ‘if it cannot reasonably be met despite the diligence of the party seeking the extension.’ If the party seeking the modification ‘was not diligent, the inquiry should end’ and the motion to modify should not be granted.” *Zivkovic v. S. Cal. Edison Co.*, 302 F.3d 1080, 1087 (9th Cir. 2002) (quoting *Johnson*, 975 F.2d at 609).

Ho contends that he could not have brought the Motion prior to the deadline for hearing motions because the legal bases for the Motion only arose after the deadline had passed. The Motion advances two arguments: (i) Plaintiffs lack standing to pursue their alter ego claim because the claim can exclusively be brought by Grande’s provisional liquidator; and (ii) Plaintiffs’ alter ego claim does not provide a basis for an award of damages. Dkt. 647.

Ho contends that the standing issue only became apparent on August 8, 2013, when Plaintiffs filed a “tardy revelation” that their actual claim in this matter is “that Grande ... suffered injuries when certain assets were purportedly ‘stripped’ or ‘fraudulently conveyed’ away.” Dkt. 695, p. 3-4. Such an allegation, Ho contends, can exclusively be brought by Grande’s provisional liquidator. *Id.* This argument is not persuasive.

The nature of Plaintiffs’ alter ego claim has been clear since at least September 17, 2012, when the TAC was filed. Dkt. 362. As discussed in further detail below, Plaintiffs alter ego claim is not, as Ho contends, a “fraudulent conveyance alter ego claim.” Dkt. 769, p. 1. Moreover, Plaintiffs always have alleged, as part of their alter ego claim, that Defendants stripped assets from Grande in order to avoid the payment of the Grande Judgment. Dkt. 362, p. 8 (“E. The Other Named Defendants And Their Scheme To Misappropriate Grande’s Cash And Other Assets And Frustrate Collection Of The Grande Judgment”); *Id.* at 30 (Defendants “Cause[d] Grande To Have A Lack Of Available Assets To Satisfy The Grande Judgment, And Divert[ed] Assets Owned And Controlled By Ho Out Of North America.”). Plaintiffs’ August 8, 2013 filing did not alter the substance of their alter ego claim. Indeed, the filing was not related to the alter ego claim. It was made in connection with Defendants’ Motions for Summary Judgment as to Plaintiffs’ third cause of action, for intentional interference with prospective economic advantage. *See* Dkt. 627, p. 1. The filing cited a provision of the California Penal Code for the proposition that Defendants’ alleged conduct “constituted an ‘independently wrongful act,’ ” which is an element of an intentional interference claim. Dkt. 627, p. 2. For these

**Kayne v. Ho, Not Reported in Fed. Supp. (2013)**

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reasons, Ho has not shown good cause to amend the scheduling order to permit his argument that Plaintiffs lack standing to pursue their alter ego claim.

\*3 Ho contends that the second basis for the Motion—the availability of damages as a remedy—only became ripe on August 28, 2013, when the Court granted summary judgment as to the third cause of action. *Id.* at 2-3. He contends that “Plaintiffs’ request for damages was not vulnerable to challenge so long as Plaintiffs had a cause of action for which damages are a proper remedy.” *Id.* at 2. Again, Ho’s position is unpersuasive.

If Ho is correct that damages are not recoverable for an alter ego claim, then he could have made that argument as early as September 17, 2012, when the TAC was filed. The TAC separately states Plaintiffs’ prayers for relief for each of their causes of action. Dkt. 362, pp. 50-51. With respect to the first cause of action, which is for alter ego relief, the TAC requests only “[d]amages in the amount of \$47,598,389.60, plus interest at the rate of 10% beginning June 14, 2011.” *Id.* at 50. If, as Ho contends, those damages are not available for an alter ego claim, then Plaintiffs’ first cause of action was deficient when it was filed. As the Ninth Circuit has stated, “[i]n these days of heavy caseloads, trial courts in both the federal and state systems routinely set schedules and establish deadlines to foster the efficient treatment and resolution of cases. Those efforts will be successful only if the deadlines are taken seriously by the parties, and the best way to encourage that is to enforce the deadlines. Parties must understand that they will pay a price for failure to comply strictly with scheduling and other orders.” *Wong v. Regents of Univ. of Cal.*, 410 F.3d 1052, 1060 (9th Cir. 2004). Again, Ho has not shown good cause for his failure to comply with the Court’s scheduling order.

c. Whether the Merits of the Motion Should Be Addressed

Notwithstanding the untimeliness of the Motion, there is no showing that Plaintiffs would suffer prejudice were the Court to consider the Motion on the merits. Taking this approach will serve the interests of efficiency and judicial economy more than proceeding to trial, only to have the same arguments advanced in a motion for involuntary dismissal brought pursuant to *Fed. R. Civ. P. 41(b)*. Therefore, the merits of the Motion are addressed.

2. The Motion Fails on the Merits

a. Plaintiffs’ Ability to Pursue an Alter Ego Claim for Damages

Ho contends that damages are not an available remedy for an alter ego claim. Dkt. 647, p. 4. As a result, he contends, because the second and third causes of action were dismissed, the TAC no longer contains “a substantive claim entitling” Plaintiffs to damages, and should be dismissed. *Id.* at 4. However, Plaintiffs allege that their alter ego claim gives rise not to “separate primary liability ... but [to] liability identical with that of the ... judgment debtor.” Dkt. 770, p. 3.

California Courts of Appeal have held that a party who has obtained a judgment against a corporation “may bring a wholly separate action against the individual to enforce a prior judgment against the corporation on an alter ego theory.” *Leek v. Cooper*, 194 Cal. App.4th 399, 419 (2011) (citing *Brenelli Amedeo, S.P.A. v. Bakara Furniture, Inc.*, 29 Cal. App.4th 1828, 1840 (1994)). See also *Daewoo Electronics America, Inc. v. Opta Corp.*, No. 13-1247, 2013 WL 3877596, at \*4 (N.D. Cal., July 25, 2013) (“Opta argues that an alter ego claim cannot stand on its own unless linked to an actual, substantive cause of action. However, California previously established that ‘a party may bring a wholly separate action against an individual shareholder on an alter ego theory to enforce a prior judgment against the corporation.’”) (citing *Brenelli Amedeo*, 29 Cal. App.4th at 1840); *Misik v. D’Arco*, 197 Cal. App.4th 1065, 1072, n.1 (2011) (holding that a plaintiff may “bring a new complaint in a separate action ... to enforce a prior judgment against [a defendant] on an alter ego theory”).

\*4 Ho contends that the appropriate means for Plaintiffs to enforce the Grande Judgment against Defendants is to seek to amend it to add additional judgment debtors pursuant to *Cal. Code Civ. P. 187*. Dkt. 695, p. 4. However, the court in *Leek* expressly declined to hold that amending a judgment is the exclusive avenue to pursue alter ego relief to enforce a judgment. Thus, it noted that parties could, “alternatively,” bring a wholly separate action. 194 Cal. App.4th at 419. For these reasons, Plaintiffs are not precluded from proceeding on their claim to enforce the prior judgment against Grande through this action.

b. Plaintiffs’ Standing to Pursue Their Alter Ego Claim

i. Law Governing the Scope of the Liquidator’s Authority

Kayne v. Ho, Not Reported in Fed. Supp. (2013)

Ho contends that Plaintiffs' alter ego claim is "premised" on "purportedly fraudulent or preferential transfers" by Defendants from Grande, and is, therefore, "one that only a bankruptcy trustee has the standing to bring" under *Ahcom, Ltd. v. Smeding*, 623 F.3d 1248, 1250 (9th Cir. 2010). Dkt. 647, p. 2. Plaintiffs contend that, although "manipulation of the judgment debtor's assets is always part of an alter ego case," they "are not asserting fraudulent conveyance, conversion, or theft." Dkt. 680, pp. 2-3 (emphasis in original). Rather, Plaintiffs contend that they are asserting alter ego liability under a "single enterprise theory," and the fact "[t]hat the way in which Grande's assets were manipulated involved transfers to some defendants in no way changes this." *Id.* at 3.

Although the parties dispute the proper characterization of Plaintiffs' claim under the tests set forth in *Ahcom*, they agree that the decision applies. Dkt. 647, pp. 2-3; Dkt. 680, pp. 2-3. However, the debtor corporation in *Ahcom* had filed for bankruptcy under Chapter 11 of the United States Bankruptcy Code. 623 F.3d at 1250. As a result, the Ninth Circuit applied the Bankruptcy Code to determine the proper scope of the trustee's authority to bring claims on behalf of the debtor corporation. *Id.* In this case, Grande is the subject of provisional liquidation proceedings in Hong Kong. Grande's provisional liquidator is not a Chapter 11 bankruptcy trustee.<sup>1</sup> Therefore, on October 22, 2013, the Court issued an Order directing the parties to submit supplemental briefing addressing, *inter alia*, whether the Bankruptcy Code sections on which the analysis in *Ahcom* is based, specifically 11 U.S.C. §§ 541, 544, and 547, apply here. Dkt. 743.

Defendants responded that Hong Kong law governs the question "whether Plaintiffs' alter ego claim belongs to the trustee or the creditor." Dkt. 769, p. 3. Plaintiffs argued that California law governs the matter. Dkt. 770, p. 4. Defendants did not provide sufficient evidence either to show that Hong Kong law governs the scope of the liquidator's authority, or to establish the outcome under an application of Hong Kong law. Thus, they did not, for example, present expert testimony as to Hong Kong law either on liquidation processes, or on substantive matters. However, the parties agreed on this issue: Hong Kong law is functionally identical to U.S. Bankruptcy law with respect to the scope of the liquidator's authority to assert the alter ego claim. Dkt. 769, p. 3; Dkt. 770, pp. 8-9. Because the parties agree that the result would be the same whether the United States Bankruptcy Code or Hong Kong law is applied, the Court proceeds on this basis, and accepts for purposes of this Motion that the scope of the authority of the liquidator in Hong Kong is governed by the same principles that apply under the United States Bankruptcy Code. Under that Code, property of the bankruptcy estate includes "all legal or

equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541. When a legal claim is determined to be property of the bankruptcy estate, the bankruptcy trustee, or provisional liquidator's standing to bring such a claim "is exclusive and divests all creditors of the power to bring the claim." *Ahcom*, 623 F.3d at 1250.<sup>2</sup>

ii. Law Governing the Determination of Ownership of the Alter Ego Claim

\*5 The question whether a legal claim is property of the debtor's estate or individual creditors is determined according to state law. *Ahcom*, 623 F.3d at 1250; *In re Artimm, S.r.L.*, 335 B.R. 149, 163 (Bankr. C.D. Cal. 2005) ("Property interests have an independent legal source, antecedent to the distributive rules of bankruptcy administration, that determines, in the first instance, the interests of claimant parties in particular property.... Property interests are generally determined by the local law where the property is located, not by the law of the forum where the insolvency case is filed."). The Ninth Circuit in *Ahcom* applied California law, noting that "[t]he parties agree that California law applies because [the debtor corporation] is a California corporation." 623 F.3d at 1250. Defendants contend, based on the reasoning in *Ahcom*, that Hong Kong law governs ownership of the alter ego claim, because "Grande is registered in Hong Kong ... and has its principal place of business in Hong Kong." Dkt. 769, p. 4 (internal citations omitted). Plaintiffs contend that California choice of law rules dictate that California law should apply. Dkt. 770, p. 5.

"In federal question cases with exclusive jurisdiction in federal court, such as bankruptcy, the court should apply federal, not forum state, choice of law rules." *In re Lindsay*, 59 F.3d 942, 948 (9th Cir. 1995). However, "many bankruptcy courts have read [the Supreme Court's opinion in *Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487 (1941)] as imposing the forum state's choice-of-law rules on bankruptcy adjudications where the underlying rights and obligations are defined by state law." *In re Koreag*, 961 F.2d 341, 350 (2d Cir. 1992). The Court need not determine which choice of law rules to apply, because the California and federal choice of law rules both direct that California law should determine the property interest in Plaintiffs' alter ego claim. Under California's choice of law rules, "California law will be applied unless the foreign law conflicts with California law and California and the foreign jurisdiction have significant interests in having their law applied." *Application Group, Inc. v. Hunter Group, Inc.*, 61 Cal.

Kayne v. Ho, Not Reported in Fed. Supp. (2013)

App.4th 881, 896 (1998) (citing *S. A. Empresa, etc. v. Boeing Co.*, 641 F.2d 746, 749-50 (9th Cir. 1981)). Thus, “[u]nder the first step of the governmental interest approach, the foreign law proponent must identify the applicable rule of law in each potentially concerned state and must show it materially differs from the law of California.” *Wash. Mutual Bank v. Super. Ct.*, 24 Cal.4th 906, 919 (2001). Here, the parties agree that California and Hong Kong law are functionally identical. Dkt. 769, p. 3; Dkt. 770, pp. 8-9. Therefore, under California choice of law rules, California law applies.<sup>3</sup>

Under federal choice of law rules, courts “apply the law of the jurisdiction having the greatest interest in the litigation.” *In re Koreag*, 961 F.2d at 350. Plaintiffs, many of whom are California residents, brought this action in California, to enforce a judgment entered by a California court applying California law. California has a strong interest both in “providing an effective means of redress for its residents,” *Sinatra v. Nat’l Enquirer, Inc.*, 854 F.2d 1191, 1200 (9th Cir. 1988), and enforcing the judgments of its courts. Defendants have not shown how Hong Kong’s interests would be harmed if California law were applied. To the contrary, Defendants have argued that “even if the Court were to apply California law to determine whether Plaintiffs’ alter ego claim belongs to the trustee (*i.e.*, the Hong Kong liquidator), the result would be the same.” Dkt. 769, p. 3. For these reasons, under federal choice of law rules, California law applies.

iii. Application of California Law

\*6 “Although the line between claims of the debtor ... and claims of creditors ... is not always clear, the focus of the inquiry is on whether the Trustee is seeking to redress injuries to the debtor itself caused by the defendants’ alleged conduct.” *Shaoxing Cnty. Huayue Import & Export v. Bhaumik*, 191 Cal. App.4th 1189, 1197 (2011). A claim belongs to the debtor when it is based on “allegations giving the corporation a right of action against the defendant.” *Id.* at 1199.

Ho contends that Plaintiffs have asserted a “fraudulent conveyance alter ego claim,” (Dkt 769, p. 1) in which they “allege that Grande ... suffered injuries when certain assets were purportedly ‘stripped’ or ‘fraudulently conveyed’ away ...” Dkt. 695, p. 4. Ho mischaracterizes Plaintiffs’ alter ego claim. Plaintiffs offer three primary theories in support of their alter ego claim: (i) “Ho controlled Grande and managed it without regard to its separate legal identity” (Dkt. 362, p. 26); (ii) “Ho has used [the corporate defendants] as instrumentalities to

exercise alter ego control over Grande” (*Id.* at 29); and (iii) Defendants manipulated assets among various entities, causing Grande “to have a lack of available assets to satisfy the Grande Judgment.” *Id.* at 30. The alleged transfers are not the basis for Plaintiffs’ claim; rather, they are evidence that Defendants are the alter ego of Grande, and that there would “be an inequitable result if the acts in question are treated as those of the corporation alone.” *Sonora Diamond Corp. v. Super. Ct.*, 83 Cal. App.4th 523, 538 (2000). Although Plaintiffs allege that the transfers reduced Grande’s assets by almost \$300 million, they do not seek “to redress injuries” to Grande. *Bhaumik*, 191 Cal. App.4th at 1197. Thus, they do not seek the return of assets to the debtor, or any remedy as to the vast majority of the \$300 million that they allege was transferred. Dkt. 362, p. 50. Rather, Plaintiffs seek only the amount of the judgment they were awarded, plus interest. *Id.*

The Ninth Circuit, in *Ahcom*, 623 F.3d 1248, and a California Court of Appeal, in *Bhaumik*, 191 Cal. App.4th 1189, each held that individual creditors have standing to pursue alter ego claims that, like the one advanced by Plaintiffs here, contain allegations of diversion and misappropriation of assets. In *Ahcom*, the plaintiff had received an award in arbitration against a corporation (“NFI”) for breach of contract, but was unable to recover from the corporation, which had petitioned for bankruptcy soon after the arbitration. 623 F.3d at 1249. The plaintiff then sued the corporation’s sole owners in state court on an alter ego theory to enforce the arbitration award. *Id.* The Ninth Circuit described the plaintiff’s alter ego claim as alleging: “ ‘Defendants controlled, dominated and operated [NFI] as their individual business and alter ego’; ‘Defendants diverted funds and other assets of [NFI] for other than corporate uses’; ‘Defendants treated the assets of [NFI] as their own’; and ‘Defendants diverted assets from [NFI] to themselves to the detriment of creditors, including Plaintiff.’ ” *Id.* at 1250. Having recognized that the plaintiff alleged that assets were inappropriately stripped from NFI, the Ninth Circuit held that “NFI’s trustee could not bring such a claim against [defendants] under California law, [but] there is no reason why [plaintiff’s] claims against the [defendants] cannot proceed.” *Id.* at 1252.

\*7 Similarly, in *Bhaumik*, the plaintiff filed an action against the International Trade Center (“ITC”) for breach of contract, and later added an individual, Ranga Bhaumik, as a defendant, seeking to hold her liable on an alter ego theory. 191 Cal. App.4th at 1193. After the action was filed, ITC petitioned for bankruptcy, and the plaintiff voluntarily dismissed the corporation from the action. *Id.* at 1194. Bhaumik then argued that the alter ego claim against her should be stayed because only the

**Kayne v. Ho, Not Reported in Fed. Supp. (2013)**

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bankruptcy trustee had standing to pursue it. *Id.* The Court of Appeal described the plaintiff's alter ego claim as one that alleged that "[a]dherence to the fiction of the separate existence for ITC as an entity distinct from Bhaumik would permit an abuse of the corporate privilege and would sanction a fraud in that Bhaumik caused the assets of ITC to be liquidated and distributed for his own benefit for purposes of avoiding and preventing attachment and execution by creditors, including [the plaintiff], thereby rendering the corporation insolvent and unable to meet its obligations." *Id.* The Court of Appeal held that, despite the allegation of asset-stripping, the plaintiff "alleged Bhaumik was liable as ITC's alter ego with respect to money that ITC owed for breach of contract and common counts. [The plaintiff] did not seek to assert a right of action belonging to the corporation." *Id.* at 1199.

Plaintiffs, like those in *Ahcom* and *Bhaumik*, seek to hold Defendants liable only "with respect to money" that

Grande owes them as a result of the Grande Judgment. *Bhaumik*, 191 Cal. App.4th at 1194. Plaintiffs do not seek redress for an injury to the debtor corporation; they seek to show the existence of an alter ego relationship, and the likelihood of an inequitable result if the corporate form is not disregarded. For these reasons, under California law, Plaintiffs have standing to pursue their alter ego claim.

### **III. Conclusion**

For the foregoing reasons, the Motion is DENIED.

**IT IS SO ORDERED.**

#### **All Citations**

Not Reported in Fed. Supp., 2013 WL 12120081

#### Footnotes

- 1 The Court recognizes that Grande filed a petition in a United States Bankruptcy Court for "Recognition of a Foreign Main Proceeding and Relief in Aid Thereof." Case No. 2:11-BK-41459-BB, Dkt. 24. However, that petition was filed under Chapter 15 of the Bankruptcy Code. No order has issued in that proceeding that provides for the application of the Bankruptcy Code to the issues raised by the Motion.
- 2 Plaintiffs contend that, even if the alter ego claim is determined to be property of the estate, the provisions of the Bankruptcy Code that govern the scope of the liquidator's authority in this case, 11 U.S.C. §§ 1520 and 1521, prohibit the liquidator from asserting the claim. Therefore, they contend that those provisions "would not preclude Plaintiffs from asserting an alter ego claim." Dkt. 770, pp. 8-9. Because, for the reasons discussed below, the Court finds that Plaintiffs' alter ego claim is not property of the estate, the Court does not address whether the liquidator would have exclusive standing to assert the alter ego claim were it determined to be property of the estate.
- 3 After oral argument on the Motion, Ho submitted a supplemental brief in which he argued that, under California choice of law rules, Hong Kong law should apply. Dkt. 777. He cited Hong Kong's interest in the application of its law to Plaintiff's alter ego claim, given that its courts are presiding over Grande's liquidation proceedings. However, Ho, the "foreign law proponent," does not show how, under the "first step of the governmental interest approach," the applicable rule of law in Hong Kong "materially differs from the law of California." *Wash. Mutual Bank*, 24 Cal.4th at 919. To the contrary, Ho conceded, in his earlier filing, and at oral argument, that Hong Kong and California law are functionally identical on this issue. Dkt. 769, p. 3.

## Exhibit 15

L.A. Terminals, Inc. v. City of Los Angeles, Slip Copy (2020)

**H** KeyCite history available

2020 WL 8028241

Only the Westlaw citation is currently available.  
United States District Court, C.D. California.  
**L.A. TERMINALS, INC.**

v.

**CITY OF LOS ANGELES, et al.**

Case No. CV 18-6754-MWF (RAOx)

Filed 12/21/2020

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**Proceedings (In Chambers):** ORDER RE: MOTION FOR SUMMARY JUDGMENT [296]

The Honorable [MICHAEL W. FITZGERALD](#), U.S. District Judge

\*1 Before the Court is Third-Party Defendant Olympic Chemical Corporation's ("Olympic") Motion for Summary Judgment (the "Motion"), filed on June 4, 2020. (Docket No. 296). Third-Party Plaintiff Occidental Chemical Corporation ("Oxy"), Defendant Union Pacific Railroad Company ("Union Pacific"), and Defendant City of Los Angeles (the "City") filed separate oppositions on November 9, 2020. (Docket No. 304, 305, 308). Olympic filed a reply on November 30, 2020. (Docket No. 310).

The Court has read and considered the papers filed in connection with the motion and held a telephonic hearing on December 14, 2020, pursuant to the General Order 20-09 and the Continuity of Operations Plan ("COOP"), effective December 9, 2020, through and including January 8, 2021, in response to the COVID-19 pandemic.

For the reasons stated below, the Motion is **DENIED**. Cross-Complainants have established that genuine issues of material fact exist with respect to each issue raised by Olympic.

#### **I. BACKGROUND**

Because the facts are well known to the parties, the Court does not repeat them in full here. The following facts are based on the evidence, as viewed in the light most favorable to the non-moving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) (acknowledging that on a motion for summary judgment, "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in [the non-movant's] favor."). The Court notes any relevant putative disputes below.

At the Port of Los Angeles in Wilmington, California, there is an industrial area that contains three portions of land that are the subject of this litigation: a 13.5 acre property referred to as the "Phillips Property," a 0.74 acre property referred to as the "Sliver Site," and a small area north of the Sliver Site referred to as "Berth 155A." (*Id.* ¶ 11). Oxy (or its predecessor in interest, Hooker Chemical, herein referred to collectively as just "Oxy") operated at the Sliver Site from 1949 through 1978. (*Id.* ¶ 12). Ash-Cross-Evans Corporation ("ACE") doing business as ("dba") Olympic Chemical Corporation operated at the Sliver Site from approximately 1978 through 1982. (OCSUF ¶ 79).

LAT filed this action on August 6, 2018, to recover costs and seek contribution for the remediation of a contamination at the "Sliver Site," under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), § 101 *et seq.*, 42 U.S.C. § 9601 *et seq.* (*See generally* Complaint (Docket No. 1)). The Sliver Site is contaminated with the chlorinated solvents trichloroethylene ("TCE") and tetrachloroethylene ("PCE"). (*Id.*).

Oxy, the City, and Union Pacific ("Cross-Complainants")

L.A. Terminals, Inc. v. City of Los Angeles, Slip Copy (2020)

bring two types of claims against Olympic: CERCLA claims and contract claims. (OCSUF ¶¶ 68-73). That distinction aside, all claims are based on the theory that: (1) Ash-Cross-Evans Corporation (“ACE”) and Olympic operated at the Sliver Site from 1978 through 1982, or (2) Olympic operated at the Sliver Site indirectly as the alter ego of ACE. (OCSUF ¶¶ 79, 82).

\*2 Olympic was incorporated in Tacoma, Washington on September 1, 1976. (Olympic’s Statement of Uncontroverted Facts (“OCSUF”) ¶ 1 (Docket No. 296-3)). At all relevant times, Alvin Ash and Donald Evans were Olympic’s only officers and owners. (*Id.* at 2).

ACE was incorporated in Tacoma, Washington on June 8, 1977. (*Id.* ¶ 21). Corporate records show that Donald Evans, Alvin Ash, and George Geoff Cross were equal shareholders in and officers of ACE. (*Id.* ¶ 22). Olympic claims that ACE conducted its business out of its office in Newport Beach, California, as indicated on its company letterhead. (*Id.* ¶ 24). Union Pacific and the City dispute this fact, asserting that ACE was headquartered in Washington, used the name Olympic Chemical Company on its letterhead, and operated at the Los Angeles Marine Terminal (“LAMT”). (See Union Pacific’s Response to OCSUF ¶ 24 (Docket No. 307)); (The City’s Response to OCSUF ¶ 24 (Docket No. 308-3)).

Olympic claims it never conducted any business, including sales or storage, in California. (*Id.* ¶ 3). Union Pacific and the City dispute this fact, asserting that Olympic operated at the Sliver Site. (See Union Pacific’s Response to OCSUF ¶ 3); (The City’s Response to OCSUF ¶ 3).

Olympic claims that Ash and Evans always kept their other business interests separate and apart from Olympic. (OCSUF ¶ 6). Union Pacific and the City dispute this fact, asserting that Olympic is an alter ego of ACE. (See Union Pacific’s Response to OCSUF ¶ 6); (The City’s Response to OCSUF ¶ 6).

Olympic claims that Richard Orth, who began working at Olympic prior to 1977, and was Olympic’s sole employee for many years, had never heard of ACE until this year. (OCSUF ¶ 8). Union Pacific and the City dispute the plausibility of this assertion, especially since Orth’s deposition testimony consisted of virtually nothing but “ I wouldn’t know.” (See Union Pacific’s Response to OCSUF ¶ 8; The City’s Response to OCSUF ¶ 8).

Olympic claims it never used, stored, distributed, or manufactured chlorinated solvents, including TCE and

PCE. (OCSUF ¶ 9). Union Pacific and the City dispute this fact, pointing out that ACE dba Olympic Chemical Corporation was issued a permit for operations involving both TCE and PCE. (See Union Pacific’s Response to OCSUF ¶ 9); (The City’s Response to OCSUF ¶ 9).

On ACE’s permit application, ACE identified itself as the applying entity, and indicated that it did business as “Olympic Chemical Company.” (OCSUF ¶ 25). The City points out that there were multiple permit applications and in some of those applications Evans indicated that the applying entity was a subsidiary of Olympic. (The City’s Response to OCSUF ¶ 25).

Olympic asserts that on March 7, 1979, Permit No. 404 was issued to ACE. (*Id.* ¶ 28). Union Pacific and the City dispute this fact, asserting that Permit No. 404 was issued to “Ash-Cross-Evans Corporation, dba Olympic Chemical Corporation.” (See Union Pacific’s Response to OCSUF ¶ 28); (The City’s Response to OCSUF ¶ 28).

Olympic asserts that while ACE was working through the permitting process with the City, it entered into a lease with Southern Pacific Transportation Company (now Union Pacific), on January 1, 1979, to lease the Sliver Site (the “Sliver Site Lease”). (OCSUF ¶ 29). Union Pacific and the City point out that the lease with Southern Pacific identifies the tenant as “Ash-Cross-Evans Corporation, a corporation doing business as Olympic Chemical Corporation.” (See Union Pacific’s Response to OCSUF ¶ 29); (The City’s Response to OCSUF ¶ 29).

\*3 Olympic asserts that ACE stored chlorine at the Sliver Site. (OCSUF ¶ 30). Union Pacific and the City point out that the City issued Permit No. 404 to ACE/Olympic for operations involving the handling of caustic soda, TCE, PCE, and 1,1,1 trichlorethane at 560 Pier “A” Place at the LAMT. (See Union Pacific’s Response to OCSUF ¶ 30); (The City’s Response to OCSUF ¶ 30).

Olympic asserts that there is no evidence that ACE stored or handled chlorinated solvents at the Sliver Site. (OCSUF ¶ 31). Cross-Complainants point out that the operators at the Sliver Site before and after Olympic stored and handled thousands of gallons of chlorinated solvents. (*Id.* ¶ 88) (“Oxy ... operated at the Sliver Site for decades and spilled thousands of gallons of chlorinated solvents during its operations).

Olympic asserts that while operating at the Sliver Site, “ACE used ‘Olympic Chemical Company’ as a formal DBA; however, perhaps out of confusion or informality, ‘Olympic Chemical Co.,’ ‘Olympic Chemical Corp.’ or ‘Olympic Chemical Corporation’ were interchangeably

L.A. Terminals, Inc. v. City of Los Angeles, Slip Copy (2020)

used as its dba by others in documents.” (OCSUF ¶ 33). The City points out that no “formal dba” was ever registered by ACE. (The City’s Response to OCSUF ¶ 33). The City also notes that the suggestion that the Olympic name was used by “perhaps out of confusion or informality” is contradicted by the records, which show that Evans used the name “Olympic Chemical Corporation” on five different agreements with three different parties. (*Id.*).

In 1981, LAT entered into the Asset Purchase Agreement (“APA”) to acquire all of ACE’s assets and liabilities for the price of \$1,750,000. (OCSUF ¶ 35). These assets included all of ACE’s intellectual property, including its dba “Olympic Chemical Company.” (*Id.* ¶ 36). After the LAT’s acquisition of ACE’s assets and liabilities, ACE filed its Statement of Intent to Dissolve with the State of Washington on November 5, 1981. (*Id.* ¶ 40). On August 26, 1982, ACE’s Articles of Dissolution were filed with the State of Washington, and ACE ceased to exist. (*Id.* ¶ 41).

LAT began operating at the Sliver Site in 1981. (*Id.* ¶ 42). LAT handled PCE during its operations at the Sliver Site from approximately 1981 through 1992. (*Id.* ¶ 43). LAT first discovered the TCE and PCE contamination at the Sliver Site in or about April 1990. (*Id.* ¶ 44). Oxy and the City were made aware of the Sliver Site’s TCE and PCE contamination no later than 1991. (*Id.* ¶ 45). In January 1991, LAT advised the City that it was investigating the contamination and those responsible. (*Id.* ¶ 46). LAT’s Sliver Site remedial investigations have continued for 30 years. (*Id.* ¶ 47).

Approximately 30 years after first learning about the TCE/PCE contamination at the Sliver Site, the City filed its complaint against LAT in Los Angeles Superior Court on January 2, 2018. (*Id.* ¶ 49). Six weeks later, on March 2, 2018, the City filed its First Amended Complaint in Los Angeles Superior Court adding as defendants all of the other entities that have operated at the Sliver Site: Hooker Chemical, Oxy, and ACE. (*Id.* ¶ 50). ACE did not appear and the court entered default against ACE on August 16, 2018. (*Id.* ¶ 52).

On August 6, 2018, LAT filed this parallel action in this Court naming Occidental and the City as defendants based on the allegations that Oxy released significant quantities of TCE and PCE at the Sliver Site. (*Id.* ¶ 53). The City filed its Third-Party Complaint, naming ACE as a cross-defendant. (*Id.* ¶ 55). ACE’s insurer filed a stipulation to intervene on behalf of ACE. (*Id.* ¶ 56). ACE is thus now defended in this action in accordance with an insurance policy it purchased to cover its liability arising

from its operation at the site. (*Id.* ¶ 57).

\*4 Cross-Complainants have all asserted claims for contribution and declaratory relief under CERCLA and declaratory relief under California law. (OCSUF ¶ 68). Union Pacific asserted claims for contribution under California law. (*Id.* ¶ 70).

Cross-Complainants allege that ACE and Olympic operated at the Sliver Site from 1978 through 1982. (*Id.* ¶ 79). Olympic asserts that it is not a party to the Sliver Site Lease or to Permit No. 404. (*Id.* ¶ 80). Union Pacific and the City dispute this assertion, pointing to evidence suggesting that the terminal was purchased by Olympic and not ACE. (*See* Union Pacific’s Response to OCSUF ¶ 80); (The City’s Response to OCSUF ¶ 80).

## II. EVIDENTIARY OBJECTIONS

The parties advance various objections to the evidence submitted in connection with the Motion. (*See generally* The City’s Response to OCSUF); (Union Pacific’s Response to OCSUF). Many of the objections are garden variety evidentiary objections based on mischaracterization of evidence, speculation, lack of foundation, hearsay, and relevance. While these objections may be cognizable at trial, on a motion for summary judgment, the Court is concerned only with the *admissibility* of the relevant *facts* at trial, and not the *form* of these facts as presented in the Motions. *See Burch v. Regents of Univ. of California*, 433 F. Supp. 2d 1110, 1119-20 (E.D. Cal. 2006) (making this distinction between facts and evidence, Rule 56(e), and overruling objections that evidence was irrelevant, speculative and/or argumentative). “If the contents of the evidence could be presented in an admissible form at trial, those contents may be considered on summary judgment even if the evidence itself is hearsay.” *O’Banion v. Select Portfolio Servs., Inc.*, No. 1:09-cv-00249-EJL, 2012 WL 4793442, at \*5 (D. Idaho Aug. 22, 2012) (citing *Fraser v. Goodale*, 342 F.3d 1032, 1036-37 (9th Cir. 2003)).

Accordingly, the parties’ objections are **OVERRULED**.

## III. LEGAL STANDARD

In deciding a motion for summary judgment under Rule 56, the Court applies *Anderson*, *Celotex*, and their Ninth Circuit progeny. *Anderson v. Liberty Lobby, Inc.*, 477

L.A. Terminals, Inc. v. City of Los Angeles, Slip Copy (2020)

U.S. 242, 255 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). “The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a).

The Ninth Circuit has defined the shifting burden of proof governing motions for summary judgment where the non-moving party bears the burden of proof at trial:

The moving party initially bears the burden of proving the absence of a genuine issue of material fact. Where the non-moving party bears the burden of proof at trial, the moving party need only prove that there is an absence of evidence to support the non-moving party’s case. Where the moving party meets that burden, the burden then shifts to the non-moving party to designate specific facts demonstrating the existence of genuine issues for trial. This burden is not a light one. The non-moving party must show more than the mere existence of a scintilla of evidence. The non-moving party must do more than show there is some “metaphysical doubt” as to the material facts at issue. In fact, the non-moving party must come forth with evidence from which a jury could reasonably render a verdict in the non-moving party’s favor.

\*5 *Coomes v. Edmonds Sch. Dist. No. 15*, 816 F.3d 1255, 1259 n.2 (9th Cir. 2016) (quoting *In re Oracle Corp. Sec. Litig.*, 627 F.3d 376, 387 (9th Cir. 2010)). “A motion for summary judgment may not be defeated, however, by evidence that is ‘merely colorable’ or ‘is not significantly probative.’ ” *Anderson*, 477 U.S. at 249-50.

“When the party moving for summary judgment would bear the burden of proof at trial, ‘it must come forward with evidence which would entitle it to a directed verdict if the evidence went uncontroverted at trial.’ ” *C.A.R. Transp. Brokerage Co. v. Darden Restaurants, Inc.*, 213 F.3d 474, 480 (9th Cir. 2000) (quoting *Houghton v. South*, 965 F.2d 1532, 1536 (9th Cir. 1992)).

#### IV. DISCUSSION

Cross-Complainants bring two types of claims against Olympic: CERCLA claims and contract claims. (OCSUF ¶¶ 68-73). All claims are based on the theory that: (1) ACE and Olympic operated at the Sliver Site from 1978 through 1982, or (2) Olympic operated at the Sliver Site indirectly as the alter ego of ACE. (OCSUF ¶¶ 79, 82).

CERCLA is a comprehensive statute that grants the President broad power to command government agencies

and private parties to clean up hazardous waste sites. 42 U.S.C. § 9601 *et seq.* Under CERCLA, a private party may recover expenses associated with cleaning up contaminated sites. *Id.* 42 U.S.C. § 9607(a). To establish a prima facie claim for recovery of response costs under CERCLA, a private-party plaintiff must demonstrate that:

- (1) the site on which the hazardous substances are contained is a facility under CERCLA’s definition of that term;
- (2) a release or threatened release of any hazardous substance from the facility has occurred;
- (3) such release or threatened release has caused the plaintiff to incur response costs that were necessary and consistent with the national contingency plan; and
- (4) the defendant is within one of four classes of persons subject to the liability provisions of [42 U.S.C. § 9607(a)].

*City of Colton v. American Promotional Events, Inc.-West*, 614 F.3d 998, 1002-03 (9th Cir. 2010) (quotation marks and internal citations omitted). Cross-Complainants allege that Olympic was an operator of the Sliver Site within the meaning of § 9607(a). (OCSUF ¶¶ 62, 63, 67, 82).

Olympic argues that it is entitled to summary judgment because Cross-Complainants cannot produce any evidence that: (1) Olympic operated at the Sliver Site; (2) Olympic is the alter ego of ACE; or (3) ACE/Olympic contributed to the PCE or TCE contamination at the Sliver Site. (Motion at 1-2).

#### A. Olympic Operating at the Sliver Site

Olympic asserts that Cross-Complainants have produced no evidence that Olympic operated at the Sliver Site. (Motion at 11).

To qualify as an “operator” under CERCLA, the defendant “must manage, direct, or conduct operations specifically related to pollution, that is, operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations.” *U.S. v. Bestfoods*, 524 U.S. 51, 66 (1998).

Olympic maintains that ACE, not Olympic, was the operator of the Sliver Site, pointing out that the permit application indicates that ACE is the applicant. (OCSUF ¶¶ 25-27). Olympic points out that the application identifies ACE’s California entity number on the application and that ACE is the contracting party on the Sliver Site Lease as well as Permit No. 404. (OCSUF ¶¶ 23, 26, 28-29).

L.A. Terminals, Inc. v. City of Los Angeles, Slip Copy (2020)

\*6 Cross-Complainants produce circumstantial evidence suggesting that Olympic operated at the Sliver Site. Specifically, Cross-Complainants present the following evidence in support of their position:

- A September 10, 1978 letter from Evans to Michael Lemke of the Port of Los Angeles, in which Evans represents that “myself and Mr. Alvin G. Ash are in the process of finalizing the purchase of Hooker Chemical’s Pier A Terminal ... Mr. Ash and I each own 50% of Olympic Chemical Corporation.” (See Occidental’s Opposition, Declaration of Gary Meyer (“Meyer Decl.”), Ex. C (Docket No. 304-5)). Evans concludes his letter by stating “Enclosed is a recent financial statement on Olympic Chemical Corporation.” (*Id.*).
- A September 15, 1978 City of Los Angeles Office Memorandum which reflected that Mr. Evans and Mr. Ash represented that the chemical entity which was soon to operate at the Sliver Site “apparently is undercapitalized, however it would be a *subsidiary of Olympic Chemical Corporation*, and we will require, as part of the approval ... that Olympic guarantee the required rental.” (*Id.*, Ex. D) (emphasis added).
- An October 26, 1978 Credit and Financial Report identifying Ash and Evans’ chemical business that would operate at the Sliver Site as a “*subsidiary of Olympic Chemical Corp.*” (*Id.*, Ex. E) (emphasis added).
- An October 30, 1978 Harbor Department Memorandum referring to Ash and Evan’s chemical business at the Sliver Site as “*a subsidiary of Olympic Chemical Corporation*” noting an assumption that “Olympic Chemical Corporation is guaranteeing rental payments.” (*Id.*, Ex. F) (emphasis added).
- A 1979 lease agreement between the City and Evans on behalf of Olympic Chemical Corporation (“Permit No. 404”), whereby ACE dba Olympic Chemical Corporation started doing business as a chemical facility at the Sliver Site. (*Id.*, Ex. A).
- A second 1979 lease agreement between Southern Pacific and Evans, again on behalf of ACE dba Olympic Chemical Corporation, in furtherance of ACE/Olympic’s operation at the Sliver Site. (*Id.*, Ex. B).

The Court is satisfied that a genuine dispute of material

fact exists with respect to whether Olympic operated at the Sliver Site. Establishing that ACE was a subsidiary of Olympic is sufficient to under these facts establish that Olympic operated at the Sliver Site. *United States v. Bestfoods*, 524 U.S. 51, 65, 118 S. Ct. 1876, 1886, 141 L. Ed. 2d 43 (1998) (“The fact that a corporate subsidiary happens to own a polluting facility operated by its parent does nothing, then, to displace the rule that the parent ‘corporation is [itself] responsible for the wrongs committed by its agents in the course of its business.’”). Viewed in the light most favorable to Cross-Complainants, the evidence suggests that Olympic operated at the Sliver Site directly or through ACE as a subsidiary of Olympic.

Accordingly, the Motion is **DENIED** with respect to the issue of whether Olympic operated at the Sliver Site.

**B. Alter Ego**

Olympic next asserts that Cross-Complainants produce no evidence showing that Olympic is the alter ego of ACE. (Motion at 12-13).

“To satisfy the alter ego test, a plaintiff must make out a prima facie case (1) that there is such unity of interest and ownership that the separate personalities [of the two entities] no longer exist and (2) that failure to disregard [their separate identities] would result in fraud or injustice.” *Ranza v. Nike, Inc.*, 793 F.3d 1059, 1073 (9th Cir. 2015) (punctuation omitted).

\*7 To satisfy the “ ‘unity of interest and ownership’ prong of [the alter ego] test requires ‘a showing that the [one entity] controls [the other] to such a degree as to render the latter the mere instrumentality of the former.’” *Id.* “This test envisions pervasive control over [the controlled entity], such as when [the controlling entity] ‘dictates every facet of the [controlled entity’s] business — from broad policy decisions to routine matters of day-to-day operation.’” *Id.* at 1073-1074 (finding no alter ego because “[t]otal ownership and shared management personnel are alone insufficient to establish the requisite level of control”).

Olympic cites to several cases for the proposition that an overlap of ownership interest and extensive control by one entity over another is insufficient by itself to establish alter ego. (See Motion at 14-15) (listing cases). Olympic emphasizes that ACE had its own business operations, leased its own property, had its own bank account and financial statements, and had its own general liability

**L.A. Terminals, Inc. v. City of Los Angeles, Slip Copy (2020)**

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insurance. (OCSUF ¶ 83).

With respect to the first prong of the alter ego test, Cross-Complainants present evidence suggesting alter ego, as follows:

- Olympic’s officer treated the entities as interchangeable during its negotiations with the City. (Meyer Decl., Exs. A-F).
- In March 1979, Evans (a 50% owner and one of only two board members of Olympic) received Permit No. 404 whereby *ACE dba Olympic Chemical Corporation* started doing business as a chemical facility at the Sliver Site. (*Id.*, Ex. A) (emphasis added).
- All of the officers of Olympic were also officers of ACE. (City’s Response to OCSUF ¶ 46).
- ACE and Olympic listed the same business address on their Washington corporate filings: 702 “A” Street, Tacoma, Washington. (*Id.* ¶ 47).
- No separate meeting minutes were kept for Olympic. (*Id.* ¶ 48).
- Both Olympic and ACE were incorporated by Alvin Ash within one year of each other. (*Id.* ¶ 49). Both were Washington corporations and utilized the same law firm. (*Id.*).

The Court is satisfied that Cross-Complainants have established a genuine dispute of material fact with respect to unity of ownership and control. Contrary to Olympic’s assertion, Cross-Complainants have produced evidence showing more than a mere “overlap” of ownership interest and extensive control. Cross-Complainants present documents suggesting that Ash and Evans used ACE and Olympic interchangeably in furtherance of Ash and Evans’s business goals.

The Court also determines that the second prong of the alter ego test is satisfied here. Treating Olympic as a separate entity would lead to an inequitable result, as it would allow Olympic to escape liability for potential violations of CERCLA.

Accordingly, the Motion is **DENIED** with respect to the alter ego issue.

Olympic argues that Cross-Complainants cannot show that ACE or Olympic ever stored or handled TCE or PCE at the Silver Site. (Motion at 17-18). The Court notes for clarity that the storage and handling of chlorine is not of concern here — only the storage and handling of chlorinated solvents TCE and PCE.

**1. Storage of TCE or PCE**

Olympic contends that ACE was in the business of storing and distributing chlorine, not TCE or PCE. (Motion at 18). Olympic points to the deposition of Dennis Gerard, who testified that he visited the site during the time of ACE’s operation and said he understood they were just storing chlorine. (OCSUF ¶ 89).

Cross-Complainants produce evidence indicating the following:

- Oxy stored and distributed a significant amount of chlorinated solvents from approximately 1948 until the mid-1970s. (Oxy’s Statement of Undisputed Facts (“OSUF”) ¶¶ 12-20 (Docket No. 304-1)). In his negotiations with Oxy to take over the Site, Evans insisted Oxy transfer all the equipment to ACE/Olympic. (The City’s Statement of Undisputed Facts (“CSUF”) ¶ 56 (Docket No. 308-1)). Additionally, Evans’s offer was contingent on “approval of all regulatory agencies with jurisdiction” for “handling of chlorine, caustic soda, and chlorinated solvents.” (*Id.* ¶ 57).

\*8 • By the mid-to-late 1970s, Evans was managing the Sliver Site under the name “Olympic Chemicals.” (*Id.* ¶ 58). The chlorinated solvent tanks used by Oxy were not cleaned or decommissioned before they were transferred to Evans’ management. (*Id.* ¶ 59).

- In the summer of 1976, Dennis Gerard (former Oxy employee) went to the Sliver Site on two different occasions to teach Evans how to use the pipes and valving. (CSUF ¶ 60).

• In Permit No. 404, Evans represented that the premises would be used for “the operation and maintenance of a marine terminal and storage facility *handling* ... trichloroethylene [TCE], perchlorethylene [PCE], and 1,1, 1, tricholorethane.” (*Id.* ¶ 63) (emphasis added). No other uses, including chlorine, were permitted under Permit No. 404. (*Id.* ¶ 64).

**C. Contribution to the PCE/TCE Contamination**

L.A. Terminals, Inc. v. City of Los Angeles, Slip Copy (2020)

- The Permit was never amended to add chlorine to the list of permitted substances, or to take away chlorinated solvents from the list of limited permitted uses. (*Id.* ¶ 69).
- The APA described the sold assets as consisting of “chemical terminaling and chlorine distribution.” (CSUF ¶¶ 71-72). The agreement valued the chlorine distribution business at \$284,375, while the terminaling business was valued at \$1,465,625. (*Id.*).
- After Permit No. 404 was transferred to LAT in July 1981, LAT stored and distributed chlorinated solvents at the Sliver Site. (*Id.* ¶ 70).

At the hearing, Olympic pointed to the deposition of Dennis Gerard, who testified that Oxy had stopped handling chlorinated solvents in 1973 or 1974, at least a year before transferring the equipment to ACE/Olympic. (Joel Meyer Decl., Ex. F, Deposition of Dennis Gerard (“Gerard Dep.”) at 185-9:185-20 (Docket No. 297-6)). However, the Court notes that Gerard also testified that the TCE and PCE tanks normally held upwards of 100,000 gallons of chemical, and that he never saw anyone clean out the TCE or PCE tanks while he worked at the facility. (*Id.* at 129:25-130:14).

In summary, the evidence shows that Olympic took over Oxy’s assets shortly after Oxy stopped handling chlorinated solvents. Gerard testified that he never saw anyone clean the TCE or PCE tanks, which could hold upwards of 100,000 gallons of TCE and PCE, respectively. Gerard also testified that the tanks were not decommissioned or cleaned before being transferred to Olympic. Olympic explicitly conditioned the purchase of Oxy’s assets on regulatory agency approval of chlorinated solvents. In the ensuing permit, Olympic explicitly represented that the purpose of its tenancy was to handle chlorinated solvents and represented that it would not store other chemicals unless it had written approval. In an amendment to the permit, Olympic reiterated that one of the permitted uses was handling a chlorinated solvent.

Viewing this evidence in the light most favorable to Cross-Complainants, the evidence shows that Olympic obtained numerous, uncleaned storage tanks that previously held upwards of 100,000 gallons of PCE and TCE. This leads to the reasonable inference that Olympic possessed large tanks containing residual TCE and PCE at the Sliver Site. The Court is therefore satisfied that Cross-Complainants have produced a genuine dispute of fact as to whether ACE/Olympic stored TCE and PCE at the Sliver Site.

## 2. Handling and release of TCE or PCE

\*9 Olympic argues that Cross-Complainants cannot produce direct evidence of a release during its alleged occupancy of the Sliver Site. (Motion at 19).

In order for an entity to be liable under CERCLA, “there must be a ‘release’ or ‘threatened release’ of a hazardous substance from the facility into the environment.” *Pakootas v. Teck Cominco Metals, Ltd.*, 452 F.3d 1066, 1074 (9th Cir. 2006). CERCLA defines a “release” as “any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment.” 42 U.S.C. § 9601(22).

“CERCLA liability may be inferred from the totality of the circumstances; it need not be proven by direct evidence.” *Tosco Corp. v. Koch Indus., Inc.*, 216 F.3d 886, 892 (10th Cir. 2000); *see also City of Moses Lake v. United States*, 458 F. Supp. 2d 1198, 1226 (E.D. Wash. 2006) (same). Direct evidence of hazardous waste disposal activities occurring decades ago is seldom available; circumstantial evidence is thus routinely used to establish liability in CERCLA actions. *Tosco Corp.*, 216 F.3d at 892 (noting that “eyewitness testimony or other direct evidence concerning specific waste disposal practices at oil refineries during the 1940s — well before the enactment of environmental laws — is rarely available”).

Cross-Complainants need only show that Olympic “at the time of disposal of any hazardous substance owned or operated any facility at which ... hazardous substances were disposed of.” 42 U.S.C. § 9607(a)(2). Any release is sufficient to create liability. *Amoco Oil Co. v. Borden, Inc.*, 889 F.2d 664 (5th Cir. 1989) (“The plain statutory language fails to impose any quantitative requirement on the term hazardous substance, and we decline to imply that any is necessary.”).

Olympic is correct that there is no direct evidence of a release of TCE or PCE at the Sliver Site while ACE/Olympic operated there. However, there is circumstantial evidence indicating that Olympic possessed large tanks containing residual amounts of TCE and PCE at the Sliver Site. (CSUF ¶ 59). And there is ample evidence suggesting that Olympic was contemplating the handling of chlorinated solvents. For example, in Permit No. 404, Evans represented that the premises would be used for “the operation and maintenance of a marine terminal and storage facility **handling** ... trichloroethylene [TCE], perchlorethylene [PCE], and 1,1, 1, trichloroethane.” (CSUF ¶ 63) (emphasis added).

L.A. Terminals, Inc. v. City of Los Angeles, Slip Copy (2020)

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At the hearing, Olympic pointed to its balance sheet from 1979, which indicates that Olympic was not in the business of buying or selling PCE or TCE. (Joel Meyer Decl, Ex HH). This is persuasive evidence that Olympic did not buy or sell PCE or TCE in 1979 — but the presence of large tanks containing residual PCE and TCE leaves open the possibility that Olympic cleaned out these tanks during its operations at the Sliver Site, leading to a release of PCE or TCE. (See Joel Meyer Decl., Ex F, Gerard Dep. at 125:21-130-18) (explaining that Oxy’s practice was to wash tanks by spraying them with water).

Viewing the evidence in the light most favorable to Cross-Complainants, it is reasonable to infer that Olympic

washed out the tanks containing the residual TCE and PCE at some point during its occupancy of the Sliver Site. The Court is satisfied that Cross-Complainants have established a genuine dispute of material fact with respect to this issue.

**\*10** Accordingly, the Motion is **DENIED**. The Court will set pre-trial and trial dates by separate order.

IT IS SO ORDERED.

**All Citations**

Slip Copy, 2020 WL 8028241

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## Exhibit 16

M.O. Dion and Sons, Inc. v. VP Racing Fuels, Inc., Slip Copy (2019)

**C** KeyCite citing references available

2019 WL 4750116

Only the Westlaw citation is currently available.  
United States District Court, C.D. California.

M.O. DION AND SONS, INC. et al.

v.

VP RACING FUELS, INC. et al.

Case No. CV 19-5154-MWF (SSx)

|  
Filed 09/27/2019

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**Proceedings (In Chambers):** ORDER RE: MOTION TO REMAND [28], MOTION TO DISMISS PURSUANT TO RULE 12(b)(2) [21], MOTION TO DISMISS PURSUANT TO RULE 12(b)(6) AND 9(b) [15]

The Honorable **MICHAEL W. FITZGERALD**, U.S. District Judge

\*1 Before the Court are three motions:

First, there is the Motion to Remand filed by Plaintiffs M.O. Dion & Sons, Inc. and Amber Resources, Inc. (collectively “Plaintiffs” or “Dion”) on July 15, 2019. (Docket No. 28). On July 22, 2019, Defendant VP Racing Fuels, Inc. (“VP”) filed an Opposition. (Docket No. 29). Plaintiffs filed a Reply on July 29, 2019. (Docket No. 46).

Second, there is the Motion to Dismiss pursuant to Rule 12(b)(2) filed by Defendants Alan B. Cerwick, Susan B. Gray, and Bruce Hendel (collectively the “Individual

Defendants”) on July 12, 2019. (Docket Nos. 21, 22). On July 22, 2019, Plaintiffs filed an Opposition. (Docket No. 32). The Individual Defendants filed a reply on July 29, 2019. (Docket No. 38).

Third, there is the Motion to Dismiss pursuant to Rule 12(b)(6) and Rule 9(b) filed by Defendant VP on June 28, 2019. (Docket Nos. 15, 16). On July 12, 2019, the Individual Defendants filed a joinder to VP’s Motion to Dismiss. (Docket No. 26). On July 22, 2019, Plaintiffs filed an Opposition. (Docket No. 31). Defendant VP filed a Reply on July 29, 2019. (Docket No. 41).

The Court has read and considered the papers filed in connection with the three motions and held a hearing on August 12, 2019.

For the reasons discussed below, the motions are ruled upon as follows:

- Plaintiffs’ Motion to Remand is **DENIED**. Defendants plausibly establish by a preponderance of the evidence that complete diversity exists and that the amount in controversy exceeds \$75,000. Plaintiffs’ request for attorneys’ fees pursuant to 28 U.S.C. § 1447(c) is also **DENIED**.
- Defendants Cerwick, Gray, and Hendel’s Motion to Dismiss for Lack of Jurisdiction under Rule 12(b)(2) is **GRANTED in part** and **DENIED in part without leave to amend**. The Court grants the motion to dismiss Cerwick based on the fiduciary shield doctrine. However, the Court denies the motion to dismiss Gray and Hendel based on the guiding spirit exception to the fiduciary shield doctrine.
- Defendant VP’s Motion to Dismiss pursuant to Rule 12(b)(6) and Rule 9(b) is **GRANTED in part** and **DENIED in part with leave to amend**. The Court denies the motion to dismiss Plaintiffs’ UCL and FAL claims based on preemption because Plaintiff has alleged at least one theory of liability that is not preempted under the PMPA. However, the Court grants the motion to dismiss Plaintiffs’ UCL claim because Plaintiff has failed to establish standing. The Court also denies the motion to dismiss fraud-based claims under Rule 9(b) because Plaintiffs have alleged at least one allegation of fraud with sufficient specificity.

M.O. Dion and Sons, Inc. v. VP Racing Fuels, Inc., Slip Copy (2019)

**I. BACKGROUND**

On June 5, 2019, Plaintiffs commenced this action in the Los Angeles County Superior Court. (*See* Notice of Removal (“NoR”), Ex. 1 (“Complaint”) (Docket No. 1-1)).

There are two plaintiffs and four defendants in this action. Plaintiff M.O. Dion & Sons is a California corporation whose principal place of business is in California. (*Id.* ¶ 2; NoR ¶ 9). Plaintiff Amber Resources, LLC is a California limited liability company whose principal place of business is in California. (*Id.* ¶ 3; NoR ¶ 9). The four defendants are VP Racing Fuels, Inc., Alan B. Cerwick, Susan G. Gray, and Bruce Hendel. (*See generally* Compl.) VP is a Texas corporation whose principal place of business is in Texas. (Compl. ¶ 4; NoR ¶ 9). Cerwick, Gray, and Hendel are residents of San Antonio, Texas. (Compl. ¶¶ 5-7; NoR 10).

\*2 The Complaint contains the following allegations:

Dion is a “full service distributor of petroleum, including racing fuels, in Southern California.” (Compl. ¶ 15). Defendant VP is a manufacturer of racing fuels. (*Id.* ¶ 1). On May 21, 2012, Dion and VP entered into a Distributor Agreement (“2012 Agreement”), in which Dion agreed to purchase racing fuels exclusively from VP. (*Id.* ¶¶ 18-20). Dion then sold VP’s racing fuel under its own brand (“F&L branded VP racing fuel”) as well as under VP’s brand (“VP branded racing fuel”). (*Id.* ¶ 20). Since about May 2012, Dion purchased racing fuels worth millions of dollars from VP. (*Id.* ¶ 21).

According to Dion, VP underwent a change in ownership around 2014, when Cerwick acquired a majority ownership interest in VP. (*Id.* ¶ 22). Dion alleges that Cerwick became the President of VP, Gray became the Chief Financial Officer and General Counsel, and Hendel subsequently became the Vice President in charge of North American sales. (*Id.* ¶ 22). Dion alleges that all three individuals “were in charge of and had control over all VP’s business decisions of any significance,” including “the manner and method of how the racing fuels ... were formulated, designed, manufactured, labeled, advertised, marketed, stored, transported, and sold to Dion and others.” (*Id.* ¶ 23).

Plaintiffs allege that VP’s original racing fuel were originally manufactured using methyl tert-butyl ether (“MTBE”), which provides high oxygenation essential for racing fuel. (Compl. ¶ 25). Plaintiffs further allege that the use of MTBE was required under the 2012 Agreement along with VP’s published product specifications. (*Id.* ¶ 25). In or about 2016, however, VP allegedly started

using ethyl tert-butyl ether (“ETBE”) instead of MTBE “at the direction of Cerwick, Gray, and/or Hendel.” (Compl. ¶ 27). According to Dion, ETBE is considerably less expensive than MTBE and provides less oxygenation, reducing the performance of racing fuels containing it. (*Id.* ¶ 26). Dion alleges that VP made this switch without disclosing it to Dion, without conducting appropriate testing, and without making appropriate changes to its published product specifications and documentations. (*Id.* ¶ 27).

Dion further alleges that Defendants “actively concealed and refused to disclose the use of ETBE and lack of testing to Dion” and “took steps to prevent others at VP from disclosing to Dion and others ... including by bribing some employees and threatening others with litigation.” (*Id.* ¶ 30). Dion also alleges that Defendants actively refused to test the octane ratings of its fuels even though VP failed several state agency testings and received complaints from customers about VP racing fuel’s poor performance. (*Id.* ¶¶ 30-34). Furthermore, around 2017, Defendants allegedly designed a VP-only-internal labeling system, which allowed VP employees to identify those that were manufactured using MTBE instead of ETBE. (*Id.* ¶ 35). Dion alleges that Defendants directed VP employees to sell and supply MTBE racing fuels to customers or places where fuel octane rating testing was planned or more likely to be conducted but sell the racing fuels with ETBE in other places. (*Id.* ¶ 37).

\*3 Around July 2018, Dion received customer complaints about its F&L branded VP racing fuel. (*Id.* ¶ 42). Dion retained two companies to test this fuel and found out that the octane rating of the was 107.1, not the required 110. (*Id.*). Dion notified VP of the testing results and met with VP employees Gray, Hendel, and Minazzi, on January 17, and 18, 2019. (*Id.* ¶ 43). In the meeting, the VP employees “represented and warranted to Dion’s representatives ... that, among other things, VP would ‘clean up’ its act by eliminating all fraudulent, unlawful, and unfair practices, and that all of VP’s future deliveries to Dion of VP racing fuels, including F&L branded VP racing fuel, would fully comply with their respective specifications, including but not limited to octane ratings.” (*Id.* ¶ 45).

As a result of this meeting, VP and Dion agreed to enter into a new distribution agreement, which provided for appropriate testing of the racing fuels. (*Id.* ¶ 44). In or about April 2019, however, VP allegedly refused to continue negotiating or sign the New Agreement. (*Id.* ¶ 47). Dion conducted additional testing on its VP racing fuel in or about May 2019 and found that F&L branded VP racing fuel had an octane rating of only 107.5. (*Id.* ¶

**M.O. Dion and Sons, Inc. v. VP Racing Fuels, Inc., Slip Copy (2019)**

48). On June 4, 2019, Dion cancelled the 2012 Agreement and ended its relationship with VP. (*Id.* ¶ 50).

Based on the above allegations, Plaintiffs assert nine claims against Defendants: (1) breach of contract; (2) breach of warranties; (3) negligence; (4) violation of California False Advertising Law (“FAL”), Cal. Bus. & Profs. Code §§ 17500, *et seq.*; (5) violation of California’s Unfair Competition Law (“UCL”), Cal. Bus. & Profs. Code §§ 17200, *et seq.*; (6) fraud, (7) negligent misrepresentation, (8) declaratory relief, and (9) breach of agreement to negotiate. (*Id.* ¶¶ 51-109).

On June 13, 2019, Defendant VP timely removed the action, invoking the Court’s diversity jurisdiction and federal question jurisdiction. (NoR ¶¶ 5-12).

## **II. MOTION TO REMAND**

Plaintiffs seeks to remand the action, arguing that neither diversity jurisdiction nor federal question jurisdiction exists. (Remand Mot. at 1). Because the Court determines that it has diversity jurisdiction, it need not address whether federal question jurisdiction also exists.

### **A. Legal Standard**

In general, “any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court[.]” 28 U.S.C. § 1441(a). A removing defendant bears the burden of establishing that removal is proper. *See Abrego v. The Dow Chem. Co.*, 443 F.3d 676, 684 (9th Cir. 2006) (per curiam) (noting the “longstanding, near-canonical rule that the burden on removal rests with the removing defendant”). If there is any doubt regarding the existence of subject matter jurisdiction, the court must resolve those doubts in favor of remanding the action to state court. *See Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992) (“Federal jurisdiction must be rejected if there is any doubt as to the right of removal in the first instance.”).

In most circumstances, “federal district courts have jurisdiction over suits for more than \$75,000 where the citizenship of each plaintiff is different from that of each defendant.” *Hunter v. Philip Morris USA*, 582 F.3d 1039, 1043 (9th Cir. 2009) (citing 28 U.S.C. § 1332(a)).

The Ninth Circuit employs the following framework for determining the amount in controversy on removal. First, a “court may consider whether it is ‘facially apparent’ from the complaint that the jurisdictional amount is in controversy.” *Singer v. State Farm Mut. Automobile Ins. Co.*, 116 F.3d 373, 377 (9th Cir. 1997). If not, the court may consider facts in the removal petition and require parties to submit “summary-judgment-type evidence” relevant to the amount in controversy. *Id.*; *see also Corbelle v. Sanyo Elec. Trading Co.*, No. CV03-01509, 2003 WL 22682464, at \*3 (N.D. Cal. Nov. 4, 2003). “[T]he defendant seeking removal bears the burden of proof to establish by a preponderance of the evidence that the amount-in-controversy requirement is satisfied.” *LaCross v. Knight Transp. Inc.*, 775 F.3d 1200, 1202 (9th Cir. 2015) (citation omitted).

### **B. Discussion**

\*4 The parties appear to agree that there is complete diversity of citizenship. (Remand Opp. at 2-5; Remand Reply at 5-6). Thus, the only issue in dispute is whether the amount in controversy exceeds the \$75,000 jurisdictional minimum.

Plaintiffs’ complaint does not allege a specific amount of money that it seeks to recover. (*See generally* Compl.). However, many of its claims seek financial compensation, including compensatory damages, restitutionary damages and disgorgement of ill-gotten revenues and profits, punitive damages, and attorneys’ fees and costs. (*See* Compl. ¶¶ 51-109). Specifically, with regard to the restitutionary damages, Plaintiffs seek “all monies [that Defendants] wrongfully obtained from Dion.” (Compl. ¶¶ 76, 85).

Defendant VP argues that the restitutionary damages alone exceeds the jurisdictional limit of \$75,000. First, it notes that Plaintiffs alleged that “it has purchased from VP ‘millions of dollars’ worth of racing fuel products.” (Remand Opp. at 6). Second, a declaration filed with VP’s Opposition asserts that Plaintiffs purchased over \$2 million in racing fuel in 2018 and over \$1 million in 2019. (Declaration of Susan G. Gray (Docket No. 30), ¶ 4). In addition, the declaration attached two invoices from May 2019, which exceed \$75,000 by themselves. (*Id.*, ¶ 5, Ex. A). Because Plaintiffs seek “all monies wrongfully obtained,” VP argues that the amount in dispute far exceeds \$75,000. (Remand Opp. at 6).

In response, Plaintiffs makes two arguments. First, they assert that the total amount of money Dion paid to VP for

**M.O. Dion and Sons, Inc. v. VP Racing Fuels, Inc., Slip Copy (2019)**

its fuel “does not equate to Dion putting this entire amount in controversy,” because it is only seeking all monies “wrongfully obtained,” which could be less than the full contract amount. (Remand Reply at 9). Second, because VP asserts in its Motion to Dismiss that Plaintiffs “cannot obtain any restitution from VP,” Plaintiffs claim that VP cannot assert in this motion that Dion’s restitutionary damages exceed \$75,000. (*Id.*). At the hearing, Plaintiffs reiterated the same arguments. Neither argument is persuasive.

As to Plaintiffs’ first argument, the Ninth Circuit rejected a similar argument in *Lewis v. Verizon Commc’ns., Inc.*, 627 F.3d 395 (9th Cir. 2010). There, plaintiff alleged that she and other putative class members were billed by Verizon for premium services they never ordered. Verizon presented a declaration stating that the total billing for members of the alleged class was in excess of \$5 million. The Ninth Circuit rejected plaintiff’s argument that Verizon’s evidence was insufficient because it did not distinguish between authorized and unauthorized charges. The court explained, “Defendant has put in evidence of the total billings and the Plaintiff has not attempted to demonstrate, or even argue, that the claimed damages are less than the total billed.” *Id.* at 400.

As in *Lewis*, Plaintiffs fail to offer *any* facts to demonstrate that the claimed damages are less than the threshold amount required. Rather, Plaintiffs merely argue that Defendant’s evidentiary support is lacking. See *Roa v. TS Staffing Servs., Inc.*, No. 2:14-CV-08424-ODW, 2015 WL 300413, at \*2 (C.D. Cal. Jan. 22, 2015) (finding removal proper where plaintiff did not “contest the allegations themselves, but instead contest[ed] [defendant’s] evidence in support of the allegations”).

\*5 Plaintiffs’ second argument also fails because the “amount in controversy” merely refers to the amount that is put at issue in the litigation, not what plaintiffs will recover. See *Lewis*, 627 F.3d at 400 (“The amount in controversy is not proof of the amount the plaintiff will recover. Rather, it is an estimate of the amount that will be put at issue in the course of the litigation.”) (internal citations omitted). “To establish the jurisdictional amount, [Defendant] does not need to concede liability for the entire amount.” *Id.* Thus, Defendant may argue both that the amount in dispute exceeds \$75,000 even if it later argues that Plaintiffs are not entitled to that amount.

The Court thus determines that Defendant VP has met its burden of establishing the amount in controversy and that the Court has diversity jurisdiction over this action. Accordingly, Plaintiffs’ Motion to Remand is **DENIED**. While having some sympathy for the argument that VP

should have been more forthcoming at the meet-and-confer, the request for attorneys’ fees is likewise **DENIED**.

**III. 12(b)(2) MOTION TO DISMISS (PERSONAL JURISDICTION)**

Individual Defendants Cerwick, Gray, and Hendel assert that the Court should dismiss all claims against them because this Court lacks personal jurisdiction over them. (12(b)(2) Mot. at 1). Specifically, they argue that the fiduciary shield doctrine should apply because all of their contacts with California were based on activities conducted on behalf of their employer VP. (*Id.* at 9).

**A. Legal Standard**

Rule 12(b)(2) governs dismissal for lack of personal jurisdiction. The plaintiff bears the burden to establish the Court’s personal jurisdiction over a defendant. *Cabbage v. Merchant*, 744 F.2d 665, 667 (9th Cir. 1984), cert. denied, 470 U.S. 1005 (1985). The court may consider evidence presented in affidavits to assist it in its determination and may order discovery on the jurisdictional issues. *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 800 (9th Cir. 2004); see also *Data Disc, Inc. v. Systems Technology Assoc., Inc.*, 557 F.2d 1280, 1285 (9th Cir. 1977). Because Defendant’s Motion is based on written materials rather than an evidentiary hearing, “[P]laintiff need only make a prima facie showing of jurisdictional facts.” *Sher v. Johnson*, 911 F.2d 1357, 1361 (9th Cir. 1990).

In addition, the “fiduciary shield” doctrine states that an independent basis must exist for exercising personal jurisdiction over corporate officers apart from the contact their corporate employer had with the forum state. “[A] corporate officer who has contact with a forum only with regard to the performance of his official duties is not subject to personal jurisdiction in that forum.” *Kransco Mfg., Inc. v. Markwitz*, 656 F.2d 1376, 1379 (9th Cir. 1981) (holding there was no personal jurisdiction over a corporate-employee defendant when his only contacts with the forum state were attendance at a trade show and mailing letters to the defendant alleging infringing activities) (citing *Chem Lab Products, Inc. v. Stepanek*, 554 F.2d 371 (9th Cir. 1977)). If the corporate employee’s only contacts with the forum state were functions of his employment, no personal jurisdiction exists. See *Calder v.*

M.O. Dion and Sons, Inc. v. VP Racing Fuels, Inc., Slip Copy (2019)

*Jones*, 465 U.S. 783, 790 (1984) (holding jurisdiction was proper because tortious activity was aimed at California where libelous story was drawn from California sources, injured a California resident, and California was the focal point of the article); see also *Davis v. Metro Productions, Inc.*, 885 F.2d 515, 520 (9th Cir. 1989) (“[A] person’s mere association with a corporation that causes injury in the forum state is not sufficient in itself to permit that forum to assert jurisdiction over the person.”).

## B. Discussion

\*6 Cerwick, Gray, and Hendel do not dispute that they have sufficient contacts with California to warrant specific jurisdiction. Instead, they argue that fiduciary shield doctrine should apply to protect them from being hauled to court in California because all the contacts they had with the forum state were through their duties as employees of VP, not as individuals. (12(b)(2) Mot. at 9-14). Because Plaintiffs do not make allegations that would justify an independent basis for exercising jurisdiction in California over the three Individual Defendants, the fiduciary shield doctrine is applicable here. (See Rule 12(b)(2) Opp. at 14).

But there are two exceptions to the fiduciary shield doctrine: the “guiding spirit” and “alter ego” exceptions. Below, the Court examines both exceptions.

### 1. Guiding Spirit Exception

When a defendant corporate-employee was the “guiding spirit” behind the wrongful conduct or the “central figure” in the challenged corporate activity, courts have exercised personal jurisdiction even in instances when the fiduciary shield would normally limit jurisdiction. See *Allstar Mktg. Group, LLC v. Your Store Online, LLC*, 666 F. Supp. 2d 1109, 1120 (C.D. Cal. 2009) (collecting cases); *Matsunoki Group, Inc. v. Timberwork Oregon, Inc.*, No. C 08–04078 CW, 2009 WL 1033818, at \*3–4 (N.D. Cal. Apr. 16, 2009). This exception applies when the officer “is a primary participant in the alleged wrongdoing” or “had control of, and direct participation in the alleged activities.” *Winery v. Graham*, No. C 06–3618 MHP, 2007 WL 963252, at \*5 (N.D. Cal. Mar. 29, 2007). But conclusory allegations will not suffice for such a showing. Rather, the pleading must contain plausible, factual allegations. See *Toyz, Inc. v. Wireless Toyz, Inc.*, No. C 09–05091 JF (HRL), 2010 WL 334475, at \*8 (N.D. Cal.

Jan. 25, 2010) (holding that conclusory allegations of “control” were insufficient to establish guiding spirit exception).

Plaintiffs argue that “the Court has specific jurisdiction over each of the Individual Defendants” without separating out their argument for each Defendant. (See Rule 12(b)(2) Opp. at 13-16). However, because there are distinct jurisdictional facts with respect to each Defendant, the Court will consider jurisdiction over each Defendant separately.

#### a. Cerwick

Alan B. Cerwick is the President of VP. (Declaration of Alan B. Cerwick (Docket No. 23), ¶ 2; Compl. ¶ 22). His “job duties generally involve providing strategic financial and operational leadership for the company and working with the senior leadership team to make sure the company’s goals are met.” (Cerwick Decl. ¶ 5).

First, Plaintiffs allege that “[o]n information and belief,” “Cerwick, Gray, and Hendel were in charge of and had control over” how VP racing fuels were formulated, marketed, and labeled, implying that he was a central figure in deciding to use ETBE instead of MBTE in VP’s racing fuels. (Compl. ¶ 23). Plaintiffs primarily argue that Cerwick must have known and been involved in these decisions because he is the President and majority-owner of VP. (Rule 12(b)(2) Opp. at 15). But “simply being the CEO is not enough to establish that [a defendant] [is] the ‘guiding spirit’ behind the injurious activities.” *Tangiers Investor, L.P. v. Americhip Intern., Inc.*, No. 11CV339 JLS BGS, 2011 WL 3299099, at \*2 (S.D. Cal. Aug. 1, 2011). Moreover, Cerwick declares that he “did not attend any of the meetings at VP in which ... ETBE was proposed as an alternate component” and “did not make the decision by VP to utilize ETBE in any of VP’s racing fuels.” (Cerwick Decl. ¶ 6). Cerwick similarly asserts that he did not provide “specific direction and instruction regarding how to market or label VP’s fuels containing ETBE.” (*Id.*)

\*7 Plaintiffs also allege that “Defendants actively concealed and refused to disclose the use of the ETBE and lack of testing to Dion and others,” and that “Defendants took steps to prevent others at VP from disclosing to Dion and others the use of ETBE and lack of testing, including by bribing some employees and threatening others with litigation.” (*Id.* ¶ 30). However, Plaintiffs allege that “Defendants” took such steps without clarifying whether Cerwick personally

**M.O. Dion and Sons, Inc. v. VP Racing Fuels, Inc., Slip Copy (2019)**

participated in any of these actions.

Plaintiffs further allege that in a meeting that occurred in January 2019, Defendants represented to Dion's representatives that "VP would 'clean up' its act by eliminating all fraudulent, unlawful, and unfair practices." (Compl. ¶ 45). However, Cerwick did not attend the meeting and Plaintiffs have not provided any evidence of Cerwick's control over these employees at the meeting. (See Compl. ¶¶ 43, 45, Mot. at 3).

At the hearing, Plaintiffs argued that the declarations attached in their Opposition provides additional support for finding personal jurisdiction. However, with regard to Cerwick, the declaration merely asserts that he is a "hands on micromanager[ ]" and that "all matters of any significance were discussed and reported" to Cerwick. (Busby Decl. ¶ 8; *see also* 12(b)(2) Opp. at 11).

Based on this record, the Court determines that Plaintiffs failed to demonstrate that Cerwick was the "central figure" in the disputed activities. Accordingly, the guiding spirit exception does not apply to Cerwick.

**b. Gray**

Susan B. Gray is the General Counsel of VP and was previously its Chief Financial Officer and Chief Operating Officer. (12(b)(2) Mot. at 3; Declaration of Suan G. Gray ¶ 2 (Docket No. 24); Compl. ¶ 22). Her job duties included or includes "general oversight of daily company operations," "ensuring VP met its various financial obligations," and "provide legal advice to various VP management and others related to the design, formulation, labeling, marketing, manufacturing, and/or distribution of VP's various products." (*Id.* ¶ 5).

Plaintiffs allege that Gray was "in charge of and had control over" how VP racing fuels were formulated, marketed, and labeled. (Compl. ¶ 23). In response, Gray asserts that she was "not the decision maker in those areas" and does "not have any specialized training, education or technical experience" in the field. Nonetheless, she admits that she attended many meetings where the decision to use ETBE instead of MTBE was discussed. (See Compl. ¶ 23; Gray Decl. ¶¶ 6-8).

More critically, Plaintiffs allege that Gray instructed employees to conceal the fact that VP's racing fuel was below the octane rating that VP represented it to be. (See 12(b)(2) Opp. at 10). For example, Busby declares that Gray directed "VP employees [ ] to not worry about [the

fact that VP's racing fuel is below the octane rating]" and to "just keep selling" them. (Busby Decl. ¶ 10). Gray also attended meetings with Plaintiffs in January 2019, where VP employees allegedly stated that VP would "clean up" its act by eliminating fraudulent practices and comply with their specifications, including octane ratings. (See Compl. ¶ 45, Gray Decl. ¶ 10).

Plaintiffs sufficiently demonstrated that Gray directly participated and had control over at least some of the challenged activities. Accordingly, the guiding spirit exception applies to Gray.

**c. Hendel**

Bruce Hendel is the Vice President North American Sales – Race Fuel and Consumer Products and was previously a Director of Sales – Consumer Products and a Regional Manager – West Coast. (12(b)(2) Mot. at 4; Declaration of Bruce Hendel (Docket No. 25) ¶ 2). As the Vice President of North American Sales, his job duties "generally involve sales and management of VP sales personnel." (Hendel Decl. ¶ 6).

\*8 Plaintiffs allege that Hendel was "in charge of and had control over" how VP racing fuels were formulated, marketed, and labeled. (Compl. ¶ 23). As with Cerwick, however, Plaintiffs mainly argue that Hendel must have been in charge because he is a "hands-on micromanager." (12(b)(2) Opp.) Otherwise, Plaintiffs provide no factual support for Hendel's role in these decisions. Based on this record, Plaintiffs have failed to demonstrate that Hendel was in charge of such decisions.

However, Plaintiffs also allege that Hendel was involved in lying about the fuels VP sold to Plaintiffs and covering up those lies. (Opp. at 16). Hendel attended the January 2019 meeting, and in that meeting, Plaintiffs allege that he and other VP employees promised to clean up their act and comply with their specifications, including octane ratings. (Compl. ¶ 45).

Plaintiffs have sufficiently demonstrated that Hendel is one of the primary participants in at least some of the challenged activities. Accordingly, the guiding spirit exception applies to Hendel.

**2. Alter-ego Exception**

M.O. Dion and Sons, Inc. v. VP Racing Fuels, Inc., Slip Copy (2019)

When a corporation is merely the alter-ego of an individual defendant, courts may “pierce the corporate veil” and exercise jurisdiction and attribute the corporation’s contacts to the individual. *ADO Finance, AG v. McDonnell Douglas Corp.*, 931 F. Supp. 711, 715 (C.D. Cal. 1996). To make such a showing, a plaintiff must allege (1) that there is such unity of interest and ownership that the separate personalities of the two entities no longer exist; and (2) that failure to disregard their separate identities would result in fraud or injustice. See *Doe v. Unocal Corp.*, 248 F.3d 915, 926 (9th Cir. 2001). A complaint must contain plausible, factual allegations of these two elements, and not merely conclusory repetition of the elements. *NuCal Foods, Inc. v. Quality Egg LLC*, 887 F. Supp. 2d 977, 993 (E.D. Cal. 2012) (finding that conclusory allegations of alter-ego status are not sufficient because “[t]his stringent pleading requirement reflects the principle that “[d]isregarding the corporate entity is recognized as an extreme remedy, and ‘[c]ourts will pierce the corporate veil only in exceptional circumstances’ ... Indeed, it is axiomatic that [t]here is a general presumption in favor of respecting the corporate entity.”).

The Individual Defendants argue, and the Court agrees, that Plaintiffs did not submit any argument or evidence to suggest the ‘alter ego’ exception applies. (12(b)(2) Reply at 1). Accordingly, this exception does not apply to any of the three Individual Defendants.

In summary, Individual Defendants’ Motion to Dismiss is granted in part and denied in part. The Court grants Defendants’ Motion to Dismiss Cerwick because fiduciary shield doctrine applies and none of the exceptions to the doctrine applies. However, the guiding spirit exception applies to Gray and Hendel because Plaintiffs have sufficiently alleged that they were central figures in the challenged activities. The Court also determines that the exercise of personal jurisdiction over Gray and Hendel is reasonable. Accordingly, the Court denies the Motion for Gray and Hendel.

#### **IV. 12(b)(6) AND 9(b) MOTION TO DISMISS**

Defendant VP also brings a motion to dismiss pursuant to Rule 12(b)(6) and 9(b). As an initial matter, Plaintiffs argue that this motion should be denied in its entirety because Defendant VP “utterly failed to comply with any of the requirements of the L.R. 7-3.” (Rule 12(b)(6) Opp. at 4). Plaintiffs explain that VP first notified Plaintiffs about its motion “two days before VP filed its motion” and sought to schedule a telephonic meet-and-confer on

July 1, which was “after VP said its motion was due.” (*Id.* at 4-5). Defendant VP admits that it failed to timely meet and confer with Plaintiffs, but it explains that its failure was driven by Plaintiffs’ refusal to extend VP’s pleading deadline. (Rule 12(b)(6) Reply at 1). VP also notes that Plaintiffs sent a four-page meet and confer letter on June 20 with regard to a separate motion, in which Plaintiffs addressed a number of issues raised in this current Motion. (*Id.* at 3).

\*9 Although it appears that the parties failed to meet and confer in strict compliance with Local Rule 7-3, it does not appear that Plaintiff has suffered prejudice as a result of this failure. The Court, therefore, will proceed to the merits of the Rule 12(b)(6) Motion. See, e.g., *Reed v. Sandstone Props., L.P.*, No. 12-CV-5021-MMM (VBKx), 2013 WL 1344912, at \*6 (C.D. Cal. Apr. 2, 2013) (“Because Reed suffered no real prejudice as result of the late conference, however, the court elects to consider the motion on the merits.”) Counsel are warned to scrupulously comply with all Local Rules in the future.

#### **A. Rule 12(b)(6)**

##### **1. Legal Standard**

“Dismissal under Rule 12(b)(6) is proper when the complaint either (1) lacks a cognizable legal theory or (2) fails to allege sufficient facts to support a cognizable legal theory.” *Somers v. Apple, Inc.*, 729 F.3d 953, 959 (9th Cir. 2013)

In ruling on the Motion under Rule 12(b)(6), the Court follows *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). “To survive a motion to dismiss, a complaint must contain sufficient factual matter ... to ‘state a claim to relief that is plausible on its face.’ ” *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570). The Court must disregard allegations that are legal conclusions, even when disguised as facts. See *id.* at 681 (“It is the conclusory nature of respondent’s allegations, rather than their extravagantly fanciful nature, that disentitles them to the presumption of truth.”); *Eclectic Properties E., LLC v. Marcus & Millichap Co.*, 751 F.3d 990, 996 (9th Cir. 2014). “Although ‘a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof is improbable,’ plaintiffs must include sufficient ‘factual enhancement’ to cross ‘the line between possibility and plausibility.’ ” *Eclectic Properties*, 751 F.3d at 995

M.O. Dion and Sons, Inc. v. VP Racing Fuels, Inc., Slip Copy (2019)

(quoting *Twombly*, 550 U.S. at 556–57) (internal citations omitted).

The Court must then determine whether, based on the allegations that remain and all reasonable inferences that may be drawn therefrom, the Complaint alleges a plausible claim for relief. See *Iqbal*, 556 U.S. at 679; *U.S. ex rel. Cafasso v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1054 (9th Cir. 2011). “Determining whether a complaint states a plausible claim for relief is ‘a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.’ ” *Ebner v. Fresh, Inc.*, No. 13-56644, 2016 WL 5389307, at \*2 (9th Cir. Sept. 27, 2016) (as amended) (quoting *Iqbal*, 556 U.S. at 679). Where the facts as pleaded in the Complaint indicate that there are two alternative explanations, only one of which would result in liability, “plaintiffs cannot offer allegations that are merely consistent with their favored explanation but are also consistent with the alternative explanation. Something more is needed, such as facts tending to exclude the possibility that the alternative explanation is true, in order to render plaintiffs’ allegations plausible.” *Eclectic Properties*, 751 F.3d at 996–97; see also *Somers*, 729 F.3d at 960.

## 2. Discussion

Defendant argues that Plaintiffs’ UCL and FAL claims are preempted by the Petroleum Marketing Practices Act, 15 U.S.C. §§ 2801 *et seq.* (the “PMPA”). (12(b)(6) Mot. at 3-8). Defendant further argues that Plaintiffs’ UCL claim is barred because it improperly seeks non-restitutionary disgorgement. (*Id.* at 9-10). The Court addresses each argument below.

### a. PMPA Preemption (UCL and FAL Claim)

\*10 The Constitution’s Supremacy Clause provides that federal law is the “supreme Law of the Land ... any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” U.S. Const., Art. VI, cl. 2. State law is preempted “to the extent of any conflict with a federal statute,” regardless of whether the conflict is express or implied. *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 372 (2000). Courts must “find preemption where it is impossible for a private party to comply with both state and federal law ..., and where under the circumstances of a particular case, the challenged state law stands as an

obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” *Id.* at 372-73 (internal quotation marks, citations, and alterations omitted).

With regard to the PMPA, the following relevant overview of the statute was discussed in *Alvarez v. Chevron Corp.*, 656 F.3d 925 (9th Cir. 2011):

The PMPA mandates that gasoline retailers “display in a clear and conspicuous manner, at the point of sale to ultimate purchasers of automotive fuel, the automotive fuel rating of such automotive fuel ...” 15 U.S.C. § 2822(c). The PMPA instructs the FTC to promulgate rules prescribing “a uniform method of displaying the automotive fuel rating of automotive fuel at the point of sale to ultimate purchasers.” 15 U.S.C. § 2823(c)(1)(B).

In response, the FTC promulgated the Posting Rule that applies to “... refiner[s], importer[s], producer[s], distributor[s], [and] retailer[s] of automotive fuel[.]” 16 C.F.R. § 306.2, and contains detailed instructions for the “posting of automotive fuel ratings in or affecting commerce ...” 16 C.F.R. § 306.1. The Posting Rule comprehensively regulates all labeling, disclosure, and rating requirements to be displayed at the point of sale to retail gasoline customers. See 16 C.F.R. § 306.10. The Posting Rule includes sample octane labels, and delineates their specific layout, type size and setting, colors, and content. See 16 C.F.R. § 306.12. The Posting Rule expressly limits label content: “No marks or information other than that called for by this rule may appear on the labels.” 16 C.F.R. § 306.12(d).

The PMPA contains a broad preemption against state and local laws and regulations addressing any acts or omissions covered by the PMPA, “unless such provision of such law or regulation is *the same* as the applicable provision of this subchapter.” 15 U.S.C. § 2824(a) (emphasis added). The Posting Rule incorporates this preemption provision. See 16 C.F.R. § 306.4(a).

*Id.* at 934. Thus, to determine whether Plaintiffs’ UCL and FAL claims are preempted, the Court must examine whether Plaintiffs’ state claims are “the same” as the applicable provision of the PMPA.

Plaintiffs claim that VP must specify on its label whether the canister contains MTBE or ETBE. Defendants argue that this is preempted because such disclosure is not required under the PMPA. (12(b)(6) Mot. at 5). In response, Plaintiffs argue that this disclosure is not incongruent with the PMPA because the PMPA would not be “interfered with by such truthful conduct.” (*Id.*).

M.O. Dion and Sons, Inc. v. VP Racing Fuels, Inc., Slip Copy (2019)

Plaintiffs' argument is unpersuasive. The PMPA also expressly preempts state regulations that are not "the same" as the PMPA. It further states that "[n]o marks or information other than that called for by this rule may appear on the labels." 16 C.F.R. § 306.12(d). To hold that the California laws may require additional disclosures not mandated by the PMPA would violate the express language of the preemption provision. See *Alvarez*, 656 F.3d at 935 (affirming district court's determination that "additional corrective disclosure sought by Plaintiffs was not 'the same as' the specific labeling requirements prescribed by the PMPA and the Posting Rule."). Thus, to the extent that Plaintiffs' UCL and FAL claims are based on the fact VP does not specify whether the canister contains MTBE or ETBE on its label, both claims are preempted.

\*11 However, in their Complaint, Plaintiffs additionally allege that VP's labeling violates the UCL and FAL because VP's fuels had lower octane rating than what was represented on its label. (Compl. ¶¶ 42-48). For example, Plaintiffs allege that VP's octane rating was actually 107.1 and 107.5 when it was represented to be 110 on its label. (*Id.* ¶¶ 42, 48). Plaintiffs' UCL and FAL claims are not preempted to the extent that they are based on Defendant's misrepresentation of the actual octane rating. See *VP Racing Fuels, Inc. v. Gen. Petroleum Corp.*, 673 F. Supp. 2d 1073, 1083 (E.D. Cal. 2009) (holding that UCL and FAL claims are not preempted when "Plaintiff is not requesting that Defendant disclose more information than required, only that Defendant's disclosure be accurate and truthful").

Because Plaintiffs have alleged at least one viable theory of liability, their UCL and FAL claims are not preempted by the PMPA. However, Plaintiffs must limit the bases for their UCL and FAL claims to only what is required under the PMPA.

### b. Economic Injury (UCL Claim)

Defendant VP argues that Plaintiffs' UCL claim is barred because they failed to plead that they "suffered actual monetary harm" and seeks non-restitutionary disgorgement. (12(b)(6) Mot. at 9-10). The parties primarily dispute whether the wording of Plaintiffs' Complaint covers only restitutionary damages or also includes non-restitutionary damages. But before diving into the proper scope of damages Plaintiffs may seek, Plaintiffs must first establish that it has standing to bring a UCL claim.

To establish standing under the UCL, a plaintiff must "(1) establish a loss or deprivation of money or property sufficient to qualify as injury in fact, i.e., *economic injury*, and (2) show that that economic injury was the result of, i.e., *caused by*, the unfair business practice." *Kwikset Corp. v. Super. Ct.*, 51 Cal. 4th 310, 322, 246 P.3d 877 (2011) (emphasis in original). "A plaintiff fails to satisfy the causation prong of the statute if he or she would have suffered 'the same harm whether or not a defendant complied with the law.'" *Junod v. Mortg. Elec. Registration Sys.*, 584 F. App'x 465, 469 (9th Cir. 2014) (quoting *Jenkins v. JP Morgan Chase Bank, N.A.*, 216 Cal. App. 4th 497, 156 Cal. Rptr. 3d 912 (2013)).

It is undisputed that Plaintiffs resold VP's fuels to their own consumers. (Compl. ¶¶ 16, 17, 42). VP speculates that Plaintiffs must have sold the fuel products at a price higher than the amount they paid to VP. (*Id.* at 10). In such a case, VP argues that Plaintiff is not entitled to any restitution. Plaintiffs respond by pointing out that their Complaint does not allege that they "sold all of the fuel [they] purchased from VP, always at a cost or at a profit." (12(b)(6) Opp. at 11). Plaintiffs assert that *if* they had sold any of the fuel below cost, they would be entitled to restitution. (*Id.*).

Plaintiffs have failed to allege sufficient facts to establish whether they suffered economic injury. Plaintiffs do not allege that they sold VP's fuel below cost in their Complaint or that they paid more than they would have if they had known about the lower octane rating. Instead, they argue in their Opposition that they *might* have sold below cost, in which case they would have suffered an economic injury. (12(b)(6) Opp. at 11). Such an assertion is insufficient to establish actual monetary harm.

Accordingly, Defendant's motion to dismiss UCL and FAL claims for preemption is denied, but Defendant's motion to dismiss UCL claim for lack of standing is granted with leave to amend.

### B. Rule 9(b)

Defendant VP also argues that Plaintiffs fail to satisfy [Federal Rules of Civil Procedure 9\(b\)](#). (Rule 12(b)(6) Mot. at 10).

\*12 Fraud-based claims are governed by [Rule 9\(b\)](#). See *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1125 (9th Cir. 2009) ([Rule 9\(b\)](#) standard applies to California consumer protection claims, including under the UCL). "[Rule 9\(b\)](#) demands that, when averments of fraud are made, the

M.O. Dion and Sons, Inc. v. VP Racing Fuels, Inc., Slip Copy (2019)

circumstances constituting the alleged fraud be specific enough to give defendants notice of the particular misconduct so that they can defend against the charge[.]” *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003) (internal citations omitted). Under Rule 9(b), fraud allegations must include the “time, place, and specific content of the false representations as well as the identities of the parties to the misrepresentations.” *Swartz v. KPMG LLP*, 476 F.3d 756, 764 (9th Cir. 2007) (citing *Edwards v. Marin Park, Inc.*, 356 F.3d 1058, 1066 (9th Cir. 2004)). In other words, “[a]verments of fraud must be accompanied by ‘the who, what, when, where, and how’ of the misconduct charged.” *Vess*, 317 F.3d at 1106. Such averments must be specific enough to “give defendants notice of the particular misconduct ... so that they can defend against the charge and not just deny that they have done anything wrong.” *Id.* (quoting *Bly-Magee v. California*, 236 F.3d 1014, 1019 (9th Cir. 2001)).

Defendant argues that Plaintiffs’ allegations are “spare and conclusory” and points to several deficiencies. (12(b)(6) Mot. at 11). First, Defendant asserts that Plaintiffs fail to allege “how the individuals exercised control over” “how the products were formulated, designed, manufactured, labeled advertised, marketed, stored, transported and sold to Dion and others.” (12(b)(6) Mot. at 11). Second, Defendant claims that Plaintiffs fail to state the factual basis for Plaintiffs’ allegation that VP directed false fuel octane ratings. (*Id.* at 11-12).

The Court notes that some of Plaintiffs’ allegations appear to be conclusory. For example, Plaintiffs appear to argue that Cerwick must have exercised control over certain decisions because he is the owner/President and because VP employees must have taken certain actions “at the instruction and direction of Cerwick, Gray, and/or Hendel.” (12(b)(6) Opp. at 14-15). Plaintiffs also allege that VP employees bought and secretly started using ETBE “at the instruction and direction of Cerwick, Gray, and/or Hendel” without any factual support for Cerwick, Gray, or Hendel’s involvement. (*See e.g.*, Compl. ¶ 27).

However, Plaintiffs have made other allegations that are sufficiently specific. For example, Plaintiffs allege that Gray and Hendel “represented and warranted to Dion’s representatives ... that, among other things, VP would

‘clean up’ its act by eliminating all fraudulent, unlawful, and unfair practices, and that all of VP’s future deliveries to Dion of VP racing fuels, including F&L branded VP racing fuel, would fully comply with their respective specifications, including but not limited to octane ratings.” (Compl. ¶ 45). Plaintiffs also allege that VP designed a VP-only-internal labeling system to minimize the chance of getting caught with lower than represented octane rating. (Compl. ¶ 35). These allegations are specific enough to give Defendants notice of the misconduct charged.

Accordingly, the Court denies Defendant’s motion to dismiss fraud-based claims pursuant to Rule 9(b).

#### V. CONCLUSION

For the reasons set forth above, Plaintiffs’ Motion to Remand is **DENIED** and its request for attorneys’ fees is **DENIED**.

Individual Defendants’ Motion to Dismiss Cerwick, Gray, and Hendel is **GRANTED in part** and **DENIED in part without leave to amend**. Defendant Cerwick is dismissed for lack of personal jurisdiction. However, the Court has personal jurisdiction over Defendants Gray and Hendel.

Defendant VP’s Motion to Dismiss pursuant to Rules 12(b)(6) and 9(b) is **GRANTED in part** and **DENIED in part with leave to amend**. Defendant’s motion to dismiss UCL and FAL claims for preemption is denied, but Defendant’s motion to dismiss UCL claim for lack of standing is granted. Plaintiff may file a First Amended Complaint, if any, by **October 11, 2019**. Defendants shall respond to the operative Complaint on or before **October 25, 2019**.

\*13 IT IS SO ORDERED.

#### All Citations

Slip Copy, 2019 WL 4750116

## Exhibit 17

In re Moshen, Not Reported in B.R. (2010)

**C** KeyCite citing references available

2010 WL 6259979

Only the Westlaw citation is currently available.  
United States Bankruptcy Appellate Panel,  
of the Ninth Circuit.

In re Amr MOHSEN, Debtor.  
Amr Mohsen, Appellant,  
v.  
Carol Wu, Chapter 7 Trustee, Appellee.

No. NC-09-1159-HKiSa.

Bankruptcy No. 05-50662.

Adversary No. 06-05183.

Argued and Submitted on Oct. 20, 2010.

Filed Dec. 21, 2010.

Appeal from the United States Bankruptcy Court for the Northern District of California, Honorable [Roger L. Efremsky](#), Bankruptcy Judge, Presiding.

#### Attorneys and Law Firms

Amr Mohsen, argued, pro se.

[Dennis D. Davis](#) of Goldberg, Stinnett, Davis & Linchey, argued, for Appellee.

Before: HOLLOWELL, KIRSCHER and SALTZMAN<sup>1</sup>, Bankruptcy Judges.

#### MEMORANDUM<sup>2</sup>

PER CURIAM.

\*1 The chapter 7<sup>3</sup> bankruptcy trustee filed a complaint against two corporate entities, Advanced Information Management, Inc. (AIM Inc.) and Advanced Investment Management, LLC (AIM LLC) (AIM Inc. and AIM LLC are collectively referred to as the AIM Entities<sup>4</sup>) alleging they were the debtor's alter ego and seeking a determination that their assets be declared property of the

bankruptcy estate. The debtor filed a pro se answer to the complaint on behalf of the AIM Entities. The bankruptcy court determined that the debtor, neither an attorney nor a named defendant in the action, did not have standing to defend against the complaint. It therefore struck the answer and entered a default judgment.

The debtor moved to set aside the default judgment but because the debtor again appeared for the AIM Entities, the bankruptcy court determined the debtor had no standing to seek the requested relief. Furthermore, the bankruptcy court found that even if the debtor had standing, there was no excusable neglect that led to the entry of the default judgment or extraordinary circumstances that existed to justify relief. We AFFIRM.

#### I. FACTS<sup>5</sup>

Dr. Amr Mohsen (the Debtor)<sup>6</sup> filed a chapter 11 bankruptcy petition on February 8, 2005. In the course of the proceedings, funds of the AIM Entities were placed in the debtor-in-possession (DIP) account. The case was converted to chapter 7 on December 22, 2005, and Carol Wu was appointed as the trustee (the Trustee). Upon conversion, the funds in the DIP account remained in the estate pending a determination of their ownership.

On September 26, 2006, the Trustee filed a complaint (Complaint) against Ehab Mohsen, as the trustee of Star Trust, and the AIM Entities. Star Trust was a revocable trust formed by the Debtor in 1982. The Debtor served as trustee until 2004, and funded the trust with real estate in Egypt, stocks, certain partnership or equity interests, and investments. The Debtor revoked the trust in March 2005.

In the Complaint, the Trustee alleged that because the Debtor revoked the Star Trust, its assets became property of the estate. Additionally, the Trustee alleged that the assets of the AIM Entities belonged to the bankruptcy estate under the theory that the AIM Entities were the Debtor's alter ego.<sup>7</sup>

On November 1, 2006, the Debtor filed, pro se, a Response to Complaint "as settlor of Star Trust, Chair of Board of Directors and Shareholder of AIM, Inc., and shareholder of AIM, LLC." The Debtor denied the allegations that the AIM Entities were his alter ego but admitted that the property of the Star Trust became property of the estate when the trust was revoked. Ehab Moshen, the successor trustee of the Star Trust, also filed an answer admitting the Star Trust property was property of the estate.

In re Moshen, Not Reported in B.R. (2010)

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In January 2007, the Debtor's bankruptcy counsel filed a motion requesting that the Trustee release from the estate the funds of the AIM Entities to cover legal fees to defend against the Complaint. The bankruptcy court denied the motion because no evidence or authority was provided to support it.

\*2 On February 27, 2007, the Trustee filed a motion to strike the answer of the AIM Entities (which was the Response to Complaint filed by the Debtor) and to enter a default against the AIM Entities (the Motion for Default). Acting pro se, the Debtor filed a response, "submitted by the defendants, [the AIM Entities]," which was a motion to reconsider the denial of the release of funds, along with a motion to dismiss the Complaint by summary judgment, or, in the alternative, continue the hearing on the Motion for Default so that the Debtor could find counsel for the AIM Entities (the Motion to Dismiss).

The bankruptcy court held a hearing on the Motion for Default and the Motion to Dismiss on May 3, 2007. The Debtor appeared by telephone "on behalf of [the AIM Entities]" and was able to present a partial argument to the bankruptcy court before the connection was cut off.<sup>8</sup> The bankruptcy court, finding that the AIM Entities had not properly answered the Complaint, entered an order on May 8, 2007, granting the Trustee's Motion for Default. It also denied the Debtor's Motion to Dismiss. On June 13, 2007, a default judgment was subsequently entered in favor of the Trustee and against the AIM Entities, declaring that the assets of the AIM Entities were property of the Debtor's estate (the Default Judgment). The Complaint was then dismissed by stipulation with Ehab Mohsen as the trustee for Star Trust.

The Debtor appealed the order granting the Motion for Default on May 21, 2007; however, the Bankruptcy Appellate Panel dismissed the appeal as interlocutory on August 14, 2007.

On May 8, 2008, the Debtor filed, on behalf of the AIM Entities, a motion to set aside the Default Judgment (the Motion to Vacate). Part of the relief requested was the release of the AIM Entities' funds in order to pay for legal representation. At the same time, the Debtor argued he had individual standing to defend against the Complaint. The Debtor cited case law regarding shareholder standing and asserted that because he was "injured directly and independently of the injury to the AIM entities" he had standing to request that the Default Judgment be set aside. The Debtor contended that when the AIM Entities' assets were seized by the Trustee as a result of the Default Judgment, the AIM Entities were unable to pay certain tax

obligations. As a result, the Debtor, as a manager of AIM Inc., was allegedly liable to the Egyptian taxing authorities for those obligations. Additionally, the Debtor argued that as a director, he was liable to individual shareholders. Therefore, he argued that he was injured directly and independently of the AIM Entities, and as a person aggrieved, had standing to defend against the Complaint.

The Trustee opposed the Motion to Vacate by arguing that the Debtor, as a non-attorney and as a shareholder whose interests in the AIM Entities belonged to the estate, had no standing to seek relief on behalf of the AIM Entities. The Debtor then filed a supplemental brief, which was a motion to impose sanctions against the Trustee due to false representations that the Debtor thought the Trustee had made in her declarations supporting the opposition (the Sanctions Motion).

\*3 A hearing on the Motion to Vacate and the Sanctions Motion was held on January 22, 2009. At the close of hearing, the bankruptcy court denied the Motion to Vacate. It determined that the Debtor was precluded from appearing on behalf of the AIM Entities because he was not a lawyer. The bankruptcy court found that the Debtor was not seeking to intervene as a shareholder but was seeking to act on behalf of corporate entities, which required counsel. Additionally, the bankruptcy court found that even if the Debtor had authority to act for the AIM Entities, there was no demonstration that excusable neglect led to the entry of the Default Judgment or that extraordinary circumstances existed to justify relief. The bankruptcy court also denied the Sanctions Motion finding there was no bad faith on the part of the Trustee.<sup>9</sup>

The Debtor filed a motion for reconsideration on January 30, 2009 (the Reconsideration Motion). In the Reconsideration Motion, the Debtor argued that the bankruptcy court made manifest errors of law and fact by finding he had no standing to defend against the Complaint. The Debtor contended (for the first time) that the Response to Complaint and Motion to Dismiss should have been construed by the bankruptcy court as motions by him to intervene as a defendant. The Debtor also argued that the Default Judgment unjustly deprived the AIM Entities of their assets in violation of their due process rights. A hearing was held on the Reconsideration Motion on April 30, 2009, at which time the bankruptcy court denied the Reconsideration Motion. The Debtor timely appealed.

In re Moshen, Not Reported in B.R. (2010)

## II. JURISDICTION

The bankruptcy court had jurisdiction pursuant to 28 U.S.C. § 157(b)(2)(J). We have jurisdiction under 28 U.S.C. § 158.

## III. ISSUES

1. Did the bankruptcy court err in determining that the Debtor did not have standing to seek relief from the Default Judgment or otherwise abuse its discretion in denying the Motion to Vacate?

2. Did the bankruptcy court abuse its discretion in denying the Reconsideration Motion?

## IV. STANDARDS OF REVIEW

We review the bankruptcy court's determination of standing de novo. *Virginia Sur. Co. v. Northrup Grumman Corp.*, 144 F.3d 1243, 1245 (9th Cir.1998); *Brown v. Sobczak (In re Sobczak)*, 369 B.R. 512, 516 (9th Cir.BAP2007). A decision on a motion to set aside entry of default is reviewed for an abuse of discretion. *In re Hammer*, 940 F.2d 524, 525 (9th Cir.1991). A denial of a motion for reconsideration is also reviewed for an abuse of discretion. *Hansen v. Moore (In re Hansen)*, 368 B.R. 868, 874–75 (9th Cir.BAP2007).

In determining whether the bankruptcy court abused its discretion, we first “determine de novo whether the [bankruptcy] court identified the correct legal rule to apply to the relief requested.” *United States v. Hinkson*, 585 F.3d 1247, 1262 (9th Cir.2009). If the bankruptcy court identified the correct legal rule, we then determine whether its “application of the correct legal standard [to the facts] was (1) illogical, (2) implausible, or (3) without support in inferences that may be drawn from the facts in the record.” *Id.* (internal quotation marks omitted).

## V. DISCUSSION

### A. Standing.

\*4 The bankruptcy court denied the Motion to Vacate because it determined that the Debtor did not have standing to act on behalf of the AIM Entities since he was not an attorney licensed to practice law. *D-Beam Ltd. P'ship v. Roller Derby Skates, Inc.*, 366 F.3d 972, 974 (9th Cir.2004); see also Local Bankruptcy Rule 9010–1(a). It is well-settled that corporations must appear in federal court through an attorney. *Id.*; *Rowland v. Calif. Men's Colony*, 506 U.S. 194, 202 (1993).

The Debtor is not an attorney. The Debtor, who is not a named defendant in the Complaint, filed the Response to Complaint as a director and shareholder of the AIM Entities. He filed the Motion to Dismiss on behalf of the AIM Entities and appeared “for the AIM [E]ntities” at the hearing on the Motion for Default. Hr'g Tr. (May 3, 2007) at 14:5–6. He subsequently filed the Motion to Vacate in “pro per, and on behalf of [the AIM Entities]” as manager and shareholder. As a result, the Debtor, throughout the litigation, appeared for the AIM Entities even though he was precluded from doing so as a non-attorney.

After entry of the Default Judgment, the Debtor argued for the first time in his Motion to Vacate that he had standing because he was “injured directly and independently of the AIM Entities” and therefore met the requirements for standing under the holding of *Virginia Sur. Co. v. Northrup Grumman Corp.*, 144 F.3d at 1245. However, *Virginia Sur. Co.* discusses the standing requirements necessary to bring a shareholder derivative suit against a corporation, and, as explained below, the Debtor no longer held any equity interest in the AIM Entities.

Here, the Debtor did not have standing to defend against the Complaint as an individual shareholder because the Debtor's shareholder interests were held by the estate on the date the Complaint was filed. The bankruptcy estate includes “all legal or equitable interests of the debtor in property as of the commencement of the case.” 11 U.S.C. § 541(a)(1). Once a bankruptcy petition is filed, property rights belonging to a debtor under state law become assets of the estate. *Butner v. United States*, 440 U.S. 48, 54–55 (1979). On his bankruptcy schedules, the Debtor listed the assets of AIM Inc. and his shares in AIM LLC. As a result, the Debtor's interests and rights as a shareholder of AIM LLC became property of his bankruptcy estate. Accordingly, the Debtor did not have standing as a shareholder to set aside the Default Judgment. Thus, the bankruptcy court did not err in denying the Motion to

In re Moshen, Not Reported in B.R. (2010)

Vacate on this basis.

In his Reconsideration Motion and on appeal, the Debtor argues that the bankruptcy court should have construed his various pleadings as motions to intervene as a separate defendant. Specifically, he argues the bankruptcy court should have construed the Response to Complaint and Motion to Dismiss as motions to intervene as an aggrieved party who had obligations to taxing authorities and AIM shareholders.

\*5 While the pleadings of pro se litigants are to be liberally construed, a court is not required to search the record and make their arguments for them. *Aguasin v. Mukasey*, 297 Fed. Appx. 706 (9th Cir.2008). Additionally, arguments must be briefed in order to be preserved. *Id.* The Debtor did not address the issue of intervention until his appellate brief (although it was mentioned in passing in the Reconsideration Motion). Therefore, the argument was waived and the bankruptcy court did not err in not addressing it. *In re Cybernetic Serv., Inc.* 252 F.3d 1039, 104 n. 3 (9th Cir.2001).

Generally, we will not consider issues raised for the first time on appeal. *Franchise Tax Bd. v. Roberts (In re Roberts)*, 175 B.R. 339, 345 (9th Cir.BAP1994). However, we may consider the issue if it is purely one of law and the opposing party is not prejudiced by the failure to raise the issue in the trial court. *Dumont v. Ford Motor Credit Co. (In re Dumont)*, 581 F.3d 1104, 1116 (9th Cir.2009). Under Federal Rule of Civil Procedure (FRCP) 24, a party has a right to intervene if certain conditions are met; and, is permitted to intervene in other instances. Permissive intervention is within the discretion of the bankruptcy court. Thus, we cannot consider the Debtor's argument to the extent it is based on permissive intervention because permissive intervention is not purely a question of law and there is no record upon which to determine whether the bankruptcy court abused its discretion. However, we may address the Debtor's argument that he had a right to intervene and defend as a matter of right under FRCP 24(a)(2).

The Ninth Circuit has adopted a four-part test to determine whether a party may intervene as a matter of right under FRCP 24(a)(2):

[a]n order granting intervention as of right is appropriate if (1) the applicant's motion is timely; (2) the applicant has asserted an interest relating to the property or transaction which is the subject of the action; (3) the applicant is so situated that without intervention the disposition may, as a practical matter, impair or impede its ability to protect that interest; and (4) the applicant's interest is not adequately represented

by the existing parties.

*United States ex rel McGough v. Covington Tech.*, 967 F.2d 1391, 1394 (9th Cir.1992); *Educ. Credit Mgmt. Corp. v. Bernal (In re Bernal)*, 223 B.R. 542, 547 (9th Cir.BAP1998).

The problem with the Debtor's argument that he should have been allowed to intervene is that he failed to demonstrate that he had an individual interest in defending against the Complaint. His alleged interest in the litigation is in protecting himself from personal liability to shareholders if the AIM Entities' corporate veil was pierced, as well as from his personal liability on tax obligations owed by AIM Inc. to the Egyptian authorities. He argues that because these obligations are non-dischargeable, his injury is distinct from the AIM Entities or its shareholders. However, there is no evidence to support his arguments other than the Debtor's assertions of purported liability.

\*6 A bankruptcy discharge in a chapter 7 relieves a debtor from prepetition claims. Accordingly, any liabilities the Debtor may have had to the AIM Entities' shareholders as a result of the Default Judgment were subject to his bankruptcy discharge.<sup>10</sup> Furthermore, debts that fall within an exception to discharge under § 523(a)(2) and (a)(4) are not self-executing; non-dischargeable claims must first be proven. *Urbatek Sys., Inc. v. Lochrie (In re Lochrie)*, 78 B.R. 257, 259–60 (9th Cir.BAP1987). There is no evidence that any shareholder claims were made against the estate or that nondischargeability actions had been filed against the Debtor.

Additionally, the Debtor's contention that he needed to intervene in order to protect against liability for tax obligations is unpersuasive. First, there is no evidence in the record that a tax obligation owed by AIM Inc. to the Egyptian taxing authorities even existed, much less that it was a nondischargeable debt of the Debtor. Furthermore, according to a letter submitted to the bankruptcy court by a member of AIM Inc.'s board of directors, the tax obligation did not result from the Default Judgment but from a withholding of payments by another entity back in 2005. The Debtor's intervention to defend against the Complaint would not have provided him with the ability to protect against any personal liability for corporate taxes. If Egyptian law imposes personal liability on a corporate director for unpaid taxes, the Debtor, as a director of AIM Inc., would owe the taxes whether or not the corporate veil was pierced.

Thus, to the extent the Debtor was not representing the AIM Entities or his shareholder interest, but sought relief from the Default Judgment as an intervening "person

In re Moshen, Not Reported in B.R. (2010)

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aggrieved,” he still did not have standing to set aside the Default Judgment because he simply did not demonstrate that he was individually damaged by the entry of the Default Judgment or the Trustee’s success in piercing the corporate veil.

In any event, even if the Debtor were allowed to individually intervene, he could not answer for the AIM Entities. Because the AIM Entities did not answer the Complaint, the bankruptcy court was required to enter a default. [Fed.R.Civ.P. 55\(a\)](#) (“When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend, ... the clerk must enter the party’s default.”).

We may affirm the bankruptcy court on any basis supported by the record. [Woodsley v. Edwards \(In re Woodsley\)](#), 117 B.R. 524, 530 (9th Cir.BAP1990). Because we conclude that the bankruptcy court did not err in denying the Motion to Vacate due to the Debtor’s lack of standing to seek relief, we do not reach the issue of whether it was an abuse of the bankruptcy court’s discretion to find there was no excusable neglect or manifest error that required the Default Judgment to be vacated.

*B. Reconsideration.*

A motion for reconsideration filed within 14 days of the underlying order is treated as a motion to alter or amend a judgment under [Fed.R.Civ.P. 59\(e\)](#) such that it tolls the time within which to file a notice of appeal of the underlying order until the order on reconsideration is entered. [Am. Ironworks & Erectors, Inc. v. N. Am. Constr. Corp.](#), 248 F.3d 892, 898–99 (9th Cir.2001). Amendment or alteration of a judgment is appropriate under [Fed.R.Civ.P. 59\(e\)](#) only if the court (1) is presented with newly discovered evidence that was not available at the time of the original hearing, (2) committed clear error or made an initial decision that was manifestly unjust, or (3) there is an intervening change in controlling law. [Zimmerman v. City of Oakland](#), 255 F.3d at 740.

\*7 A motion for reconsideration is not permitted to rehash the same arguments made the first time or to simply express an opinion that the bankruptcy court was wrong; or, to assert new legal theories that could have been raised

before. [In re Greco](#), 113 B.R. 658, 664 (D.Haw.1990), *aff’d and remanded*, [Greco v. Troy Corp.](#), 952 F.2d 406 (9th Cir.1991). In reviewing the Reconsideration Motion, we note that the Debtor largely presents the same arguments made in his Motion to Vacate or asserts new legal arguments (such as his argument that his pleadings should have been construed as a motions to intervene) that he could have presented earlier.

The Debtor did not provide any excerpts of record or transcripts and the appellants provided only limited documents. We may review the bankruptcy court’s electronic docket if the parties’ excerpts of record do not include relevant documents (see [Atwood v. Chase Manhattan Mrtg. Co. \(In re Atwood\)](#), 293 B.R. 227, 233 n. 9 (9th Cir.BAP2003)); however, we cannot review here whether the bankruptcy court abused its discretion in denying the Reconsideration Motion because the transcript for the hearing on the Reconsideration Motion is not contained on the bankruptcy court docket.

Absent a record demonstrating that the bankruptcy court abused its discretion in denying the Debtor’s Reconsideration Motion, we must affirm. [Kritt v. Kritt](#), 190 BR 387; [Syncom Capital Corp. v. Wade](#), 924 F.2d 167 (where appellant failed to provide a trial transcript, his contentions were “unreviewable” and “justif[ied] summary affirmance.”); [McCarthy v. Prince \(In re McCarthy\)](#), 230 B.R. 414, 417 (9th Cir.BAP1999) (if findings of fact and conclusions of law were made orally on the record, a transcript of those findings is mandatory).

**CONCLUSION**

We agree with the bankruptcy court’s determination that the Debtor did not have standing to defend against the Complaint or set aside the Default Judgment. There is no basis to demonstrate that the bankruptcy court abused its discretion in denying reconsideration of that ruling. Accordingly, we AFFIRM.

**All Citations**

Not Reported in B.R., 2010 WL 6259979

Footnotes

<sup>1</sup> Hon. Deborah J. Saltzman, Bankruptcy Judge for the Central District of California, sitting by designation.

In re Moshen, Not Reported in B.R. (2010)

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- 2 This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have (*see Fed. R.App. P. 32.1*), it has no precedential value. *See* 9th Cir. BAP Rule 8013–1.
- 3 Unless otherwise specified, all chapter and section references are to the Bankruptcy Code, 11 U.S.C. §§ 101–1532, and all “Rule” references are to the Federal Rules of [Bankruptcy Procedure, Rules 1001–9037](#).
- 4 AIM Inc. is an Egyptian corporation and AIM LLC is a Delaware limited liability investment and holding company.
- 5 The Appellant did not submit excerpts of record or transcripts as required by Rule 8009(b) and [BAP Rule 8006–1](#). The Appellees provided only a limited number of documents as part of their excerpts of record. Therefore, the facts recited here are gleaned from taking judicial notice of the pleadings filed with the bankruptcy court through the electronic docketing system *See O’Rourke v. Seaboard Sur. Co. (In re E.R. Fegert, Inc.)*, 887 F.2d 955, 957–58 (9th Cir.1988); *Atwood v. Chase Manhattan Mrtg. Co. (In re Atwood)*, 293 B.R. 227, 233 n. 9 (9th Cir.BAP2003).
- 6 The Debtor has been incarcerated in federal prison since 2004.
- 7 Under the alter ego doctrine, when the corporate form is used to perpetuate a fraud, circumvent a statute, or accomplish some other inequitable purpose, a court may disregard the corporate entity and hold its individual shareholders liable for the actions of the corporation. In California, courts have consistently stated there are two general requirements for the application of the alter ego doctrine:
- 1) there must be such a unity of interest and ownership between the corporation and its equitable owner(s) that the separate personalities of the corporation and its shareholders do not truly exist;
  - 2) there must be an inequitable result if the acts in question are treated as those of the corporation alone, or stated differently, the failure to disregard the corporate entity would sanction a fraud or promote injustice. *See Sonora Diamond Corp. v. Superior Court*, 83 Cal.App. 4th 523, 539 (2000).
- Factors considered in applying the doctrine include whether there was commingling of funds or assets, use of the entity as a shell or conduit for the affairs of the other, inadequate capitalization, disregard of corporate formalities, and lack of segregation of corporate records. *Id.*
- 8 The Debtor was only allowed 15 minutes of telephone time from the prison.
- 9 The Debtor has not addressed the bankruptcy court’s denial of the Sanctions Motion in his appellate briefs. Therefore, the issue is deemed abandoned. *See Branam v. Crowder (In re Branam)*, 226 B.R. 45, 55 (9th Cir.BAP1998), *aff’d*, 205 F.3d 1350 (9th Cir.1999).
- 10 A claim is defined as a “right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured.” 11 U.S.C. § 101(5). The broad definition of claim allows that no matter how remote or contingent, all prepetition legal obligations of the debtor will be dealt with in the bankruptcy case and all scheduled liabilities will be subject to discharge. *See Hassanally v. Republic Bank (In re Hasanally)*, 208 B.R. 46, 49 (9th Cir.BAP1997).
- In California, a civil action ordinarily accrues when the wrongful act is done and the liability arises. *Id.* at 50. In this situation, any shareholder liability would have arisen at the time there was a breach of any fiduciary duty by not keeping the corporate form.

## Exhibit 18

Palumbo Design, LLC v. 1169 Hillcrest, LLC, Slip Copy (2019)

**H** KeyCite history available

2019 WL 10944852

Only the Westlaw citation is currently available.  
United States District Court, C.D. California.

**PALUMBO DESIGN, LLC**, Plaintiff,

v.

1169 HILLCREST, LLC, et al.,  
Defendants.

19-CV-06664 DSF (PLAx)

Signed 12/03/2019

#### Attorneys and Law Firms

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Order GRANTING in PART and DENYING in PART  
Defendants' Motions to Dismiss (Dkts. 13, 16)

[Dale S. Fischer](#), United States District Judge

\*1 Plaintiff Palumbo Design, LLC sues Defendants 1169 Hillcrest, LLC, NEM 2, LLC (fka NAM 2, LLC) and Neil Moffitt (collectively, Defendants) for breach of contract and quantum meruit. Dkt. 1 (FAC). 1169 Hillcrest moves to dismiss the FAC under Rule 12(b)(6) for failure to state a claim. Dkt. 13. NEM 2 and Moffitt move to dismiss on the same grounds and under Rule 12(b)(2) for lack of personal jurisdiction. Dkt. 16 (Mot.). Plaintiff opposes the motions. Dkts. 24, 26 (Opp'n).<sup>1</sup> The Court deems this matter appropriate for decision without oral argument. See [Fed. R. Civ. P. 78](#); Local Rule 7-15.

#### I. Background

Palumbo is a California LLC managed by Michael Palumbo, a California-based home designer and developer. FAC ¶¶ 1, 14. In March 2014, Palumbo entered into a Development Services Agreement (DSA) with 1169 Hillcrest, LLC to develop a property located at 1169 North Hillcrest Road in Beverly Hills, California (the Property). [Id.](#) ¶ 22; Dkt. 1-1, Ex. 1 (DSA). 1169 Hillcrest is a limited liability corporation with a single member, Defendant NEM 2 LLC (NEM 2).<sup>2</sup> FAC ¶ 4. NEM 2 is a Nevada LLC with Defendant Moffitt as its sole member. [Id.](#) ¶ 5.

Under the DSA, Palumbo was tasked with developing the Property and, in return, would receive a portion of the net profits when 1169 Hillcrest sold the Property. [Id.](#) ¶¶ 22-25. In particular, Palumbo agreed to “manage and oversee the planning, approvals, programming, permitting, construction, and development” of the Property. [Id.](#) ¶ 23. Once the Property was developed and sold by 1169 Hillcrest, Palumbo would receive an Aggregate Development Fee in the amount of 40% of the net profits from the sale. FAC ¶ 24; DSA, Schedule 5.1. During its development of the Property, Palumbo also received a “Monthly Draw” of \$15,000, which served as an “advance” on the Aggregate Development Fee. FAC ¶ 24.

In early 2015, Moffitt received an offer from Skyview Capital to purchase the undeveloped Property. FAC ¶ 27. On February 10, 2015, Moffitt terminated Palumbo's development of the Property under the DSA. [Id.](#) ¶ 27. Days later, NEM 2 entered into an agreement to sell the Property to Skyview Capital. [Id.](#) Palumbo sued 1169 Hillcrest and Moffitt in this Court to stop the sale, asserting claims of fraud in the inducement, breach of contract, breach of implied covenant of good faith, and unfair business practices ([Palumbo I](#)). [Id.](#) ¶ 28. In December 2015, the parties reached an agreement to settle Palumbo's claims and dismiss the lawsuit. [Id.](#) ¶ 30; Dkt. 1-2, Ex. 2 (Settlement Agreement).

Under the Settlement Agreement, Palumbo agreed to dismiss [Palumbo I](#) with prejudice; in exchange, Defendants allowed Palumbo to market the Property for sale and gave Palumbo an option to purchase the Property at a fixed price if it was not sold within 19 weeks. [Id.](#) ¶ 30; Settlement Agreement §§ 1(a), (f). Pursuant to the Settlement Agreement, this Court dismissed [Palumbo I](#) with prejudice on December 15, 2015. FAC ¶ 33.

Palumbo Design, LLC v. 1169 Hillcrest, LLC, Slip Copy (2019)

\*2 More litigation ensued. While Palumbo I was still pending, Skyview Capital filed a state court action against 1169 Hillcrest and NEM 2 seeking to enforce its agreement to purchase the Property. Id. ¶ 34. That claim settled. Id. In February 2016, a real estate agent sued Moffitt, NEM 2, and 1169 Hillcrest in California state court to recover an unpaid real estate commission from the sale of the Property. Id. ¶ 35. In July 2016, the United States filed a civil forfeiture complaint against the Property to recover delinquent tax liabilities. Id. ¶ 36. To settle that matter, 1169 Hillcrest agreed to would sell the Property and remit the net proceeds from the sale to the government. Id.

The Property was finally sold to Skyview Capital on October 25, 2016. Id. ¶ 40. However, pursuant to a stipulation between 1169 Hillcrest, Moffitt, and the government in the civil forfeiture case, the funds from the sale were held in trust “pending distribution according to the judgment” to pay Moffitt’s tax liabilities. Id. This Court issued an order adopting the parties’ stipulation and consent judgment governing the distribution of the funds on May 30, 2017. Id. ¶ 40.

On February 14, 2019, Palumbo filed suit in California state court against Defendants asserting claims of breach of contract and quantum meruit (Palumbo II). RJN, Ex. B.<sup>3</sup> Shortly after, on February 22, 2019, Palumbo provided notice to 1169 Hillcrest and Moffitt that a “termination event”—the sale of the Property to Skyview Capital—had occurred, obligating 1169 Hillcrest to pay Palumbo the Aggregate Development fee within 60 days. Id. ¶ 41; DSA § 8.4. After the case was removed, this Court dismissed the action without prejudice because Plaintiff was suspended by the California Franchise Tax Board and therefore did not have standing to sue. RJN, Ex. F. On May 30, 2019, after being reinstated by the Tax Board, Plaintiff filed its current Complaint for breach of contract and quantum meruit against 1169 Hillcrest, NEM 2, and Moffitt.

## II. Legal Standards

### A. Rule 12(b)(2)

“When a defendant moves to dismiss for lack of personal jurisdiction [under Rule 12(b)(2) ], the plaintiff bears the burden of demonstrating that the court has jurisdiction.” In re W. States Wholesale Nat. Gas Antitrust Litig., 715 F.3d 716, 741 (9th Cir. 2013). If the motion is based on

written materials rather than an evidentiary hearing, the plaintiff need only make “a prima facie showing of jurisdictional facts to withstand the motion to dismiss,” and the court resolves all contested facts in favor of the plaintiff. Id. (citation and internal quotation marks omitted). A plaintiff may not, however, establish jurisdiction by alleging bare jurisdictionally-triggering facts without providing some evidence of their existence. Scott v. Breeland, 792 F.2d 925, 927 (9th Cir. 1986) (citation omitted). Rather, the plaintiff is “obligated to come forward with facts, by affidavit or otherwise, supporting personal jurisdiction.” Id.

“Personal jurisdiction over a nonresident defendant is tested by a two-part analysis.” Chan v. Soc’y Expeditions, Inc., 39 F.3d 1398, 1404 (9th Cir. 1994). “First, the exercise of jurisdiction must satisfy the requirements of the applicable state long-arm statute.” Id. “Second, the exercise of jurisdiction must comport with federal due process.” Id. at 1404-05 (citation omitted). California permits “[a] court of [the] state [to] exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States.” Cal. Civ. Proc. Code § 410.10; see also Ballard v. Savage, 65 F.3d 1495, 1500 n.4 (9th Cir. 1995) (“California permits its courts to exercise personal jurisdiction to the extent permitted by the federal due process clause.”). Therefore, the Court need consider only whether the exercise of jurisdiction comports with due process.

\*3 Due process requires that nonresident defendants have “certain minimum contacts with [the forum] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.” Int’l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (citations and internal quotation marks omitted). Personal jurisdiction may be either general or specific. See Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414 nn. 8 & 9 (1984). “[T]he foreseeability that is critical to due process analysis ... is that the defendant’s conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there.” Burger King Corp. v. Rudzewicz, 471 U.S. 462, 474 (1985) (citing World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980)).

### B. Rule 12(b)(6)

Federal Rule of Civil Procedure 12(b)(6) allows an attack on the pleadings for failure to state a claim upon which relief can be granted. “[W]hen ruling on a defendant’s motion to dismiss, a judge must accept as true all of the

Palumbo Design, LLC v. 1169 Hillcrest, LLC, Slip Copy (2019)

factual allegations contained in the complaint.” [Erickson v. Pardus](#), 551 U.S. 89, 94 (2007). However, allegations contradicted by matters properly subject to judicial notice or by exhibit need not be accepted as true, [Sprewell v. Golden State Warriors](#), 266 F.3d 979, 988 (9th Cir. 2001); and a court is “not bound to accept as true a legal conclusion couched as a factual allegation.” [Ashcroft v. Iqbal](#), 556 U.S. 662, 678 (2009) (citation and internal quotation marks omitted). “Nor does a complaint suffice if it tenders naked assertion[s] devoid of further factual enhancement.” *Id.* (alteration in original) (citation and internal quotation marks omitted). A complaint must “state a claim to relief that is plausible on its face.” [Bell Atlantic Corp. v. Twombly](#), 550 U.S. 544, 570 (2007). This means the complaint must plead “factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” [Iqbal](#), 556 U.S. at 678. “The plausibility standard is not akin to a ‘probability requirement,’ but it asks for more than a sheer possibility that a defendant has acted unlawfully.” *Id.*

Ruling on a motion to dismiss will be “a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not ‘show[n]’—‘that the pleader is entitled to relief.’ ” *Id.* at 679 (alteration in original) (citation omitted) (quoting [Fed. R. Civ. P. 8\(a\)\(2\)](#)).

As a general rule, leave to amend a complaint that has been dismissed should be freely granted. [Fed. R. Civ. P. 15\(a\)](#). However, leave to amend may be denied when “the court determines that the allegation of other facts consistent with the challenged pleading could not possibly cure the deficiency.” [Schreiber Distrib. Co. v. Serv-Well Furniture Co.](#), 806 F.2d 1393, 1401 (9th Cir. 1986).

### III. Discussion

#### A. Personal Jurisdiction

Plaintiff argues that Moffitt and NEM 2 consented to personal jurisdiction by signing the Settlement Agreement or, alternatively, “purposefully availed” themselves of the forum to warrant the Court’s exercise of personal jurisdiction.<sup>4</sup>

#### 1. Consent to Jurisdiction

Moffitt and NEM 2 move to dismiss the claims against them under [Rule 12\(b\)\(2\)](#) for lack of personal jurisdiction. Mot. at 16. Plaintiff maintains that Moffitt and NEM 2 consented to personal jurisdiction when they signed the Settlement Agreement in the [Palumbo I](#) litigation. Opp’n at 13. Section 2(c) of the Settlement Agreement states that the parties “expressly incorporate by reference herein the venue and choice-of-law provisions of the DSA.” The incorporated provisions of the DSA—to which Moffitt and NEM 2 are not parties—provide that “any dispute related hereto shall be filed in state or federal court located in Los Angeles County, California, and said courts shall be the exclusive jurisdiction for any such dispute. All parties consent to the jurisdiction of the state and federal court[s] of California.” DSA § 10.9.

\*4 While it may be true that Moffitt and NEM 2 consented to this Court’s jurisdiction in actions related to the Settlement Agreement, this suit arises out of the DSA, not the Settlement Agreement. *See, e.g.*, FAC ¶ 6 (“This lawsuit arises from a Development Services Agreement (‘DSA’) that was entered into [in] March of 2014 between Plaintiff and 1169 Hillcrest”). In fact, Plaintiff argues that the claims in this suit arose months after the Settlement Agreement was signed and are “obviously very different” from those resolved by the Settlement Agreement. Opp’n at 23-24. The Settlement Agreement does not provide a basis for personal jurisdiction over Moffitt and NEM 2.

#### 2. Specific Personal Jurisdiction

Plaintiff next argues that NEM 2 and Moffitt are subject to personal jurisdiction because they “purposefully and repeatedly [availed themselves] of the privilege of conducting business activities in California.” Opp’n at 14.

The Ninth Circuit has established a three-prong test for analyzing specific personal jurisdiction:

- (1) The non-resident defendant must purposefully direct his activities or consummate some transaction with the forum or resident thereof; or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws;
- (2) the claim must be one which arises out of or relates to the defendant’s forum-related activities; and
- (3) the exercise of jurisdiction must comport with fair

Palumbo Design, LLC v. 1169 Hillcrest, LLC, Slip Copy (2019)

play and substantial justice, *i.e.* it must be reasonable. [Schwarzenegger v. Fred Martin Motor Co.](#), 374 F.3d 797, 802 (9th Cir. 2004) (citing [Lake v. Lake](#), 817 F.2d 1416, 1421 (9th Cir. 1987)). “If any of the three requirements is not satisfied, jurisdiction in the forum would deprive the defendant of due process of law.” [Pebble Beach Co. v. Caddy](#), 453 F.3d 1151, 1155 (9th Cir. 2006) (citation omitted). The plaintiff bears the burden of satisfying the first two prongs and then the burden shifts to the defendant to make a “compelling case” that the third prong has not been met. [Schwarzenegger](#), 374 F.3d at 802.

Plaintiff’s claims are based in contract and should be analyzed under the purposeful availment test. See [Boschetto v. Hansing](#), 539 F.3d 1011, 1016 (9th Cir. 2008) (holding the purposeful availment analysis is typically used in suits sounding in contract). In such cases, courts look at “prior negotiations and contemplated future consequences, along with the terms of the contract and the parties’ actual course of dealing to determine if the defendant’s contacts are ‘substantial’ and not merely ‘random, fortuitous, or attenuated.’” [Sher v. Johnson](#), 911 F.2d 1357, 1362 (9th Cir. 1990) (quoting [Burger King](#), 471 U.S. at 479).

a. Purposeful Availment

Moffitt and NEM 2 argue that any forum-related acts they allegedly performed were done as corporate officers “on behalf of [1169] Hillcrest LLC” and therefore are “not material for establishing minimum contacts” for personal jurisdiction over them personally under the fiduciary shield doctrine. Mot. at 20 (citing [Colt Studio, Inc. v. Badpuppy Enter.](#), 75 F. Supp. 2d 1104 (C.D. Cal. 1999)). Defendants are wrong.

Under the fiduciary shield doctrine, “a person’s mere association with a corporation that causes injury in the forum state is not sufficient in itself to permit that forum to assert jurisdiction over the person.” [Davis v. Metro Prods., Inc.](#), 885 F.2d 515, 520 (9th Cir. 1989). But where the corporation is the agent or alter ego of the individual defendant, [Flynt Distrib. Co. v. Harvey](#), 734 F.2d 1389, 1393 (9th Cir. 1984), or the individual controls and directly participates in the alleged activities, [Transgo, Inc. v. Ajac Transmission Parts Corp.](#), 768 F.2d 1001, 1021 (9th Cir. 1985), the fiduciary shield doctrine does not protect him.

\*5 Defendants stress that Moffitt was acting on behalf of 1169 Hillcrest in all dealings concerning the Property and

therefore any forum-related acts cannot be attributed to him personally. But Moffitt’s “status as [an] employee[ ] does not somehow insulate [him] from jurisdiction.” [Calder v. Jones](#), 465 U.S. 783, 790 (1984). Rather, “[e]ach defendant’s contacts with the forum State must be assessed individually.” *Id.*; see also [Keeton v. Hustler Magazine, Inc.](#), 465 U.S. 770, 781 n.13 (1984) (Employees who “act in their official capacity” are not “shielded from suit in their individual capacity.”).

Following the Supreme Court’s directive, courts evaluate a corporate officer’s personal acts to assess whether personal jurisdiction applies. In [Davis](#), for instance, the Ninth Circuit determined that assertion of personal jurisdiction over two corporate officers was reasonable where the individuals each owned 50% of the defendant corporation and solicited and conducted business in the forum state that led to the litigation. [Davis](#), 885 F.2d at 522-23. Here, the FAC alleges that Moffitt approached Palumbo about purchasing the Property in California, FAC ¶ 16, entered into a preliminary Memorandum of Understanding with Palumbo concerning the development of the Property, *id.* ¶ 17, signed the DSA on behalf of 1169 Hillcrest, *id.* ¶ 22, terminated Plaintiff’s appointment under the DSA, *id.* ¶ 27, facilitated multiple transfers and sales of the Property, *id.*, and used the proceeds from the sale of the Property to pay off a personal tax debt to the IRS. *Id.* ¶ 40. Moffitt is the manager of 1169 Hillcrest and the sole member of NEM 2. NEM 2 is alleged to have bought out minority ownership interests in 1169 Hillcrest in order to facilitate a sale of the Property, *id.* ¶ 27, and to have entered into a purchase agreement to sell the Property to Skyview Capital. *Id.* These allegations are sufficient to find that Moffitt and NEM 2 engaged in “direct participation in the alleged activities” that make up Plaintiff’s FAC and are not protected by the fiduciary shield doctrine. [Wolf Designs, Inc. v. DHR Co.](#), 322 F. Supp. 2d 1065, 1073 (C.D. Cal. 2004) (finding personal jurisdiction over corporate executive with 50% ownership share in the defendant corporation who was the “prime moving force in all policies and decisions” underlying the litigation).

b. Forum Related Activities

Plaintiff must next show it would not have been injured “but for” Defendants’ California activities. See [Menken v. Emm](#), 503 F.3d 1050, 1058 (9th Cir. 2007). “Under the ‘but for’ test, a lawsuit arises out of a defendant’s contacts with the forum state if a direct nexus exists between those contacts and the cause of action.” [In re W. States Wholesale Nat. Gas Antitrust Litig.](#), 715 F.3d 716, 742

Palumbo Design, LLC v. 1169 Hillcrest, LLC, Slip Copy (2019)

(9th Cir. 2013).

Plaintiff's claims clearly arise out of Moffitt's and NEM 2's activities (described above) related to the Property that occurred in California.

c. Reasonableness

Finally, Defendants have not presented a compelling case that the exercise of jurisdiction here would be unreasonable: the Property is located in California, the parties explicitly contemplated California jurisdiction when signing the DSA, and California law will govern. Defendants' concerns about excessive travel are overblown. See Menken, 503 F.3d at 1060 (“[W]ith the advances in transportation and telecommunications and the increasing interstate practice of law, any burden [of litigation in a forum other than one’s residence] is substantially less than in days past.”). The exercise of personal jurisdiction over Moffitt and NEM 2 comports with fair play and substantial justice.

\*6 The motion to dismiss Moffitt and NEM 2 for lack of personal jurisdiction is DENIED.

**B. Failure to State a Claim**

**1. Claim Preclusion**

Defendants argue that the same claims asserted in Plaintiff's FAC were dismissed with prejudice in Palumbo I pursuant to the Settlement Agreement and therefore Plaintiff is precluded from re-asserting them here. Mot. at 9-12 (“Plaintiff is barred from re-filing this action based on the same contract, claims, and damages under the doctrines of res judicata and retraxit.”).<sup>5</sup> Plaintiff contends that the Palumbo I settlement and dismissal did not involve the same claims and in fact “preserved Palumbo’s ability to bring a lawsuit to enforce” its right to a share of the profits from the eventual sale of the Property. Opp’n at 23. Plaintiff emphasizes that the Property was not sold until 10 months after the settlement and dismissal of Palumbo I. Id.

The Court must first determine what law applies to this question. The parties cite California law in evaluating the preclusive effect of this Court’s prior judgment in Palumbo I. See Mot. at 11; Opp’n at 24. This is not so

clear. “[F]ederal common law governs the claim-preclusive effect of” a judgment rendered “by a federal court sitting in diversity.” Semtek Int’l Inc. v. Lockheed Martin Corp., 531 U.S. 497, 508 (2001). For such judgments, “federal law incorporates the rules of preclusion applied by the State in which the rendering court sits.” Taylor v. Sturgell, 553 U.S. 880, 891 n.4 (2008); Daewoo Elecs. Am. Inc. v. Opta Corp., 875 F.3d 1241, 1246-47 (9th Cir. 2017) (Federal common law requires the court to “determine the preclusive effect of the prior [federal] decision by reference to the law of the state where the rendering federal diversity court sits.”).

Because this Court’s jurisdiction in Palumbo I was based on diversity, California law governs what effect should be given to that prior judgment. However, “California law ... determines the res judicata effect of a prior federal court judgment by applying federal standards.” Costantini v. Trans World Airlines, 681 F.2d 1199, 1201 (9th Cir. 1982). The Court therefore applies federal standards to the claim preclusion inquiry.<sup>6</sup>

\*7 “Under the doctrine of claim preclusion, a final judgment on the merits in a case precludes a successive action between identical parties or privies concerning the same claim or cause of action.” Wojciechowski v. Kohlberg Ventures, LLC, 923 F.3d 685, 689 (9th Cir. 2019) (internal citations omitted). However, “the claim preclusion ‘inquiry is modified in cases where the earlier action was dismissed in accordance with a release or other settlement agreement.’ ” Id. (quoting U.S. ex rel. May v. Purdue Pharma L.P., 737 F.3d 908, 913 (4th Cir. 2013)). In such cases, “[a] judgment entered ‘based upon the parties’ stipulation, unlike a judgment imposed at the end of an adversarial proceeding, receives its legitimating force from the fact that the parties consented to it.’ ” Id. (quoting Norfolk S. Corp. v. Chevron, U.S.A., Inc., 371 F.3d 1285, 1288 (11th Cir. 2004)). Therefore, “[a] settlement can limit the scope of the preclusive effect of a dismissal with prejudice by its terms.” U.S. ex rel. Barajas v. Northrop Corp., 147 F.3d 905, 911 (9th Cir. 1998).

The Ninth Circuit has instructed courts to “look to the intent of the settling parties to determine the preclusive effect of a dismissal with prejudice entered in accordance with a settlement agreement, rather than to general principles of claim preclusion.” Wojciechowski, 923 F.3d at 689. “The best evidence of [the parties’] intent is ... the settlement agreement itself ... as interpreted according to traditional principles of contract law.” Id. (quoting Norfolk S. Corp., 371 F.3d at 1289); In re W. States Wholesale Nat. Gas Antitrust Litig., 743 F. App’x 802, 803 (9th Cir. 2018) (The court “look[s] to the terms of the settlement agreement ... to determine the preclusive effect

Palumbo Design, LLC v. 1169 Hillcrest, LLC, Slip Copy (2019)

of the judgment” in the prior action).

Section 2(b) of the Settlement Agreement provides that “Palumbo is entitled to a ‘Development Services Fee,’ as defined in Schedule 5.1 of the DSA, *upon sale of the Property* by 1169 Hillcrest, LLC to any other party, including Palumbo.” (emphasis added). The Settlement Agreement therefore leaves no doubt that the parties did not intend to preclude Plaintiff from seeking its share of the Aggregate Development Fee *after* the eventual sale of the Property.<sup>7</sup> Defendants’ contention that the dismissal in Palumbo I “effectively ended any further lawsuits for breaches of the DSA,” Mot. at 12, is not supported by the plain terms of the Settlement Agreement. See Settlement Agreement § 1(h) (“This release [ ] does not [a]ffect any new conduct that would constitute a breach of the DSA after the execution of this Agreement.”).

The Court is “not at liberty to give the agreement greater preclusive effect than the parties intended.” Wojciechowski, 923 F.3d at 691. And the intent of the settling parties is clear: the dismissal with prejudice of Palumbo I was not meant to limit or preclude Plaintiff from collecting the Aggregate Development Fee after Defendants sold the Property and therefore has no preclusive effect on this litigation.

## 2. Statute of Limitations

Defendants next argue that Plaintiff’s claims for breach of contract and quantum meruit are “barred by the statute of limitations based on judicial admissions contained in Palumbo II.” Mot. at 14. According to Defendants, Plaintiff alleged in the Palumbo II First Amended Complaint that the DSA was terminated on February 10, 2015, making payment of the Aggregate Development Fee due to Palumbo (and starting the clock on the limitations period) on April 11, 2015. Id. at 15; RJN, Ex. E ¶¶ 27-29. Plaintiff disputes Defendants’ reading of the Palumbo II allegations and argues that statements made in a separate litigation are not “judicial admissions” that can be held against it here. Opp’n at 22-23.

\*8 The Court agrees that Plaintiff is not bound by the statements or allegations made in Palumbo II or any other prior litigation between the parties. Casa Del Caffè Vergnano S.P.A. v. ITALFLAVORS, LLC, 816 F.3d 1208, 1213 (9th Cir. 2016) (finding the doctrine of “binding judicial admission” is “inapplicable [where] the alleged admission was made in a separate case from the present action”). The Court therefore will not consider allegations or admissions from previous litigation in

ruling on Defendants’ motions.

“In a federal diversity action brought under state law, the state statute of limitations controls.” Bancorp Leasing & Fin. Corp. v. Agusta Aviation Corp., 813 F.2d 272, 274 (9th Cir. 1987) (citing Walker v. Armco Steel Corp., 446 U.S. 740, 751–53 (1980)). “A claim may be dismissed as untimely pursuant to a 12(b)(6) motion ‘only when the running of the statute [of limitations] is apparent on the face of the complaint.’” United States ex rel. Air Control Techs., Inc. v. Pre Con Indus., Inc., 720 F.3d 1174, 1178 (9th Cir. 2013) (quoting Von Saher v. Norton Simon Museum of Art at Pasadena, 592 F.3d 954, 969 (9th Cir. 2010) (alteration in original)).

Based on the allegations in the FAC, Plaintiff’s claims are not barred by the statute of limitations. The FAC alleges that Defendants were required under the DSA to pay Plaintiff the Aggregate Development Fee within sixty days of the sale of the Property. FAC ¶ 27; DSA § 8.3. Plaintiff alleges that the sale of the Property occurred October 25, 2016, but that the money was not disbursed to Defendants until sometime after May 30, 2017. FAC ¶ 40. Plaintiff filed this action on May 30, 2019.

**Breach of Contract.** Under California law, the statute of limitations for a breach of written contract claim is four years. Cal. Code Civ. Proc. § 337. In general, “[a] cause of action for breach of contract accrues at the time of breach, which then starts the limitations period running.” Cochran v. Cochran, 56 Cal. App. 4th 1115, 1121 (1997). At the earliest, the FAC alleges that the DSA was breached in December 2016—sixty days after the sale of the Property, when the Aggregate Development Fee became due. Plaintiff’s breach of contract claim was filed within four years of that date and is therefore timely.

**Quantum Meruit.** The statute of limitations for a quantum meruit claim is two years. Cal. Code Civ. Proc. § 339. The limitations period on a cause of action for quantum meruit for personal services usually begins to run when those services or the relationship between the parties terminate. Zakk v. Diesel, 33 Cal. App. 5th 431, 455 (2019). However, “when services are provided with the understanding that payment for those services will be made at some time after the termination of those services or upon some contingency, the statute of limitations does not begin to run until that time arrives or contingency occurs.” Id.

Here, Plaintiff developed the Property with the understanding that it would receive payment after the Property was sold. The FAC alleges that the sale took place on October 25, 2016, but distribution of the funds to

Palumbo Design, LLC v. 1169 Hillcrest, LLC, Slip Copy (2019)

Defendants did not occur until sometime after May 30, 2017. FAC ¶ 40. It is not “apparent on the face of the complaint” that Defendants’ equitable obligation to pay for Plaintiff’s services accrued *before* Defendants’ received the funds from the sale of the Property. Therefore, the Court cannot conclude that Plaintiff’s quantum meruit claim is barred by the statute of limitations.

### 3. Claims Against Moffitt and NEM 2

\*9 That the Court has personal jurisdiction over Moffitt and NEM 2 does not necessarily mean that Plaintiff’s claims against them survive. Defendants argue that the breach of contract claim against them should be dismissed “[b]ecause they are not parties to the DSA and therefore have no liability for breach of the DSA.” Mot. at 12. Similarly, the quantum meruit claim should be dismissed because it has been asserted against them “merely as a result of the[ir] status as alleged members” of 1169 Hillcrest. *Id.* at 14 (citing [Cal. Corp. Code § 17703.04](#)) (A manager or member does not become personally responsible for the “debts, obligations, or other liabilities of a limited liability company ... solely by reason of the member acting as a member or manager acting as a manager for the limited liability company.”).

Plaintiff admits that neither Moffitt nor NEM 2 was a party to the DSA and it therefore has no remedy at law against either of them. Opp’n at 20. Instead, Plaintiff argues that it has adequately alleged the elements of a constructive trust remedy against them “based on its breach of contract claim against Defendant 1169 Hillcrest.” Opp’n at 20. Not so. “A plaintiff seeking imposition of a constructive trust must show: (1) the existence of a res (property or some interest in property); (2) the right to that res; and (3) the wrongful acquisition or detention of the res by another party who is not entitled to it.” [Mattel, Inc. v. MGA Entm’t, Inc.](#), 616 F.3d 904, 909 (9th Cir. 2010) (citing [Communist Party of U.S. v. 522 Valencia, Inc.](#), 35 Cal. App. 4th 980, 990 (1995)).<sup>8</sup> “Before a constructive trust can be imposed, the plaintiff must prove that the defendant’s acquisition of the property was wrongful.” [PCO, Inc. v. Christensen, Miller, Fink, Jacobs, Glaser, Weil & Shapiro, LLP](#), 150 Cal. App. 4th 384, 398 (2007). Because Plaintiff has not stated a claim against Moffitt or NEM 2, it has failed to allege that their acquisition of the proceeds from the sale of the Property was “wrongful” and the request for a standalone

remedy against these parties necessarily fails. See [Deutsche Bank Nat. Tr. Co. v. F.D.I.C.](#), 784 F. Supp. 2d 1142, 1163 (C.D. Cal.), on reconsideration in part, 854 F. Supp. 2d 756 (C.D. Cal. 2011), aff’d, 744 F.3d 1124 (9th Cir. 2014) (dismissing constructive trust claim because the Plaintiff had “no substantive claim supporting its constructi[ve] trust claim against that entity”).

Plaintiff argues that California law permits a court to impose a constructive trust against a third party that has acquired the wrongfully withheld property from the defendant. Opp’n at 19-20. But the cases cited by Plaintiff do not support that argument. In [Chang v. Redding Bank of Commerce](#), 29 Cal. App. 4th 673, 681 (1994), the court held that the plaintiff could pursue a constructive trust remedy against funds held by a third-party bank that had acquired the funds from the defendant. But the plaintiff in [Chang](#) had asserted a claim of unjust enrichment against the third-party bank and sought to impose a constructive trust as a remedy for that claim. *Id.* at 679; see also [Optional Capital, Inc. v. DAS Corp.](#), 222 Cal. App. 4th 1388, 1402 (2014) (Plaintiff asserted claims for conversion and fraudulent conveyance against the party over which a constructive trust was sought).

\*10 The claims of breach of contract and quantum meruit against Moffitt and NEM 2 are DISMISSED with leave to amend.

### IV. Conclusion

The motion to dismiss for lack of personal jurisdiction is DENIED. The claims against Moffitt and NEM 2 are DISMISSED with leave to amend. The motion to dismiss the claims against 1169 Hillcrest is DENIED.

An amended complaint may be filed and served no later than January 2, 2020. Failure to file by that date will waive the right to do so. The Court does not grant leave to add new defendants or new claims. Leave to add new defendants or new claims must be sought by a separate, properly noticed motion.

IT IS SO ORDERED.

### All Citations

Slip Copy, 2019 WL 10944852

### Footnotes

Palumbo Design, LLC v. 1169 Hillcrest, LLC, Slip Copy (2019)

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- 1 The Court refers in this Order to the Moffitt and NEM 2 motion to dismiss (Dkt. 16), which encompasses the same arguments and grounds for dismissal as the 1169 Hillcrest motion (Dkt. 13).
- 2 At the time the DSA was signed, NEM 2 was named “NAM 2, LLC”; its name was changed in November 2015 to “NEM 2, LLC.” FAC ¶ 4; Mot. at 1 n.1. NEM 2 and NAM 2 are the same entity and the parties treat them interchangeably.
- 3 Defendants ask the Court to take judicial notice of filings and court orders from the Palumbo I and Palumbo II cases. Dkt. 14 (RJN) Exs. B-G. The unopposed request is granted. Fed. R. Evid. 201(b). The Court does not rely on any other documents subject to Defendants’ RJN or Plaintiff’s Request for Judicial Notice (Dkt. 27) and DENIES those requests for judicial notice as moot.
- 4 Plaintiff does not argue that the Court has general personal jurisdiction over NEM 2 and Moffitt.
- 5 Under California law, “[a] retraxit is equivalent to a judgment on the merits and as such bars further litigation on the same subject matter between the parties.” Torrey Pines Bank v. Superior Court, 216 Cal. App. 3d 813, 820 (1989) (citations omitted). Retraxit is not a separate ground for dismissal, but rather “constitute[s] a decision on the merits invoking the principles of res judicata.” Id. at 822.
- 6 Some courts have cast doubt on the Ninth Circuit’s conclusion that California law applies the federal standard to determine the preclusive effect of federal court judgments in diversity actions. See, e.g., S. Cal. Stroke Rehab. Assocs., Inc., v. Nautilus, Inc., 782 F. Supp. 2d 1096, 1105 (S.D. Cal. 2011) (collecting state court cases applying California law to assess claim preclusion of a federal court judgment in diversity actions); Gamble v. Gen. Foods Corp., 229 Cal. App. 3d 893, 899 (1991) (“[W]e believe that [the Costantini] court misconstrued” California law in applying federal law “for the purposes of a res judicata analysis when a prior judgment has been rendered in federal court”). In any event, the Court’s analysis and conclusion would be the same under California law. California courts considering the preclusive effect of a stipulated dismissal also look to “the scope of the settlement agreement” to determine which claims are precluded in a subsequent action. Nakash v. Superior Court, 196 Cal. App. 3d 59, 67 (1987); see also Neil Norman, Ltd. v. William Kasper & Co., 149 Cal. App. 3d 942, 948 (1983) (“[a] finding on the scope of the settlement agreement [is] material to the determination on the issue of retraxit.”); Perez v. Gordon & Wong Law Grp., P.C., No. 11-CV-03323-LHK, 2012 WL 1029425, at \*4 (N.D. Cal. Mar. 26, 2012) (“[I]t is well settled under California law in the context of consent decrees, stipulated judgments, and court-approved class action settlements that when ‘applying the doctrine of res judicata, courts may examine the terms of the settlement to ensure that the defendant did not waive res judicata as a defense.’ ” (quoting Villacres v. ABM Indus., Inc., 189 Cal. App. 4th 562, 577 (2010))). Accordingly, under California law the terms of the Settlement Agreement also control the scope of preclusion and lead to the conclusion that Plaintiff’s claims are not barred.
- 7 Under the DSA, the Aggregate Development Fee is the primary component of the Development Services Fee identified in the Settlement Agreement. DSA, Schedule 5.1.
- 8 The parties assume California law applies to the constructive trust issue. Under the Erie doctrine, federal courts are bound to apply state substantive law and federal rules of procedure to state law claims. Hanna v. Plumer, 380 U.S. 460, 465 (1965). “Under [Erie], the remedy for a state-law claim—even if brought in federal court—is defined by the state statute that created the claim.” Bateman v. Nat’l Union Fire Ins. Co. of Pittsburgh, Pa., 423 F. App’x 763, 766 (9th Cir. 2011) (citing Clausen v. M/V New Carissa, 339 F.3d 1049, 1065 (9th Cir. 2003) (holding that a right to damages is substantive and governed by state law in a diversity action because the remedy “is inseparably connected with the right of action”)); see also Wright and Miller, 19 Federal Practice and Procedure § 4513 (“[A]s a general rule, when forum state law defines the underlying substantive right, state law also governs the availability of [ ] equitable remedies ...”). Accordingly, the Court applies California law to determine Plaintiff’s right to a constructive trust remedy.

## Exhibit 19

Platypus Wear, Inc. v. Bad Boy Europe Ltd., Not Reported in Fed. Supp. (2018)

**H** KeyCite history available

2018 WL 3706876

Only the Westlaw citation is currently available.  
United States District Court, S.D. California.

PLATYPUS WEAR, INC., Plaintiff,  
v.  
**BAD BOY EUROPE LTD.**, et al.,  
Defendants.

Case No. 16-cv-02751-BAS-DHB

Signed 08/02/2018

#### Attorneys and Law Firms

[Karen Barbara King](#), San Diego, CA, for Plaintiff.

John Paul Gardner, pro se.

#### ORDER:

**(1) DENYING PLAINTIFF PLATYPUS WEAR, INC.'S MOTION TO STRIKE (ECF No. 44); AND**

**(2) DENYING DEFENDANT JOHN PAUL GARDNER'S MOTION TO DISMISS (ECF No. 38)**

Hon. [Cynthia Bashant](#), United States District Judge

\*1 This action arises out of the business relationship between Plaintiff Platypus Wear, Inc. and Defendants Bad Boy Europe LTD. ("BBE"), Deep Blue Sports LTD. ("Deep Blue Sports"), and John Paul Gardner. (Compl., ECF No. 1.) After Plaintiff commenced this action, Gardner, proceeding pro se, wrote an ex parte letter to the Court contesting the sufficiency of service and personal jurisdiction. (ECF No. 13.) The Court construed this letter as a motion to dismiss the complaint for lack of personal

jurisdiction and insufficient service of process under [Federal Rules of Civil Procedure 12](#). (Mot., ECF No. 38; see ECF No. 37 at 2.) Plaintiff opposed the motion. (Opp'n, ECF No. 40.) In response, Gardner sent a second letter, which the Court construes as his reply. (Reply, ECF No. 43.) Plaintiff then filed a motion to strike the Reply. (ECF No. 44.)

The Court finds these motions suitable for determination on the papers submitted and without oral argument. See Civ. L.R. 7.1(d.1). For the following reasons, the Court **DENIES** Plaintiff's motion to strike the reply (ECF No. 44) and **DENIES** Gardner's motion to dismiss (ECF No. 38).

#### I. BACKGROUND

In July 2010, Plaintiff and Deep Blue Sports executed a license agreement that enabled Deep Blue Sports to sell products bearing a trademark owned by Plaintiff to customers in the United Kingdom ("2010 Agreement"). (Compl. ¶ 20.) The 2010 Agreement included a California choice of law provision. (*Id.*) The provision also stated that "the parties agree to subject to the non-exclusive jurisdiction of the Courts of San Diego County in California." (*Id.*) In October 2013, Plaintiff, Deep Blue Sports, and BBE added an addendum to the existing agreement ("2013 Addendum"). (*Id.* ¶ 21.) The 2013 Addendum included a provision assigning Deep Blue Sports's rights and liabilities to BBE. (*Id.*) Plaintiff alleges that Deep Blue Sports continued to operate as a licensee despite the 2013 Addendum. (*Id.*) The 2010 Agreement and the 2013 Addendum are collectively referred to as the "License Agreement."

In early 2015, Plaintiff performed an audit and determined that BBE and Deep Blue Sports owed Plaintiff over \$300,000 in unpaid royalties and other commitments under the License Agreement. (Compl. ¶ 23.) The License Agreement was set to expire on June 30th 2015. (*Id.*) Once the License Agreement expired, BBE's right to sell any inventory bearing Plaintiff's mark would also expire after ninety days. (*Id.* ¶ 25.) Plaintiff alleges that, as the expiration date approached, it became apparent to BBE that it was going to be left with hundreds of thousands of dollars of inventory that it would soon be unable to sell. (*Id.*) In order to avoid this loss, Gardner traveled to San Diego, California to renegotiate the terms of the 2013 Agreement. (*Id.* ¶ 26.)

In July 2015, Plaintiff and Gardner began to negotiate

**Platypus Wear, Inc. v. Bad Boy Europe Ltd., Not Reported in Fed. Supp. (2018)**

terms of a second addendum (“2015 Addendum”). (Compl. ¶ 29.) Upon execution of the 2015 Addendum in October, Plaintiff agreed to (1) waive monies owed to Plaintiff by BBE and Deep Blue Sports through the expiration of the License Agreement, (2) release Deep Blue Sports of liability, and (3) assist BBE in recouping costs of unsold inventory. (*Id.* ¶ 29.) Gardner executed the 2015 Addendum on behalf of Deep Blue Sports and BBE in his capacity as the director of both companies.

\*2 Six days after executing the Second Addendum, Gardner formally resigned from his positions of director and officer of BBE. (*Id.* ¶ 43.) Plaintiff alleges that even after his resignation, Gardner continued to represent himself as BBE’s managing director and CEO. (*Id.*)

Plaintiff further alleges that, during negotiations with Gardner, it was “ignorant of the material facts” regarding BBE’s financial stability. (Compl. ¶ 28.) These allegations include that BBE was not adequately capitalized and that Gardner was planning to transfer all of BBE’s assets (including unsold inventory of licensed products) to Deep Blue Sports and then liquidate BBE to escape its financial obligations. (*Id.*) Plaintiff also alleges that during the process of negotiating the 2015 Addendum, Gardner transferred BBE’s assets to Deep Blue Sports, but represented to Plaintiff that the assets belonged to BBE. (*Id.* ¶ 34.)

After receiving a notice of default from Plaintiff in December of 2015, Gardner contacted Plaintiff and allegedly promised to fulfill all of the obligations under the License Agreement including paying any monies owed. (Compl. ¶ 50.) Because he had formally resigned from his positions with BBE in November, Plaintiff alleges that Gardner must have intended to promise that either he, personally, or Deep Blue Sports would fulfill the obligations. (*Id.*) Additionally, Plaintiff claims that, although all agreements were terminated by January 2016, Deep Blue Sports and Gardner continued to sell apparel bearing Plaintiff’s registered trademarks without any license or permission, and without paying Plaintiff royalties. (*Id.* ¶ 60.)

Lastly, Plaintiff asserts that, at all times, Gardner was the sole owner and managing director of both BBE and Deep Blue Sports and that the companies shared the same office location, employees, officers, directors, and attorneys, and engaged in the same business (selling martial arts equipment and apparel). (Compl. ¶ 74.) Plaintiff asserts that Gardner freely transferred assets in the form of licensed products between the two companies without adequate consideration and that BBE sold products bearing Plaintiff’s trademarks on a website registered to

Deep Blue Sports and Gardner. (*Id.*) Plaintiff claims that Gardner operated BBE as a mere shell company without capital assets, stock, or stockholders.

Plaintiff filed this action on November 7, 2016 alleging breach of contract, fraud and deceit, unjust enrichment, and trademark infringement arising out of the License Agreement and related addendums. (Compl. ¶¶ 20-30.) In his motion to dismiss, Gardner asserts that Plaintiff never served him with any documents. (Mot. at 1.) Gardner also argues that the Court lacks personal jurisdiction over him because he never interacted with Plaintiff in his individual capacity. Instead, he asserts that any interaction he had with Plaintiff was as an agent/representative of a BBE or Deep Blue Sports. (*Id.*) Plaintiff opposed Gardner’s Motion to Dismiss (ECF No. 40) and moved to strike Gardner’s Reply (ECF No. 44).

## II. MOTION TO STRIKE

On May 9, 2018, Gardner sent a letter to the Court, responding to Plaintiff’s opposition to his motion to dismiss. (ECF No. 43.) The Court accepted this letter as Gardner’s Reply. (*Id.*) Plaintiff now moves to strike Gardner’s Reply, arguing that the Reply contains new purported facts without any evidentiary support. (ECF No. 44 at 1-2.)

\*3 According to the Ninth Circuit, “[p]arties cannot raise a new issue for the first time in their reply brief.” *State of Nev. v. Watkins*, 914 F.2d 1545, 1560 (9th Cir. 1990). Reply papers should be limited to matters raised in the opposition papers. *See Clark v. County of Tulare*, 755 F. Supp. 2d 1075, 1090 (E.D. Cal. 2010). “[I]t is improper for the moving party to ‘shift gears’ and introduce new facts or different legal arguments in the reply brief than presented in the moving papers.” *Id.* Accordingly, a district court does not need to consider arguments raised for the first time on reply. *See Zamani v. Carnes*, 491 F.3d 990, 997 (9th Cir. 2007); *see also U.S. v. Romm*, 455 F.3d 990, 997 (9th Cir. 2006) (“Arguments not raised by a party in its opening brief are deemed waived.”).

Given Gardner’s pro se status, the Court does not find that striking the Reply in its entirety is warranted. Though the Court recognizes that Gardner fails to provide support for his factual allegations, the Court finds that Gardner’s arguments were within the scope of the opposition papers. Moreover, Gardner raises the issue of personal jurisdiction in his motion to dismiss, and, when liberally construed, his Reply merely expounds on this argument. *See Bernhardt v. L.A. County*, 339 F.3d 920, 925 (9th Cir.

**Platypus Wear, Inc. v. Bad Boy Europe Ltd., Not Reported in Fed. Supp. (2018)**

2003) (“Courts have a duty to construe pro se pleadings liberally, including pro se motions as well as complaints.”).

Plaintiff also argues that the Court should strike the Reply because Gardner’s factual allegations are unsubstantiated. This argument ignores the standard that the Court must apply for a motion to dismiss for lack of personal jurisdiction. See *Doe v. Unocal Corp.*, 248 F.3d 915, 922 (9th Cir. 2001) (finding that a plaintiff need only make a prima facie showing of personal jurisdiction to survive a Rule 12(b)(2) motion). To defeat a prima facie showing of personal jurisdiction, Gardner would have to produce actual evidence to dispute Plaintiff’s allegations, and the Court is limited in considering such evidence. *Id.* Because the Reply only states Gardner’s assertions and does not constitute evidence, Plaintiff’s request to strike is unnecessary.

Accordingly, the Court **DENIES AS MOOT** Plaintiff’s Motion to Strike. (ECF No. 44.)

### III. LEGAL STANDARD

#### A. Motion to Dismiss for Insufficient Service of Process

The Supreme Court has set forth a constitutional minimum for sufficient service of process. To ensure due process, notice of an action must be “reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action.” *Greene v. Lindsey*, 456 U.S. 444, 449-50 (1982) (quoting *Mullane v. Central Hanover Bank and Trust*, 339 U.S. 306, 314 (1950) ). Once service is challenged, plaintiffs bear the burden of establishing that service was valid under Federal Rule of Civil Procedure 4. See *Brockmeyer v. May*, 383 F.3d 798, 801 (9th Cir. 2004).

“Rule 4 is a flexible rule that should be liberally construed so long as a party receives sufficient notice of the complaint.” *United Food & Comm. Workers Union v. Alpha Beta Co.*, 736 F.2d 1371, 1382 (9th Cir. 1984). Under Rule 4(f), a plaintiff can serve an individual abroad by one of three means, the first of which is service authorized by an internationally agreed means such as the Hague Convention. See *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 705 (1988). The Hague Convention requires signatory countries to establish a Central Authority to receive requests for

service of documents from other countries, and to serve those documents by methods compatible with the internal laws of the receiving state. See *id.* at 698-99. Once the Central Authority has received documents in compliance with applicable requirements, the Hague Convention affirmatively requires the Central Authority to effect service in its country. See *Brockmeyer*, 383 F.3d at 804 (citing *Hague Convention*, arts. 4-5, Nov. 4, 1965, 20 U.S.T. 361).

\*4 Constitutional due process does not require proof that a defendant actually receives notice. See *Greene*, 456 U.S. at 449-50. Rather, service of process is valid where an individual is served “by any internationally agreed means of service that is reasonably calculated to give notice, such as those authorized by the Hague Convention.” *Lidas, Inc. v. United States*, 238 F.3d 1076, 1084 (9th Cir. 2001) (quoting *Fed. R. Civ. P. 4(f)(1)* ). “A signed return of service constitutes prima facie evidence of valid service which can be overcome only by strong and convincing evidence.” *SEC v. Internet Sols. for Bus., Inc.*, 509 F.3d 1161, 1167 (9th Cir. 2007). The burden is on the defendant to show that he or she was not served with process. See *id.*

#### B. Motion to Dismiss for Lack of Personal Jurisdiction

When the parties dispute whether personal jurisdiction over a foreign defendant is proper, “the plaintiff bears the burden of establishing that jurisdiction exists.” *Rio Props. Inc. v. Rio Int’l Interlink*, 284 F.3d 1007, 1019 (9th Cir. 2002). In general, “personal jurisdiction over a defendant is proper if it is permitted by a [state] long-arm statute and if the exercise of that jurisdiction does not violate federal due process.” *Pebble Beach Co. v. Caddy*, 453 F.3d 1151, 1154 (9th Cir. 2006). Both the California and federal long-arm statutes require compliance with due-process requirements. See *Pebble Beach*, 453 F.3d at 1155; see also *Holland Am. Line Inc. v. Wartsila N. Am., Inc.*, 485 F.3d 150, 161 (9th Cir. 2007).

“When a defendant moves to dismiss for lack of personal jurisdiction, the plaintiff bears the burden of demonstrating that the court has jurisdiction over the defendant.” *Pebble Beach Co. v. Caddy*, 453 F.3d 1151, 1154 (9th Cir. 2006). “However, this demonstration requires that the plaintiff ‘make only a prima facie showing of jurisdictional facts to withstand the motion to dismiss.’ ” *Id.* (quoting *Doe*, 248 F.3d at 922). The Court must resolve disputed jurisdictional facts in the plaintiff’s favor, taking the allegations in the plaintiff’s complaint as

**Platypus Wear, Inc. v. Bad Boy Europe Ltd., Not Reported in Fed. Supp. (2018)**

true. See *AT&T v. Compagnie Bruxelles Lambert*, 94 F.3d 586, 588 (9th Cir. 1996); see also *Doe*, 248 F.3d at 922 (“[T]he plaintiff need only demonstrate facts that if true would support jurisdiction over the defendant.”).

If the defendant adduces evidence controverting the allegations in the complaint, however, the plaintiff must “come forward with facts, by affidavit or otherwise, supporting personal jurisdiction.” *Scott v. Breeland*, 792 F.2d 925, 927 (9th Cir. 1986) (quoting *Amba Mktg. Sys., Inc. v. Jobar Int’l, Inc.*, 551 F.2d 784, 787 (9th Cir. 1977)). “Conflicts between [the] parties over statements contained in the affidavits must be resolved in the plaintiff’s favor.” *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 800 (9th Cir. 2004); see *AT&T*, 94 F.3d at 588 (“[C]onflicts between the facts contained in the parties’ affidavits must be resolved in [plaintiffs’] favor for purposes of deciding whether a prima facie case for personal jurisdiction exists.”)

#### IV. ANALYSIS

##### A. Request to Dismiss for Insufficient Service of Process

The Court construes Gardner’s assertion that he was never served with any documents as a defense of insufficient service of process pursuant to [Rule 12\(b\)\(5\)](#). (Mot. at 1.) Plaintiff claims that it effected service on Gardner, a U.K. resident, in accordance with the Hague Convention as permitted by [Rule 4\(f\)\(1\)](#). (Opp’n at 10.)

Here, Plaintiff provided a signed return of service from the U.K. Central Authority (“Certificate”) that constitutes “prima facie evidence of valid service that can be overcome only by strong and convincing evidence.” See *Internet Sols.*, 509 F.3d at 1167. In her sworn declaration, Plaintiff’s counsel affirms that Gardner provided his mailing address to her in an email. (King Decl. at 2, ECF No. 40-1.) The email shows that, as of September 2016, Gardner’s mailing address was 15 Rothbury Terrace in Newcastle upon Tyne. (ECF No. 40-9 at Ex. B.) According to the Certificate, “documents were served by posting them through the defendant’s letterbox” at his Rothbury Terrace address. (ECF No. 40-10 at Ex. C.) This method of service is in accordance with [Rule 6.3\(1\)\(c\)](#) of the Civil Procedure Rules of England and Wales, and is thus valid under the Hague Convention. See Hague Convention, art. 5; (*Id.*)

\*5 Additionally, Gardner does not provide any evidence establishing that he was not served with process. Even construing Gardner’s letter as a sworn affidavit, the mere statement that “I have not been served any documents” does not meet the burden of clear and convincing evidence establishing that service of process was insufficient. (Mot. at 1.) Moreover, Gardner does not contend that the Rothbury Terrace address was an incorrect address for him on the date of service. Additionally, though Gardner alleges he did not receive any documents, due process does not require that the plaintiff prove the defendant received actual notice. See *Internet Sols.* 509 F.3d at 1167. Instead, Plaintiff only needs to show that it used a method of service reasonably calculated to give notice to Gardner in accordance with [Rule 4](#), which the Court finds that it did. See *Lidas, Inc.*, 238 F.3d at 1084.

Because Plaintiff made a prima facie showing that service was valid under [Rule 4](#), and Gardner did not provide sufficient evidence to dispute this, the Court denies Gardner’s request to dismiss this action for insufficient service.

##### B. Request to Dismiss for Lack of Personal Jurisdiction

Gardner asserts that the Court lacks personal jurisdiction over him. (Mot. at 1.) In response, Plaintiff argues that the Court can exercise personal jurisdiction over Gardner for two reasons: (1) specific personal jurisdiction exists for the intentional tort claims because Gardner purposefully directed his tortious conduct toward a California resident, and (2) personal jurisdiction exists for the contract claims because Gardner is the alter ego of companies that consented to jurisdiction in California. (Opp’n at 12-13.) The Court discusses each issue in turn.

##### 1. Specific Personal Jurisdiction Over Intentional Tort Claims

First, Plaintiff argues that the Court has personal jurisdiction over Gardner for intentional tort claims because these claims arise out of activities that Gardner purposefully directed at California. (Opp’n at 14.)

Specific jurisdiction allows a court to exercise jurisdiction over a defendant whose forum-related activities gave rise to the action before the court. See *Bancroft & Masters*,

Platypus Wear, Inc. v. Bad Boy Europe Ltd., Not Reported in Fed. Supp. (2018)

*Inc. v. Augusta Nat'l Inc.*, 223 F.3d 1082, 1086 (9th Cir. 2000). The Ninth Circuit employs a three-part test to determine whether the defendant's contacts with the forum state are sufficient to subject it to a court's specific personal jurisdiction. See *Ballard v. Savage*, 65 F.3d 1495, 1498 (9th Cir. 1995). For claims arising out of intentional torts, specific jurisdiction exists when (1) the defendant purposefully directed his activities toward the forum, (2) the plaintiff's claims arise out of the defendant's forum-related activities, and (3) it is reasonable for the court to assert jurisdiction over the defendant. See *Schwarzenegger*, 374 F.3d at 802; see also *Ziegler*, 64 F.3d at 473 (noting that courts apply different purposeful availment tests to contract and tort cases).

To assess the first prong of the specific jurisdiction framework, the Court uses the "effects test" and determines whether the defendant allegedly "(1) committed an intentional act, (2) expressly aimed at the forum state, (3) causing harm that the defendant knows is likely to be suffered in the forum state." *Dole Food Co. v. Watts*, 303 F.3d 1104, 1111 (9th Cir. 2002). Next, to assess the second prong of the framework, the Court uses a "but for" test to determine whether the plaintiff's claims arise out of the defendant's forum-related activities. See *Ballard*, 65 F.3d at 1500 (explaining that the question is "but for" defendant's contacts with the forum, would a plaintiff's claims against a defendant have arisen). If the plaintiff shows that the first two prongs are met, the burden then shifts to the defendant to "present a compelling case" that the exercise of jurisdiction would not be reasonable. *Schwarzenegger*, 374 F.3d at 802. "If any of the three requirements is not satisfied, jurisdiction in the forum would deprive the defendant of due process of law." *Pebble Beach*, 453 F.3d at 1155.

\*6 In this case, Plaintiff alleges that the first prong of the specific jurisdiction framework is met because Gardner purposefully directed his activities toward California. (Opp'n at 14.) Plaintiff claims that Gardner attempted to defraud a California resident, and thus expressly aimed his intentional fraudulent acts at California. See *Dole*, 303 F.3d at 1111. Plaintiff alleges that Gardner repeatedly visited Plaintiff's San Diego office, including to negotiate the 2015 Addendum, which he allegedly used to implement his fraudulent scheme. (See Compl. ¶ 26.) Plaintiff contends that, during these negotiations, Gardner intentionally misrepresented the financial status of his company, BBE, and withheld material information, such as his alleged plan to transfer assets out of BBE and liquidate the company. (*Id.* ¶ 41.) Plaintiff argues further that Gardner fraudulently induced Plaintiff to agree to terms that it would not have agreed to had it known these material facts. (*Id.* ¶ 42.) Additionally, Plaintiff claims

that Gardner knew his fraud would cause harm in California, and that Gardner caused such harm when Plaintiff allegedly lost several hundreds of thousands of dollars in California—its principal place of business. (Opp'n at 15.); see *Dole*, 303 F.3d at 1113 ("The places where a corporation suffers economic harm include its principal place of business.").

Taking the allegations in Plaintiff's complaint as true, the Court finds that Plaintiff satisfies the first prong of the specific jurisdiction under the "effects test." Plaintiff makes a prima facie showing that Gardner committed intentional acts of fraud, that the acts were targeted at Plaintiff in California, and that Gardner knew that the economic loss would be suffered in California. See *Dole*, 303 F.3d at 1111.

For the second prong, Plaintiff alleges that its tort claims arise out of Gardner's forum-related activities. Specifically, Plaintiff alleges that if it were not for Gardner withholding material information during the contact negotiations in California, Plaintiff would not have suffered harm. (Opp'n at 16.) In other words, but-for Gardner's forum-related activities in California, Plaintiff's claims would not have arisen. (See *id.*); *Ballard*, 65 F.3d at 1500. The Court agrees with Plaintiff for the purposes of jurisdiction, and finds that Plaintiff establishes the second prong. (*Id.*)

Next, because Plaintiff's allegations support the first two prongs of specific personal jurisdiction over Gardner, Gardner must show that the Court exercising personal jurisdiction over him would be unreasonable. See *Dole*, 303 F.3d at 1111. Gardner has not produced any evidence controverting the allegations in the complaint nor has he made a compelling case that asserting jurisdiction would be unreasonable. See *Schwarzenegger*, 374 F.3d at 802. Although Gardner contests having any fraudulent intent sufficient to characterize his actions as tortious, he has not produced sufficient evidence to support this contention. Even construing Gardner's letters as a sworn affidavits, the Court must resolve conflicting evidence in Plaintiff's favor at this stage. See *id.* at 800.

Taking the allegations in Plaintiff's complaint as true, the Court finds that Plaintiff has shown that Gardner purposely directed his tortious conduct at a California resident, giving rise to this action. Because asserting jurisdiction would not be unreasonable, the Court finds all three prongs necessary to establish specific jurisdiction over Gardner for the intentional tort claims are met. See *Schwarzenegger*, 374 F.3d at 802.

**Platypus Wear, Inc. v. Bad Boy Europe Ltd., Not Reported in Fed. Supp. (2018)**

**2. Specific Personal Jurisdiction Over Contract Claims**

Although Gardner is subject to the Court’s jurisdiction for claims arising out of his alleged tortious conduct, Plaintiff also brings claims against Gardner personally for disputes arising out of the License Agreement. For these claims, Gardner argues that the Court lacks personal jurisdiction over him because he did not enter into any agreement or addendum in his individual capacity. (Mot. at 1 (“I do not consider that this case can proceed against me in a personal capacity, as I have only ever interacted with Platypus [W]ear Inc. in a capacity as an agent/representative of a limited company.”)) The Court construes Gardner’s objection as arguing that he is protected under the fiduciary shield doctrine. See *Bernhardt*, 339 F.3d at 925 (explaining that courts have a duty to construe pro se motions liberally).

\*7 Plaintiff argues that Gardner is subject to the Court’s jurisdiction for actions arising out of Plaintiff’s agreements with BBE and Deep Blue Sports because Gardner is the alter ego of these companies, which explicitly consented to jurisdiction in California. (Opp’n at 12.) Plaintiff’s alter ego argument is as follows: (1) the Court has personal jurisdiction over Deep Blue Sports and BBE by virtue of their contractual consent, and (2) the fiduciary shield doctrine does not protect Gardner because (3) Gardner is an alter ego of the companies, which justifies piercing the corporate veil and asserting jurisdiction over Gardner. The Court addresses each issue—consent, fiduciary shield doctrine, and alter ego liability to pierce the corporate veil—in turn.

**a. Consent to Personal Jurisdiction**

Plaintiff alleges that BBE and Deep Blue Sports consented to personal jurisdiction in their license agreements with Plaintiff. (Opp’n at 12 (“[T]he parties agree to the non-exclusive jurisdiction of the Courts of San Diego County in California.”).)

Personal jurisdiction is a waivable right, and a party may give “express or implied consent to the personal jurisdiction of the court.” *Ins. Corp. of Ir. v. Compagnie Des Bauxites De Guinee*, 456 U.S. 694, 703 (1982). For example, parties may stipulate in advance to litigate any possible controversies within a particular jurisdiction. See *Doe*, 248 F.3d at 922 (“[P]arties to a contract may agree in advance to submit to the jurisdiction of a given court.”) (quoting *Nat’l Equip. Rental, Ltd. v. Szukhent*, 375 U.S. 311, 316 (1964)). Ultimately, where such an agreement

has been freely negotiated and is not “unreasonable or unjust,” its enforcement does not offend due process. See *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972).

At this stage, the Court finds that BBE and Deep Blue Sports agreed to the non-exclusive jurisdiction of San Diego Courts. There is no evidence that the License Agreement was not freely negotiated, and thus enforcement of the forum selection clause does not offend due process. See *M/S Bremen*, 407 U.S. at 15. Based on this express consent, BBE and Deep Blue Sports are subject to the Court’s personal jurisdiction for actions arising out of their agreements with Plaintiff. See *Ins. Corp. of Ir., Ltd.*, 456 U.S. at 703.

**b. Fiduciary Shield Doctrine**

Next, the Court construes Gardner as asserting the fiduciary shield doctrine as the basis of his argument that the Court cannot assert jurisdiction over him for injuries caused by Deep Blue Sports and BBE. Gardner may seek protection under the fiduciary shield doctrine because Plaintiff seeks to hold Gardner liable for Deep Blue Sports’s and BBE’s contract breaches, though he was not individually a party to the agreements at issue.

Under the fiduciary shield doctrine, “a person’s mere association with a corporation that causes injury in the forum state is not sufficient in itself to permit that forum to assert jurisdiction over the person.” *Davis v. Metro Prods., Inc.*, 885 F.2d 515, 520 (9th Cir. 1989). Although, it may be true that “[t]he mere fact that a corporation is subject to local jurisdiction does not necessarily mean its nonresident officers ... are suable locally as well,” *Colt Studio, Inc. v. Badpuppy Enter.*, 75 F. Supp. 2d 1104, 1111 (C.D. Cal. 1999), ultimately, the fiduciary shield doctrine does not apply where there is “reason for the court to disregard the corporate form.” *Davis*, 885 F.2d at 520; see, e.g., *Dish Network L.L.C. v. Vicxon Corp.*, 923 F. Supp. 2d 1259, 1264 (S.D. Cal. 2013) (finding the fiduciary shield doctrine does not protect an officer who acted as the “moving force” behind corporation’s alleged copyright-infringing activity).

The Court’s jurisdiction over BBE and Deep Blue Sports does not automatically establish jurisdiction over Gardner for the same injuries under the fiduciary shield doctrine. See *Colt Studio*, 75 F. Supp. 2d at 1111. Instead, to find jurisdiction over Gardner for actions taken in his official capacity, the Court needs grounds to “pierce the corporate veil.” See *Davis*, 885 F.2d at 520 (“Because the corporate

**Platypus Wear, Inc. v. Bad Boy Europe Ltd., Not Reported in Fed. Supp. (2018)**

form serves as a shield for the individuals involved for purposes of liability as well as jurisdiction, many courts search for reasons to ‘pierce the corporate veil’ in jurisdictional contexts parallel to those used in liability contexts.”). Thus, the Court must now determine whether it has sufficient grounds to pierce the corporate veil of Deep Blue and BBE, and hold that jurisdiction over the companies establishes jurisdiction over Gardner individually.

**c. Alter Ego and Piercing the Corporate Veil**

\*8 Plaintiff argues that, because Gardner is the alter ego of BBE and Deep Blue Sports, the Court may disregard the corporate form, or “pierce the corporate veil,” and find that the companies’ consent to jurisdiction is a basis for personal jurisdiction over Gardner. (Opp’n at 12.) Gardner, on the other hand, argues that “[Plaintiff] [is] attempting to misrepresent[ ] a number of facts in order to create a false representation of some wrong doing on my behalf in order to support an ‘alter ego’ argument that has not been proven.” (Reply at 1.)

Grounds for piercing the corporate veil include (1) where the corporation is the agent or alter ego of the individual defendant, or (2) where a corporate officer or director authorizes, directs, or participates in tortious conduct. *Transgo, Inc. v. AJAC Transmission Parts Corp.*, 768 F.2d 1001, 1021 (9th Cir. 1985); *Flynn*, 734 F.2d at 1393. Thus, where a corporation is the alter ego of its stockholder, a district court may disregard the corporate form and exercise personal jurisdiction over those individual stockholders. See *Certified Building Products, Inc. v. NLRB*, 528 F.2d 968, 969 (9th Cir. 1975). *Sheard v. Superior Court*, 114 Cal. Rptr. 743, 745 (Cal. Ct. App. 1974).<sup>1</sup>

“To apply the alter ego doctrine, the court must determine (1) that there is such unity of interest and ownership that the separate personalities of the corporation and the individuals no longer exist and (2) that failure to disregard the corporation would result in fraud or injustice.” *Flynn Distrib. Co., Inc. v. Harvey*, 734 F.2d 1389, 1393 (9th Cir. 1984) (citing *Watson v. Commonwealth Ins. Co.*, 8 Cal. 2d 61, 68 (1936) ). Because the facts relating to personal jurisdiction are intertwined with the merits of its claims, a plaintiff need only make a prima facie showing of alter ego liability. See *Data Disc, Inc. v. Sys. Tech. Assocs., Inc.*, 557 F.2d 1280, 1285 (9th Cir. 1977); see also *Stuart v. Spademan*, 772 F.2d 1185, 1198, n.12. (5th Cir. 1985) (noting that the alter ego test for personal jurisdiction is less stringent than that for liability).

Plaintiff makes a prima facie showing that there is a unity of interest between Gardner, Deep Blue Sports, and BBE sufficient for alter ego liability. Plaintiff alleges that Gardner was the sole owner, stockholder, and managing director of both Deep Blue Sports and BBE. In addition, the two companies share the same office and employees, operate the same type of business, and Gardner freely transferred assets between them. (Compl. ¶ 74.) Plaintiff also alleges that BBE sold products on a website registered to Deep Blue Sports and Gardner. (*Id.*) Finally, Plaintiff alleged that Deep Blue Sports and BBE failed to observe corporate formalities, that BBE was so undercapitalized that it was illusory, and that BBE was a mere shell company without capital, assets, or stock, and was used a device to avoid liability. (*Id.*) The Court finds that these allegations demonstrate a unity of interest between Gardner, Deep Blue Sports, and BBE. See *Flynn*, 734 F.2d at 1393. Thus, Plaintiff establishes a prima facie showing that separate personalities of the companies and Gardner do not exist, and rather they are alter egos.

Plaintiff also makes a prima facie showing that failure to find alter ego liability would result in injustice. Because Plaintiff alleges that Gardner engaged in asset stripping and using BBE as a device to avoid liability, failure to find alter ego would allow Gardner to succeed in his alleged fraudulent scheme to avoid liability. Gardner allegedly placed BBE’s assets in Deep Blue Sports’s name, and simultaneously negotiated with Plaintiff to release Deep Blue Sports from liability for its past debts without disclosing the asset transfer to Plaintiff. (Compl. ¶ 74.) Plaintiff remained under the impression that BBE was adequately capitalized to operate as a business and maintain a prosperous relationship. (*Id.*) Based on these allegations, Gardner may be liable for Deep Blue Sports and BBE’s contract breach and subsequent debts, especially if he caused BBE’s insolvency to the detriment of its creditors, like Plaintiff. If the allegations against Gardner, Deep Blue Sports, and BBE prove to be true, then adhering to the fiction of their separate existence would permit an abuse of corporate privilege. As suggested by Plaintiff, it would be inequitable for Gardner to escape liability to Plaintiff by virtue of his fraudulent scheme. And though Gardner contests Plaintiff’s claims of fraud and asset stripping (Reply at 1), for jurisdiction, “the plaintiff need only demonstrate facts that if true would support jurisdiction over the defendant.” *Unocal*, 248 F.3d at 922. Even construing Gardner’s Reply as evidence, the Court resolves these factual conflicts in Platypus’s favor. See *Schwarzenegger*, 374 F.3d at 800.

\*9 Because Plaintiff made a prima facie showing that Gardner is the alter ego of Deep Blue Sports and BBE, the

**Platypus Wear, Inc. v. Bad Boy Europe Ltd., Not Reported in Fed. Supp. (2018)**

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Court has sufficient grounds to disregard the corporate form, or pierce the corporate veil. See *Transgo, Inc.*, 768 F.2d at 1021. This makes Gardner subject to the Court's jurisdiction for the contract claims because, where alter ego is established so as to justify piercing the corporate veil, the basis for jurisdiction over the corporation supports jurisdiction over the alter ego stockholder. See *Sheard*, 114 Cal. Rptr. at 745. As discussed above, the Court finds that Deep Blue Sports and BBE are subject to the Court's personal jurisdiction by virtue of their contractual consent. Thus, this basis for personal jurisdiction over Deep Blue Sports and BBE—their consent to jurisdiction—establishes the Court's jurisdiction over Gardner.

In sum, the Court finds that Plaintiff has shown that Gardner is the alter ego of BBE and Deep Blue Sports for the purposes of personal jurisdiction. Because BBE and Deep Blue Sports consented to the Court's jurisdiction in their agreements with Plaintiff, Gardner, as an alter ego, is also subject to the Court's jurisdiction for the actions arising out of these agreements.

Footnotes

- 1 California law analyzing personal jurisdiction is appropriate because Rule 4(k)(1)(a) allows personal jurisdiction over defendants "subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located."

**V. CONCLUSION**

For the foregoing reasons, the Court **DENIES** Gardner's Motion to Dismiss (ECF No. 38.) The Court **ORDERS** Gardner to file an answer to Plaintiff's complaint **no later than August 30, 2018**. If Gardner fails to file an answer by that date, he will be subject to an entry of default.

Additionally, the Court **DENIES** Plaintiff's Motion to Strike (ECF No. 44).

**IT IS SO ORDERED.**

**All Citations**

Not Reported in Fed. Supp., 2018 WL 3706876

## Exhibit 20

Shinde v. Nithyananda Foundation, Not Reported in Fed. Supp. (2014)

**H** KeyCite history available

2014 WL 12597121

Only the Westlaw citation is currently available.  
United States District Court, C.D. California.

Dr. Manohar SHINDE et al.

v.

NITHYANANDA FOUNDATION et al.

Case No. EDCV 13-00363-JGB (SPx)

Filed 08/25/2014

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**Proceedings: (HEARING HELD) Order (1) GRANTING IN PART Defendants' Motion to Dismiss (Doc. No. 87); (2) GRANTING Plaintiffs' Motion for Court Order Allowing Service of Summons and Complaint (Doc. No. 97); and (3) GRANTING IN PART Defendants' Request to Strike New Evidence and Argument (Doc. No. 109) ; (4) Continuing Scheduling Conference.**

JESUS G. BERNAL, UNITED STATES DISTRICT JUDGE

\*1 Before the Court are Defendants' Motion to Dismiss Pursuant to [Federal Rule of Civil Procedure 12\(b\)\(2\)](#) and [Federal Rule of Civil Procedure 12\(b\)\(5\)](#) (Doc. No. 87)

and Plaintiffs' Motion for a Court Order Allowing Service of Summons and Complaint on Non-appearing Defendants under [Federal Rule of Civil Procedure 4\(f\)\(3\)](#) and [Federal Rule of Civil Procedure 4\(h\)](#) (Doc. No. 97). After reviewing and considering all papers filed in support of and in opposition to the Motions, as well as the arguments at the hearing, the Court (1) GRANTS in part Defendants' Motion to Dismiss, (2) GRANTS Plaintiffs' Motion for Court Order Allowing Service of Summons and Complaint, and (3) GRANTS in part Defendants' Request to Strike New Evidence and Argument.

#### I. BACKGROUND

##### A. Procedural History

Dr. Manohar Shinde; Ramesh Bhutada, individually and as Trustee of the Bhutada Family Foundation; Siva Tayi; Dr. Bala Bhat; and Hiten Dalal (collectively, "Plaintiffs") brought this action on February 27, 2013, against Nithyananda Foundation; Life Bliss Foundation, Inc.; Nithyananda Dhyanapectam Temple & Cultural Center; and Dhyanapectam Charitable Trust (collectively, "Entity Defendants"), as well as against Swami Nithyananda ("Nithyananda"); Siva Vallabhaneni ("Siva"); and Gopal Sheelum ("Gopal") (collectively, "Individual Defendants"). (See Compl. at 1, Doc. No. 1.)

Plaintiffs filed a First Amended Complaint ("FAC") on May 28, 2013. (Doc. No. 35.) Plaintiffs filed a Second Amended Complaint ("SAC") on August 12, 2013. (Doc. No. 48.) Plaintiffs filed a Third Amended Complaint ("TAC") on January 16, 2014, alleging claims for: (1) fraud and deceit; (2) civil conspiracy; (3) violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), [18 U.S.C. §§ 1961, et seq.](#); (4) RICO Conspiracy, [18 U.S.C. §§ 1961, et seq.](#); and (5) violation of California's Unfair Competition Law ("UCL"), [Cal. Bus. & Prof. Code §§ 17200, et seq.](#) (Doc. No. 67.) On July 1, 2014, Plaintiffs filed Proofs of Service, reflecting personal service of the Summons and TAC, on Defendant Mr. Nithyananda aka Sri Nithyananda Swami ("Nithyananda") and Defendant Dhyanapectam Charitable Trust ("Trust"). (Doc. Nos. 85, 86.)

On July 7, 2014, Defendants Trust and Nithyananda (collectively, "Defendants") filed a Motion to Dismiss Pursuant to [FRCP 12\(b\)\(2\)](#) and [FRCP 12\(b\)\(5\)](#). ("MTD," Doc. No. 87.) On July 14, 2014, Plaintiffs opposed

**Shinde v. Nithyananda Foundation, Not Reported in Fed. Supp. (2014)**

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Defendants' MTD. (Doc. No. 90.) Defendants replied on July 21, 2014. (Doc. No. 100.)

On July 21, 2014, Plaintiffs filed a Motion for Order Allowing Service of Summons and Complaint on Defendants Under [FRCP 4\(f\)\(3\)](#) and [FRCP 4\(h\)](#). ("Mot. for Service," Doc. Nos. 96, 97.) Defendants opposed the Motion for Service on July 28, 2014, and Plaintiffs replied on August 3, 2014. (Doc. No. 106.)

**B. Objection to Declarations**

Defendants object to several portions of the Declarations of Allan A. Sheno and B. Kishan Reddy. (Doc. No. 105.) The Court does not rely on the objected to statements in its rulings below. Therefore, the objections are overruled as moot.

**C. Request to Strike**

\*2 Defendants request that new evidence and arguments in Plaintiffs' reply in support of its Motion for Service be stricken. (Doc. No. 109.) If a party raises a new argument or presents new evidence in a reply brief, the Court may consider these matters only if the adverse party is given an opportunity to respond. See [El Pollo Loco v. Hashim](#), 316 F.3d 1032, 1040-1041 (9th Cir. 2003); [Provenz v. Miller](#), 102 F.3d 1478, 1483 (9th Cir. 1996). The Court will not consider new arguments and evidence in Plaintiffs' Reply.

**II. LEGAL STANDARD**

**A. Federal Rule of Civil Procedure 12(b)(5)**

[Federal Rule of Civil Procedure 12\(b\)\(5\)](#) authorizes a defendant to move for dismissal based on insufficient service of process. When a defendant challenges service, the plaintiff bears the burden of establishing the validity of service. See [Brockmeyer v. May](#), 383 F.3d 798, 801 (9th Cir. 2004).

**B. Federal Rule of Civil Procedure 12(b)(2)**

[Fed. R. Civ. P. 12\(b\)\(2\)](#) permits defendants to move to

dismiss for "lack of jurisdiction over the person[.]" Although defendants move to dismiss, plaintiffs bear the burden of establishing jurisdiction. [Rio Properties, Inc. v. Rio Int'l Interlink](#), 284 F.3d 1007, 1019 (9th Cir. 2002) (citing [KVOS, Inc. v. Assoc. Press](#), 299 U.S. 269, 278 (1936)). When a district court acts on a defendant's [Rule 12\(b\)\(2\)](#) motion without holding an evidentiary hearing, the plaintiff need make only a prima facie showing of jurisdictional facts to withstand the motion to dismiss. [Ballard v. Savage](#), 65 F.3d 1495, 1498 (9th Cir. 1995) (citing [Pac. Atl. Trading Co. v. M/V Main Exp.](#), 758 F.2d 1325, 1327 (9th Cir. 1985) and [Data Disc, Inc. v. Systems Technology Assocs.](#), 557 F.2d 1280, 1285 (9th Cir. 1977)). "[T]he plaintiff need only demonstrate facts that if true would support jurisdiction over the defendant." *Id.* (citing [Data Disc](#), 557 F.2d at 1285). "[U]ntil an evidentiary hearing or trial on the merits, the complaint's uncontroverted factual allegations must be accepted as true, and any factual conflicts in the parties' declarations must be resolved in plaintiff's favor." William W. Schwarzer, A. Wallace Tashima & James M. Wagstaffe, [Federal Civil Procedure Before Trial § 9:117](#) (2005). However, the Court need not assume the truth of mere conclusory allegations. [Nicosia v. De Rooy](#), 72 F. Supp. 2d 1093, 1097 (N.D. Cal. 1999).

**C. Foreign Service**

[Federal Rule of Civil Procedure 4\(h\)\(2\)](#) provides for service of corporations in a foreign country "in any manner prescribed by [Rule 4\(f\)](#) for serving an individual, except personal delivery under (f) (2)(C)(i)." [Rule 4\(f\)](#), in turn, provides several means by which a plaintiff may serve an individual "at a place not within any judicial district of the United States." Pursuant to [Rule 4\(f\)\(1\)](#), an individual or corporation may be served in a foreign country "by an internationally agreed means of service that is reasonably calculated to give notice, such as those authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents." [Rule 4\(f\)\(3\)](#) further provides for service "by any other means not prohibited by international agreement, as the court orders." [Fed. R. Civ. P. 4\(f\)\(3\)](#).

**III. DISCUSSION**

Shinde v. Nithyananda Foundation, Not Reported in Fed. Supp. (2014)

## A. Motion to Dismiss

### 1. Service

Defendants move to dismiss the action or, alternatively, quash service for insufficient service of process. The Proofs of Service show that Defendants were personally served in India on June 16, 2014 by A. Raghavendra. (See Doc. Nos. 85, 86.) The Parties agree that the unserved Defendants are located in India, which is a signatory to the Hague Convention referenced in [Rule 4\(f\)\(1\)](#).

\*3 The Hague Convention requires signatory countries to establish a Central Authority to receive requests for service of documents from other countries and to serve those documents by methods compatible with the internal laws of the receiving state. See [Volkswagenwerk Aktiengesellschaft v. Schlunk](#), 486 U.S. 694, 698-99 (1988). Service through a country's Central Authority is the principal means of service under the Hague Convention. Under this method, process is first sent to the Central Authority of the foreign jurisdiction in which process is to be served. Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters, Nov. 15, 1965 ("Hague Convention"), [1969] 20 U.S.T. 361, T.I.A.S. No. 6638, 1969 WL 97765, Art. 3. The Central Authority must then arrange to have process served on the defendants. *Id.*, Art. 5. Upon completion of service, the Central Authority must complete a Certificate detailing how, where, and when service was made, or explaining why service did not occur. *Id.*, Art. 6. Finally, the completed Certificate is returned to the applicant. *Id.* The Hague Convention does not require the Central Authority to respond to requests for status updates. Article 10 of the Hague Convention also permits other forms of service, such as service "by postal channels" or through judicial officers or "other competent persons of the State of designation," provided that the state of destination does not object.<sup>2</sup> See *id.*, Art. 10. However, because India has objected to Article 10, service by mail or through judicial officers, or other competent persons, is not available and service through India's Central Authority is the exclusive method by which Plaintiffs can serve Defendants. [Richmond Technologies, Inc. v. Aumtech Bus. Solutions](#), No. 11-02460, 2011 WL 2607158 (N.D. Cal. July 1, 2011); [OGM, Inc. v. Televisa, S.A. de C.V.](#), No. 08-5742, 2009 WL 1025971, at \*4 (C.D. Cal. Apr. 15, 2009).

Defendants argue that Plaintiffs failed to comply with the requirements of the Hague Convention by personally serving Defendants Trust and Nithyananda using an unauthorized private process server, and by not having the Proofs of service executed by India's Central Authority,

rendering service void and the Court without personal jurisdiction over Defendants. (MTD at 1-6.) Plaintiffs respond that they previously attempted to comply with the Hague Convention to serve the original complaint and the SAC, and because the documents were returned and they did not obtain a reason from the Central Authority as to why the documents were returned, personal service was valid under Article 15. (MTD Opp. 3-5, 8-11.) Plaintiffs also contend that personal service was valid under Article 19 of the Hague Convention, which permits service by any method of service permitted by the internal laws of the country in which service is being made.<sup>3</sup> (*Id.* at 6-8.) Under Article 19, personal service is proper if allowed either by internal Indian law or by provisions of the Hague Convention itself. See [R. Griggs Group Ltd. v. Filanto Spa](#), 920 F. Supp. 1100, 1105 (D. Nev. 1996).

The Court finds that Defendants have not been properly served under the Hague Convention. As an initial matter, the Parties have not provided the Court with any evidence of the propriety of personal service under Indian law. Therefore, the Court only considers whether service was proper under the provisions of the Hague Convention.<sup>4</sup> *Cf. id.* The Court is unpersuaded by Plaintiffs' argument that they previously complied with the Hague Convention by attempting to serve the prior complaints and, therefore, the Court can hold that service was proper. According to Article 15 of the Hague Convention, the Court may hold that service is complete even if the Central Authority has not returned a certificate under Article 6, if the following three conditions are satisfied: (1) "the document was transmitted by one of the methods provided for in this Convention," (2) "a period of time of not less than six months, considered adequate by the judge in the particular case, has elapsed since the date of the transmission of the document," and (3) "no certificate of any kind has been received, even though every reasonable effort has been made to obtain it through the competent authorities of the State addressed." Hague Convention, Art. 15. However, Plaintiffs acknowledge that they did not submit a Request for Service of the operative complaint, the TAC, to India's Central Authority. Therefore, the requirements of Article 15 have not been satisfied.

\*4 Where service of process is insufficient, federal courts have broad discretion to dismiss the action or to retain the case but quash the service of process. [Stevens v. Security Pac. Nat'l Bank](#), 538 F.2d 1387, 1389 (9th Cir. 1976) ("The choice between dismissal and quashing service of process is in the district court's discretion."). "[D]ismissal of a complaint is inappropriate when there exists a reasonable prospect that service may yet be obtained. In such instances, the district court should, at most, quash service, leaving the plaintiffs free to effect proper

**Shinde v. Nithyananda Foundation, Not Reported in Fed. Supp. (2014)**

service.” [Umbenhauer v. Woog](#), 969 F.2d 25, 30-31 (3rd Cir. 1992) (citing 5AB Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1354 (2004)). Because there is a reasonable prospect that Plaintiffs will be able to serve Defendants, the Court quashes the service on Defendants, but declines to dismiss the action based on insufficient service of process. See [OGM, Inc. v. Televisa, S.A. de C.V.](#), No. 08-5742, 2009 WL 1025971 (C.D. Cal. Apr. 15, 2009).

## 2. Personal Jurisdiction

Defendants also argue that the Court does not have personal jurisdiction over the Trust. When a defendant moves to dismiss for lack of personal jurisdiction, “the plaintiff bears the burden of demonstrating that jurisdiction is appropriate.” [Schwarzenegger v. Fred Martin Motor Co.](#), 374 F.3d 797, 800 (9th Cir. 2004). Because this Court has not conducted an evidentiary hearing, Plaintiff “need only make a prima facie showing of jurisdictional facts.” [Sher v. Johnson](#), 911 F.2d 1357, 1361 (9th Cir. 1990). At this stage of the proceeding, uncontroverted facts contained in the Complaint are taken as true, and “[c]onflicts between parties over statements contained in affidavits must be resolved in the plaintiff’s favor.” [Schwarzenegger](#), 374 F.3d at 800.

Where, as here, there is no federal statute that governs personal jurisdiction, the Court must apply the law of the state in which it sits. [Schwarzenegger](#), 374 F.3d at 800. In this case, “[b]ecause California’s long-arm jurisdictional statute is coextensive with federal due process requirements, the jurisdictional analyses under state law and federal due process are the same.” [Id.](#) at 800-01. Therefore, for this Court to exercise personal jurisdiction over the Trust, it “must have at least ‘minimum contacts’ with the relevant forum such that the exercise of jurisdiction ‘does not offend traditional notions of fair play and substantial justice.’ ” [Id.](#) at 801 (quoting [International Shoe Co. v. Washington](#), 326 U.S. 310, 316 (1945)). A federal court may exercise either general or specific jurisdiction over a non-resident defendant. General jurisdiction exists where a defendant has “continuous and systematic” contacts with the forum state such that the defendant may be “haled into court in the forum state to answer for any of its activities anywhere in the world.” [Schwarzenegger](#), 374 F.3d at 801. Specific jurisdiction is more limited in scope and can be exercised where the defendant has sufficient minimum contacts with the forum state, and the plaintiff’s claims arise out of those contacts. [Id.](#) at 801-02. Plaintiffs do not argue that general jurisdiction over the Trust exists. Therefore, the

Court only determines whether it can exercise specific jurisdiction over the Trust.

The Ninth Circuit has developed a three-prong test for analyzing claims of specific personal jurisdiction: “(1) The nonresident defendant must do some act or consummate some transaction with the forum or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws. (2) The claim must be one which arises out of or results from the defendant’s forum-related activities. (3) Exercise of jurisdiction must be reasonable.” [Data Disc, Inc. v. Sys. Tech. Associates, Inc.](#), 557 F.2d 1280, 1287 (9th Cir. 1977). The plaintiff bears the burden of establishing the first two prongs of the test.” [Schwarzenegger](#), 374 F.3d at 801. “If the plaintiff succeeds in satisfying both of the first two prongs, the burden then shifts to the defendant to ‘present a compelling case’ that the exercise of jurisdiction would not be reasonable.” [Id.](#) (quoting [Burger King Corp. v. Rudzewicz](#), 471 U.S. 462, 476-78 (1985)).

### **Alter Ego**

\*5 Plaintiff argues that during the relevant time period Defendants Nithyananda, Sheelim, and Vallabhaneni were acting as agents of the Entity Defendants, including the Trust, the Trust was run as part of the Nithyananda organization, and the Individual Defendants’ activities can be imputed to the Trust. (MTD Opp. 14-17.) A corporation’s association with a person who has caused injury in the forum state is not sufficient in itself to permit the forum to assert jurisdiction over that corporation. See [Davis v. Metro Prods., Inc.](#), 885 F.2d 515, 520 (9th Cir. 1989); [Keeton v. Hustler Magazine, Inc.](#), 465 U.S. 770, 781 n. 13 (1984) (“jurisdiction over a parent corporation [does not] automatically establish jurisdiction over a wholly owned subsidiary”). However, the Ninth Circuit has held that “the corporate form may be ignored in cases in which the corporation is the agent or alter ego of the individual defendant, or where there is an identity of interests between the corporation and the individuals.” [Davis](#), 885 F.2d at 520-21 (internal citation omitted); see also [Martensen v. Koch](#), 942 F. Supp. 2d 983, 993 (N.D. Cal. 2013) (“For purposes of personal jurisdiction, the actions of an agent are attributable to the principal.”); [Daimler AG v. Bauman](#), 134 S. Ct. 746, 754 (2014) (“*International Shoe* recognized, as well, that ‘the commission of some single or occasional acts of the corporate agent in a state’ may sometimes be enough to subject the corporation to jurisdiction in that State’s tribunals with respect to suits relating to that in-state

**Shinde v. Nithyananda Foundation, Not Reported in Fed. Supp. (2014)**

activity.”) (citation omitted).

To apply the alter ego doctrine the Court must find “(1) that there is such unity of interest and ownership that the separate personalities of the corporation and the individuals no longer exist, and (2) that failure to disregard the corporation would result in fraud or injustice.” [Flynt Distributing Co., Inc. v. Harvey](#), 734 F.2d 1389, 1393 (9th Cir. 1984). Plaintiffs allege in the TAC that Defendants instructed Plaintiffs to make their checks payable to the Trust from time to time, the funds of the Entity Defendants were pooled and under common control, and the Individual Defendants moved assets between the entities, including the Trust. (TAC ¶¶ 21, 32, 35.) Additionally Plaintiffs allege that the Nithyananda Organization entities in the United States issued hundreds of thousands of dollars in “grants” to the Trust, and Defendant Nithyananda had sole control of those funds. (*Id.* ¶ 41.) Because over the years the Defendants co-mingled and pooled the entities’ revenues, moved money and assets between entities, solicited donations interchangeably, and most of the money has been sent to India where it is controlled by Nithyananda, Plaintiffs would have difficulty collecting judgment if the Court treated the Trust as separate from the Individual Defendants. (*Id.* ¶¶ 43-44.) These allegations have not been controverted. Therefore, taking the allegations as true, the Court finds that application of the alter ego doctrine is appropriate and disregards the corporate form for jurisdictional purposes and treats the Individual Defendants and the Trust as one. See [Fractional Villas, Inc. v. Reflections](#), No. 08-1423, 2010 WL 1568509, at \*3 (S.D. Cal. Apr. 19, 2010).

**Minimum Contacts**

The first prong of the Ninth Circuit’s test “ensures that a defendant will not be haled into a jurisdiction solely as a result of random, fortuitous, or attenuated contacts, or of the unilateral activity of another party or a third person.” [Yahoo! Inc. v. La Ligue Contre Le Racisme Et L’Antisemitisme](#), 379 F.3d 1120, 1124 (9th Cir. 2004) (quoting [Burger King](#), 471 U.S. at 475). Typically, a “purposeful availment” analysis is used in cases sounding in contract, while a “purposeful direction” analysis is used in cases sounding in tort. [Schwarzenegger](#), 374 F.3d at 802. Here, Plaintiffs’ complaint centers on allegations that their donations were procured through fraud. Therefore, the Court utilizes a purposeful direction analysis.

The three-part purposeful direction test “requires that the defendant have ‘(1) committed an intentional act, (2)

expressly aimed at the forum state, (3) causing harm that the defendant knows is likely to be suffered in the forum state.’ ” *Id.* at 805 (quoting [Dole Food](#), 303 F.3d at 1111). However, “[t]he commission of an intentional tort in a state is a purposeful act that will satisfy the first two requirements under *Data Disc. E.g., Data Disc*, 557 F.2d at 1288. A tortious act, standing alone, can satisfy all three requirements under *Data Disc* if the act is aimed at a resident of the state or has effects in the state.” [Paccar Int’l, Inc. v. Commercial Bank of Kuwait, S.A.K.](#), 757 F.2d 1058, 1064 (9th Cir. 1985) (citing [Calder v. Jones](#), 465 U.S. 783(1984); *Data Disc*, 557 F.2d at 1288); see also [Martensen v. Koch](#), 942 F. Supp. 2d 983, 994-95 (N.D. Cal. 2013) (“Instead, the ‘effects’ test appears unnecessary where, as here, part of the alleged tort occurred in California”); [MMCA Group, Ltd. v. Hewlett-Packard Co.](#), 2007 WL 1342586, at \*7 (N.D. Cal. May 8, 2007) (“When a nonresident defendant commits a tort within the state ... that tortious conduct amounts to sufficient minimum contacts with the state by the defendant to constitutionally permit courts within that state ... to exercise personal adjudicative jurisdiction....”).

\*6 Plaintiffs allege that the Individual Defendants committed intentional fraudulent acts in California by meeting with Plaintiffs Shinde, Bhat, Bhutada, Dalal in California, and making fraudulent misrepresentations and omissions that these Plaintiffs relied upon in making their donations (TAC ¶¶ 62-67, 71-73, 76, 80, 85-90, 111, 115, 119, 121-125, 131, 142-145, 147, 149, 151.) Additionally, Plaintiffs Shinde, Bhat, and Dalal are residents of California. (*Id.* ¶¶ 3, 7, 9.) Therefore, because Plaintiffs have adequately alleged that Defendants committed the tort of fraud within the forum, aimed at residents of the state, the Court finds Plaintiffs have made a prima facie showing of minimum contacts needed to establish personal jurisdiction over the Trust. See [Martensen](#), 942 F. Supp. 2d at 996.

**B. Motion for Court Order Allowing Service**

Plaintiffs move for an order to allow Plaintiffs to serve the TAC on the defendants who have not yet appeared, Defendants Nithyananda, Trust, Sheelum, and Vallabhaneni (“Non-appearing Defendants”), by email, Facebook, Defendants’ counsel, or the registered agent of Defendant Nithyananda Foundation. (See generally *Mot. for Service*.)

[Rule 4\(f\)\(3\)](#), permits service in a place not within any judicial district of the United States “by ... means not prohibited by international agreement as may be directed

**Shinde v. Nithyananda Foundation, Not Reported in Fed. Supp. (2014)**

by the court.” “Service under [Rule 4\(f\)\(3\)](#) must be (1) directed by the court; and (2) not prohibited by international agreement. No other limitations are evident from the text. In fact, as long as court-directed and not prohibited by an international agreement, service of process ordered under [Rule 4\(f\)\(3\)](#) may be accomplished in contravention of the laws of the foreign country.” [Rio Properties, Inc. v. Rio Int’l Interlink](#), 284 F.3d 1007, 1014 (9th Cir. 2002). The Advisory Committee Notes indicate the availability of alternate service of process under [Rule 4\(f\)\(3\)](#) without first attempting service by other means, suggesting that in cases of “urgency,” [Rule 4\(f\)\(3\)](#) may allow the Court to order a “special method of service,” even if other methods of service remain incomplete or unattempted. [Id.](#) at 1015. “Thus, examining the language and structure of [Rule 4\(f\)](#) and the accompanying advisory committee notes, we are left with the inevitable conclusion that service of process under [Rule 4\(f\)\(3\)](#) is neither a ‘last resort’ nor ‘extraordinary relief.’ It is merely one means among several which enables service of process on an international defendant.” [Id.](#) (citation omitted).

Plaintiffs have demonstrated that they have had difficulty in serving the Non-appearing Defendants located in India. They have twice attempted to serve the Non-appearing Defendants through the Central Authority, pursuant to the Hague Convention, but the documents were returned without an explanation as to why they could not be served. Therefore, the Court finds it appropriate to craft an alternate means of service given the facts and circumstances of the case.

**Methods of Service**

The Court first addresses whether Plaintiffs’ proposed methods of service are prohibited by an international agreement. As noted above, the United States and India are signatories to the Hague Service Convention. Article 2 of the Convention provides that “[e]ach contracting State shall designate a Central Authority which will undertake to receive requests for service coming from other contracting States.” Hague Convention on Service Abroad of Judicial and Extrajudicial Documents art. 2, [Nov. 15, 1965](#), 20 U.S.T. 361, 658 U.N.T.S. 163. Article 10, in turn, allows for service of process through alternative means such as “postal channels” and “judicial officers,” provided that the destination state does not object to those means. [Id.](#), Art. 10. India has objected to the means listed in Article 10, although that objection is specifically limited to the means of service enumerated in Article 10. See [Gurung v. Malhotra](#), 279 F.R.D. 215, 219 (S.D.N.Y.

2011). “[N]umerous courts have authorized alternative service under [Rule 4\(f\)\(3\)](#) even where the Hague Convention applies. This is true even in cases involving countries that, like India, have objected to the alternative forms of service permitted under Article 10 of the Hague Convention.” [Richmond Technologies, Inc. v. Aumtech Bus. Solutions](#), No. 11-02460, 2011 WL 2607158, at \*12 (N.D. Cal. July 1, 2011). “Where a signatory nation has objected to only those means of service listed in Article [10], a court acting under [Rule 4\(f\)\(3\)](#) remains free to order alternative means of service that are not specifically referenced in Article [10].” [Gurung](#), 279 F.R.D. at 219.

\*7 Service by email and Facebook are not among the means listed in Article 10, and India has not specifically objected to them. The Court agrees with the numerous courts that have held that service by email does not violate any international agreement where the objections of the recipient nation are limited to those means enumerated in Article 10. See, e.g., [Gurung](#), 279 F.R.D. at 220; [Philip Morris USA Inc. v. Veles Ltd.](#), 2007 WL 725412, at \*3 (S.D.N.Y. Mar. 12, 2007) (collecting cases authorizing email service). Service by Facebook is also outside the scope of Article 10. India has not objected to service by Facebook, and the Court knows of no international treaty prohibiting such means. See [F.T.C. v. PCCare247 Inc.](#), No. 12-7189, 2013 WL 841037 (S.D.N.Y. Mar. 7, 2013). Therefore, service by means of email and Facebook is not prohibited by international agreement. Additionally, service upon a foreign defendant’s United States-based counsel is a common form of service ordered under [Rule 4\(f\)\(3\)](#) and nothing in the Hague Convention prohibits such service. See [Richmond Technologies](#), 2011 WL 2607158, at \*13; [RSM Production Corp. v. Fridman](#), No. 06-11512, 2007 WL 2295907, at \*3 (S.D.N.Y. Aug. 10, 2007) (“The Hague Service Convention does not prohibit an order pursuant to [Rule 4\(f\)\(3\)](#) permitting service through American counsel.”). Finally, Plaintiffs’ proposed service on the registered agent of the Nithyananda Foundation is not prohibited by the Hague Convention, and the Court is unaware of any other international agreement that this method of service would violate. See [Rose v. Deer Consumer Products, Inc.](#), No. 11-03701, 2011 WL 6951969, at \*2 (C.D. Cal. Dec. 29, 2011). Thus, Court, in its discretion, may authorize service by the means Plaintiffs propose, provided that due process is also satisfied.

**Due Process**

Even if facially permitted by [Rule 4\(f\)\(3\)](#), a method of

**Shinde v. Nithyananda Foundation, Not Reported in Fed. Supp. (2014)**

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service of process must also comport with constitutional notions of due process. [Rio Properties, Inc. v. Rio Int'l Interlink](#), 284 F.3d 1007, 1016-17 (9th Cir. 2002). To meet this requirement, the method of service crafted by the district court must be “reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” *Id.* (quoting [Mullane v. Cent. Hanover Bank & Trust Co.](#), 339 U.S. 306, 314 (1950)).

Assessing the proposed methods of service, the Court concludes that service upon Mr. Tuchman of Tuchman & Associates is reasonably calculated to apprise Defendants Nithyananda and Trust of the pendency of the action and afford them an opportunity to present their objections. Defendants Nithyananda and Trust already have actual notice of the action, and Mr. Tuchman is representing them for the purpose of contesting jurisdiction and opposing substituted service. Mr. Tuchman has not stated that he is not in current communication with Defendants Nithyananda and Trust, or that his relationship with Defendants Nithyananda and Trust is not intended to be ongoing. Accordingly, service of the TAC on Defendants Nithyananda and Trust through Mr. Tuchman comports with due process.

Plaintiffs also provide evidence that Mr. Tuchman represented Defendants Sheelum and Vallabhaneni in other actions in 2012. However, there is no evidence that Mr. Tuchman is still in contact with Defendants Sheelum and Vallabhaneni, and it is specifically noted in his opposition to the Motion for Service that Tuchman & Associates does not represent them in this action. ([See](#) Opp. to Mot. for Service at 23 n. 5.) However, Defendant Sheelum’s deposition testimony from November 2011 identifies Defendant Sheelum’s email address as [nthleap@yahoo.com](mailto:nthleap@yahoo.com) and Defendant Siva Vallabhaneni’s email address as [srvalla@yahoo.com](mailto:srvalla@yahoo.com). Additionally, the Sheno Declaration identifies Defendant Sheelum and Defendant Vallabhaneni’s Facebook pages. Courts have

**Defendant**

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Swami Nithyananda

Counsel Aviv Tuchman

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Dhyanapectam Charitable Trust

Counsel Aviv Tuchman

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Gopal Sheelum

[nthleap@yahoo.com](mailto:nthleap@yahoo.com) and any other known email addresses; Facebook; and the Foundation’s Registered Agent for service of process

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found that email service and service through Facebook comport with due process. [See, e.g. Liberty Media Holdings, LLC v. March](#), No. 101809, 2011 WL 197838, at \*2 (S.D. Cal. Jan. 20, 2011) (finding that serving the defendants at their last known valid email address comported with due process); [F.T.C. v. PCCare247 Inc.](#), 2013 WL 841037 (S.D.N.Y. Mar. 7, 2013) (“[S]uch service would work as follows: The FTC would send a Facebook message, which is not unlike an email, to the Facebook account of each individual defendant, attaching the relevant documents. Defendants would be able to view these messages when they next log on to their Facebook accounts (and, depending on their settings, might even receive email alerts upon receipt of such messages.)”). Additionally, in an abundance of caution, the Court additionally orders Plaintiffs to serve the summons and TAC through the registered agent of service of process of the Foundation, for which Defendant Sheelum and Defendant Vallabhaneni previously served as board members or officers.

**IV. CONCLUSION**

\*8 For the foregoing reasons, the Court: Court (1) GRANTS in part Defendants’ Motion to Dismiss, (2) GRANTS Plaintiffs’ Motion for Court Order Allowing Service of Summons and Complaint, and (3) GRANTS in part Defendants’ Request to Strike New Evidence and Argument.

The Court QUASHES the service on Defendants Nithyananda and Trust. Plaintiffs may serve the summons and the Third Amended Complaint in the following manners:

**Method of Service**

Shinde v. Nithyananda Foundation, Not Reported in Fed. Supp. (2014)

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Siva Vallabhaneni

srvalla@yahoo.com and any other known email addresses; Facebook; and the Foundation's Registered Agent for service of process

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Any return of service on the above-listed Defendants that Plaintiffs file must include proof that Plaintiffs have attempted, at a minimum, to verify actual receipt of the summons and Third Amended Complaint.

**IT IS SO ORDERED.**

**All Citations**

**The scheduling Conference is continued to December 8, 2014, at 11:00 a.m.**

Not Reported in Fed. Supp., 2014 WL 12597121

Footnotes

- 1 Unless otherwise noted, all mentions of "Rule" refer to the Federal Rules of Civil Procedure.
- 2 Under Article 10: "Provided the State of destination does not object, the present Convention shall not interfere with—(a) the freedom to send judicial documents, by postal channels, directly to persons abroad, (b) the freedom of judicial officers, officials or other competent persons of the State of origin to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination, (c) the freedom of any person interested in a judicial proceeding to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination." [Hague Convention, 20 U.S.T. 361, T.I.A.S. No. 6638](#), Art. 10.
- 3 "To the extent that the internal law of a contracting State permits methods of transmission, other than those provided for in the preceding articles, of documents coming from abroad, for service within its territory, the present Convention shall not affect such provisions." Hague Convention, Art. 19.
- 4 Defendants argue that India's objection to personal service under Article 10 means that India objects to all personal service, other than by those authorized by its Central Authority. (MTD Reply at 3-5.) The Court finds that this argument is insufficient to show definitively that personal service is not authorized under Indian law, but makes no ruling on this issue.

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## Exhibit 21

Soares v. Lorono, Not Reported in Fed. Supp. (2015)

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Declined to Extend by [In re Spielbauer](#), N.D.Cal., March 13, 2018

2015 WL 151705

Only the Westlaw citation is currently available.  
United States District Court, N.D. California.

Paul F. SOARES, Plaintiff,  
v.  
Jeffrey LORONO, et al., Defendants.

Case No. 12-cv-05979-WHO

Signed January 12, 2015

#### Attorneys and Law Firms

Paul F. Soares, Grandville, MI, pro se.

[David M. Hollingsworth](#), Law Offices of David M. Hollingsworth, Monterey, CA, for Defendants.

#### MEMORANDUM OPINION

[WILLIAM H. ORRICK](#), United States District Judge

#### INTRODUCTION

\*1 Plaintiff Paul F. Soares and defendants<sup>1</sup> Jeffrey Lorono, Lisa Lorono, Salinas Valley Roofing Incorporated (“SVR”), Adolfo Rangel, and Village Heating and Sheet Metal (“Village”) have a long and acrimonious history, culminating in this consolidated civil action in federal district court and adversary proceeding in bankruptcy court. Their relationship dates back to 2006, when Soares contracted with SVR, owned by Jeffrey Lorono, to provide work and materials on his Monterey apartment building. A year later, Soares entered into an oral contract with Village, owned by Rangel, for sheet metal work on the roof. After Soares breached both agreements, SVR and Village filed separate lawsuits against him in the Monterey Superior Court. SVR and

Soares reached a settlement agreement in 2008, which Soares ultimately breached through his failure to pay, spurring further litigation in the Superior Court.

Soares filed for bankruptcy in 2009. SVR and Village brought an adversary complaint in the bankruptcy proceeding on October 26, 2009, alleging that the debts owed to them are non-dischargeable by reason of fraud. *See generally Salinas Valley Roofing, Inc. v. Soares*, No. 09–05296–ASW (Bankr.N.D.Cal. Oct. 26.2009). In 2012, Soares brought a complaint in federal district court in New Jersey against the Loronos, SVR, Village, and Rangel<sup>2</sup> for breach of contract, breach of warranty, and fraud.

The adversary case and civil case proceeded on separate tracks until September, 2014, when the adversary case went to trial before U.S. Bankruptcy Judge Arthur Weissbrodt. After two days of trial, the substantial overlap between the adversary proceeding and the civil matter became apparent, and Judge Weissbrodt directed the parties to raise the possible consolidation of the matters with me. I then consolidated the adversary proceeding with the civil case in this Court since some of the underlying issues are the same in each case and Soares’s civil claims serve as potential defenses in the adversary proceeding. *See* Dkt. No. 259.

On December 8, 2014, the case proceeded to trial without a jury. In the civil proceeding, Soares brought causes of action for breach of contract, breach of warranty, and fraud against defendants Rangel and Village, and against defendants Lisa and Jeffrey Lorono and SVR. In the adversary proceeding, Village and SVR sought the establishment and liquidation of debts owed to them and requested a finding of non-dischargeability of these debts pursuant to 11 U.S.C. §§ 523(a)(2)(A) and 523(a)(6). Although the parties had indicated that the trial would take several days, it was completed on the day it began.

In this Memorandum of Decision, I issue my findings of fact and conclusions of law pursuant to [Rule 52\(a\) of the Federal Rules of Civil Procedure](#). In the civil proceeding, I find that Soares failed to meet the burden of proof for his claims of breach of contract and breach of warranty because he did not prove damages or causation. In addition, he failed to present any evidence of fraud. Therefore, I find against Soares and in favor of the defendants on all causes of action in the civil proceeding.

\*2 In the adversary proceeding, the amounts of Soares’s debts to SVR and Village are largely undisputed. I find that Soares owes a debt of \$5, 697.00 to SVR and

Soares v. Lorono, Not Reported in Fed. Supp. (2015)

\$14,517.36 to Village. I further find that both of these debts are non-dischargeable under Section 523(a)(6). Soares has engaged in an extensive pattern of wrongful conduct that was intentionally designed to avoid paying debtors such as SVR and Village, including using sham corporations that he formed abroad to insulate himself from liability. SVR is entitled to attorney's fees pursuant to the Settlement Agreement between Soares and SVR, in an amount to be calculated after SVR files a motion for fees within 14 days of entry of judgment.

**FINDINGS OF FACTS<sup>3</sup>**

**I. THE PARTIES**

1. Plaintiff Paul F. Soares resides in Monterey, California. Tr. 9:18. Soares owns the four-unit residential apartment complex property involved in this case, located at 416 Drake Avenue in Monterey (the "Drake property"). *Id.* at 9:19–21, 99:15–20. Soares lives in the largest unit of the Drake property. *Id.* at 98:17–99:11.<sup>4</sup>

2. Soares represented himself in these proceedings. While not a lawyer, Soares obtained a masters' degree in International AgriBusiness from the University of Santa Clara, *see* Bankr.Tr. at 39:2–4, and has previously acted as a trustee for a pension fund. *See United States v. Soares*, 998 F.2d 671, 671 (9th Cir.1993). He has been extensively involved in litigation in state and federal court, *see* Tr. Ex. 139 at 1–2, including as a pro se litigant in this bankruptcy proceeding, *see* Bankr.Tr. at 2, and before the Ninth Circuit in his prior criminal case for wire fraud, *see* Brief of Defendant–Appellant, *United States v. Soares*, 89 F.3d 847 (9th Cir.1996) (No. 95–10359), 1996 WL 33487038. He is not unsophisticated.

3. Soares testified several times during the bench trial and the bankruptcy proceedings. I do not find Soares to be a credible witness. Soares's testimony during both the bench trial on December 8, 2014 and the bankruptcy proceedings on September 18, 2014 was often inconsistent or contradicted by reliable extrinsic evidence. In addition, his memory was at times very detailed while at other times he was unable to remember important information, such as the fact that he was the general partner of Casa Vista, a key fact in his prior conviction for receiving

kickbacks and embezzlement between 1991 and 1993. *Soares*, 998 F.2d at 671. Soares also pled guilty to wire fraud around 1996. *United States v. Soares*, 89 F.3d 847 (9th Cir.1996). These are crimes affecting a witness's truthfulness, *see* Fed. R. Evid. 609, and while I find Soares not credible without regard to his conviction, the fraud conviction is admissible and relevant even if it took place over ten years ago. The sophistication of the schemes proven there are of the same genre as those in this case. *See* Fed. R. Evid. 609 advisory committee's note (criminal fraud and embezzlement "involve[ ] some element of untruthfulness, deceit or falsification bearing on the accused's propensity to testify truthfully").

4. Defendant Jeffrey Lorono owned defendant SVR, a roofing company that is now dissolved. Tr. 33:18–34:2. Jeffrey Lorono is married to defendant Lisa Lorono. *Id.* at 246:20–21. At the time of the roofing contracts at issue, Lisa Lorono was the secretary of SVR. *Id.* at 247:2–5.

\*3 5. I heard testimony from both Jeffrey and Lisa Lorono, and find that they were credible in their testimony.

6. Defendant Village is a sheet metal business owned by defendant Adolfo Rangel. *Id.* at 150:23–151:23. Rangel is a licensed contractor for sheet metal working, heating, and air conditioning. *Id.* at 239:18–25. He has held a license continually since 2002. *Id.* Although Rangel's contracting license was suspended several times in the past, the license was not suspended at the time of his contract with Soares or when he performed under the contract. *Id.* at 243:3–23.

7. I heard testimony from Rangel and find that he was a credible witness.

**II. NZH AND OCC**

8. New Zealand Holdings, Limited ("NZH") and Oceania Capital Company, Limited ("OCC") are corporations formed in the Cook Islands. Bankr.Tr. 37:17–22. NZH registered with the California Secretary of State on March 7, 2001, and OCC registered on April 27, 2006. Tr. Ex. 216; Tr. Ex. 215.

9. Soares initially testified that that he formed OCC

Soares v. Lorono, Not Reported in Fed. Supp. (2015)

and NZH for the purpose of converting an apartment building—the Drake property—to condominiums. Bankr.Tr. at 37:23–25. He stated that the “apartment building had some defects in it, and to my knowledge, it is a standard practice to form corporations either in other states or in other jurisdictions ... so that those corporations, once the condominiums are sold, are dissolved to avoid any homeowners’ association lawsuits in subsequent years.” *Id.* at 37:24–38:6.

10. During the bench trial, Soares denied that he formed the corporations. Tr. 82:12–16. Instead, he maintained that they were formed by an individual named Mr. Short in order to convert the Drake property into condominiums. *Id.* at 93:6–9. I credit Soares’s earlier testimony and find that Soares formed the corporations, possibly with Short.

11. Short works in the asset protection business and had offices in New Zealand and the Cook Islands. *Id.* at 81:10–19. Soares testified that he “got involved” with Short in order to form a trust for his children. *Id.* According to Soares, Short owned NZH and OCC. Bankr.Tr. at 40:16–19.

12. In 2006, at Soares’s request, the Monterey Superior Court set aside a judgment against Soares personally because NZH, and not Soares, was a party to the contract. Tr. Ex. 146; Tr. 174:7–176:22. That lawsuit involved a tenant of the Drake property who sued both Soares and NZH for the return of his security deposit. Tr. Ex. 146; Tr. 174:7–176:22.

13. According to Soares, until 2007 the mortgages on the Drake property were paid by OCC and proceeds from the sale of the condos were paid to OCC’s investors. Tr. 94:8–96:9. In 2007, Soares “refinanced” the Drake property by obtaining personal mortgages on it. *Id.* at 93:6–95:10. Thereafter, Soares admitted at trial, OCC’s only asset was the Drake property and the assets and liabilities of OCC were the same as those of Soares personally. *Id.* at 90:23–91:18, 218:7–18.

\*4 14. Soares was the president, chief executive officer, and a director of both corporations, and signed deeds on their behalf. *Id.* at 84:1–8; Bankr.Tr. at 44:11–16. According to Soares, decisions about conveyancing the Drake property were made by Short and the board in New Zealand or the Cook Islands. Tr. 84:9–13. However, Soares testified that he could not recall the names or even the number of OCC’s owners. *Id.* at 93:17–94:4. Given the evidence of Soares’s control over the corporations, I

do not believe Soares’s testimony that decisions were made by Short and the board, or his testimony that proceeds from the condos were paid to OCC’s “investors.”

15. Soares initially testified that he first acquired an interest in NZH and OCC in May or June of 2009, after which he owned a 100 percent interest in NZH and OCC. Bankr.Tr. at 42:5–45:2. He also testified that he did not pay any consideration for his interest in the corporations. *Id.* Soares stated that he acquired an interest in the companies so that they could be dissolved. Tr. 83:11–13.

16. Soares and Short signed and filed certificates of dissolution for OCC and NZH on or around June 18, 2009. Tr. Ex. 217 at 2; Tr. Ex. 218 at 2. These were received by the California Secretary of State on July 22, 2009. Tr. Ex. 217 at 1; Tr. Ex. 218 at 1.

17. Each certificate of dissolution stated that “[t]he corporation’s known debts and liabilities have been adequately provided for by their assumption and the name and address of the assumer is Paul F. Soares.” Tr. Ex. 217 at 2; Tr. Ex. 218 at 2.

18. On July 23, 2009, Soares filed a “Notice of Automatic Stay in Bankruptcy” in the Superior Court case brought by SVR (M86548). Tr. Ex. 213. This requested that the court take judicial notice of the fact that defendants’ counsel, David Hollingsworth, “appears to have successfully argued that all Defendants are one and the same and that each and every corporate defendant is a sham and is the alter ego of Paul F. Soares.” *Id.* Soares requested that the matter be subject to stay. *Id.*

19. The carefully worded Notice in fact induced the Monterey Superior Court to enter a stay, *see* Tr. 178:9–23, 184:10–15, and was at minimum an attempt to avoid debt to creditors of OCC and NZH by placing them under the umbrella of the bankruptcy protection, if not a judicial admission that the companies are alter egos of Soares.

20. During the bankruptcy proceedings, Soares testified that before 2009, he never owned any interest in either NZH or OCC. Bankr.Tr. at 42:9–44:9.

21. In a 2008 letter to his creditors, Soares also asserted that he never owned any interest in either NZH or OCC. Tr. Ex. 204.

22. During the time that OCC owned the Drake property, Soares entered into a contract with

Soares v. Lorono, Not Reported in Fed. Supp. (2015)

California Closets for installations on the Drake property units. Tr. Ex. 301. This contract was signed by Soares individually and did not mention OCC. *Id.* Soares testified that OCC paid for the work that went into rental units aside from his own. Tr. 135:22–136:10.

23. In 2009, Soares shared a post office box with both OCC and NZH. *Id.* at 97:20–24. At that time, Soares’s testimony reflects that he cannot recall whether he wrote a check related to the settlement agreement with SVR from his personal account or OCC’s account. *Id.* at 91:19–23, 97:13–19.

24. I find that NZH and OCC are alter egos of Soares. Soares entered all contracts for the repairs and improvements of the Drake property, sometimes in a personal capacity; paid no consideration for his ultimate ownership of the property; shared a mailbox with OCC and NZH; and was often unable at trial to distinguish between his personal affairs and those of OCC and NZH. This creates a unity of interest and ownership such that the separateness of Soares and the corporations ceased as a practical matter.

\*5 25. Although Soares asserts that consideration for the transfer of the Drake property to his name was the assumption of all debts on the property, a substantial portion of these debts—including two mortgages—were his personal debts. The short term “transfer” in 2007, which allowed Soares to obtain such financing, was made by OCC without any consideration.

26. Short and the other unnamed directors and shareholders of OCC and NZH serve as a pretense to give the appearance of distinct entities when in reality Soares alone controlled both companies as his alter egos. Short, who lives overseas, had no meaningful role in the operations of OCC and NZH, whose businesses focused on the Drake property in Monterey. As Soares testified, Short works in “asset protection” and initially assisted Soares in forming a trust for his children. Short served as a director of NZH and OCC only in order to maintain the appearance that the corporations were separate entities, when in reality they were not.

27. Soares’s substantial use of the corporations to obtain personal financing and other benefits from third parties, combined with his repeated claims that he has no interest in them, leads me to find that Soares used the corporations in order to avoid personal debts that he either was unwilling or unable to pay.

### III. SOARES’S INVOLVEMENT WITH OTHER BUSINESSES

28. In the past, Soares has been a director, president, or partner of between 20 and 40 businesses. Bankr.Tr. 39:12–40:3.

29. A corporation called Cgambo Development Company Incorporated (“Cgambo”) previously held title to the Drake property. *Id.* at 47:23–48:2. According to Soares, he had no relationship with the company until its principal, Carl Graham, died. *Id.*; Tr. 196:19197:23.

30. Soares signed a grant deed conveying the Drake Property to NZH as president of Cgambo in 2000. Tr. Ex. 131.

31. In the bankruptcy proceedings a creditor of Cgambo, Homer T. Hayward Lumber Co., filed a claim against Soares on the basis that Cgambo was Soares’s alter ego. Tr. Ex. 306. at 2.

32. Soares was involved in 3 lawsuits that also involved Cgambo in 2000 and 2002. Tr. Ex. 139 at 1.

33. Soares controlled a corporation called Casa Vista Limited Partnership (“Casa Vista”). *Soares*, 998 F.2d at 672. Soares was convicted of receiving kickbacks in his fiduciary position as the investment advisor for an employee pension plan, in part through his work with Casa Vista. *Id.*

34. Soares was involved as a co-defendant with a company called Duke & Rosie’s in three lawsuits in 2003, 2005, and 2008. Tr. Ex. 139 at 1. The last of these lawsuits named Duke & Rosie’s as Soares’s dba. *Id.* In letters written by Soares in 2008 and 2009, he denied having any interest in Duke & Rosie’s, but stated that the company was owned by OCC. Tr. Ex. 204; Tr. Ex. 205.

35. During the bankruptcy trial, Soares testified that he held a five percent interest in a general partnership that owned Carpodeum Limited Partnership (“Carpodeum”). Bankr.Tr. 49:7–17. Soares’s brother was the major partner of the general partnership. *Id.*

36. Soares also stated that he and his brother each held a five percent interest in Presidio Hill Group

Soares v. Lorono, Not Reported in Fed. Supp. (2015)

(“Presidio”). *Id.* at 50:8–17.

37. Soares has been a party as a plaintiff or defendant to 23 lawsuits in the California superior courts. Tr. 170:15–171:6; Tr. Ex. 139 at 1. Many of these lawsuits involved corporations with which Soares was affiliated, including Casa Vista, Carpodeum Limited, Cgambo, Duke & Rosie’s, NZH, and OCC. Tr. Ex. 139 at 1.

\*6 38. Soares has been involved in at least a dozen bankruptcy cases as a debtor. Tr. 171:19173:21; Tr. Ex. 139 at 2. These include proceedings with Carpodeum, Cgambo and Casa Vista as debtors. Tr. Ex. 139 at 2.

#### IV. THE DRAKE PROPERTY

39. The Drake property consists of a roughly 6,000 square foot unit that is Soares’s residence, two 1,000 square foot one-bedroom apartments, and one 700 square foot studio apartment. Tr. 98:13–99:20.

40. Soares personally collects rent from the tenants living in the Drake property units that he does not live in. *Id.* at 99:21–100:1.

41. According to Soares, he paid \$4,000.00 in monthly rent to NZH and then OCC until 2008, after which he made payments toward the deed of trust on the property. *Id.* at 100:2103:21.

42. On a number of occasions, Soares denied ever having an interest in the Drake property. This includes during a deposition on April 17, 2008, *see* Tr. 156:16–157:9, and in his pleadings in the Superior Court. Tr. Ex. 112 at 2.

43. In addition, in the bankruptcy proceeding Soares testified that he first acquired an interest in the Drake property in 2009, approximately six to eight weeks before he filed for bankruptcy. Bankr.Tr. 44:23–25.

44. The Drake property was granted to Soares on July 8, 2009. Tr. Ex. 126. This deed is signed by Soares as the president of OCC. *Id.*

45. The Drake property was also granted to Soares from OCC on June 28, 2007. Tr. Ex. 127. Again, Soares signed the deed as the director of OCC. *Id.* On the same day, Soares as an individual transferred the Drake property back to OCC. Tr. Ex. 128. A

handwritten note on this deed indicates that the transfer was for “financial purposes.” *Id.*

46. When confronted with the 2007 deed, Soares admitted that this transfer took place and that he owned the Drake property for “approximately one week.” Bankr.Tr. 58:2–7. Soares stated that the conveyance took place so that he could obtain a loan from Triton Commercial Capital. *Id.* at 58:8–17; Ex 304. The loan from Triton Commercial Capital, dated June 27, 2007, was made to Soares personally. Tr. Ex. 304.

47. Soares also obtained a loan on the Drake property on May 7, 2007, before title was transferred from to him from OCC. Tr. Ex. 303 at 1. This deed of trust was made in OCC’s name. *Id.*

48. Soares admitted that by the time OCC transferred the Drake property to him in 2009, the mortgages and other debts against the Drake property were all his personal debts. Tr. 90:18–91:9.

49. Soares also held title to the Drake property in 1984. Tr. Ex. 135; Tr. Ex. 136.

50. Soares’s statements that he did not have any interest in the Drake property before 2009 were false. Soares’s multiple assertions that he did not own the property, even when presented with information to the contrary, undermine his argument that he forgot about owning the property. I find that Soares knew he had previously owned the property but claimed he did not in order to avoid personal liability for debts incurred upon the property and in order to avoid the appearance that his corporations were alter egos.

51. Soares initially stated that he did not pay any money to OCC for the property, but assumed the debts of the property as consideration. Tr. 164:4–14. Soares then recanted his testimony and testified that he paid roughly a quarter of a million dollars in January of 2009. *Id.* at 165:20–166:21. He did not provide any evidence as proof of this payment. *Id.* at 166:14–18.

\*7 52. OCC obtained the Drake property from NZH on May 18, 2006. Tr. Ex. 129. Soares signed the deed as the director of NZH. Tr. Ex. 129.

53. NZH obtained the property from Cgambo on May 15, 2000. Tr. Ex. 131. Soares signed this grant deed as president of Cgambo. *Id.*

54. Cgambo was granted the property from Casa

Soares v. Lorono, Not Reported in Fed. Supp. (2015)

Vista on December 4, 1997. Tr. Ex. 132. Soares signed this deed on behalf of Casa Vista as the General Partner. *Id.*

55. Casa Vista obtained the property from Presidio on June 20, 1985. Tr. Ex. 133. Soares signed this deed as the General Partner of Presidio. *Id.*

56. Presidio obtained the property from Soares as an individual on March 8, 1984. Tr. Ex. 134. Soares had obtained the property from his wife, Sharon Soares, on February 16, 1984. Tr. Ex. 135. A grant deed dated February 14, 1984 also conveyed title to Soares from Arthur and Isabell Jones. Tr. Ex. 136.

57. Soares stated that he could not recall if he was the general partner of Presidio or Casa Vista, and could not recall if he was the president of Cgambo at the time it conveyed the Drake property to NZH. Bankr.Tr. at 53:10–54:10.

58. Soares testified that at the time NZH acquired the Drake property from Cgambo, he had no ownership interest in NZH. *Id.* at 54:11–13. Soares stated that he did not recall if he was the director of NZH when the deed was signed. *Id.* at 56:7–11.

59. Considering the facts that Soares signed every deed of conveyance for the Drake property on behalf of other corporations, and at times transferred it to himself, I do not believe Soares's testimony that Short, and not he, made decisions about conveying the Drake property.

60. I find that Soares exercised control over all conveyances of the Drake property since it was sold by the Joneses in 1984. It is not believable that Soares did not remember the fact that he signed every one of the deeds conveying the Drake property. Like NZH and OCC, the various corporations that conveyed the Drake property were likely alter egos of Soares. Soares's repeated statements that he had no interest in the Drake property were false and were made in bad faith in order to avoid paying debts incurred on the Drake property.

61. On February 24, 2006, SVR submitted a "Proposal and Contract" to "Sirius Forest"<sup>3</sup> which proposed to furnish material and work for the replacement of the roof on the Drake property. Tr. Ex. 101 at 1.

62. The Proposal and Contract was signed by Jeffrey Lorono on behalf of SVR and by Soares on behalf of NZH on March 1, 2006. *Id.* at 2. This document provided that there was a "ten year warranty on workmanship." *Id.* at 1. It also provided that Soares would pay 50 percent of the purchase price down, and 50 percent upon completion. *Id.*; Tr. 255:2–5.

63. On or around July 2, 2006, Soares signed another Proposal and Contract from SVR with similar terms, this time on behalf of OCC. Tr. Ex. 102. This also stated that there was a "ten year warranty on workmanship." *Id.* It also stated that 50 percent would be paid when "material is loaded," with the balance due on completion. *Id.*

\*8 64. Soares stopped payment on the contracts with SVR (collectively referred to as the "Proposal and Contract") after paying the first 50 percent. Tr. 252:22–253:22.

65. After Soares failed to pay the remaining balance, SVR ceased paying its supplier. *Id.* at 252:18–20. Because Soares did not pay within 60 days of completion of the project, a mechanic's lien was filed against the Drake property. *Id.* at 254:15–22, 256:2–11.

66. When Lisa Lorono attempted to obtain payment from Soares and went to his house, he stood at the window but would not open the door. *Id.* at 248:8–16. Soares repeatedly made verbal promises to pay the Loronos that he failed to fulfill. *Id.*

67. Soares maintains that his signature on the Proposal and Contract with SVR was "forged." *Id.* at 105:16–106:3. Soares admits that the signature was his but claims that it—as well as his fax number—was pasted on the document without his consent. *Id.* at 106:1–107:18.

68. According to Lisa Lorono, Soares's signature on the fax was not forged or unlawfully pasted onto the fax. *Id.* at 248:17–249:10.

69. I find that Soares's signature was not forged or unlawfully pasted onto the contract with SVR. The parties do not dispute the existence of an agreement for roofing work. Soares has not presented any evidence to support his contention that there was a

## V. THE ROOFING CONTRACTS

### A. With Lisa Lorono, Jeffrey Lorono, and SVR

Soares v. Lorono, Not Reported in Fed. Supp. (2015)

scheme by which both the signature and fax number were “pasted” onto the document, and Lisa Lorono denies any bad faith conduct on her part.

**B. With Village and Rangel**

70. In 2007, Soares entered into an oral contract to provide work on the Drake property roof with Rangel, who acted on behalf of Village. *Id.* at 239:18–240:21.

71. When making the oral agreement, Soares did not say that he was acting as an agent of any corporation, and indicated to Rangel that he entered into the contract personally. *Id.* Soares represented to Rangel that he was the party that would pay Rangel in exchange for his services. *Id.*

72. Soares does not deny owing money to Rangel, but asserts that he did not have the money to pay the remaining balance. *Id.* 153:3–19.

73. Rangel claims that the debt owed to him amounts to \$13,124.54 plus interest, equaling \$14,517.36. Tr. Ex. 208; Bankr.Dkt. No. 1 at 6; Tr. 244:6–11. Soares did not, and has not to date, paid any of this sum to Rangel. Tr. 241:20–242:3; Tr. Ex. 208.

74. Soares claims that the balance owed to Rangel is around \$11,000.00. Tr. 154:8–10. Soares’s account differs from Rangel’s claimed debt of \$14,517.36 (which Soares also recognized as valid) because Soares subtracted about \$2,000.00 from the initial debt due to “problems” with the copper work that he estimated would cost about \$2,000.00 to repair. Tr. 154:5–10.

75. Soares also testified that he did not hire Rangel, notwithstanding his admission of debt to Village. *Id.* at 154:18–21.

76. Soares has argued that Rangel was not licensed and that therefore he does not have standing to sue. Dkt. No. 309 at 2; Tr. 243:3–23. The evidence supports a contrary conclusion that Rangel was licensed. Tr. 239:22–240:2, 243:17–23.

**A. Between Rangel and Soares**

\*9 77. Rangel filed an action in case number M93920 against Soares in the Monterey Superior Court in 2008. Tr. Ex. 220.

78. In his defense of the M93920 case, Soares claimed that the contract with Village was made with NZH and OCC, and not with him personally. *Id.* at 2, 6.

79. On January 12, 2009, Soares sent an email to Rangel’s lawyer, David Hollingsworth, stating that

...neither Mr. Rangel, personally, nor Rangel dba Village Heating and Sheet Metal did any work on the property at 416 Drake and they are the plaintiffs in the matter.

A company named Rangel Heating Ventilating Air Conditioning, a California Corporation, dba Village Heating and Sheet Metal did the alleged work at 416 Drake Avenue, and even if they did the work, their Fictitious Business Name Statement expired and was not renewed on December 2, 2007. The above named corporation does not own the dba thereafter, because they did not publish as required and forfeited the company name, which is now owned by New Zealand Holdings Ltd.

Tr. Ex. 151. Soares claimed that Village should be dismissed for lack of standing. *Id.*

80. At trial, Soares testified that he attempted to acquire the dba because he wanted to draw Rangel’s attention to the fact that “he’s not doing business as a sole proprietor; he is a corporation.” Tr. 151:20–21. The court does not credit this testimony as truthful. The above email indicates that Soares attempted to acquire Village’s dba in order to avoid its debt to Village, and that he used NZH as an alter ego of himself.

81. Rangel’s case against Soares was stayed when Soares filed for bankruptcy. Bankr.Dkt. No. 1 at 6.

**B. Between SVR and Soares**

Soares v. Lorono, Not Reported in Fed. Supp. (2015)

82. SVR filed case number M86548 against Soares in the Monterey Superior Court in order to enforce the mechanic's lien on the Drake property. Tr. Ex. 112.

83. On January 21, 2008, Soares, represented by counsel, filed a "Cross-Complaint to Quash Lien and Remove Cloud on Title and for Damages." *Id.* at 1. It asserted that: (i) OCC was the sole owner of the Drake property; (ii) Soares did not have and never had any interest in the Drake property; (iii) the February 24, 2006 Proposal and Contract was never accepted by OCC and did not reflect the agreement between OCC and SVR; (iv) Soares's signature on the document was forged; (v) NZH did not own and did not contract for improvements on the Drake property; (vi) the July 2, 2006 Proposal and Contract was not valid because it was not signed by SVR and there was no indication that Soares was the director of OCC; and (vii) there was never a written agreement between OCC and SVR. *Id.* at 1-4.

84. The Cross-Complaint also included a cause of action for fraud on the basis that SVR forged Soares's signature on the contracts, and converted payments made by Soares to its own use instead of paying the manufacturer. *Id.* at 9.

85. The Cross-Complaint further alleged that SVR destroyed a \$20,000.00 sculpture by Fletcher Denton and a \$20,000.00 mink coat. *Id.* at 11-12.

86. After SVR filed an insurance claim in order to defend against Soares's lawsuit for damages to the sculpture, Soares claimed he was entitled to the insurance proceeds. Tr. 126:12128:2; 221:18-222:4. At the pretrial conference on November 21, 2014, I ruled that this dispute would generally not be admissible at trial, but stated that I would determine later whether the insurance payment might be treated as a setoff for attorney's fees. Dkt. No. 311.<sup>6</sup>

\*10 87. Soares admitted during the bench trial that there was a valid written roofing agreement for the Drake property between OCC and SVR. Tr. 114:7-8. Yet when confronted with his prior inconsistent position in the Cross-Complaint, he continued to maintain that SVR did not provide a valid written contract but instead forged his signature on the Proposal and Contract, which did not represent the true agreement of the parties. Tr. 112:5-20, 114:7-115:5; Tr. Ex. 112 at 9.

88. On July 29, 2008, the parties announced that they had reached a settlement agreement in the case. Tr. Ex. 202 at 1-3.

89. On August 6, 2008, the court ordered that Soares pay \$45,000.00 in attorney's fees to SVR through the date of settlement on July 29, 2008. Tr. Ex. 214.

90. On September 12, 2008, the court indicated that "as of today, the court does not find bad faith on the part of any party." Tr. Ex. 3.

## VII. THE SETTLEMENT AGREEMENT

91. In September of 2008, Soares, NZH, OCC, SVR, and the Loronos signed a settlement agreement reflected in two documents entitled "Agreements to Release and Distribute Proceeds of Mechanic's Lien Bond" and "Global Settlement and Release" (collectively referred to as the "Settlement Agreement"). Tr. Ex. 201.

92. The Settlement Agreement purported to resolve the case brought by SVR in M86548. *Id.* at 1. It also addressed a pending action brought by ALL Roofing Materials ("ALL") against Soares and OCC. *Id.*

93. Under the Settlement Agreement, Soares agreed to pay \$36,500.00 to ALL, and \$18,651.72 to the plaintiffs' lawyer, David Hollingsworth, in attorney's fees. *Id.* at 2. These funds were to be disbursed from a bond that Soares obtained from American Contractors Indemnity Company. *Id.* at 1-2.

94. Soares also agreed to a future payment of the remaining \$26,000.00 of the \$45,000.00 in attorney's fees awarded in the Superior Court in exchange for dismissal of M86548. *Id.* at 2-3.

95. The Settlement Agreement acknowledged that Soares had paid SVR a balance of \$11,994.00. *Id.* at 2.

96. The Settlement Agreement provided that:

In consideration of the foregoing agreement, each party ... hereby irrevocably release[s] each and every other party ... from any and all claimed liability of any kind for any acts or omissions arising out of relations between the parties, of whatsoever nature, from the beginning of the world to the date of these presents and shall also extend to any claims for any injuries or damages, including any attorney's fees or costs, proximately or indirectly caused by matters related to the subject matter of the dispute, whether

Soares v. Lorono, Not Reported in Fed. Supp. (2015)

such claims be legal or equitable in nature, arising out of tort or contract, and whether or not enumerated in this release.

*Id.* at 3. However, it provided an exception for “liability by SVR for its guarantee on roofing materials and work.” *Id.*

97. The agreement also stated that “[i]n the event any action is necessary to enforce any of the terms, covenants or conditions of this release, the prevailing party shall, in addition to any other recovery, recover his, her, its, or their reasonable attorneys’ fees and costs.” *Id.* at 4.

#### VIII. SOARES’S EFFORTS TO PAY UNDER THE SETTLEMENT AGREEMENT

98. On October 17, 2007, Soares obtained a release of lien bond from American Contractors Indemnity Company. Tr. Ex. 207.

\*11 99. SVR received a sum of \$18,651.72 from Soares as provided in the Settlement Agreement on or around September 26, 2008. Tr. Ex. 155 at Ex. B.

100. On October 23, 2008, Soares sent a letter expressing a willingness to work out a payment plan with the unnamed creditors to which it is addressed. Tr. Ex. 204. In this letter, Soares stated that he had no personal interest in NZH, OCC, or Duke & Rosie’s. *Id.* at 1. In a letter to attorney Hollingsworth, dated January 8, 2009, Soares stated that the balance remaining to SVR was around \$7,000.00. Tr. Ex. 205. He wrote, “I have given you all the cash over the past 4 months that was available to me and to Oceania.” *Id.* Soares’s letter also indicates a unity of interest between OCC and Soares.

101. On July 30, 2009, Soares sent a letter to Hollingsworth, the Loronos, and SVR, requesting that they agree to alternative dispute resolution with the bankruptcy court. Tr. Ex. 206.

102. Soares testified that at the time he filed for bankruptcy, OCC and NZH did not owe any money under the Settlement Agreement. Tr. 86:7–17. According to Soares, SVR filed a claim for around \$6,000.00 in 2009 against Soares alone, thus waiving all claims against the corporate entities. *Id.* at 87:1–90:9. Soares had no reasonable basis for this

assertion. In the relevant filing, SVR named Soares, OCC, and several other parties as defendants. *See* Tr. Ex. 154 at 1. Soares’s incorrect assertion that the corporations did not owe any money under the Settlement Agreement suggests an attempt to avoid his debts.

103. Soares admitted to owing \$5,697.12 under the Settlement Agreement. Tr. At 91:1–2; Ex. 53 at 3. However, he appears to take the position that this is owed not to SVR but to Hollingsworth as attorney’s fees. Tr. 48:6–49:19. SVR contends that it has incurred additional attorney’s fees in attempting to collect this sum. Ex. 155 at 1.

#### IX. BANKRUPTCY PROCEEDINGS

104. Soares filed for Chapter 11 bankruptcy in 2009. Tr. 10:1–14, 191:3–4.

105. SVR and Village filed the present adversary complaint in the bankruptcy court on October 26, 2009. Bankr.Dkt. No. 1.

106. In recommending that the case be converted to a Chapter 7 proceeding, the U.S. Trustee stated that Soares “has not made any serious effort to sell or refinance his residence, and has not demonstrated that he has any reasonable likelihood of rehabilitation.” Tr. Ex. 125 at 4. It also cited Soares’s “desire to avoid creditors.” *Id.* at 6.

107. Soares’s Chapter 11 proceeding was converted to a Chapter 7 proceeding on September 12, 2011. Bankr.Dkt. No. 183 at 2.

108. On September 18, 2014, SVR and Village’s [11 U.S.C. § 523](#) claims proceeded to trial in the bankruptcy court. Bankr.Tr. at 1. The court suspended trial upon learning of the pending civil action in this Court. *Id.* at 63:3–64:19. I ultimately consolidated the actions, and heard SVR and Village’s [Section 523](#) claims during the bench trial on December 8, 2014. *See* Dkt. No. 259.

#### X. CIVIL PROCEEDING

109. Soares testified that he discovered problems

Soares v. Lorono, Not Reported in Fed. Supp. (2015)

with his roof in 2009. Tr. 10:7–14. In particular, he noticed that shingles were peeling off the roof and falling into his yard. *Id.* at 10:23–25.

\*12 110. Soares counted thirteen shingles that fell into the yard in one month, *see id.* at 14:10–11; Jeffrey Lorono counted eight tabs that were either missing or peeling.<sup>7</sup> *Id.* at 36:20–24.

111. Soares filed a complaint in the current civil proceeding on May 16, 2012. Dkt. No. 1. Soares requested over \$11 million in damages. Tr. 22:2–4.

112. Soares initially filed this case in the District of New Jersey. *See* Dkt. No. 1. He testified during trial that this was a “mistake,” and that he filed in New Jersey because one of the parties was based in New Jersey. Bankr.Tr. 35:21–25. The parties remaining in this case, as well as the Drake property, are all located in Monterey, California.

113. Soares testified that he hired a roof inspector, Pete Scudder, to inspect his roof approximately one year after he filed the present lawsuit. Tr. 11:8–10, 17:3–14. However, Soares’s Rule 26 disclosures in this case indicate that Scudder’s observation report is dated April 2, 2012. Tr. Ex. 140 at 5.

114. Scudder prepared a written observation report. *Id.* at 5–6. This stated that the roof appeared to be installed according to most of the manufacturer recommendations, although there were several areas of concern that needed further investigation. *Id.* at 5. This would require “destructive testing,” or physically removing shingles to examine the application, and contacting the manufacturer of the shingles. *Id.* at 6.

115. The report stated that the shingles were installed using four copper fasteners or nails, although if the building was in a high wind zone good practice calls for six fasteners. *Id.* at 5.

116. The report highlighted several areas of potential concern, including that (i) the clear adhesive strip on the shingles was not removed, which could affect whether the roof properly adheres to the eaves; (ii) in some areas the nails were nailed higher than recommended; (iii) several shingles were missing or damaged; (iv) seven shingles were delaminating, apparently due to a manufacturing defect; (v) the chimney needed additional caulking; (vi) a blower vent cap needed to be replaced; (vii) ventilation was outdated and potentially inadequate; and (viii) there were some exposed or caulked fasteners. *Id.* at 5–6.

117. The report also noted installation of parts of the roof called “valleys” in a manner that would require approval by the manufacturer to ensure a correct installation procedure. *Id.* at 6.

118. The report stated that due to “numerous unanswered questions,” more testing was required. *Id.* There is no evidence that Scudder performed more testing, and therefore his testimony regarding any problems that might have been the responsibility of the defendants was inconclusive.

119. An addendum to Scudder’s report states that the adhesive membrane appeared to have been installed correctly. *Id.* at 7. It also did not find that there was water intrusion into the attic. *Id.* The addendum expressed concern that some nails were “backing out,” although the exact reason for this was not known. *Id.* It recommended further inspection by a manufacturer. *Id.* at 8.

120. In his deposition, Scudder testified that he had inspected the roof once and his colleague had tested the roof once. Scudder Depo. at 7 (Dkt. No. 318).

\*13 121. Scudder stated that there was a history of a leak at one place on the roof. *Id.* at 9.

122. Scudder also testified that he did not know whether the Drake property was in a high wind zone, although he would guess it was not in a high wind zone. *Id.* at 10.

123. Scudder testified that the nails that were higher than recommended were only in isolated areas and not throughout the roof. *Id.* at 13.

124. According to Scudder, many things could cause missing roof shingles, from raccoons or the wind to someone walking on the roof. *Id.* at 15–16. He could not give any opinion as to what caused the missing shingles on Soares’s roof. *Id.* at 16.

125. Scudder testified that caulking could be done by either a roofer or a sheet metal contractor. *Id.* at 24. To fix the caulking on Soares’s roof, he estimated that it would cost between \$200.00 and \$250.00. *Id.*

126. Scudder did not know when the blower vent cap or the roofing vents were installed. *Id.* at 26–28. He also could not specify the cause of the nails “backing out” or whether they had caused any problems with the roof. *Id.* at 35–36, 54.

127. Scudder testified that the entire roof should not be replaced. *Id.* at 41.

Soares v. Lorono, Not Reported in Fed. Supp. (2015)

128. According to Soares, Scudder told him that it would cost less than \$1,000.00 to fix the shingles that were loose on the roof. Tr. 24:4–5.

129. Jeffrey Lorono testified that he did not know if someone “slapped” the shingles to put a curve in them, or warmed the shingles. *Id.* at 37:6–38:5. He did not recall whether he or his roofers used a product called Geocel. *Id.* at 38:19–25. He did not know if he or his roofers “trimmed the exposed area of the starter course on the eave of the roof.” *Id.* at 40:22–25.

130. Lorono also testified that SVR, and not Rangel, installed the valleys on Soares’s roof. *Id.* at 45:18–23.

## CONCLUSIONS OF LAW

### I. CIVIL PROCEEDING

#### A. Breach of warranty

At trial, the parties focused on Soares’s breach of warranty claim under the Magnusson–Moss Warranty Act (“MMWA”). The SAC alleges that the defendants “violated the Magnusson–Moss Act ... by advertising and writing ‘deceptive warranty’ that does not conform to the requirements of Magnusson.” SAC ¶ 95 (Dkt.Nos.129, 130). It asserts violations of express, implied, and statutory contract warranty. *Id.* ¶¶ 87, 94.

The MMWA states that “[i]t shall be a violation of section 45(a)(1) of this title for any person to fail to comply with any requirement imposed on such person by this chapter (or a rule thereunder) or to violate any prohibition contained in this chapter (or a rule thereunder).” 15 U.S.C. § 2310(b). 15 U.S.C. § 2310(d)(1) states that “a consumer who is damaged by the failure of a supplier, warrantor, or service contractor to comply with any obligation under this chapter, or under a written warranty, implied warranty, or service contract, may bring suit for damages and other legal and equitable relief.” However, only claims which total over \$50,000.00, exclusive of interests and costs, are cognizable in federal court. 15 U.S.C. § 2310(d)(3)(B).

\*14 In addition to a violation of the express provisions of the MMWA, a plaintiff may also allege a state law breach of warranty under the MMWA. *Clemens v.*

*DaimlerChrysler Corp.*, 534 F.3d 1017, 1022 (9th Cir.2008); 15 U.S.C. § 2301(7). Soares must establish the elements of breach of warranty by preponderance of the evidence. *Cimino v. Fleetwood Enter., Inc.*, 542 F.Supp.2d 869, 882 (N.D.Ind.2008). To prove breach of warranty under either federal or state law, Soares must prove both damages and causation between the alleged breach and the harm suffered by the plaintiff. *See, e.g., Rooney v. Sierra Pac. Windows*, No. 10–CV–00905–LHK, 2011 WL 5034675, at \*4, 8–9 (N.D.Cal. Oct. 11, 2011) *aff’d*, 566 Fed.Appx. 573 (9th Cir.2014) (MMWA claim must plead damages, as well as causation, as required by Article III); *see also McGarvey v. Penske Auto. Grp., Inc.*, 639 F.Supp.2d 450, 456–57 (D.N.J.2009) opinion vacated in part on other grounds, No. CIV.08–5610JBS/AMD, 2010 WL 1379967 (D.N.J. Mar. 29, 2010) (stating that a majority of federal courts have concluded that “a plaintiff is required to show that he has sustained actual damage, proximately caused by [the defendant’s] failure to [comply] ... with the MMWA”) (internal quotations and citations omitted); *Holmes v. Home Depot USA, Inc.*, No. 1:06CV01527–SMS, 2008 WL 4966098, at \*6 (E.D.Cal. Nov. 20, 2008) (causation of harm is an element in breach of warranty actions under California law).

With respect to SVR, the operative warranty in this case is the Settlement Agreement. Although the parties disagree as to whether SVR warranted labor and materials, or only labor, *see* Tr. 66:10–69:23, it is unnecessary to resolve this issue because Soares’s claims fail under either interpretation. Soares cannot establish breach of warranty, whether under 15 U.S.C. § 45(a)(1) or under state law for express or implied warranty, because he has not proved either damages or causation.

With regard to damages, Soares demonstrated that up to thirteen shingles were peeling off the roof. *Id.* at 13:20–14:11. According to his own evidence from Scudder, replacement of these shingles would cost less than \$1,000.00. This is far short of the \$50,000.00 required under the MMWA. *See* 15 U.S.C. § 2310(d)(3)(b). Although Soares indicated that he elected to replace the roof instead of repair it, *see* Tr. 61:24–62:1, Scudder opined that the roof did not need to be replaced.<sup>8</sup> This view is consistent with the fact that it would cost under \$1,000 to replace the defective shingles—far less than the cost of re-roofing the house. *Id.* at 24:4–5. In addition, Soares admitted that apart from Scudder’s estimates, he did not know how much it would cost to repair the roof. *Id.* at 20:10–22:21. Therefore, Soares has not adequately established damages caused by the peeling or missing shingles.

Soares v. Lorono, Not Reported in Fed. Supp. (2015)

Soares also took the position that damages were merited based upon the cost of properly venting the roof or removing shingles that did not have enough nails put in them. *Id.* at 24:6–19. However, he did not present any evidence that SVR or Rangel installed the roof vents or that this work was included in the roofing contract. In addition, Scudder’s opinion that the roof does not meet current roof venting requirements is insufficient to establish that the vents need to be replaced. *See* Tr. Ex. 140 at 6. Similarly, Soares’s statements that the roof had a history of leaks are not substantiated by any evidence that the roof actually leaks and must be repaired. Scudder’s report tellingly found no evidence of water intrusion into the attic. *Id.* at 7.

\*15 Soares also did not prove that the Drake property is located in a high wind zone, which would call for five nails per shingle instead of the four that were used. Tr. 18:11–19. He offered no other basis that would support a conclusion that these shingles needed to be re-installed or replaced.

For these reasons, Soares has not established any certain, non-speculative damages to his roof. *See Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 563 (1931) (“The general rule is, that all damages resulting necessarily and immediately and directly from the breach are recoverable, and not those that are contingent and uncertain”) (internal quotations and citations omitted).

Further, Soares failed to establish causation between the alleged damages to the roof and the actions of any defendant. At trial, Soares appeared to argue that the peeling roof resulted from a manufacturing defect, SVR’s failure to use the proper amount of nails in each shingle, SVR’s failure to “slap” the shingles, or the installation of improper valleys by either SVR or Rangel. *See* Tr. 30:9–31:18, 36:3–37:25, 61:3–21. However, the evidence presented does not support any of Soares’s assertions.

Soares did not present any other evidence of what procedures were used when the roof was installed except the testimony of Jeffrey Lorono, who was unable to remember most of the pertinent details relating to the roof’s installation. Soares also did not present any evidence of the proper procedure for installing a roof such as the one on the Drake property—for example, that the shingles used should be slapped before installation. Scudder could not determine whether there was in fact a manufacturing defect in the shingles, or even whether there were any defects in the roof installation at all. *See* Scudder Depo. at 16. Instead, Scudder repeatedly expressed an opinion that further investigation was necessary. Tr. Ex. 140 at 6, 8.

Soares’s other arguments as to breach of warranty likewise lack the necessary causation. Soares did not offer any proof that the valleys installed on his roof were defective or caused any damages to the roof. He was unable to prove that the shingles were peeling off his house as a result of a defect in the labor or even materials supplied by SVR. According to Soares’s own expert, shingles may peel off the roof because of raccoons, humans, or natural causes. Scudder Depo. at 15–16. Finally, although Scudder’s report indicated that Soares’s chimney needed additional caulking, that a blower vent cap needed to be replaced, and that the roof ventilation was out of date, *see* Tr. Ex. 140 at 5–7, there is no indication that SVR or Rangel did any work on Soares’s chimney, or installed his blower vent cap or roofing ventilation.

As to defendants Rangel and Village, Soares did not establish the existence of any warranty by Village for its work on the roof. The parties had an oral contract and Rangel did not testify that Village warranted its work.

Soares stated that his action against Village was based upon the “leaking copper work and the valleys that he built on the roof.” Tr. 30:9–10. However, Soares was unable to prove that Rangel was responsible for the incorrectly built valleys, aside from the fact that he remembered paying Rangel for that work. *Id.* at 30:17–31:3. Moreover, Soares’s position is contradicted by Jeffrey Lorono’s testimony that SVR, and not Village, installed the valleys on the roof. *Id.* at 45:20–23. As discussed, Soares presented no evidence of water intrusion or leaking caused by the work of SVR or Village. In fact, during the bench trial he was unable to articulate any damages resulting from Village’s alleged breach of warranty or breach of contract. *Id.* at 31:1–18.

\*16 Because Soares was unable to establish damages, causation, or any specific action of any defendant that would constitute a breach of warranty, I rule in favor of the defendants and against Soares on his second cause of action in the civil SAC.<sup>9</sup>

**B. Breach of contract**

Soares’s SAC alleges breach of contract, although it does not specify the actions that constituted the breach or under what statute he brings his breach of contract action. *See* SAC at 1. “Under California law, the elements of a breach of contract claim are: (1) the existence of a contract; (2) plaintiff’s performance or excuse for nonperformance, (3)

**Soares v. Lorono, Not Reported in Fed. Supp. (2015)**

defendant's breach, and (4) resulting damage to plaintiff." *EPIS, Inc. v. Fid. & Guar. Life Ins. Co.*, 156 F.Supp.2d 1116, 1124 (N.D.Cal.2001). Here, the only operative contracts are the Settlement Agreement, which superseded the underlying contracts with SVR, and the oral contract with Village.

Soares failed to meet his burden with respect to elements (2), (3), and (4) of his breach of contract claim with respect to any defendant. For the reasons discussed above, Soares has not established any wrongdoing that would constitute a breach on the part of Village or SVR related to their work on his roof. He also did not establish his injuries or other damages from the alleged breach. In addition, Soares did not present evidence that he substantially performed under either contract, or that he was excused for his nonperformance. Therefore, I find in favor of the defendants and against Soares on the breach of contract claims as alleged in Soares's first cause of action.<sup>10</sup>

**C. Fraud, including mail fraud and wire fraud**

The third cause of action in Soares's SAC alleges fraud, including mail fraud and wire fraud. SAC ¶¶ 96–115. Soares appears to have abandoned these claims, which he did not mention in his pretrial or trial briefs, or during the bench trial. Because Soares has not presented any evidence to support a finding of fraud on the part of any defendant, I rule in favor of SVR and against Soares on the third cause of action in the SAC.

In sum, I will enter Judgment in favor of the defendants and against Soares in the civil proceeding.

**II. ADVERSARY PROCEEDING**

**A. Soares's debt to SVR**

Soares's argument that he does not owe any money to SVR is premised on his misguided understanding that he owes attorney's fees to Hollingsworth personally, and not to SVR. *See* Tr. 48:6–49:18. As repeatedly held in these proceedings, Soares owes attorney's fees to SVR, a valid party to this proceeding. *See* Dkt. Nos. 306, 313. Regardless of whether the \$5,697.00 sum is owed as attorney's fees or as the balance due to SVR under the

Settlement Agreement, the money is nonetheless owed to SVR.

\*17 Soares admits that he owes \$5,697.00. *See* Tr. Ex. 53 at 3. This is reflected by the fact that he wrote a check to Hollingsworth for that amount, though he subsequently cancelled it in the apparent belief that it was a preference payment that would be returned to the bankruptcy coffer. Tr. 91:19–92:4. Therefore, I find that Soares's debt to SVR is \$5,697.00.

**B. Soares's debt to Village**

Soares stated that he owes money to Village, but disputed the exact amount. Soares conceded that he initially owed Village \$13,124.54, and at trial even admitted that he owed the sum of \$14,517.36. *Id.* at 154:1–156:3. However, Soares's calculation of the amount owed to Village offsets his debt to Village by \$2,000.00, the amount Soares believes is necessary to make repairs to his roof caused by Village's faulty work. *Id.*

I ruled against Soares on all claims against Village in the civil proceeding. Soares is not entitled to any offset of his debt to Village because he did not establish that Village breached its contract. The amount of debt that Soares owes to Village is \$14,517.36.

**C. Non-dischargeability under 11 U.S.C. § 523(a)(2)(A)<sup>11</sup>**

Creditors must prove exceptions to discharge under Section 523(a) by preponderance of the evidence. *Grogan v. Garner*, 498 U.S. 279, 286 (1991). 11 U.S.C. § 523(a)(2)(A) states that individual debtors are not entitled to discharge from any debt "for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by ... false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition." This section focuses on the intent of the parties at a discrete point in time: when the debt was incurred. *See, e.g., In re Lund*, 202 B.R. 127, 131 (B.A.P. 9th Cir.1996). As Judge Weissbrodt clarified, to establish non-dischargeability under Section 523(a)(2)(A) "SVR needs to show [ ] that Mr. Soares did not intend to pay the amounts due under the settlement agreement at the time he executed the settlement agreement." Bankr.Tr. at 20:13–16 (emphasis added). He added that Village's "burden is to prove that when Mr. Soares signed the

Soares v. Lorono, Not Reported in Fed. Supp. (2015)

contract with Village, he didn't intend to pay." *Id.* at 20:24–25.

SVR did not meet its burden to prove that Soares did not intend to pay SVR at the time he entered into the Settlement Agreement. Soares paid a substantial portion of the funds owed under the Settlement Agreement, all but \$5,697.00. *See* Tr. Ex. 155 at Ex. B; Tr. Ex. 300; Tr. Ex. 305. In addition, Soares made several efforts to work out payment plans with SVR. *See* Tr. Ex. 204; Tr. Ex. 205; Tr. Ex. 206. Therefore, the defendants have not met their burden of establishing non-dischargeability under [Section 523\(a\)\(2\)\(A\)](#).

\*18 With respect to Village, there was no evidence presented, either direct or circumstantial, that Soares did not intend to pay at the time of the oral contract. In fact Soares testified that he intended to pay and did pay a large portion of Village's billings. Tr. 153:8–12. Therefore, Village also did not meet its burden under [Section 523\(a\)\(2\)\(A\)](#), and I do not find that its debt is non-dischargeable under this subsection.

**D. Non-dischargeability under 11 U.S.C. § 523(a)(6)**

11 U.S.C. § 523(a)(6) states that "[a] discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt ... for willful and malicious injury by the debtor to another entity or to the property of another entity." 11 U.S.C.A. § 523(a)(6). Therefore, in order to prove that a debt is dischargeable under [Section 523\(a\)\(6\)](#), a creditor must prove that a debtor's conduct was both willful and malicious. Unlike the defendants' claims under [Section 523\(a\)\(2\)\(A\)](#), claims under [Section 523\(a\)\(6\)](#) are not evaluated as of a particular date. Instead, the entire course of conduct between the parties is relevant. *See U.S. Bank v. Franklin*, No. 05–05200, 2006 WL 2716128, at \*3 (Bankr.E.D.Wash. Sept. 22, 2006) ("11 U.S.C. § 523(a)(6) covers a broader range of conduct than 11 U.S.C. 523 § (a)(2)(A)"); *In re Waag*, 418 B.R. 373, 375 n.4 (B.A.P. 9th Cir.2009); *see also In re Kim*, No. ADV. 05–90027, 2006 WL 6810943, at \*3 (B.A.P. 9th Cir. Mar. 17, 2006) (affirming determination of non-dischargeability under 523(a)(6) based upon pattern of fraudulent conduct); *In re Cohen*, No. 05–26783, 2010 WL 545720, at \*5 (Bankr.W.D.Wash. Feb. 10, 2010) (applying 523(a)(6) based on multiple acts of deception).

The element of willfulness "requires proof that the debtor deliberately or intentionally injured the creditor, and that in doing so, the debtor intended the consequences of his act, not just the act itself." *In re Suarez*, 400 B.R. 732,

736–37 (B.A.P. 9th Cir.2009). This requirement is satisfied when the debtor either subjectively intended to inflict injury or believed that injury was substantially certain to result from his conduct. *In re Jerich*, 238 F.3d 1202, 1208 (9th Cir.2001). In determining willfulness, the court "may consider circumstantial evidence that tends to establish what the debtor must have actually known when taking the injury-producing action." *In re Su*, 290 F.3d 1140, 1146 n.6 (9th Cir.2002).

The "maliciousness" element is satisfied where the creditor proves that the debtor: (i) committed "a wrongful act; (ii) done intentionally; (iii) which necessarily causes injury; and (iv) is done without just cause or excuse." *Su*, 290 F.3d at 1146–47. An intentional breach of contract alone cannot establish willful and malicious injury under [Section 523\(a\)\(6\)](#). *Jerich*, 238 F.3d at 1205. Instead, the breach must be accompanied by some form of tortious conduct that gives rise to the injury. *Id.* at 1206. This Court looks to California law to determine whether asserted conduct is tortious. *Id.*; *see also Lockerby v. Sierra*, 535 F.3d 1038, 1043 (9th Cir.2008) (523(a)(6) not met where party breached settlement agreement without good cause). "Malicious intent may be demonstrated by evidence that the debtor had knowledge of the creditor's rights and that, with that knowledge, proceeded to take action in violation of those rights." *Partners for Health & Home, L.P. v. Seung Wee Yang*, 488 B.R. 109, 118 (C.D.Cal.2012).

\*19 Activity that constitutes actionable fraud may satisfy both the willful and malicious requirements of [Section 523\(a\)\(6\)](#). *See In re Kirkland*, No. AZ–08–1143–EMoMK, 2008 WL 8444824, at \*5 (B.A.P. 9th Cir. Nov. 26, 2008) (finding willful injury when "[debtor] had willfully failed to give adequate notice for the express purpose of obtaining" excessive proceeds from foreclosure sale, which also constituted fraudulent RICO scheme); *In re Kim*, 2006 WL 6810943, at \*3 (affirming non-dischargeability under 523(a)(6) based on pattern of intentional fraudulent concealment of property issues); *In re Diamond*, 285 F.3d 822, 828 (9th Cir.2002) (willful injury where there was underlying state court finding of fraud); *In re Bammer*, 131 F.3d 788, 793 (9th Cir.1997) (523(a)(6) applies where party committed "knowing, intentional, and damaging fraud"); *Jerich*, 238 F.3d at 1208–09; *In re Cooper*, No. 12–51833–CN, 2014 WL 1675751, at \*5 (Bankr.N.D.Cal. Apr. 28, 2014).

Similarly, the use of an alter ego or sham corporation to commit wrongful acts such as fraud may establish willful and malicious injury under [Section 523\(a\)\(6\)](#). *In re Yarbrow*, 150 B.R. 233 (B.A.P. 9th Cir.1993); *see also In re Wisniewski*, No. 2:12–bk–07266–EWH, 2014 WL

Soares v. Lorono, Not Reported in Fed. Supp. (2015)

1796272, at \*10 (Bankr.D.Ariz. May 5, 2014) (“Damages resulting from a fraudulent scheme or a pattern of intentional conduct that necessarily results in an injury may be nondischargeable under § 523(a)(6).”). California law, which this Court must apply, provides that “alter ego liability may be imposed where (1) there is such a unity of interest and ownership that the individuality, or separateness, of the [defendant] and corporation has ceased; and (2) the facts are such that an adherence to the fiction of the separate existence of the corporation would ... sanction a fraud or promote injustice.” *Whitney v. Arntz*, 320 Fed.Appx. 799, 800 (9th Cir.2009) (internal quotations and citations omitted).

Under California law, an action for fraud requires a showing that the defendant (i) made a misrepresentation; (ii) with knowledge of its falsity; (iii) with the intent to defraud or induce reliance; (iv) that the plaintiff justifiably relied upon; and (v) that the plaintiff suffered damage. *Tom Trading, Inc. v. Better Blue, Inc.*, 26 Fed.Appx. 733, 736 (9th Cir.2002).

### 1. Soares’s debt to SVR

Soares’s debt to SVR arises under the Settlement Agreement, but originates from Soares’s Proposal and Contract with SVR for its roofing work on the Drake property. By not paying the full amount owed to SVR under the Settlement Agreement, Soares committed a breach of contract. At the moment Soares made the agreement in question, it is unclear whether he intended to fulfill his obligations. But it is abundantly clear that Soares extensively prepared to evade the debts prior to entering into the agreements, and his actions since incurring the debts demonstrate a pattern of fraudulent conduct that belies his intent to avoid paying them.

Soares’s fraudulent conduct begins with his use of NZH and OCC. As set forth in the findings of facts, NZH and OCC were Soares’s alter egos. Soares used these corporations not for a benign purpose, but in order to engage in wrongful conduct. Soares admitted that he formed the corporations for the purpose of avoiding homeowners’ association lawsuits. Bankr.Tr. at 38:1–6. In the past, he persuaded the Superior Court that he was not liable to third party debtors on the basis that OCC and not he was a party to the contract. Tr. Ex. 146; Tr. 174:22–176:22. As discussed, however, NZH and OCC were sham corporations with no real distinction from Soares as an individual. On more than one occasion, Soares incurred personal debts using these corporations and disclaimed individual liability on the basis that NZH

or OCC was the debtor.

\*20 In this case, Soares falsely represented to SVR that OCC was a separate entity from himself, which SVR relied upon in signing the Proposal and Contract and later the Settlement Agreement. Soares knew that OCC was his alter ego, but intended that SVR believe otherwise. SVR has suffered financial damages as a result of this misrepresentation, combined with Soares’s refusal to pay personally and his later actions that ultimately divested OCC of all assets. Around the time of the original contract with SVR, Soares refinanced the Drake property, OCC’s only asset, adding more secured debt to the property. Tr. 93:6–95:10. Later, Soares conveyed both the property and the corporation to himself before dissolving the corporation and filing for bankruptcy in 2009. *See* Tr. Ex. 127; Bankr.Tr. at 42:9–44:10. Soares then filed the notice of automatic stay, admitting that the debt to SVR is his own and that OCC was his alter ego. Tr. Ex. 213. This filing brought the corporations under the umbrella of the bankruptcy proceedings and prevented SVR from proceeding with its case against OCC in the Superior Court. Through his manipulation of the sham corporation, Soares defrauded SVR in an intentional attempt to avoid personal liability for his debts.

Soares’s other actions also provide circumstantial evidence of his plan to defraud SVR. Before the state court action, Soares hid from the Loronos when they attempted to collect his debts, and then falsely claimed that he did not sign the Proposal and Contract with SVR. Tr. 248:10–24. During the bench trial, Soares made incorrect claims that the corporations waived all claims under the Settlement Agreement by filing against him individually. Tr. 87:1–90:9. Throughout these proceedings Soares continued to maintain that SVR owes \$10,000.00 in insurance money to him, even though he did not own the insurance policy. Tr. 126:12–128:2, 221:18–222:4. Lastly, Soares brought the current civil action, originally in New Jersey, for over \$11 million in damages, although there is no evidence of wire or mail fraud or of any damages that would reasonably amount to \$11 million. The damages in Soares’s civil case could at the most amount to around \$1,000—.0001 of the amount sought. At trial, no damages at all were proven. *See Hughes v. Arnold*, 393 B.R. 712, 718 (E.D.Cal.2008) *aff’d sub nom. In re Hughes*, 347 Fed.Appx. 359 (9th Cir.2009) (initiating and prosecuting claim was “willful and malicious insofar as [the] conduct was unreasonable, frivolous, vexatious and in bad faith”). Soares’s repeated reliance on absurd and patently incorrect arguments indicates a bad faith attempt to avoid his debts to SVR by any possible means. Each of these acts constitutes a wrongful and intentional attempt to avoid paying SVR.

Soares v. Lorono, Not Reported in Fed. Supp. (2015)

They necessarily caused financial injury to SVR, and were done without just cause or excuse.

Taken together, all of Soares's above-described actions establish a plan to avoid paying his debt to SVR and are wrongful acts that satisfy the maliciousness requirement of [Section 523\(a\)\(6\)](#). In addition, the evidence demonstrates that these actions were willful, as Soares's scheme belies a clear intent that SVR not be paid for its work on the Drake property as well as knowledge that SVR was financially injured by his actions. Therefore, Soares's debt to SVR is non-dischargeable pursuant to [Section 523\(a\)\(6\)](#).

## 2. Soares's debt to Village

As discussed above, NZH was formed by Soares as an alter ego. With the case of Village, Soares initially indicated to Rangel that he personally was a party to the contract. Tr. 240:9–17. Later, he falsely claimed that NZH was the entity that owed Village for the sheet metal work. Tr. Ex. 220 at 2, 6. As with SVR, Soares's use of a sham corporation to avoid his debt to Rangel, even though Soares entered the contract personally, supports a finding of both willful and malicious behavior. This ultimately injured Village financially when Soares did not pay for its services.

In addition, Soares, acting through NZH, attempted to divest Village of standing by acquiring its dba when it lapsed, made unsubstantiated claims that he did not owe money to Village because Rangel was unlicensed, and falsely asserted that there was no contract with Village at all. *See* Tr. Ex. 151; Tr. 154:18–21, 243:3–23. Each of these actions constitutes an intentional and wrongful act that caused injury to Village through Soares's failure to pay. Soares had no just cause or excuse to act in this way, and instead appears to have resorted to these tactics in order to avoid paying Village. For these reasons, Soares's debt to Village is non-dischargeable under [Section 523\(a\)\(6\)](#).

## E. Attorney's Fees

\*21 SVR seeks attorney's fees pursuant to [Federal Rule of Bankruptcy Procedure 7008\(b\)](#), which previously required a "request for attorney's fees always to be pleaded as a claim in an allowed pleading."<sup>12</sup> [Fed. R. Bankr. P. 7008](#) advisory committee's notes. However, in 2014 this subsection was deleted. *Id.* Attorney's fees are now governed by [Federal Rule of Bankruptcy Procedure 7054\(b\)\(2\)](#). *Id.* This states that "Rule 54(d)(2)(A)-(C) and (E) [of the Federal Rules of Civil Procedure] applies in adversary proceedings except for the reference in Rule 54(d)(2)(C) to Rule 78." [Fed. R. Bankr. P. 7054\(b\)\(2\)](#). The advisory committee's comments state that in accordance with [Federal Rule of Civil Procedure 54\(d\)\(2\)\(A\) and \(B\)](#), "a claim for attorney's fees must be made by a motion filed no later than 14 days after entry of the judgment unless the governing substantive law requires those fees to be proved at trial as an element of damages. When fees are an element of damages, such as when the terms of a contract provide for the recovery of fees incurred prior to the instant adversary proceeding, the general pleading requirements of this rule still apply." [Fed. R. Bankr. P. 7008](#) advisory committee's notes.

In this case, SVR has pleaded that it is entitled to attorney's fees pursuant to the terms of the Settlement Agreement. Bankr.SAC at 16–18. The Settlement Agreement clearly provides that "[i]n the event any action is necessary to enforce any of the terms, covenants or conditions of this release, the prevailing party shall, in addition to any other recovery, recover his, its, or their reasonable attorneys' fees and costs." Tr. Ex. 201 at 4. Therefore, SVR is entitled to attorney's fees, and shall file a motion no later than 14 days from entry of judgment in this case. Soares will have an opportunity to file an opposition to the motion for attorney's fees fourteen days thereafter, and SVR may reply seven days after that.

**IT IS SO ORDERED.**

## All Citations

Not Reported in Fed. Supp., 2015 WL 151705

## Footnotes

- 1 Soares is the defendant and SVR and Village are plaintiffs in the bankruptcy proceeding. I refer the parties as they are designated in the civil case.
- 2 Soares initially brought claims against several other defendants, who have all been dismissed from the action.

Soares v. Lorono, Not Reported in Fed. Supp. (2015)

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- 3 All of the findings of facts below are relevant to the adversary proceeding. The facts found in sections I, V, and X are relevant to the civil proceeding, as are several facts that are identified and discussed in the conclusions of law addressing the civil proceeding. I DENY any request for admission of evidence not previously addressed or relied upon in this memorandum opinion. Defendants' request to offer additional evidence, made more than a week after the trial had concluded, *see* Dkt. No. 328, is DENIED.
- 4 I refer to the transcript from the trial on December 8, 2014 as "Tr." At trial, I admitted the transcript of the aborted adversary bankruptcy trial before Judge Weissbrodt, without objection, and refer herein to the second day of bankruptcy trial held on September 18, 2014 as "Bankr.Tr." I refer to all trial exhibits ("Tr.Ex.") by their exhibit number, regardless of whether they were submitted by the plaintiff, defendants, or as agreed exhibits. Unless otherwise indicated, references to the bankruptcy docket refer to the case in *Salinas Valley Roofing, Inc. v. Soares*, No. 09-05296-ASW (Bankr.N.D.Cal. Oct. 26.2009).
- 5 This appears to be a mistake, corrected by the second Proposal and Contract, which crossed out the name "Sirus Forest" and replaced it with OCC. Ex. 102.
- 6 I will determine whether it is appropriate to offset the insurance proceeds from any attorney's fees after considering the parties' motions for and in opposition to attorney's fees.
- 7 There are three tabs in a shingle. Tr. 71:22.
- 8 Over the objection of SVR and Village, I allowed Scudder's deposition testimony to be admitted even though Soares did not formally designate him as an expert. *See* Dkt. No. 311. I reasoned that SVR and Village had an adequate opportunity to cross-examine Scudder, and I limited his potential expert testimony to the opinions provided in his deposition and report attached to Soares's Rule 26 disclosures. As discussed herein, Scudder's testimony was inconclusive at best. He did not opine that SVR or Village caused any damage to the roof, and testified that the identifiable problems on the roof would cost relatively little to fix in any event.
- 9 Due to this conclusion, I need not determine whether Soares's action is proper against the Loronos and Rangel individually, as opposed to against the corporate defendants with whom Soares contracted.
- 10 In the SAC, Soares alleged breach of contract; breach of warranties; and fraud, including wire fraud and mail fraud. SAC at 1. Soares pled breach of warranties under the heading "Count 2," and fraud under "Count 3." SAC ¶¶ 79-115. Under his "First Count," Soares discussed the parties and the unities of interest between corporate and individual entities. *Id.* ¶¶ 59-78. He did not plead breach of contract in the SAC outside of his general allegations. Because of the liberal pleading standard for pro se parties, the fact that the remaining defendants in this action did not file a motion to dismiss, and the fact that the "First Count" does not plead any cause of action, I consider the breach of contract claims to be Soares's first cause of action.
- 11 The defendants' bankruptcy SAC initially pled that Soares's debt was non-dischargeable under 11 U.S.C. § 523(a)(2)(B), 11 U.S.C. §§ 548(a)(1)(A) and (B), 11 U.S.C. §§ 727(a)(2) and (4), and California Civil Code § 3439.07. Bankr.SAC (Bankr.Dkt. No. 205). The 727 claims were dropped earlier in the proceedings, *see* Bankr.Dkt. 388 at 9, and during the bankruptcy adversary trial proceedings the defendants acknowledged that 11 U.S.C. § 523(a)(2)(B) was not applicable. Bankr.Tr. at 5:4-6:10. They also agreed with the bankruptcy court that the 11 U.S.C. §§ 548(a)(1)(A) and (B) failed because only the Bankruptcy Trustee can bring those claims. *Id.* at 6:11-7:23, 12:10-11. Similarly, counsel agreed not to pursue California Civil Code § 3439.07, governing fraudulent transfers, because it is unclear that it would help the defendants. *Id.* at 6:207:23, 12:10-11.
- 12 During the bankruptcy proceedings, counsel for Village conceded that it has no basis for attorney's fees for Village or Rangel. *See* Bankr. Tr. at 65:12-14.

## Exhibit 22

In re Turner, Not Reported in B.R. (2007)

 KeyCite Yellow Flag - Negative Treatment  
Distinguished by [Foronda v. Wells Fargo Home Mortgage, Inc.](#),  
N.D.Cal., November 26, 2014

2007 WL 7238117

Only the Westlaw citation is currently available.  
United States Bankruptcy Appellate Panel  
of the Ninth Circuit.

In re Stephen Brian TURNER, Debtor.  
Susana C. Turner, Appellant,

v.

John T. Kendall, Chapter 7 Trustee,  
Appellee.

Nos. NC-06-1263-SDR, NC-06-1336-SDR,  
02-44874.

|  
Adversary No. 02-07273.

|  
Argued by Telephone Conference and Submitted  
on March 23, 2007.

|  
Filed Sept. 18, 2007.

Appeal from the United States Bankruptcy Court for the  
Northern District of California, Honorable [Leslie  
Tchaikovsky](#), Bankruptcy Judge, Presiding.

Before [SMITH](#), [DUNN](#) and [RADCLIFFE](#), Bankruptcy  
Judges.

## MEMORANDUM<sup>2</sup>

\*1 Following a three-day trial, the bankruptcy court entered a judgment in favor of the trustee finding that the 2001 transfer of debtor's home to his wife was fraudulent under § 548(a)<sup>3</sup> and thus avoidable. Debtor's wife sought reconsideration of the judgment, which the court granted in part. After reconsidering the evidence, the court amended the judgment so turnover of the home was based exclusively on an alter ego liability theory. We AFFIRM.

## I. FACTS

### A. Pre-Bankruptcy Actions

In November 1991, Stephen Brian Turner ("Debtor") and his wife Susana (collectively, the "Turners") acquired title to and began living in a residence located in Alameda County, California (the "Home"). The deed transferring title to the Home was recorded on November 25, 1991, and indicates that the Home was granted to "Stephen B. Turner and Susana C. Turner, husband and wife, as community property."

The Turners executed a written transmutation agreement in June 1992. Pursuant to the agreement, Debtor transferred his community property interest in the Home to Susana as her separate property, and in return, Susana transferred her community property interest in the couple's paramedical business to Debtor as his separate property. During this time, the Turners were allegedly having marital difficulties which they hoped to resolve through the transmutation agreement. The agreement was never recorded.

In 1994, Debtor attended a seminar on "asset protection" presented by Robert Matthews ("Matthews"). At Matthews' suggestion, Debtor consulted a tax attorney knowledgeable about the formation of foreign trusts. The attorney prepared a document entitled "Declaration of Trust" ("GG Trust Declaration"), which the Turners signed on June 30, 1995, but never recorded. The GG Trust Declaration established an irrevocable Bahamian trust (the "GG Trust") and declared that specific assets, including the Home, were to be held in trust for the Turners' three children. There is no evidence that title to the Home was ever transferred to the GG Trust.

In the spring of 1995, Debtor once again met with Matthews to discuss asset protection strategies. During this meeting, the two discussed the transmutation agreement and the GG Trust Declaration, as well as Matthews' preference for limited liability companies for holding real property rather than offshore trusts.

In 1997, Ah Beng Yeo and E.A. Martini (collectively, "Judgment Creditors") initiated an action against Debtor in state court based on tortious conduct allegedly committed in mid-1995. Shortly thereafter, at Debtor's direction, Matthews created Real Investment Capital Holdings LLC ("RICH"), a limited liability company, and Proset Enterprises, Inc. ("Proset"), a Nevada corporation. The GG Trust is the 99% owner of RICH and the sole shareholder of Proset. Proset owns the remaining 1% of RICH LLC. Alfred Cheung, Susana's brother who resides

In re Turner, Not Reported in B.R. (2007)

in Hong Kong, is Proset's president and secretary.

\*2 In early 1998, after the filing of the civil complaint but before the money judgment was entered against Debtor<sup>4</sup>, the Turners executed a grant deed (the "1998 Deed") transferring title to the Home to RICH in March 1998 (the "1998 Transfer"). The 1998 Deed was recorded in April of that year.

On March 16, 1999, approximately seven months after the state court judgment was entered, Debtor, acting on behalf of RICH, executed a deed of trust in favor of Proset (the "Proset Deed"), encumbering the Home to secure a line of credit.<sup>5</sup> The Proset Deed was recorded on March 18, 1999, and identified Debtor as the managing partner of RICH.

On September 22, 1999, the Judgment Creditors recorded an abstract of judgment in Alameda County. Thereafter, in October 1999, they filed a fraudulent conveyance action against the Turners in Contra Costa Superior Court. On May 31, 2001, the Judgment Creditors obtained a writ of execution which they attempted to execute against the Home.

In June 2001, Debtor prepared a marriage dissolution petition for Susana. In the petition, Debtor and Susana stipulated that the Home (which had previously been transferred to RICH) should be confirmed as Susana's separate property (the "Turner Marital Settlement Agreement"). A dissolution judgment was entered in September 2001 (the "Turner Dissolution Judgment"). Although divorced, Debtor and Susana both continued to reside in the Home and file joint tax returns identifying themselves as married.

On December 27, 2001, RICH executed a deed (the "2001 Deed") transferring title to the Home to Susana (the "2001 Transfer"). The 2001 Deed was signed by Nancy Lake, the trustee of the GG Trust, and recorded on that same day.

Debtor filed for chapter 7 relief on September 10, 2002. Subsequently, the fraudulent conveyance action was removed to the bankruptcy court and the chapter 7 trustee ("Trustee") substituted in as the real party in interest.

#### B. The Bankruptcy

On January 14, 2004, Trustee filed his first amended complaint (the "FAC") against Susana, Just In Case Holdings Inc.<sup>6</sup>, Proset, RICH, the GG Trust, and Nancy Lake as the trustee of the GG Trust (collectively,

"Defendants").<sup>7</sup> The FAC asserted four claims for relief. The first and second claims prayed for avoidance of all the transfers related to 1) the 1992 transmutation agreement, 2) the GG Trust, 3) the 1998 Deed, 4) the Proset Deed, 5) the Turner Marital Settlement Agreement, 6) the Turner Dissolution Judgment, and 7) the 2001 Deed (collectively, the "Transfers") as actually and constructively fraudulent under § 548(a), § 544 and California Civil Code ("CC") § 3439 et seq. The third claim sought a determination that, despite the Transfers, Debtor retained an equitable interest in the Home when he filed for bankruptcy, and, that being the case, the Home should be declared property of the estate. Under the fourth claim, Trustee sought turnover of the Home under § 542(a).

#### 1. The Trial Memorandum Decision

\*3 Following a three-day trial, the bankruptcy court took the matter under submission.<sup>8</sup> The court issued its memorandum decision on December 5, 2005 ("Trial Decision") in which it determined that "all of the transfers in question were made with actual intent to hinder, delay, or defraud creditors." Trial Decision at 9, Dec. 5, 2005. In this regard, the court found that the evidence established that

all of the transfers were to insiders; the Debtor retained possession and control of the Home after the all [sic] transfers; the Debtor had been sued before most of the transfers; no consideration was received for the transfers; and the Debtor was rendered insolvent by the transfers.

*Id.* at 9 n. 7. It also found that Debtor received no consideration for any of the Transfers and that the Transfers rendered him insolvent.

In addition, the court concluded that RICH and Proset were Debtor's alter egos, noting Debtor's testimony that the entities were created, and their relationships structured, to maximize the protection of his assets, particularly the Home. While the court recognized that asset protection is permitted when done for a legitimate business purpose, it found that RICH and Proset were created solely for the improper purpose of shielding the Home from creditors. Relying on *Fleet Credit Corp. v. TML Bus Sales, Inc.*, 65 F.3d 119 (9th Cir.1995), the court determined that the transfer of the Home by RICH to Susana in 2001 should be treated as a fraudulent transfer by Debtor and that the "only relevant transfer to be avoided [was] the transfer reflected by the 2001 Deed."<sup>9</sup> Trial Decision at 12, Dec. 5, 2005.

In re Turner, Not Reported in B.R. (2007)

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The 2001 Transfer occurred on December 27, 2001, within one year of the bankruptcy filing. Therefore, the court held that Trustee was entitled to avoid the 2001 Transfer of the Home to Susana under § 548(a)(1)(A) and (a)(1)(B).

The effect of avoiding the 2001 Transfer was to revert title to the Home back to RICH. Because Debtor and Susana were divorced prior to the bankruptcy filing, the court found that the entire interest in the Home ultimately reverted to Debtor as his separate property based on the court's determination that RICH is Debtor's alter ego. This finding entitled Trustee to the turnover of the Home's entire value under § 542.

On January 20, 2006, a judgment was entered in favor of Trustee ("Judgment").

#### 2. The New Trial Memorandum Decision

Following the entry of the Judgment, the Turners filed a motion seeking: (1) amendment of the Judgment, (2) reconsideration, (3) a new trial, and (4) a stay of enforcement of the Judgment (the "New Trial Motion"). They asserted that the court erred in determining that there was an actual and constructive fraudulent conveyance of the Home, that the 2001 Deed was the operative deed for the purpose of the fraudulent conveyance claim, that Debtor held an equitable interest in the GG Trust, and that RICH was the alter ego of Debtor. In addition, they argued that the Judgment violated Susana's due process rights because the statutory scheme for finding a fraudulent conveyance under § 727, § 548, and CUFTA were internally inconsistent.

\*4 The court rejected most of the arguments in the New Trial Motion but did find persuasive the argument that Susana did not have an adequate opportunity to address the following issues:

- (1) whether the court erred by treating RICH LLC as the Debtor's alter ego, and
- (2) whether the court's conclusion that the 2001 Transfer was avoidable as a fraudulent transfer pursuant to 11 U.S.C. § 548 was erroneous because the grant deed executed in 2001, purporting to transfer the House from RICH to Susana, was invalid.

New Trial Decision at 3, June 29, 2006.<sup>10</sup> It therefore provided the parties with the opportunity to brief these issues.

On June 29, 2006, the court issued its ruling on the New Trial Motion ("New Trial Decision"). As to the alter ego issue, the court was not persuaded by the Turners' argument that Debtor could not be held as RICH's alter ego because he was not named as an owner or shareholder. Rather, it read California law as recognizing an alter ego relationship when two conditions are met: "(1) a unity of interest and ownership such that the person and the entity cannot fairly be considered separate and (2) adherence to the fiction of the separate existence of the entity and the individual would work an injustice." New Trial Decision at 5, June 29, 2006. The court found that the evidence presented during trial satisfied both prongs.

With respect to the validity of the 2001 Deed, the court agreed with the Turners that it was invalid. Consequently, the 2001 Transfer was ineffective and ownership of the Home was held by RICH, and not Susana, at the time of the bankruptcy filing. Based on its finding that RICH was Debtor's alter ego, the court concluded that the Home was property belonging to Debtor, and thus, property of the estate.

Given the Turners' concession regarding the invalidity of the 2001 Deed, the court determined that the Judgment required modification because the "prior ruling—that the 2001 Transfer should be avoided as a fraudulent transfer pursuant to 11 U.S.C. § 548—[was] clearly erroneous." *Id.* at 7. On July 14, 2006, the court entered an amended judgment nunc pro tunc in which it directed that the Home should be turned over to Trustee ("Amended Judgment").

Susana appealed on July 21, 2006.<sup>11</sup> Following the filing of the appeal, the bankruptcy court approved Trustee's motion to sell the Home on August 14, 2006.<sup>12</sup> At oral argument, Susana's counsel informed us that the Home sold for over \$900,000.

## II. JURISDICTION

The bankruptcy court had jurisdiction under 28 U.S.C. § 1334 and 28 U.S.C. § 157(b)(1) and (b)(2)(E), (H). We have jurisdiction under 28 U.S.C. § 158.

In re Turner, Not Reported in B.R. (2007)

### III. ISSUES

1) Whether the court erred in holding that the Home was solely property of the estate based upon its alter ego finding;

2) Whether Trustee holds a valid fraudulent transfer claim;

3) Whether Trustee is entitled to the increased equity in the Home that accumulated subsequent to the 1998 Transfer;

\*5 4) Whether the court abused its discretion in denying the New Trial Motion; and

5) Whether the bankruptcy court abused its discretion in admitting evidence concerning Debtor's 1994 conviction.

### IV. STANDARDS OF REVIEW

We review a bankruptcy court's conclusions of state and federal law and questions of statutory interpretation de novo. *Movitz v. Baker (In re Triple Star Welding Inc.)*, 324 B.R. 778, 788 (9th Cir. BAP2005); *Smith v. Lachter (In re Smith)*, 352 B.R. 702, 705 (9th Cir. BAP2006). Accordingly, a determination of a fraudulent transfer based on undisputed facts is reviewed de novo. *Trujillo v. Grimmitt (In re Trujillo)*, 215 B.R. 200, 203 (9th Cir. BAP1997). A bankruptcy court's findings of facts are reviewed for clear error. *Id.*

A bankruptcy court's decision to deny a motion for reconsideration or a motion for a new trial is reviewed for an abuse of discretion. *First Ave. W. Bldg., LLC v. James (In re OneCast Media, Inc.)*, 439 F.3d 558, 561 (9th Cir.2006); see *United States v. Bhagat*, 436 F.3d 1140, 1145 (9th Cir.2006). Rulings on admissibility of evidence are also reviewed for an abuse of discretion. *United States v. Rice*, 38 F.3d 1536, 1542 (9th Cir.1994). An abuse of discretion will be found if the court "base[d] its ruling upon an erroneous view of the law or a clearly erroneous assessment of the evidence." *Triple Star*, 324 B.R. at 788. "The panel also finds an abuse of discretion if it has a definite and firm conviction that the bankruptcy court committed a clear error of judgment in the conclusion it reached." *Id.*

On appeal, we may affirm the bankruptcy court on any ground supported by the record, even if it differs from the

bankruptcy court's stated rationale. *Pollard v. White*, 119 F.3d 1430, 1433 (9th Cir.1997).

### V. DISCUSSION

#### A. The Alter Ego Finding

Susana argues that the bankruptcy court erred in finding that RICH is the alter ego of Debtor because Debtor has no ownership interest in RICH and, under California law, alter ego liability cannot be imposed absent ownership. We agree.

The law of the forum state is used to determine whether an entity is an alter ego of an individual. *SEC v. Hickey*, 322 F.3d 1123, 1128 (9th Cir.2003). In California, an alter ego relationship exists if "(1) [there is] such unity of interest and ownership that separate personalities of the corporation and the individual no longer exist and (2) that, if the acts are treated as those of the corporation alone, an inequitable result will follow." *Mesler v. Bragg Mgmt. Co.*, 702 P.2d 601, 606 (Cal.1985) (emphasis added). While there is "no litmus test" for the existence of an alter ego relationship, there are two general requirements that must be present: ownership and the specter of fraud. *Hickey*, 322 F.3d at 1128–29 (interpreting California law). Accordingly, if the individual has no ownership in the entity, there can be no alter ego finding. *Id.* at 1128 ("Ownership is a pre-requisite to alter ego liability, and not a mere 'factor' or 'guideline.' "); *Firstmark Capital Corp. v. Hempel Fin. Corp.*, 859 F.2d 92, 94 (9th Cir.1988) ("Ownership of an interest in the corporation is an essential part of the element of unity of ownership and interest."); see also *Riddle v. Leuschner*, 335 P.2d 107 (Cal.1959)(finding the wife was the alter ego of the subject corporation based on her ownership of a single share but the husband was not because he held no stock).

\*6 Members of limited liability companies are "subject to liability under the same circumstances and to the same extent as corporate shareholders under common law principles governing alter ego liability." *People v. Pac. Landmark, LLC*, 29 Cal.Rptr.3d 193, 199 (Ct.App.2005); Cal. Corp.Code § 17101(b).

While there is evidence to support a unity of interest finding, there is no evidence that Debtor was an owner or shareholder of either RICH or Proset—a pre-requisite for

In re Turner, Not Reported in B.R. (2007)

alter ego liability. Rather, the evidence establishes that the GG Trust owns a 99% membership interest in RICH and that Proset owns the remaining 1% membership interest.<sup>13</sup> In addition, the record indicates that the GG Trust was the sole shareholder of Proset<sup>14</sup> and that the GG Trust was controlled by two unrelated trustees, Nancy Lake and Janis Galanis. The beneficiaries of the GG Trust were the Turner's children.

The fact that Debtor may have served as the "managing partner" of RICH at some point<sup>15</sup> does not resolve the ownership issue because a manager need not be a member of a limited liability company. *Cal. Corp.Code § 17151(a)*. There is no evidence of Debtor's membership interest.

The bankruptcy court's determination that the Home is property of the estate is based entirely upon its erroneous alter ego finding. Accordingly, the court's ultimate ruling that the Home is property of the estate cannot be affirmed on an alter ego theory.

*B. The Fraudulent Transfer Claim*<sup>16</sup>

Section 544(b) permits a trustee to avoid any transfer voidable by unsecured creditors pursuant to state law. *11 U.S.C. § 544(b)*; *Sherwood Partners, Inc. v. Lycos, Inc.*, 394 F.3d 1198, 1201 (9th Cir.2005). Under CUFTA, a creditor is able to avoid the transfer of a debtor's asset that is actually or constructively fraudulent and which is made within four years prior to the date the avoidance action is filed. *CC §§ 3439.07 & 3439.09*.

For Trustee to be entitled to turnover of all or part of the Home's value, there must be a finding that one of the transfers represents a fraudulent conveyance. The FAC lists seven transfers upon which Trustee asserts an actual and/or constructive fraudulent transfer action can be based: 1) the 1992 transmutation agreement, 2) the GG Trust, 3) the 1998 Deed, 4) the Proset Deed, 5) the Turner Marital Settlement Agreement, 6) the Turner Dissolution Judgment, and 7) the 2001 Deed. Susana contends that the relevant transfer is the 1992 transmutation agreement. We disagree and find that the transfer of the 1998 Deed is the operative one for fraudulent conveyance purposes.<sup>17</sup>

*1. The 1992 transmutation agreement*

Under California law, a married person may by agreement transmute an asset in which he has a community property

interest into the separate property of his spouse. *Cal. Fam.Code § 850(a)*. A transmutation is valid between spouses if it is made in writing by an express declaration approved by the adversely affected spouse, *In re Marriage of Benson*, 116 P.3d 1152, 1153 (Cal.2005), but will remain ineffective against third parties until it is recorded or notice of it is provided, *Cal. Fam.Code § 852(b)*. Transmutations are subject to the laws governing fraudulent transfers. *Id.* § 851.

\*7 Here, the 1992 transmutation agreement was made in writing by express declaration approved by Debtor and Susana. Pursuant to the agreement, Susana obtained the Home as her separate property and, in return, Debtor received the family business as his separate property. Although the agreement was valid between Debtor and Susana as of June 1992, it was never recorded.<sup>18</sup> Consequently, it never took effect against third parties nor did it have any affect on the title or ownership status of the Home. *Id.* § 852(b); *see also Finalco, Inc. v. Roosevelt (In re Roosevelt)*, 87 F.3d at 311, 315 nn. 4-5 (9th Cir.1996), *amended by*, 98 F.3d 1169 (9th Cir.1996), *overruled on other grounds by*, *Murray v. Bammer (In re Bammer)*, 131 F.3d 788 (9th Cir.1997).<sup>19</sup>

In support of her argument that the relevant transfer date is the effective date of the 1992 transmutation agreement, Susana asserts that 1) the analysis for determining when a transfer is "made" should be the same for § 548 and CUFTA purposes as it is for § 727 purposes, and 2) the application of different definitions for when a transfer is made is unconstitutional.

*a. The making of the transfer*

Relying on the Ninth Circuit's decision *In re Roosevelt*, 87 F.3d 311 (9th Cir.1996), Susana argues that, for CUFTA purposes, the transfer of the Home should be deemed "made" as of the date the 1992 transmutation agreement became effective between she and Debtor. *Roosevelt* does not support this proposition.

At issue in *Roosevelt* was whether, *for purposes of § 727(a)(2)*<sup>20</sup>, a transfer is made when it is effective between the parties or when it is effective against third parties. 87 F.3d at 315. Importantly, the court there noted that, unlike § 548 (the Bankruptcy Code fraudulent transfer statute), § 727(a)(2) does not define when a transfer is made.<sup>21</sup> Although both § 548(d) and § 727(a)(2) pertain to the fraudulent transfer of property belonging to the debtor, the *Roosevelt* court determined that the purposes underlying each differ in ways that impact the analysis of

In re Turner, Not Reported in B.R. (2007)

when a transfer is deemed made. *Id.* at 317. Section 727(a)(2) “centers on the debtor’s wrongdoing in or in connection with the bankruptcy case.” S.Rep. No. 598, 95th Cong., 2d Sess. 98 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5884. Because § 727(a)(2) “premises denial of discharge on certain conduct of the debtor in relation to his assets and creditors if done with ‘intent to hinder, delay or defraud[,]’ “ there is some suggestion that the transfer which is contemplated by § 727(a)(2) should be deemed made at “the time of the debtor’s activity and not when the activity is somehow fully-insulated from the claims of other creditors.” *Roosevelt*, 87 F.3d at 317 (citing *First Nat’l Bank & Trust Co. of Fremont v. Shreves (In re Kock)*, 20 B.R. 453, 454 (Bankr.D.Neb.1982)). In contrast, § 548 is more concerned with protecting creditors than punishing a debtor for his wrongdoing. *See id.* Under § 548, a trustee has “the power to avoid transactions and bring them back into the debtor’s estate, a power that is not limited to situations where the debtor acted with the intent to defraud.” *Id.* Based on the primary purposes of the two statutes, the *Roosevelt* court found that the transfer date for purposes of § 548 does not apply to fraudulent transfer claims made pursuant to § 727(a)(2).

\*8 In contrast to the issue before the *Roosevelt* court, CUFTA expressly defines the date a transfer is presumed made. *See* CC § 3439.06(a)-(b). Because Susana offers no authority or persuasive argument as to why we should not apply CUFTA’s definition or why *Roosevelt* would suggest otherwise, the CUFTA definition found in CC § 3439.06 governs our determination of when the 1992 transmutation agreement transfer was made.

Under CC § 3439.06,

A transfer is made with respect to ... real property ... when the transfer is so far perfected that a good faith purchaser of the asset from the debtor against whom applicable law permits the transfer to be perfected cannot acquire an interest in the asset that is superior to the interest of the transferee.

CC § 3439.06(a)(1). If the transfer has not been perfected in accordance with the applicable state law prior to the commencement of a fraudulent transfer action, then “the transfer is deemed made immediately before the commencement of the action.” *Id.* § 3439 .06(b).

As discussed above, because the 1992 transmutation agreement was never recorded, i.e., perfected, CC § 3439.06(b) governs the operative date of the transfer. Pursuant to this subsection, the transfer is deemed to have been made in October 1999, just prior to the filing of the action by the Judgment Creditors.

The problem, however, with using the transmutation agreement transfer as the critical conveyance, is that it was “made” in October 1999, over a year after the date if the 1998 Transfer.<sup>22</sup> In light of the ineffectiveness of the transmutation of the Home to Susana as to third parties, and the fact that the 1998 Transfer was made prior to the transmutation agreement transfer, we view the 1998 Transfer as the first effective conveyance of Debtor’s community property interest in the Home and the relevant transfer for Trustee’s fraudulent transfer claim.

b. *Constitutionality of § 727, § 548, and CUFTA*

Having determined that the transfer date for purposes of § 548 and CUFTA is different from that of § 727, we next turn to Susana’s argument that the application of different definitions of when a transfer is “made” renders one or all of the statutes unconstitutional because they present “an internally inconsistent statutory scheme[ ] which violate[s] the substantive Due Process clauses of the 5th and 14th Amendments.” Appellant’s Opening Brief at 22–23, Jan. 26, 2007. Due to these inconsistencies, Susana contends that the statutes are void for vagueness due to their failure to provide notice of what the law prescribes.

In order for a statute to be deemed unconstitutional, it must be so vague as not to provide a “person of ordinary intelligence a reasonable opportunity to know what is prohibited.” *Grayned v. Rockford*, 408 U.S. 104, 108 (1972). As we have earlier noted, the purposes underlying fraudulent transfers governed by § 727(a)(2) on the one hand, and those governed by § 548 and CUFTA on the other hand, are fundamentally different. That being the case, as the Ninth Circuit determined in *Roosevelt*, the defined transfer date under § 548, and by implication CUFTA, need not be applied to actions under § 727(a)(2). *See Roosevelt*, 87 F.3d at 316. The fact that a court could find a particular transaction to be fraudulent under § 548 and CUFTA but not under § 727(a)(2), is of no consequence and raises no discernable constitutional issues. None of the constitutional arguments presented by Susana on this appeal persuade us otherwise.

2. *The 1998 Deed*

\*9 For the transfer of the 1998 Deed to be deemed fraudulent and avoidable, we must determine that 1) the 1998 Deed was executed with fraudulent intent or was a

In re Turner, Not Reported in B.R. (2007)

constructive fraudulent conveyance, and 2) the Home, at the time of the 1998 Transfer, held some asset value which Trustee can avoid.

a. *Fraudulent intent*

An actual fraudulent transfer is one made by the debtor with the “actual intent to hinder, delay, or defraud [a] creditor.” CC § 3439.04(a). Because intent is difficult to prove, case law has evolved to allow actual intent to be established by reference to external circumstances (i.e., badges of fraud). See *United States v. Markarian*, 385 F.3d 1187, 1191–92 (9th Cir.2004); *Kupetz v. Wolf*, 845 F.2d 842, 846 (9th Cir.1988). Under California law, the badges of fraud from which an inference of fraudulent intent may be drawn include:

- (1) Whether the transfer or obligation was to an insider.
- (2) Whether the debtor retained possession or control of the property transferred after the transfer.
- (3) Whether the transfer or obligation was disclosed or concealed.
- (4) Whether before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit.
- (5) Whether the transfer was of substantially all the debtor’s assets.
- (6) Whether the debtor absconded.
- (7) Whether the debtor removed or concealed assets.
- (8) Whether the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred.
- (9) Whether the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred.
- (10) Whether the transfer had occurred shortly before or shortly after a substantial debt was incurred.
- (11) Whether the debtor transferred the essential assets of the business to a lienholder who transferred the assets to an insider of the debtor.

CC § 3439.04(b); *Markarian*, 385 F.3d 1191–92 (9th Cir.2004).

Based upon the evidence presented at trial, the bankruptcy court found that Debtor made the 1998 Transfer with actual fraudulent intent. The presence of the following six “badges of fraud,” one or more of which provides evidence from which an inference of fraudulent intent may be drawn, sufficiently support the court’s finding: (1) retention of control over property, (2) presence of a lawsuit, (3) transfer of substantially all assets, (4) insolvency, (5) incurrence of a substantial debt, and (6) an absence of reasonably equivalent value received for the transfer. CC § 3439.04(b).

First, it is undisputed that Debtor retained control over of the Home after the execution of the 1998 Deed. At all times, Debtor lived at the Home and paid the monthly mortgage. Second, by the time of the 1998 Transfer, the Judgment Creditors had filed a million dollar tort action against Debtor. Third, the 1998 Transfer caused Debtor to transfer away substantially all of his assets except those related to the paramedical business. Fourth, Debtor was rendered insolvent by the transfer. Fifth, the 1998 Transfer was made only four months before the Judgment Creditors’ million dollar judgment was entered. And sixth, there is no evidence that Debtor received reasonably equivalent value for the Home from RICH in executing the 1998 Deed. In fact, the evidence indicates that no value was given at all.

**\*10** Because these badges of fraud clearly support a fraudulent intent finding, we find that the bankruptcy court did not err in determining that Debtor had the actual intent to defraud his creditors when he transferred his interest in the Home to RICH.

b. *Constructive fraud*

A transfer will be considered constructively fraudulent if, when it was made, the debtor did not receive reasonably equivalent value in exchange for the transfer and the debtor was insolvent at that time or became insolvent as a result of the transfer. CC § 3439.05; *Gill v. Stern (In re Stern)*, 345 F.3d 1036, 1042 n. 6 (9th Cir.2003).

Here, there is no evidence of Debtor receiving any monetary value for the 1998 Transfer when it was made. Moreover, because Debtor is neither a beneficiary of the GG Trust nor an owner of RICH, he could not have obtained any increase in the value of his interests in those entities in exchange for the 1998 Transfer. Debtor does not dispute this, but instead relies on the fact that he obtained value for the transfer of the Home when the

In re Turner, Not Reported in B.R. (2007)

1992 transmutation agreement was entered into. As discussed above, this is not the relevant transfer for the fraudulent conveyance claim. Thus, whether he obtained any value for the execution of the 1992 transmutation agreement has no bearing on whether he received reasonably equivalent value for the 1998 Grant Deed.

In addition, it is undisputed that at the time of the 1998 Transfer, Debtor did not have \$1 million in assets to cover the possible damages claim the Judgment Creditors held as alleged in the state court complaint. Although the 1998 Grant Deed was executed and recorded a few months prior to the issuance of the Judgment, at the time of its transfer, Debtor knew about the possibility of becoming liable for the Judgment. Nevertheless, he still chose to transfer the Home, which could have been used to pay off part of the Judgment. While Debtor may have been able to pay the Judgment prior to the Home's transfer, after the 1998 Transfer he clearly did not have the assets to do so. Thus, the 1998 Transfer also rendered Debtor insolvent for CUFTA purposes.

Based on the foregoing, we agree with the bankruptcy court's finding that the 1998 Transfer was constructively fraudulent.

*c. Remedies under CUFTA*

The record supports the bankruptcy court's finding that the 1998 Transfer of the Home was actually and constructively fraudulent and therefore voidable. Under CUFTA, a creditor's remedies for a fraudulent transfer include "avoidance of a transfer, attachment, and the equitable remedies of injunction and receivership as well as 'any other relief the circumstances may require.'" *Filip v. Bucurenciu*, 28 Cal.Rptr.3d 884, 887 (Ct.App.2005) (citing CC § 3439.07(a)(3)(C)).

CC § 3439.07(a)(1) allows a creditor to obtain "[a]voidance of the transfer ... to the extent necessary to satisfy the creditor's claim." To the extent a transfer is voidable by a creditor, "the creditor may recover judgment for the value of the asset transferred ... or the amount necessary to satisfy the creditor's claim, whichever is less." CC § 3439.08(b). The asset value of a transfer "equal[s] the value of the asset at the time of the transfer, subject to adjustment as the equities may require." *Id.* § 3439.08(c). "Asset" is defined as the value of the property minus the amount encumbered by valid liens and exempt under nonbankruptcy law. *Id.* § 3439.01(a)(1)-(2).

\*11 Notwithstanding the fact that the bankruptcy court ultimately ruled that the 2001 Transfer was the relevant conveyance, during the pre-trial stage of the proceeding, the court identified the 1998 Transfer as the critical one. Thus, at the court's direction, Susana and Trustee each presented expert witness testimony as to the unencumbered, nonexempt value of the Home at the time of the 1998 Transfer. Susana's appraiser testified that the Home had no asset value at the time of the transfer, while Trustee's appraiser valued the unencumbered, nonexempt value of the Home at \$7,700. Though the court found both appraisers credible, it ultimately found the methodology of Trustee's expert to be the more credible of the two, and therefore, accepted the latter's valuation.

On appeal, there appears to be no objection to the bankruptcy court's finding that the asset value of the Home in 1998 was \$7,700. In fact, Susana states in both the opening and reply briefs that the available net equity as of April 1998 was \$7,700. We, therefore, adopt the court's finding and hold that Trustee can avoid \$7,700 of the 1998 Transfer pursuant to CC § 3439.07(a)(1).

*C. The Equitable Remedy Available To Trustee*

CUFTA "is not the exclusive remedy by which fraudulent conveyances may be attacked"; they "may also be attacked by ... a common law action." *Macedo v. Bosio*, 104 Cal.Rptr.2d 1, 6 (Ct.App.2001); *Fleet Nat'l Bank v. Valente (In re Valente)*, 360 F.3d 256, 261-62 (1st Cir.2004). Trustee asserts that Debtor retained an equitable interest in the Home after the execution and recordation of the 1998 Grant Deed. Hence, when Debtor filed for bankruptcy, the increased equity in the Home was property of the estate based upon this interest. Trustee's claim has a strong basis in California law under the resulting trust doctrine.

Under California law, "[a] resulting trust arises from a transfer of property under circumstances showing that the transferee was not intended to take the beneficial interest." *Siegel v. Boston (In re Sale Guar. Corp.)*, 220 B.R. 660, 664 (9th Cir. BAP1998)(citing *Am. Motorists Ins. Co. v. Cowman*, 179 Cal.Rptr. 747, 752 (Ct.App.1982)). When a transfer is recognized to be fraudulent as to a debtor's creditors, the creditors can seek to impose a resulting trust upon the debtor's equitable interests in the transferred property for their benefit. See *In re Torrez*, 63 B.R. 751, 753-54 (9th Cir. BAP1986) (applying California law).

Here, the record supports a finding that RICH was not intended to take a beneficial interest in the Home. After

In re Turner, Not Reported in B.R. (2007)

the 1998 Transfer, Debtor retained all important incidents of ownership in the Home: possession, the duty to pay expenses (i.e., mortgage, utility bills, property taxes<sup>23</sup>), and the right to claim a tax deduction for mortgage payments. Moreover, there is no evidence that RICH paid any consideration for the Home, and the facts suggest no basis to infer a gift to RICH. In addition, neither RICH nor the GG Trust (the 99% owner of RICH) filed any response to Trustee's FAC arguing that Debtor did not hold an equitable interest in the Home at the time of his bankruptcy filing.

\*12 The evidence compels a finding of a resulting trust, with RICH holding legal title to the Home in trust for Debtor, who retained an equitable interest in the Home at the time of the transfer. When Debtor filed for bankruptcy, this equitable interest became property of the estate. 11 U.S.C. § 541. Under § 542 Trustee is entitled to turnover of Debtor's equitable interest in the Home including the increased equity.<sup>24</sup>

*D. The New Trial Motion*

On appeal, Susana argues that the bankruptcy court abused its discretion in denying the "post judgment motions for a new trial and to vacate, amend, modify, and/or reconsider the judgment." Appellant's Opening Brief at 29–30, Jan. 26, 2007. We disagree.

The post-trial motions were all filed in a single document—the New Trial Motion. The New Trial Motion was denied in part and granted in part. The bankruptcy court denied reconsideration of the following matters as lacking merit: 1) whether the court committed legal and/or factual error in determining that a) there was an actual and constructive fraudulent conveyance of the Home and b) Debtor held an equitable interest in the GG Trust, 2) whether Susana's due process rights were being violated, and 3) whether the Judgment was punitive (collectively, the "Denied Issues").

Rule 9023, which incorporates Federal Rule of Civil Procedure ("FRCP") 59, provides the legal standard for granting a new trial or amendment to a judgment. *Fed. R. Bankr.P. 9023*. Although there are no specific grounds listed for when a *FRCP 59* motion should be granted, one "should not be granted, absent highly unusual circumstances, unless [the bankruptcy court] is presented with newly discovered evidence, committed *clear error*, or if there is an intervening change in the controlling law." *McDowell v. Calderon*, 197 F.3d 1253, 1255 (9th Cir.1999) (emphasis in original).

Rule 9024, which incorporates *FRCP 60(b)*, is similar to *FRCP 59* and allows for reconsideration of an issue based upon:

- (1) mistake, inadvertence, surprise, or excusable neglect;
- (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under *Rule 59(b)*;
- (3) fraud ... misrepresentation, or other misconduct of an adverse party;
- (4) the judgment is void;
- (5) the judgment has been satisfied ... or
- (6) any other reason justifying relief from the operation of the judgment.

*Fed.R.Civ.P. 60(b)*.

For purposes of this appeal, Susana has not sufficiently articulated how the bankruptcy court abused its discretion in denying a new trial, amendment to the Judgment, or reconsideration of the Judgment as to the Denied Issues in the New Trial Motion. The opening brief and reply both fail to indicate how the New Trial Motion demonstrated the existence of newly discovered evidence, clear legal or factual error by the court, an intervening change in the controlling law, fraud or misrepresentation by Trustee, that the Judgment was void or had been satisfied, or any other reason justifying relief. Because the New Trial Motion did not provide sufficient grounds for a new trial, amendment to the Judgment, or reconsideration of the Judgment in regard to the Denied Issues, we find that the bankruptcy court did not abuse its discretion in declining to grant the relief requested therein.

*E. Admissibility Of Debtor's 1994 Conviction*

\*13 During trial, the bankruptcy court admitted into evidence a misdemeanor conviction related to a sexual assault claim that was entered against Debtor in 1994.<sup>25</sup> Susana objected to its admission as irrelevant. The court found the conviction relevant to Debtor's state of mind in regards to whether he "had some awareness of a potential claim in 1992" which would have influenced him to enter into the 1992 transmutation agreement in order to avoid potential civil liability and future creditors.<sup>26</sup> Hr'g Tr. 8:11, Mar. 10, 2005.

Relevant evidence is defined in Federal Rule of Evidence ("FRE") 401 as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Evidence that is relevant may be excluded, however, under *FRE 403* "if its probative value is substantially

In re Turner, Not Reported in B.R. (2007)

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outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” [Fed.R.Evid. 403](#). Bankruptcy courts “have wide latitude in ruling on the relevancy of evidence.” *United States v. Alvarez*, 358 F.3d 1194, 1217 (9th Cir.2004).

Here, the 1994 conviction tends to render the reason that Debtor entered into the 1992 transmutation agreement for fraudulent purposes more probable. If Debtor was engaging in unlawful activity, he may have had reason to believe that a civil action money judgment could result from his tortious conduct (i.e., assault). Susana has argued from the beginning that the relevant transfer for fraudulent conveyance purposes v/as the one associated with the 1992 transmutation agreement. Trustee appropriately should have the opportunity to present evidence to support his argument that the 1992 transmutation agreement was entered into fraudulently.

Furthermore, Susana’s assertion that admission of the conviction is unduly prejudicial is without merit. The fact that this conviction was later expunged would not affect its relevancy. The bankruptcy court was not using the conviction as evidence of Debtor’s character.<sup>27</sup> The

bankruptcy court did not abuse its discretion in allowing evidence of the conviction to be presented to determine Debtor’s state of mind as to why he entered into the 1992 transmutation agreement.

## VI. CONCLUSION

Although we find that the bankruptcy court erred in basing the Amended Judgment on an alter ego theory, we may “affirm on any ground supported by the record, even if it differs from the rationale of the [bankruptcy court].” *Pollard*, 119 F.3d at 1433. Therefore, based on our resulting trust finding, we AFFIRM the Amended Judgment. We also AFFIRM the court’s denial of the New Trial Motion and admission of Debtor’s criminal conviction.

## All Citations

Not Reported in B.R., 2007 WL 7238117

## Footnotes

- 1 Hon. Albert E. Radcliffe, U.S. Bankruptcy Judge for the District of Oregon, sitting by designation.
- 2 This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have (*see Fed. R.App. P. 32.1*), it has no precedential value. *See* 9th Cir. [BAP Rule 8013-1](#).
- 3 Unless otherwise indicated, all chapter, section and rule references are to the Bankruptcy Code, [11 U.S.C. §§ 101-1330](#), and to the Federal Rules of [Bankruptcy Procedure, Rules 1001-9036](#), as enacted and promulgated prior to the effective date (October 17, 2005) of The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, [Pub.L. 109-8](#), Apr. 20, 2005, 119 Stat. 23.
- 4 The state court entered a million dollar judgment in favor of the Judgment Creditors in August 1998.
- 5 Debtor testified at trial that there was never any draw on the line of credit. Thus, the Proset Deed did not secure any debt.
- 6 Just In Case Holdings Inc. is a Nevada corporation that was formed on July 31, 2002 by Debtor.
- 7 The original complaint also named Debtor as a defendant.
- 8 Prior to the matter going to trial, the bankruptcy court heard two different summary judgment motions—one filed by Defendants on March 5, 2004, and a subsequent one filed by Trustee on December 23, 2004.  
Defendants’ summary judgment motion contended that, among other things, under California’s Uniformed Fraudulent Transfer Act (“CUFTA”), the definition of “asset” includes only the unencumbered, nonexempt value of a debtor’s property. At the time of the 1998 Transfer, the Home did not have any unencumbered, nonexempt value. Therefore, they were entitled to summary judgment in their favor on both fraudulent transfer claims. On July 27, 2004, the court denied the motion. Although it agreed with the Defendants’ definition of “asset” under CUFTA, it held that there was a triable issue of fact with respect to whether the Home had any unencumbered, nonexempt value at the time of the 1998 Transfer.

In re Turner, Not Reported in B.R. (2007)

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Trustee's summary judgment motion asked the court to summarily adjudicate in his favor that 1) the 1998 Transfer was made with the actual intent to hinder, delay, or defraud the Judgment Creditors, 2) the 1998 Transfer was made for less than reasonably equivalent value at a time when Debtor was insolvent or that it rendered him insolvent, and 3) the transfer of the Proset Deed was avoidable under § 544(b). The court entered its memorandum decision granting the motion in part and denying it in part on February 17, 2005 ("February 17 memorandum decision"). Specifically, it granted Trustee's request to summarily adjudicate the issues of reasonably equivalent value and insolvency and denied summary judgment as to the fraudulent intent issue and any issues concerning the avoidance of the Proset Deed. An order evidencing the court's findings was entered on March 9, 2005.

- 9 Notably, in its memorandum decision addressing Defendants' motion for partial summary judgment entered on July 27, 2004, the court indicated that the transfer of the 1998 Deed was the critical one for fraudulent transfer purposes. Because the 1998 Transfer occurred more than one year before the filing of the petition, the court assumed that Trustee's remedy was limited to avoidance of the asset transferred pursuant to the 1998 Deed under [CC § 3439 et seq.](#) (CUFTA). Under [CC § 3439.01\(a\)](#), an asset is defined to include only the unencumbered, nonexempt value of the property transferred. If the 1998 Transfer had been the operative transfer, Trustee would only be entitled to a judgment avoiding the transfer of the Home to the extent of its asset value. Based on the testimony of Trustee's appraiser, the court determined the asset value of the Home in 1998 was \$7,700.
- 10 This memorandum decision was not included as part of the record; nevertheless, we may take judicial notice of it. [Harris v. U.S. Trustee \(In re Harris\)](#), 279 B.R. 254, 261 n. 4 (9th Cir. BAP2002) ("A judicially noticed fact must be one not subject to reasonable dispute in that it is ... capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.").
- 11 Subsequent to the filing of the notice of appeal of the Amended Judgment, the bankruptcy court entered an order granting in part and denying in part the New Trial Motion in accordance with the reasons stated in its New Trial Decision. Susana filed a notice of appeal as to that order on September 20, 2006. That appeal has been consolidated with Susana's appeal of the Amended Judgment.
- 12 The order granting the sale was not included in the record, however, we may take judicial notice of it. *See supra* note 10.
- 13 Limited liability companies consist of members who own membership interests. [Pac. Landmark](#), 29 Cal.Rptr.3d at 198. Each limited liability company must have at least two members who own membership interests to be valid. *Id.*
- 14 Proset was dissolved prior to the removal of the complaint.
- 15 The Proset Deed, which evidenced the line of credit extended to Proset by RICH, was signed by Debtor as RICH's managing partner.
- 16 The only relevant conveyances for fraudulent transfer purposes are those associated with the 1992 transmutation agreement and the 1998 Deed. *See infra*, p. 15 and note 17. Both these transfers were made more than one year before the bankruptcy filing. As such, Trustee's § 548(a)(1) claim is not applicable to these transfers because they were made outside of the one year reach back period. [11 U.S.C. § 548\(a\)\(1\)](#) ("[t]he trustee may avoid any transfer of an interest of the debtor in property ... that was made ... on or within one year before the date of the filing of the petition"). Our analysis is therefore limited to the application of § 544(b) and CUFTA.
- 17 The transfers other than those related to the 1992 transmutation agreement and the 1998 Deed are irrelevant to our analysis. As to the GG Trust transfer, there is no evidence in the record that the Home was ever transferred to the GG Trust. Therefore, avoidance of that transfer would not have any effect on Debtor's interest in the Home. In regards to the Proset Deed and the 2001 Deed transfers, those deeds were entered into between RICH and third parties (i.e., Susana and Proset). RICH and Proset are not the alter egos of Debtor. As such, Debtor cannot be found to be liable for the Proset Deed and the 2001 Deed transfers. Moreover, the Turner Marital Settlement Agreement and the Turner Dissolution Judgment had no legal effect on Debtor's interest in the Home because both Susana and Debtor transferred whatever interest they held in the Home to RICH pursuant to the 1998 Deed. Thus, when the Turner Marital Settlement Agreement and Turner Dissolution Judgment were entered into, Debtor held no interest in the Home which he could transfer.
- 18 Pursuant to the transmutation agreement, it could have been "recorded at any time ... by either party in any place ... authorized by law for the recording of documents affecting title to or ownership status of property[.]" Hence, Debtor or Susana could have caused the transmutation agreement to be effective against third parties at any time from the date of execution by recording it. There is no evidence that either tried to do so.
- 19 In light of the other "transfers" of the Home later made by Debtor, Susana, and their affiliates, the evidentiary record is clear that Debtor and Susana never treated the "transfer" of the Home supposedly effected by the 1992 transmutation agreement as effective.

In re Turner, Not Reported in B.R. (2007)

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- 20 Section 727(a)(2) states,  
(a) The court shall grant the debtor a discharge, unless—  
(2) the debtor, with intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under this title, has transferred, removed, destroyed, mutilated, or concealed, or has permitted to be transferred, removed, destroyed, mutilated, or concealed—  
(A) property of the debtor, within one year before the date of the filing of the petition; or  
(B) property of the estate, after the date of the filing of the petition[.]
- 21 Under the Code's fraudulent transfer statute,  
a transfer is made when such transfer is so perfected that a bona fide purchaser from the debtor against whom applicable law permits such transfer to be perfected cannot acquire an interest in the property transferred that is superior to the interest in such property of the transferee, but if such transfer is not so perfected before the commencement of the case, such transfer is made immediately before the date of the filing of the petition.  
[11 U.S.C. § 548\(d\)\(1\)](#).
- 22 In March 1998, Debtor and Susana by grant deed transferred the Home to RICH. The deed was recorded that April. Based on the recordation date, the 1998 Deed transfer is deemed to have been made in April 1998. [CC § 3439.06\(a\)\(1\)](#).
- 23 After the divorce, Susana testified that whenever she needed money for the mortgage payment, property taxes, or utility bills she would ask Debtor for the money, and he would write her a check for the requested amount. Susana would deposit the check into her account and then pay the bills out of that account.
- 24 Prior to the bankruptcy, RICH transferred the Home to Susana in 2001. Both Trustee and Susana agree that when the 2001 Deed was recorded it was invalid due to it not being in compliance with [CC § 1183](#), which requires that if a deed is made outside the United States and acknowledged by a notary public, there must be proof that the signature of the notary public was proved "(1) before a judge of a court of record of the country where the proof ... is made, or (2) by an American diplomatic officer, consul, general counsel, vice consul, or consular agent, or (3) by an apostille affixed to the instrument[.]" [CC § 1183](#). Nevertheless, Susana argues that even though the 2001 Deed was invalid at the time of recordation, [CC § 1207](#) causes it to now be effective.  
[CC § 1207](#) states,  
Any instrument affecting the title to real property, one year after the same has been copied into the proper book of record, kept in the office of any county recorder, imparts notice of its contents to subsequent purchasers and encumbrancers, notwithstanding any defect, omission, or informality in the execution of the instrument, or in the certificate of acknowledgment thereof, or the absence of any such certificate; but nothing herein affects the rights of purchasers or encumbrancers previous to the taking effect of this act.  
The 2001 Deed was recorded on December 27, 2001. It would not have become valid under [CC § 1207](#) until December 27, 2002. Debtor filed for bankruptcy on September 10, 2002. As such, Debtor's equitable interest in the Home became property of the estate prior to Susana having valid legal title to it.
- 25 It should be noted that the conviction was later expunged pursuant to [Cal.Penal Code § 1203.4](#).
- 26 Because we find the 1998 Transfer to be the operative transfer, the admission of the conviction in connection with the 1992 transmutation agreement is irrelevant. Nevertheless, as Susana raised the matter as a significant issue in her briefs on appeal, we have addressed and disposed of the issue.
- 27 We note parenthetically that the bankruptcy court conducted a bench trial and not a trial before a jury.

## Exhibit 23

US Fire Pump Company, LLC v. Alert Disaster Control (Middle East) Ltd., Slip Copy (2021)

dispute.

**H** KeyCite history available

2021 WL 296073

Only the Westlaw citation is currently available.

United States District Court, M.D. Louisiana.

**US FIRE PUMP COMPANY, LLC**

v.

**ALERT DISASTER CONTROL (MIDDLE  
EAST) LTD., et al.**

Civil Action 19-335-SDD-EWD

Signed 01/28/2021

## RULING

**SHELLY D. DICK**, CHIEF JUDGE

\*1 Before the Court is a *Motion to Dismiss*<sup>1</sup> under Rule 12(b)(2) and Rule 12(b)(5) and a *Motion for Partial Dismissal*<sup>2</sup> under Rule 12(b)(6) filed by Alert Disaster Control (Asia) PTE. Ltd (“Alert Asia”), Alert Disaster Control (Middle East) Ltd. (“Alert Middle East”), and Michael E. Allcorn (“Allcorn”) (collectively, “Defendants”). US Fire Pump Company, LLC (“Plaintiff”) filed an *Opposition*<sup>3</sup> to each *Motion*, to which Defendants filed two *Replies*.<sup>4</sup> For the following reasons, Defendants’ *Motion to Dismiss*<sup>5</sup> under Rule 12(b)(2) and Rule 12(b)(5) shall be DENIED, and Defendants’ *Motion for Partial Dismissal*<sup>6</sup> under Rule 12(b)(6) shall be GRANTED in part and DENIED in part.

### **I. BACKGROUND**

This is at core a breach of contract case. However, Plaintiff brings several causes of action against three foreign defendants with different citizenships and asserts a veil piercing theory. The Court will provide the following summary of the salient facts in this complex

### **A. The Parties**

Plaintiff is an LLC whose sole member is Louisiana domiciliary Christopher Ferrara (“Ferrara”).<sup>7</sup> Plaintiff is a provider of “industrial fire solutions” and a manufacturer of firefighting systems operated in Holden, Louisiana.<sup>8</sup> Alert Middle East is a company incorporated in Cyprus with its “place of business in the United Arab Emirates and other locations outside of the United States.”<sup>9</sup> Alert Asia is a company organized in Singapore with its principal place of business in Singapore.<sup>10</sup> Both Alert companies are engaged in emergency response and risk management, with an emphasis on “oilfield firefighting and blowout control, well control engineering and project management, marine and industrial firefighting, hazardous material control, integrated QHSE management, safety and survival training, toxic environment protection, and fire and safety OEM and product sales.”<sup>11</sup> Allcorn is the common tie between these companies, allegedly serving as sole shareholder and operator of each.<sup>12</sup> Allcorn is also, by his own admission, the managing director of each company.<sup>13</sup> Allcorn is a permanent resident of Singapore, and a registered resident of the UAE.<sup>14</sup>

### **B. Facts Alleged**

Plaintiff and Alert Middle East, via Allcorn, began negotiations on December 5, 2018, for Plaintiff to sell firefighting equipment to Alert Middle East.<sup>15</sup> Who initiated contact is a matter of dispute. Plaintiff alleges that Allcorn and Plaintiff traded a flurry of emails, phone calls, and text messages over several months related to specifications for the equipment, pricing, payment terms, and delivery.<sup>16</sup> Although Plaintiff tendered several contracts, the parties never executed one. Plaintiff alleges that a contract formed through communications which evidence offer and acceptance. In sum, beginning in December 2018 and into February 2019, Alert Middle East, via Allcorn, allegedly agreed to purchase more than \$3.4 million in materials and equipment from Plaintiff.<sup>17</sup>

\*2 On January 10, 2019, Plaintiff contacted Alert Middle East to inquire about payment.<sup>18</sup> On January 29, 2019, Alert Middle East, via Allcorn, emailed an assurance of future payment.<sup>19</sup> Plaintiff alleges that no payment has

US Fire Pump Company, LLC v. Alert Disaster Control (Middle East) Ltd., Slip Copy (2021)

been made despite multiple demands.<sup>20</sup> Plaintiff filed suit on May 29, 2019, claiming breach of contract, bad faith breach of contract, fraud, a violation of the Louisiana Unfair Trade Practices Act (“LUTPA”), and failure to pay on an open account.<sup>21</sup> Plaintiff seeks specific performance and damages, including interest, costs, lost profits, incidental damages, court costs, attorney fees, and treble damages.<sup>22</sup>

## II. LAW AND ANALYSIS

Subject matter jurisdiction is based on diversity of citizenship. Defendants challenge personal jurisdiction under Rule 12(b)(2) and allege improper service of process under Rule 12(b)(5); Defendants also move to dismiss under Rule 12(b)(6).

### A. Personal Jurisdiction: Rule 12(b)(2) Motion to Dismiss

Plaintiff asserts that the Court has specific personal jurisdiction over Alert Middle East and Allcorn for both its contractual and tortious causes of action.<sup>23</sup> Plaintiff argues that Allcorn and Alert Middle East’s contacts can be imputed to Alert Asia for the purpose of personal jurisdiction under a single business enterprise theory.<sup>24</sup>

A federal district court sitting in diversity may exercise personal jurisdiction over a foreign defendant if: (1) the long-arm statute of the forum state enables personal jurisdiction over the defendant, and (2) the exercise of personal jurisdiction is consistent with the Due Process Clause. The due process and long-arm statute inquiries merge because Louisiana’s long-arm statute extends jurisdiction coextensively with the limits of the Due Process Clause.<sup>25</sup>

A court may exercise specific jurisdiction<sup>26</sup> in conformity with due process “in a suit arising out of or related to the defendant’s contacts with the forum”<sup>27</sup> when the “‘nonresident defendant has purposefully directed its activities at the forum state and the litigation results from alleged injuries that arise out of or relate to those activities.’”<sup>28</sup> The Fifth Circuit follows a three-step analysis for specific personal jurisdiction. First, a court must determine “whether the defendant has minimum contacts with the forum state, i.e., whether it purposely directed its activities toward the forum state or purposefully availed itself of the privileges of conducting

activities there.”<sup>29</sup> The “‘purposeful availment’ must be such that the defendant ‘should reasonably anticipate being haled into court’ in the forum state.”<sup>30</sup> Second, a court considers “whether the plaintiff’s cause of action arises out of or results from the defendant’s forum-related contacts.”<sup>31</sup> Third, “[e]ven if minimum contacts exist, the exercise of personal jurisdiction over a non-resident defendant will fail to satisfy due process requirements if the assertion of jurisdiction offends traditional notions of fair play and substantial justice.”<sup>32</sup>

\*3 “When a nonresident defendant presents a motion to dismiss for lack of personal jurisdiction, the plaintiff bears the burden of establishing the court’s jurisdiction over the nonresident.”<sup>33</sup> When a district court rules on a motion to dismiss without an evidentiary hearing, the plaintiff need only present a *prima facie* case of personal jurisdiction.<sup>34</sup> At this stage, uncontroverted allegations in the complaint must be taken as true, and conflicts between the parties’ affidavits must be resolved in the plaintiff’s favor.<sup>35</sup> To aid resolution of the jurisdictional issue, a court “may receive interrogatories, depositions or any combination of the recognized methods of discovery .... But even if the court receives discovery materials, unless there is a full and fair hearing, it should not act as a fact finder and must construe all disputed facts in the plaintiff’s favor and consider them along with the undisputed facts.”<sup>36</sup> “When deciding a motion to dismiss for lack of personal jurisdiction, the court is not limited to considering the facts pleaded in the complaint.”<sup>37</sup>

### 1. Allcorn/Alert Middle East’s Contacts with Louisiana

The starting point of the fact-intensive analysis is Allcorn/Alert Middle East’s contacts with Louisiana. Plaintiff asserts Allcorn contacted it first.<sup>38</sup> Defendants assert that Plaintiff contacted them first because Plaintiff’s agent in the UAE, Emergency Safety Solutions (“ESS”), contacted Defendants first.<sup>39</sup> Defendants cite to the affidavit of David Jackson, Managing Director of ESS.<sup>40</sup> Jackson attests that on December 5, 2018, he provided Alert Middle East with Plaintiff’s contact information and asked Alert Middle East to reach out to Plaintiff as a potential customer.<sup>41</sup> Jackson also notified Plaintiff of the potential sales opportunity.<sup>42</sup> Alert Middle East, via Allcorn, contacted Plaintiff on the same day.<sup>43</sup> So while Plaintiff’s agent initially contacted Alert Middle East, Alert Middle East then took the next step to contact Plaintiff directly.

From there, the parties began exchanging emails, phone calls, and text messages. The substantive emails began on

US Fire Pump Company, LLC v. Alert Disaster Control (Middle East) Ltd., Slip Copy (2021)

December 5, 2018, when Allcorn acknowledged that the parties had spoken on the phone earlier that day and requested quotes for several items.<sup>44</sup> Later that day, Plaintiff's representative sent Allcorn a quote.<sup>45</sup> The following day, December 6, Allcorn sent an additional email acknowledging that another phone call had occurred and "confirm[ing] [Alert Middle East's] interest in the immediate purchase of the following..."<sup>46</sup> Plaintiff's representative responded with an updated proposal and draft contract.<sup>47</sup> Plaintiff alleges that this contract provided for Louisiana choice of law and F.O.B. Holden, Louisiana.<sup>48</sup> However, Defendants did not sign this or any other contract.

On the following day, December 7, Allcorn sent one email with pictures of Defendants'<sup>49</sup> current equipment<sup>50</sup> and one email acknowledging a phone call that had occurred that day and providing a timeline for Allcorn/Alert Middle East's payment to Plaintiff.<sup>51</sup> Plaintiff's representative emailed Allcorn that night requesting that Allcorn sign and return the proposal and contract or ask for revisions.<sup>52</sup>

\*4 On the following day, December 8, Allcorn responded to the previous email and indicated that Allcorn/Alert Middle East would sign the contract if the reference to ENOC<sup>53</sup> was removed and the client name was amended to Alert Middle East—instead of Alert Asia and Allcorn as it had been written.<sup>54</sup> In the same email, Allcorn requested preferential pricing and indicated that "we wish to establish a long-term relationship between ALERT – US Fire Pump."<sup>55</sup> On the same day, Allcorn sent another email with 32 pictures of Alert equipment for reference.<sup>56</sup> Plaintiff's representative responded with a revised contract in conformance with Allcorn's request.<sup>57</sup>

On December 10, Plaintiff's representative sent Allcorn an email that acknowledged an earlier conference call, scheduled another call, and attached another revised quotation and contract.<sup>58</sup> Allcorn responded, acknowledged receipt of the quotation and contract, and stated, "[t]he revised Service Quotation and Contract shall be duly signed, scanned, and returned to you immediately upon our arrival at the office in the morning."<sup>59</sup> Allcorn also sent an email that day with a copy of the ENOC–Alert Middle East contract.<sup>60</sup>

On December 17, Plaintiff's representative emailed Allcorn the invoices.<sup>61</sup> Allcorn responded, requesting a correction to one field, but otherwise "confirmed the invoices as presented."<sup>62</sup> The following day, December 18, Allcorn confirmed receipt of the amended proposals via email.<sup>63</sup> From there things deteriorated.

On January 28, 2019, Allcorn confirmed "receipt of the requested photographs" of the equipment Plaintiff built and asked for more pictures of other equipment.<sup>64</sup> On the following day, January 29, Allcorn confirmed receipt of the additional pictures.<sup>65</sup> On one occasion in February 2019, Allcorn sent Plaintiff's representative a text message.<sup>66</sup> Finally, Ferrara attests to Allcorn attending telephone conferences, sending emails and text messages, and calling Plaintiff.<sup>67</sup>

*2. Personal Jurisdiction Analysis for Allcorn and Alert Middle East*

Plaintiff argues that this Court has personal jurisdiction over Alert Middle East for the contract claims.<sup>68</sup> Plaintiff appears to argue that this Court has personal jurisdiction over Allcorn personally for the contract claims and briefs personal jurisdiction over Allcorn/Alert Middle East jointly.<sup>69</sup> However, "jurisdiction over individual officers and employees of a corporation may not be predicated merely upon jurisdiction over the corporation itself."<sup>70</sup> "When dealing with corporate officers, a court must look to the individual and personal contacts, if any, of the officer or employee, with the forum state."<sup>71</sup> This analysis applies to Allcorn because he is the managing director of Alert Middle East.<sup>72</sup>

\*5 Under Louisiana law, the Court can impute Alert Middle East's contacts to Allcorn. In *Fryar v. Westside Habilitation Center*, the Louisiana Supreme Court held that the exercise of personal jurisdiction over a bank officer was appropriate because: (1) the bank officer was the only officer involved in the transaction, (2) the officer was responsible for the bank's commitments in the contract, and (3) the officer had a duty to see that the bank's obligations were carried out.<sup>73</sup> The supreme court held, "[a]n employee cannot shield himself behind a corporate wall when he is the officer responsible for the corporation's acts in a particular transaction."<sup>74</sup> Plaintiff alleges, and Defendants do not controvert, that Allcorn is the only director and shareholder of Alert Middle East.<sup>75</sup> Thus, assuming Alert Middle East had an obligation, the execution of that obligation was solely contingent on the will of its only director—Allcorn. If the Court has personal jurisdiction over Alert Middle East for the contractual claims, the Court has personal jurisdiction over Allcorn. Because the only contacts that Plaintiff alleges were contacts by Allcorn on behalf of Alert Middle East, the minimum contacts portion of the analysis merges for the two.

The unchallenged email chain that Plaintiff introduced of

US Fire Pump Company, LLC v. Alert Disaster Control (Middle East) Ltd., Slip Copy (2021)

the communications indicates that Allcorn negotiated delivery terms, pricing terms, types of equipment, and other contractual terms. The email chain also demonstrates that Allcorn knew or should have known that each of those communications were being directed to a Louisiana company at the latest on December 5, 2018—the same day negotiations started—because the quotation sent that day listed Plaintiff’s Holden, Louisiana address.<sup>76</sup> Ferrara attests that Allcorn agreed to the terms and price of the contract and agreed that one existed,<sup>77</sup> and Allcorn attests to precisely the opposite;<sup>78</sup> however, conflicts in affidavits are settled in favor of the plaintiff at the 12(b)(2) stage.<sup>79</sup> The email chain shows that Allcorn agreed to sign the written contract and confirmed the accuracy of the invoices, but in any event did not memorialize those understandings in writing via a contract.<sup>80</sup> The question is: are the above contacts sufficient under the Due Process Clause for this Court to exercise specific jurisdiction over Allcorn/Alert Middle East?

The Court finds in the affirmative. Defendants argue that the Court does not have specific personal jurisdiction because the present case is based on “an isolated sales transaction between a resident seller and a non-resident buyer.”<sup>81</sup> Defendants rely almost exclusively on *Hydrokinetics, Inc. v. Alaska Mechanical, Inc.* for the proposition that a “single, isolated transaction” is insufficient for specific personal jurisdiction.<sup>82</sup> Defendants also argue that Plaintiff made the initial overture (through ESS, Plaintiff’s agent), and there was no executed contract, so there are not minimum contacts.

In response, Plaintiff—who bears the burden of proving jurisdiction—argues that minimum contacts exist because: there was prolonged contact between the parties; the unsigned contracts and documents provided for Louisiana choice of law and F.O.B. Holden, Louisiana; Allcorn/Alert Middle East knew that Plaintiff would perform entirely in Louisiana; and Allcorn/Alert Middle East exerted “significant control” over Plaintiff’s assembly of the equipment.<sup>83</sup> Plaintiff argues that the factors that Defendants cite are not determinative and provide some authority to that effect

*Hydrokinetics* is distinguishable. The defendant, Alaska Mechanical, was approached by an agent of the plaintiff, Hydrokinetics, who communicated that Hydrokinetics was interested in supplying Alaska Winter with equipment for an upcoming project.<sup>84</sup> Alaska Mechanical and the agent negotiated some of the contract, then the parties themselves communicated by telephone, letter, and telex (a predecessor of the fax machine).<sup>85</sup> Two of Alaska Mechanical’s officers visited Hydrokinetics’ plant in

Texas.<sup>86</sup> The signed contract provided that Hydrokinetics would build the equipment in Texas and deliver it to Washington.<sup>87</sup> Importantly, the contract also contained an Alaska choice of law clause.<sup>88</sup> Alaska Mechanical did not like the goods for whatever reason and refused to pay for them. Hydrokinetics sued in federal court in Texas.

\*6 The Fifth Circuit concluded there were not minimum contacts. After noting that the number of contacts was not determinative and that the heart of the issue was whether Alaska Mechanical had purposefully availed itself of the benefits of Texas,<sup>89</sup> the court went on to describe as important the facts that: Hydrokinetics’ agent initiated contact and started the negotiations, the contract contained an Alaska choice of law clause, and delivery was made in Washington—not Texas.<sup>90</sup> The court also found it important that Alaska Mechanical’s only performance in Texas under the contract was payment.<sup>91</sup> The court noted that the exchange of communications between the parties was insufficient to establish minimum contacts.<sup>92</sup> In distinguishing the cases Hydrokinetics cited, the court noted that the inclusion of the Alaska choice of law clause made it less foreseeable that Alaska Mechanical could be haled into Texas.<sup>93</sup> The court also emphasized that Alaska Mechanical did not have to do an “integral, essential portion” of its performance in Texas.<sup>94</sup>

The facts in this case are dissimilar, but the legal principles articulated in *Hydrokinetics* inform the Court’s analysis. Plaintiff’s agent did not begin the negotiations; rather, Plaintiff’s agent gave Alert Middle East, via Allcorn, Plaintiff’s contact information, and Allcorn/Alert Middle East made the decision to reach out.<sup>95</sup> The initial substantive contact was made by Allcorn on behalf of Alert Middle East. Like the defendant in *Hydrokinetics*, Allcorn/Alert Middle East did not perform in Louisiana. However, Plaintiff alleges that Allcorn/Alert Middle East agreed to perform in Louisiana with F.O.B in Holden and payment in Louisiana.<sup>96</sup> The portions of the email chain where Allcorn agrees to sign the contract and confirms that the invoices are accurate lend credence to Plaintiff’s allegation. The *Hydrokinetics* court emphasized the contract’s Alaska choice of law clause because the clause decreased the foreseeability that the defendant would be haled into a Texas court.<sup>97</sup>

Foreseeability is a part of the purposeful availment portion of the specific jurisdiction test. In *World-Wide Volkswagen Corp. v. Woodson*, the United States Supreme Court held that “the foreseeability that is critical to the due process analysis ... is that the defendant’s conduct and connection with the forum state are such that he should reasonably anticipate being haled into court there.”<sup>98</sup> The foreseeability element informs the

US Fire Pump Company, LLC v. Alert Disaster Control (Middle East) Ltd., Slip Copy (2021)

purposeful availment analysis in that courts must ask: given the extent that the nonresident availed itself of the privileges and benefits of the laws of the forum state, should the nonresident have foreseen being haled into court there?<sup>99</sup> In other words, are the contacts with the forum state of such a number, nature, and degree that the nonresident defendant should have foreseen that those contacts rendered it amenable to suit in that jurisdiction?

\*7 The objective of the purposeful availment requirement is to provide predictability and give notice to the defendant that it is subject to suit in the forum state, so that the company can act to alleviate the risk of burdensome litigation by procuring insurance, passing the expected costs on to customers, or, if the risks are too great, severing its connection with the State.<sup>100</sup> “The purposeful availment requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of random, fortuitous, or attenuated contacts.”<sup>101</sup>

Plaintiff relies on another Fifth Circuit case, *Mississippi Interstate Exp., Inc. v. Transpo, Inc.*, and a plethora of district court cases.<sup>102</sup> *Mississippi Interstate* is factually distinguishable, but the principles articulated therein shape the Court’s analysis. The plaintiff was a Mississippi trucking company who sued several California citizens.<sup>103</sup> The plaintiff initiated contact with one of the defendants which led to an oral agreement that the plaintiff would supply trucks to move goods for the defendant.<sup>104</sup> Over the next two months, the defendant called the plaintiff’s headquarters in Mississippi at least 19 times ordering 19 shipments.<sup>105</sup> There was no discussion as to where payment was to be made, but the court noted that the invoices directed payment in Mississippi, as the parties “reasonably contemplated.”<sup>106</sup> *Mississippi Interstate* is distinguishable because of the number of shipments (19), whereas in this case all of the communications related to one order.

In concluding that the exercise of jurisdiction was appropriate, the court stated some basic principles relevant here. First, “[t]he rule developed by this circuit, however, is that when a nonresident defendant takes ‘purposeful and affirmative action,’ the effect of which is ‘to cause business activity, foreseeable by [the defendant] in the forum state,’ such action by the defendant is considered a ‘minimum contact’ for jurisdictional purposes.”<sup>107</sup> The court went on to say that the defendant, by contracting with the Mississippi plaintiff, purposefully availed itself of the privilege of conducting activities within Mississippi if it was “reasonably foreseeable that [the plaintiff] would in fact perform a material part of its contractual obligations within the forum state.”<sup>108</sup> The court continued its analysis by noting that the defendant was no “mere passive customer.”<sup>109</sup> Instead, the defendant

exercised a “significant measure of control” over the details of each shipment.<sup>110</sup> Furthermore, “the relationship between the parties was sustained (not ‘single’ or ‘fortuitous’), and the plaintiff performed its part of the undertaking at its sole place of business in Mississippi as was known to the California defendants at the outset of their relations.”<sup>111</sup>

\*8 Plaintiff argues that Allcorn/Alert Middle East knew that Plaintiff would perform all of its obligations in Louisiana.<sup>112</sup> The email chain supports that conclusion because the quotation sent to Allcorn/Alert Middle East on December 5 (the first day of contact between the parties), listed Plaintiff’s Louisiana address.<sup>113</sup> However, as Defendants point out, the bulk of the price of the order came from the delivery of firefighting foam from Spain.<sup>114</sup> This ignores Plaintiff’s allegation that there was still over \$1 million worth of the order that would be performed in Louisiana,<sup>115</sup> and, moreover, even if the firefighting foam would ship from Spain, that does not mean that Plaintiff performed all of its obligations related to the foam in Spain. On the contrary, accepting Plaintiff’s well-pleaded facts as true and construing the jurisdictional evidence in the light most favorable to Plaintiff, Plaintiff acted from Louisiana to organize the delivery of the foam from Spain. The source of a portion of the goods does not control the analysis and does not change the fact that a “material part” of Plaintiff’s performance (building the equipment that Alert Middle East ordered) occurred in Louisiana. The Court therefore finds that Plaintiff has supported the allegation that Allcorn/Alert Middle East knew from the outset that a “material part” of Plaintiff’s performance would occur in Louisiana. By the same token, Allcorn/Alert Middle East took “purposeful and affirmative action” to request the production of certain equipment in Louisiana, which was business activity within Louisiana foreseeable to Allcorn/Alert Middle East.

Moreover, Plaintiff has alleged that Allcorn/Alert Middle East were not “mere passive customers.” The email chain and Ferrara’s affidavit, accepted as true, demonstrate near daily communications regarding the specifics of the order, including Allcorn/Alert Middle East adding additional equipment to the order and sending and requesting photographs which guided production in Louisiana. While the majority of the communications took place over a relatively short period of a couple of weeks in December, the flurry of communications during that time, coupled with the fact that Allcorn/Alert Middle East made their intentions clear as to a long term relationship, leads inexorably to the conclusion that this transaction was not a “fortuitous” event. To be sure, there was one “single” transaction, but it took place over the span of weeks and

US Fire Pump Company, LLC v. Alert Disaster Control (Middle East) Ltd., Slip Copy (2021)

involved near constant communication between the parties. Application of the principles of *Mississippi Interstate* yields the conclusion that Allcorn/Alert Middle East purposefully availed themselves of the benefits and privileges of doing business in Louisiana.

The foreseeability aspect of the purposeful availment analysis buttresses this conclusion. Plaintiff alleges that from the outset of the negotiations, Allcorn/Alert Middle East knew they were contracting with a Louisiana company. And, while Alert Middle East did not sign the contracts providing for F.O.B. Holden and choice of law Louisiana, it (via Allcorn) agreed to sign and presumably read them.<sup>116</sup> While Allcorn/Alert Middle East may not be bound by those contracts, the terms of the contracts put Allcorn/Alert Middle East on notice that if litigation were to occur in relation to the contracts, Louisiana law would apply. This, coupled with Plaintiff's well-pleaded allegation that Allcorn/Alert Middle East knew that they were contracting with a Louisiana company whose performance would primarily be in Louisiana, made it foreseeable to Allcorn/Alert Middle East that they could be haled into court in Louisiana. Because Allcorn/Alert Middle East purposefully availed itself of the privilege of doing business in Louisiana, Allcorn/Alert Middle East has minimum contacts with Louisiana.

The remainder of the specific personal jurisdiction analysis requires consideration of (1) "whether the plaintiff's cause of action arises out of or results from the defendant's forum-related contacts,"<sup>117</sup> and (2) whether "the exercise of personal jurisdiction over a non-resident defendant [fails] to satisfy due process requirements [because] the assertion of jurisdiction offends 'traditional notions of fair play and substantial justice.'" <sup>118</sup> Allcorn/Alert Middle East's contacts with Louisiana led to the business dealings between the parties. As such, the Court has no trouble concluding that "plaintiff's cause of action arises out of or results from the defendant's forum-related contacts..."<sup>119</sup>

\*9 It remains to be determined whether the exercise of personal jurisdiction comports with traditional notions of fair play and substantial justice. This requires the Court to consider "(1) the defendant's burden, (2) the forum state's interests, (3) the plaintiff's interest in convenient and effective relief, (4) the judicial system's interest in efficient resolution of controversies, and (5) the state's shared interest in furthering fundamental social policies."<sup>120</sup> "It is rare to say the assertion [of jurisdiction] is unfair after minimum contacts have been shown."<sup>121</sup>

Defendants argue that the assertion of jurisdiction offends traditional notions of fair play and substantial justice

because (1) "the burdens on Defendants are extreme since, they are overseas parties with no Louisiana connection"; (2) "Louisiana has no special interest [because] Plaintiff willingly explored an overseas business opportunity with no connection to Louisiana"; (3) "Plaintiff may pursue its remedy against Defendants where they are located"; and (4) "this is a simple breach of contract case relating to an overseas project (and best addressed overseas), and no interests are triggered to favor maintaining the case in Louisiana."<sup>122</sup> Defendants do not provide different reasons for Allcorn and Alert Middle East.

As to Defendants' first argument, they have one connection to Louisiana—the business negotiations which gave rise to this suit—which the Court has already determined establish minimum contacts. Also, the fact that Defendants are located overseas is not a reprieve from the exercise of jurisdiction by American courts.

As to Defendants' second and fourth arguments, Louisiana has an interest in establishing the rights of its corporate citizen. Similarly, it does not matter that the final destination of the goods was overseas because the majority of Plaintiff's alleged obligations were to be performed in Louisiana, and Defendants' alleged duty to pay was to be performed in Louisiana. Defendants' characterization of the dealings between the parties as "an overseas project" and an "overseas business opportunity" is inaccurate insofar as substantial performance was contemplated and foreseeable in Louisiana.

As to Defendant's third argument, it implicitly contradicts its first. But more to the point, it does not matter whether Plaintiff can sue Defendants where they are located. The availability of a foreign forum does not diminish or negate personal jurisdiction in a local forum.

In sum, the Court finds that Plaintiff has established that Allcorn/Alert Middle East have sufficient minimum contacts such that the Court's exercise of jurisdiction comports with Due Process, Plaintiff's causes of action arise from those contacts, and the exercise of jurisdiction comports with traditional notions of fair play and substantial justice.

Having concluded that the Court may exercise personal jurisdiction over Allcorn and Alert Middle East for Plaintiff's contract theory of liability, the Court need not consider whether those same contacts give rise to personal jurisdiction for Plaintiff's tort theories. The Fifth Circuit in *Seifert v Helicopteros Atuneros, Inc.*<sup>123</sup> held that a "plaintiff bringing multiple claims that arise out of different forum contacts of the defendant must establish

US Fire Pump Company, LLC v. Alert Disaster Control (Middle East) Ltd., Slip Copy (2021)

specific jurisdiction for each claim.”<sup>124</sup> The court came to that conclusion because “[i]f a defendant does not have enough contacts to justify the exercise of personal jurisdiction, the Due Process Clause prohibits the exercise of jurisdiction over any claim that does not arise out of or result from the defendant’s forum contacts.”<sup>125</sup> In other words, the court restated the truism that the claim must arise out of the defendant’s contacts.

\*10 The instant case is inapposite. Allcorn/Alert Middle East’s contacts with Louisiana that give rise to the contractual claims are the same contacts that give rise to the tortious claims. The Court has already concluded that the contacts are sufficient to exercise jurisdiction and need not do so again simply because Plaintiff seeks recovery based on different theories of liability.<sup>126</sup> “This is consistent with the general principle that jurisdiction is properly asserted over claims when the *contacts* meet the minimum contact standard.”<sup>127</sup>

### 3. Jurisdictional Veil Piercing as to Alert Asia

Plaintiff asserts that the Court has specific jurisdiction over Alert Asia by virtue of its connection with Allcorn/Alert Middle East under a single business enterprise theory.<sup>128</sup> Defendants counter that Plaintiff must make that showing under foreign law—not Louisiana law.<sup>129</sup> Plaintiff does not rebut that assertion, and Defendants do not explain what foreign law is applicable. For the following reasons, the Court concludes that Louisiana law applies to the imputation of contacts for the jurisdictional analysis.<sup>130</sup>

Defendants cite *In re Chinese-Manufactured Drywall Products Liability Litigation*<sup>131</sup> in support of their contention that Plaintiff’s showing is under foreign law.<sup>132</sup> The court in that case had to determine whether to apply the law of the forum state (Louisiana) or the law of the state of the defendant’s incorporation (China) to the imputation of contacts question. The court quoted the Fifth Circuit<sup>133</sup> for the contention that, “under Louisiana law, ‘the law of the state of incorporation governs the determination when to pierce the corporate veil.’”<sup>134</sup> With that, the court concluded that Chinese law applied.<sup>135</sup>

The Fifth Circuit, however, has not answered whether the choice of law analysis for imputation of contacts for the purposes of personal jurisdiction is the same as the analysis for liability based on veil piercing.<sup>136</sup> Instead, the Fifth Circuit characterized this “complicated choice of law question” as an “open issue.”<sup>137</sup> Under Defendants’ interpretation, the Court would apply foreign law because

the Alert companies are not incorporated in the United States. Plaintiff argues in favor of the application of Louisiana law.

\*11 Fed. R. Civ. P. 4(k)(1) provides that a federal court’s jurisdiction is determined in reference to the jurisdiction of the forum state’s courts, which in turn is defined in the state’s long-arm statute.<sup>138</sup> The scope of both federal and state court jurisdiction is, in other words, a creature of the forum state’s law. Moreover, it is the forum state, rather than the state of incorporation, that has the “valid interest in the jurisdictional reach of the forum state’s court (and, derivatively through Rule 4, Fed. R. Civ. P., the federal courts in that state).”<sup>139</sup> The instant case puts this issue in sharp relief.

The application of foreign law to the jurisdictional issue could cause the substantive law of another nation to abrogate the jurisdictional reach of Louisiana.<sup>140</sup> Because the exercise of personal jurisdiction must comport with the Due Process Clause, this result could also allow foreign law to negate the breadth and scope of the Due Process Clause. In this Court’s view, the better approach is to apply the forum state’s law to the jurisdiction issue.

Under Louisiana law, the single business enterprise doctrine treats multiple corporate entities as the same entity, including for jurisdictional purposes.<sup>141</sup> The relationship between the corporate entities is not strictly confined to a parent-subsidiary relationship; the entities may be connected to “any related entity if warranted by the facts.”<sup>142</sup>

The factors considered by Louisiana courts in determining whether entities constitute a single business enterprise include:

common ownership, directors and officers, employees, and offices; unified control; inadequate capitalization; noncompliance with corporate formalities; centralized accounting; unclear allocation of profits and losses between corporations; one corporation paying the salaries, expenses, or losses of another corporation; and undocumented transfers of funds between entities. No one factor is dispositive.<sup>143</sup>

The Court finds that Plaintiff has carried its burden to present a *prima facie* case of personal jurisdiction over Alert Asia under a single business enterprise theory.<sup>144</sup> At the 12(b)(2) stage, uncontroverted allegations in the complaint must be taken as true and conflicts between the parties’ affidavits must be resolved in the plaintiff’s favor.<sup>145</sup> The standard for jurisdictional veil piercing is less stringent than the standard for piercing the corporate veil for liability.<sup>146</sup> Taking each of the factors in order,

US Fire Pump Company, LLC v. Alert Disaster Control (Middle East) Ltd., Slip Copy (2021)

Plaintiff has sufficiently alleged common ownership through exhibits purporting to show that Allcorn is the sole shareholder and managing director of both Alert Asia and Alert Middle East.<sup>147</sup>

\*12 Plaintiff has likewise alleged unified control. Allcorn's affidavit alleges that Alert Asia's governing documents state that "a written resolution signed by a majority of the directors is as valid and effectual as if passed at a formal meeting."<sup>148</sup> Similarly, Alert Middle East's governing documents state that "a decision in writing signed by all members has the same effect as if taken at a General Meeting."<sup>149</sup> Plaintiff stresses the "impotence" of these provisions: Allcorn's alleged status as sole shareholder and director grants him unified control.

Plaintiff further alleges that Alert Middle East and Alert Asia are based in the same office in Singapore.<sup>150</sup> Allcorn's affidavit rebuts this assertion, stating that each company "operates and conducts" business in different parts of the world.<sup>151</sup> The parties' email chain lends credence to Plaintiff's claim given that Allcorn requested that the name of the contracting party be changed from Alert Asia to Alert Middle East, but did not request that the address be changed from one in Singapore to one in the UAE or Cyprus.<sup>152</sup> This conflict must be resolved in favor of the Plaintiff.<sup>153</sup>

Plaintiff does not allege inadequate capitalization but does allege that the Alert companies do not comply with corporate formalities.<sup>154</sup> Allcorn's affidavit effectively rebuts those accusations,<sup>155</sup> but Plaintiff points out that these formalities are toothless given Allcorn's alleged total control over the companies.<sup>156</sup> Even accepting Plaintiff's argument as to the impotence of the formalities, it does not follow that they are not observed. This factor weighs in favor of Defendants.

Plaintiff does not directly allege centralized accounting, but it does allege that the Alert companies "share the same servers, e-mail account, and website."<sup>157</sup> Allcorn's affidavit does not dispute this claim, instead asserting that the Alert companies share those expenses but pay for them proportionally.<sup>158</sup> Plaintiff's argument is buttressed by the fact that Allcorn communicated with Plaintiff through an email account that did not differentiate between the Alert companies and contained an email signature for Alert Asia.<sup>159</sup> Plaintiff does not allege an unclear allocation of profits and losses between corporations; one corporation paying the salaries, expenses, or losses of another corporation; or undocumented transfers of funds between entities.

\*13 Considering Plaintiff's allegations as a whole, and mindful of the 12(b)(2) procedural posture, the Court finds that Plaintiff has sufficiently alleged a single business enterprise theory under Louisiana law for jurisdictional purposes. Plaintiff alleges that the companies are mere alter egos of Allcorn, and the 12(b)(2) evidence submitted supports that claim given the unified control, interchangeable addresses and emails, and apparent lack of other shareholders or directors in any of the Alert companies. Plaintiff has no support as to some of the single business enterprise factors, however, no one factor is dispositive. And at the present procedural posture, where the Court has only now concluded that Defendants are amenable to its authority, Plaintiff has not had the ability to use discovery to obtain evidence to support its claims. Cognizant of that, and in light of the factually supported allegations Plaintiff has levied, the Court concludes that it has personal jurisdiction over Alert Middle East under a single business enterprise theory.<sup>160</sup> Defendants' *Motion to Dismiss* under Rule 12(b)(2) is DENIED.

**B. Improper Service of Process: Rule 12(b)(5) Motion to Dismiss**

Defendant moves for dismissal of the *Amended Complaint* under Rule 12(b)(5) for insufficiency of service of process but notes that the issue may be moot.<sup>161</sup> After Defendants filed their *Motions*, Plaintiff filed affidavits of service for both Alert Middle East and Alert Asia.<sup>162</sup> Plaintiff alleges that Allcorn has been intentionally evading service and asks the Court to authorize alternative service.<sup>163</sup> The burden is on Plaintiff to show that service was valid.<sup>164</sup> Plaintiff asserts that service was valid as to Alert Asia under *Fed. R. Civ. P. 4(f)(2)(A) and 4(h)(2)*.<sup>165</sup> Plaintiff asserts that service was valid as to Alert Middle East under *Fed. R. Civ. P. 4(f)(1), 4(f)(2)(A), and 4(h)(2)*, as well as Article 10(c) of the Hague Service Convention.<sup>166</sup>

*1. Sufficiency of Service as to Alert Asia*

Alert Asia was properly served at its headquarters in Singapore. *Fed. R. Civ. P. Rule 4(f)(h)(2)* provides that a foreign corporation may be served in any manner prescribed by *Rule 4(f)*. *Rule 4(f)(2)(A)* provides that "if there is no internationally agreed means" the defendant may be served "by a method reasonably calculated to give notice[ ] as prescribed by the foreign country's law for

US Fire Pump Company, LLC v. Alert Disaster Control (Middle East) Ltd., Slip Copy (2021)

service in that country in an action in its courts of general jurisdiction ...”.

Singapore is not a party to the Hague Service Convention,<sup>167</sup> and the parties have not identified another internationally agreed upon means by which Alert Asia has, or has not, been served. Singapore law authorizes service of process by leaving a copy of the document at the registered or principal office of the corporation.<sup>168</sup> Plaintiff has filed the affidavit of its Singapore process server who attests that he served Alert Asia in the above manner.<sup>169</sup> This service, coupled with the fact that Defendants consider the issue effectively moot, is “evidence satisfying the court that the summons and complaint were delivered to the addressee.”<sup>170</sup> Service on Alert Asia was proper.

### 2. Sufficiency of Service as to Alert Middle East

Alert Middle East was properly served at its corporate address in Cyprus. Cyprus is a party to the Hague Service Convention.<sup>171</sup> Alert Middle East was served by a Cyprus process server at its registered address in Cyprus, and Alert Middle East’s secretary signed the summons as proof of service.<sup>172</sup> This qualifies as service under [Fed. R. Civ. P. 4\(f\)\(1\)](#) because, under Article 10(c) of the Hague Service Convention, service can be made “directly” by “competent officials in the State of destination.” Article 10(c) does not specify a method for establishing proof of service.<sup>173</sup> “In instances in which service is effected abroad and the applicable international agreement allows other means of service, [\[Fed. R. Civ. P.\] 4\(l\)](#) states that proof of service shall ‘include a receipt signed by the addressee or other evidence of delivery to the addressee satisfactory to the court.’”<sup>174</sup> In this case, Alert Middle East’s secretary signed a copy of the summons, which has been filed with the Court, so Plaintiff has provided proof of service as to Alert Middle East.<sup>175</sup>

### 3. Insufficiency of Service as to Allcorn

\*14 Plaintiff requests that the Court order alternative service pursuant to [Fed. R. Civ. P. 4\(f\)\(3\)](#). Plaintiff alleges that Allcorn has been intentionally evading service.<sup>176</sup> Defendants deny this.<sup>177</sup> Defendants do not contest that Plaintiff’s Singapore process server attempted to serve Allcorn three times to no avail.<sup>178</sup> Additionally, Defendants characterize “any service issues [as] effectively moot.”<sup>179</sup>

The Fifth Circuit has not provided an analysis for district courts to follow when considering whether to order alternative service. Other district courts within the Fifth Circuit have followed analyses provided by the Ninth and District of Columbia Circuits.<sup>180</sup>

The Ninth Circuit has noted that “[t]he decision whether to allow alternative methods of serving process under [Rule 4\(f\)\(3\)](#) is committed to the sound discretion of the trial court.”<sup>181</sup> The Ninth Circuit has also stated that “court-directed service under [Rule 4\(f\)\(3\)](#) is as favored as service under [Rule 4\(f\)\(1\)](#) or [Rule 4\(f\)\(2\)](#).”<sup>182</sup> District courts have permitted alternative means of service if the plaintiff can establish: “(1) a showing that the plaintiff has reasonably attempted to effectuate service on the defendant, and (2) a showing that the circumstances are such that the court’s intervention is necessary.”<sup>183</sup> Of course, any method of service must satisfy due process by being “notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them the opportunity to present their objections.”<sup>184</sup>

Alternative service on Allcorn through his United States-based counsel is appropriate in this case.<sup>185</sup> Plaintiff has attempted to serve him three times at his home address in Singapore without success. Given the international scope of Allcorn’s businesses and his dual residency in the UAE and Singapore,<sup>186</sup> Allcorn’s geographical flexibility justifies Plaintiff’s difficulties in serving him. Moreover, under the circumstances of this case, where three<sup>187</sup> of Allcorn’s businesses have been served, and he is alleged to be personally liable on their behalf, Allcorn has notice of the action pending against him. The fact that all Defendants share one legal team and file jointly bolsters this contention. Moreover, Allcorn has provided an affidavit, which further demonstrates that he has been apprised of the pendency of the action and afforded the opportunity to present his objections.<sup>188</sup> Plaintiff is ordered to serve Allcorn through his United States-based counsel.<sup>189</sup> Defendants’ *Motion to Dismiss*<sup>190</sup> under Rule 12(b)(5) is DENIED.

### C. 12(b)(6) Motion to Dismiss

\*15 Defendants seek to dismiss Plaintiff’s *Amended Complaint*.<sup>191</sup> Plaintiff asserts five causes of action against three defendants, requests multiple remedies, and advances the application of single business enterprise theory.<sup>192</sup>

US Fire Pump Company, LLC v. Alert Disaster Control (Middle East) Ltd., Slip Copy (2021)

Plaintiff asserts (1) breach of contract; (2) bad faith breach of contract; (3) fraud; (4) a LUTPA violation; and (5) a suit on an open account as to all Defendants.<sup>193</sup> Plaintiff alleges that: Alert Middle East is liable as the contracting party; Allcorn is personally liable in contract and for his fraudulent actions; and Alert Asia is liable for the actions of Allcorn/Alert Middle East under a single business enterprise theory.<sup>194</sup>

When deciding a Rule 12(b)(6) motion to dismiss, “[t]he ‘court accepts all well-pleaded facts as true, viewing them in the light most favorable to the plaintiff.’”<sup>195</sup> The Court may consider “the complaint, its proper attachments, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice.”<sup>196</sup> “To survive a Rule 12(b)(6) motion to dismiss, the plaintiff must plead ‘enough facts to state a claim to relief that is plausible on its face.’”<sup>197</sup>

In *Twombly*, the United States Supreme Court set forth the basic criteria necessary for a complaint to survive a Rule 12(b)(6) motion to dismiss. “While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff’s obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.”<sup>198</sup> A complaint is also insufficient if it merely “tenders ‘naked assertion[s]’ devoid of ‘further factual enhancement.’”<sup>199</sup> However, “[a] claim has facial plausibility when the plaintiff pleads the factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.”<sup>200</sup> In order to satisfy the plausibility standard, the plaintiff must show “more than a sheer possibility that the defendant has acted unlawfully.”<sup>201</sup> “Furthermore, while the court must accept well-pleaded facts as true, it will not ‘strain to find inferences favorable to the plaintiff.’”<sup>202</sup> On a motion to dismiss, courts “are not bound to accept as true a legal conclusion couched as a factual allegation.”<sup>203</sup>

### 1. Breach of Contract

\*16 Defendants give short shrift to Plaintiff’s breach of contract claim. Defendants’ most thorough mention of Plaintiff’s breach of contract claim comes in a footnote: “Defendants dispute that any agreement or binding commitment was reached. Instead, although the parties did explore a potential sale opportunity, no agreement was reached, and no commitment was ever made, to sell or purchase the equipment or materials.”<sup>204</sup> Plaintiff, on the other hand, cites copiously to the *Amended Complaint*

which in turn holds bountiful citations to the parties’ alleged email chain.<sup>205</sup> The Court may consider the parties’ alleged email chain<sup>206</sup> at the 12(b)(6) stage because it is attached to the *Amended Complaint* and referenced therein.<sup>207</sup>

The facts alleged in the *Amended Complaint* and supported by reference to the uncontroverted email chain could plausibly fit within the hornbook offer–acceptance paradigm. On December 5, 2018, a Plaintiff’s representative emailed a “proposal” to Defendants.<sup>208</sup> On December 6, after further communication between the parties, Plaintiff’s representative provided Defendants with a draft contract.<sup>209</sup> On December 8, Defendants requested revisions and indicated they would sign the contract after those revisions were made.<sup>210</sup> On December 10, Allcorn/Alert Middle East thanked Plaintiff’s representative for sending another revised proposal and contract and stated “[t]he revised Service Quotation and Contract shall be duly signed, scanned, and returned to you immediately upon our arrival at the office in the morning.”<sup>211</sup> On December 17, Allcorn/Alert Middle East confirmed the invoices Plaintiff’s representative had sent save one issue.<sup>212</sup> Viewed in the light most favorable to Plaintiff, Allcorn/Alert Middle East’s statement from a January 29, 2019 email acknowledges that Allcorn/Alert Middle East had an “outstanding account” with Plaintiff: “[p]lease rest assured that we are progressing forward to resolve the outstanding account with ENOC and ultimately with yourselves, as we truly look forward to securing the equipment within our inventory.”<sup>213</sup>

Plaintiff has sufficiently alleged a contract existed because the above emails, and others within the chain, could plausibly be a series of offers and counteroffers, and an agreement as to the terms. It also appears that Allcorn/Alert Middle East recognized that respective rights and obligations were agreed upon. Plaintiff further alleges that Allcorn/Middle East never paid on the alleged contract.<sup>214</sup> These two allegations, a purported contract and Allcorn/Alert Middle East’s failure to perform under it, are sufficient to carry Plaintiff’s breach of contract beyond the 12(b)(6) stage—at least for some of the Defendants.

\*17 Plaintiff asserts that Alert Middle East is liable contractually; Allcorn is liable personally, both contractually and as a result of his alleged fraud; and Alert Asia is liable under a single business enterprise theory. The first copy of the draft contract provided that it was between Alert Asia, Allcorn, and Plaintiff.<sup>215</sup> Allcorn/Alert Middle East explicitly requested that the “client name” portion of the contract be amended to read only Alert Middle East.<sup>216</sup> Plaintiff complied, and it was

US Fire Pump Company, LLC v. Alert Disaster Control (Middle East) Ltd., Slip Copy (2021)

only later versions of the contract that Alert Middle East, through Allcorn, allegedly assented to. This chain of events illustrates two things about the alleged contract: (1) the parties *did not* intend for Allcorn to be contractually liable, and (2) the parties *did* intend for Alert Middle East to be liable. Allcorn cannot be held personally liable under a contract theory as there is a lack of allegations that plausibly establish Plaintiff's contractual privity with Allcorn. Alert Asia's liability under a single business enterprise theory will be discussed below.

## 2. Bad Faith Breach of Contract

Plaintiff's claim for bad faith breach of contract fails. Plaintiff alleges that Allcorn/Alert Middle East breached in bad faith in three ways: (1) by lying to Plaintiff about the existence of a contract between Alert Middle East and ENOC, (2) by guaranteeing that Alert Middle East would pay for the equipment when it either lacked the ability to pay or did not intend to, and (3) by intentionally refusing to perform under the alleged contract.<sup>217</sup> Defendants counter that Plaintiff's allegation about the non-existence of a contract between Alert Middle East and ENOC is directly contradicted by the signed contract between Alert Middle East and ENOC that Plaintiff filed as an exhibit with the *Amended Complaint*.<sup>218</sup> Defendants further argue that Plaintiff is merely alleging that Allcorn/Alert Middle East breached the contract and that, because Plaintiff does not allege sufficient facts to show that the breach was malicious or fraudulent, Plaintiff has not alleged sufficient facts to support its claim for bad faith breach of contract.<sup>219</sup>

Louisiana Civil Code article 1983 provides, "[c]ontracts must be performed in good faith." The Louisiana Supreme Court has stated:

[a]n obligor is in bad faith if he intentionally and maliciously fails to perform his obligations. The jurisprudence has consistently held that bad faith as used in the context of La. Civ. Code art. 1997 generally implies actual or constructive fraud or a refusal to fulfill contractual obligations, not an honest mistake as to actual rights or duties....Courts have recognized bad faith is more than mere bad judgment or negligence; it implies the conscious doing of a wrong for dishonest or morally questionable motives.<sup>220</sup>

Plaintiff argues that "[t]hese fraudulent statements [concerning the ENOC contract and Allcorn/Alert Middle East's ability to pay] were made intentionally to induce Plaintiff, a Louisiana company, to enter into the

agreement with Alert Middle East ...".<sup>221</sup> The Court finds plausible Plaintiff's characterization of the statements as occurring before the parties allegedly contracted. Thus, by Plaintiff's allegations, these statements came before the alleged contract was formed and therefore cannot be the basis for a breach of the duty to perform in good faith.<sup>222</sup>

Plaintiff also claims that Allcorn/Alert Middle East breached in bad faith by intentionally choosing not to perform. This allegation falls short of "maliciously" failing to perform. Even if Allcorn/Alert Middle East breached the alleged contract, the simple fact that they did so does not mean they did so in bad faith. The Court is unwilling to allow the appendage of the word "malicious" to a breach of contract claim to establish a cause of action for bad faith breach in the absence of additional factual allegations that "nudge" the "malicious" component across the line from conceivable to plausible.<sup>223</sup> In light of the foregoing, Plaintiff's claims for bad faith breach of contract are dismissed as to all Defendants.

## 3. Fraud

\*18 Turning to Plaintiff's fraud claims, "[t]he elements of a Louisiana delictual fraud or intentional misrepresentation cause of action are: (a) a misrepresentation of a material fact, (b) made with the intent to deceive, and (c) causing justifiable reliance with resultant injury."<sup>224</sup> "Fraud is a misrepresentation or a suppression of the truth made with the intention either to obtain an unjust advantage for one party or to cause a loss or inconvenience to the other."<sup>225</sup>

Plaintiff's fraud claims are subject to the heightened pleading requirements of Fed. R. Civ. P. 9(b).<sup>226</sup> A party claiming fraud must "state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally."<sup>227</sup> "[T]he pleading requirements of Rule 9(b) may be to some extent relaxed where ... the facts relating to the alleged fraud are peculiarly within the perpetrator's knowledge."<sup>228</sup> "At a minimum, Rule 9(b) requires allegations of the particulars of time, place, and contents of the false representations, as well as the identity of the person making the misrepresentation and what he obtained thereby."<sup>229</sup> "Put simply, Rule 9(b) requires the who, what, when, where, and how to be laid out."<sup>230</sup>

Plaintiff alleges that Allcorn/Alert Middle East made the following fraudulent statements or intentional misrepresentations: (1) Allcorn/Alert Middle East had a

US Fire Pump Company, LLC v. Alert Disaster Control (Middle East) Ltd., Slip Copy (2021)

contract with ENOC and (2) Allcorn/Alert Middle East would pay for the equipment.<sup>231</sup>

Plaintiff's claim that Allcorn/Alert Middle East fraudulently told Plaintiff they had a contract with ENOC fails as pled. To be sure, Plaintiff identifies no fewer than nine communications via email and phone on various dates when Allcorn/Alert Middle East allegedly told Plaintiff that Allcorn/Alert Middle East had a contract with ENOC.<sup>232</sup> However, Plaintiff offers nothing from which the Court can draw the reasonable inference that Allcorn/Alert Middle East did not have a contract with ENOC. In fact, the only fact-bearing allegation on the issue is a copy of a signed contract between Allcorn/Alert Middle East and ENOC—which Plaintiff introduced.<sup>233</sup> Plaintiff asserts that this illustrates the depths of Allcorn/Alert Middle East's fraudulent behavior, but offers nothing more than suspicions and bare allegations to disprove the validity of the contract. "Conclusory allegations and unwarranted deductions of fact are not admitted as true, especially when such conclusions are contradicted by facts disclosed by a document appended to the complaint."<sup>234</sup> Plaintiff's fraud claim under this theory must be dismissed.

\*19 Plaintiff claims that Allcorn/Alert Middle East's statements that they intended to perform were fraudulent and enticed Plaintiff to enter into the alleged contract. This is best characterized as a claim for fraudulent inducement, which has the same elements as a basic fraud claim.<sup>235</sup> This claim differs from the bad faith breach of contract claim dismissed above in that this claim centers on Allcorn/Alert Middle East's actions before the parties contracted, rather than Allcorn/Alert Middle East's actions during the performance of the contract. Moreover, this claim is consistent with Plaintiff's alternative theory that Allcorn/Alert Middle East induced Plaintiff to contract with them in the hopes of leveraging that contract into one with ENOC, regardless of whether Allcorn/Alert Middle East accepted the order it placed with Plaintiff.<sup>236</sup>

Regarding fraudulent inducement, the Fifth Circuit has explained that:

[G]enerally, there is no inference of fraudulent intent not to perform from the mere fact that a promise made is subsequently not performed. However, where substantial nonperformance is coupled with other probative factors, such as where only a short time elapses between the making of the promise and the refusal to perform it, and there is no change in the circumstances, an intent not to perform when the promise was made may, in appropriate circumstances, be properly inferred.<sup>237</sup>

"[T]he requisite intent must be coupled with prompt,

substantial nonperformance to demonstrate fraud in the inducement. It must be shown that the defendant promptly followed through on its intent not to perform by substantially failing to carry out its obligations under the contract."<sup>238</sup>

Defendants argue that this claim is merely one for breach of contract and not cognizable as a fraud action.<sup>239</sup> Plaintiff merely distinguishes the cases Defendants cite without providing further support for its own argument.<sup>240</sup>

Plaintiff's theory and the facts of this case make this a close call. A fraud claim cannot piggyback on a breach of contract claim solely based on an allegation that the alleged contract-breaker never intended to perform; that was Plaintiff's bad faith breach of contract theory. Plaintiff's theory here is slightly different. Here, Plaintiff alleges that Allcorn/Alert Middle East convinced Plaintiff to contract with them based on fraudulent promises of intent to perform. Further, Plaintiff alleges the "plus factors" that the Fifth Circuit has stated support an actionable fraudulent inducement claim in this context.

First, Allcorn/Alert Middle East's nonperformance was prompt. It is difficult to place exactly when Allcorn/Alert Middle East allegedly breached, but they sent a payment timeline on December 7, 2018 that provided for payment to Plaintiff on December 17.<sup>241</sup> Allcorn/Alert Middle East confirmed the validity of the invoices on December 17, and the situation deteriorated from there, eventually culminating in Plaintiff's counsel sending Defendants a demand letter on April 4, 2019.<sup>242</sup>

Second, Allcorn/Alert Middle East's nonperformance was more than "substantial"—it was total. Their only obligation was to pay under the alleged contract, and they failed to do so.

\*20 Third, the Fifth Circuit has stated that, in this context, a lack of a change in circumstances is important.<sup>243</sup> Plaintiff asserts *ad nauseum* that Allcorn/Alert Middle East backed out of the contract because Allcorn/Alert Middle East's contract with ENOC either fell through or never existed, but Plaintiff provides no factual bases for these claims.<sup>244</sup> Defendants, for their part, provide no explanation why Allcorn/Alert Middle East backed out of the order. There are simply no allegations to suggest that there was a change in circumstances between December 2018 and April 2019 that could explain Allcorn/Alert Middle East backing out of the alleged contract. Under the applicable precedent, this leads to the inference that Allcorn/Alert Middle East never intended to perform, as Plaintiff alleges.<sup>245</sup> Of course, were either party to introduce evidence that supports Plaintiff's claims as to

US Fire Pump Company, LLC v. Alert Disaster Control (Middle East) Ltd., Slip Copy (2021)

the ENOC contract, there would be a change in circumstances that would considerably weaken that inference.

The Court is mindful of the procedural posture of this case. All reasonable inferences must be drawn in favor of the Plaintiff, and the Plaintiff's version of the facts is accepted as true unless entirely unsubstantiated. Plaintiff has alleged that Allcorn/Alert Middle East told Plaintiff that they would perform under a contract, then entirely failed to do so within a short period of time. Because of Plaintiff's complete failure to set forth more than conclusory allegations regarding the ENOC contract, there is no basis to conclude that there was a change of circumstances that would justify Allcorn/Alert Middle East's alleged breach. Reading the facts and law generously, the Court finds it plausible that Allcorn/Alert Middle East never intended to perform.

Because it is plausible that if Allcorn/Alert Middle East never intended to perform, representations that they would perform were misrepresentations. The last prong of the fraudulent inducement claim is detrimental reliance, and Plaintiff alleges that it relied on these misrepresentations by contracting with Allcorn/Alert Middle East and producing the equipment Allcorn/Alert Middle East allegedly ordered.<sup>246</sup>

Plaintiff's allegations satisfy the "bare minimum" of Fed. R. Civ. P. 9(b). Plaintiff alleges that Allcorn/Alert Middle East made the misrepresentations regarding intent to perform via email and phone throughout December 2018 and into 2019,<sup>247</sup> and that the reason for doing so was to induce Plaintiff to enter into a contract with Allcorn/Alert Middle East and build the equipment for them.<sup>248</sup> "Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally," and Plaintiff makes the requisite allegations.<sup>249</sup> As such, Plaintiff's fraud theory based on Allcorn/Alert Middle East telling Plaintiff they would perform survives the *Motion*.

#### 4. LUTPA<sup>250</sup>

Plaintiff claims that Defendants violated the LUTPA. Plaintiff asserts that it has standing under the LUTPA as a result of the Louisiana Supreme Court's "holding" in *Cheremie Services, Inc. v. Shell Deepwater Production, Inc.*<sup>251</sup> However, only three out of seven justices joined the portion of the opinion that addressed LUTPA standing; as such, *Cheremie* is not binding.<sup>252</sup> While the Court will assume for the purposes of this *Ruling* that the plurality opinion in *Cheremie* and subsequent state appellate and

federal district court decisions reflect the current state of Louisiana law, some courts have held the opposite.<sup>253</sup>

\*21 In many ways, the foregoing fraud analysis obviates the need for a deep dive into the LUTPA. The parties frame the LUTPA argument the same way as the fraud argument; Defendants argue that Fed. R. Civ. P. 9(b) is not satisfied and that the lack of "actionable fraud" forecloses Plaintiff's LUTPA claim.<sup>254</sup> Plaintiff rehashes its arguments in favor of a determination that its fraud claims are plausible.<sup>255</sup>

A majority of the *Cheremie* court agreed:

Louisiana Revised Statutes § 51:1405(A) [ (the LUTPA) ] prohibits any 'unfair or deceptive acts or practices in the conduct of any trade or commerce ....' It has been left to the courts to decide, on a case-by-case basis, what conduct falls within the statute's prohibition...The courts have repeatedly held that, under this statute, the plaintiff must show the alleged conduct "offends established public policy and ... is immoral, unethical, oppressive, unscrupulous, or substantially injurious."<sup>256</sup>

Plaintiff's claim that Allcorn/Alert Middle East defrauded them by stating that they had a contract with ENOC fails for the same reasons as above. Plaintiff offers nothing more than conclusory allegations to suggest that Allcorn/Alert Middle East did not have a contract with ENOC. In fact, Allcorn/Alert Middle East's assertions that there was a contract are buttressed by Plaintiff's introduction of a signed contract between Allcorn/Alert Middle East and ENOC into the record.<sup>257</sup> Plaintiff's LUTPA claim under this theory fails and is dismissed.

Plaintiff's other LUTPA theory is based on the same facts as its fraud in the inducement claim so the preceding analysis is dispositive. Plaintiff has sufficiently alleged that Alert Middle East/Allcorn never intended to perform and that its statements to the contrary were fraudulent. Plaintiff has thus alleged an "element of fraud, misrepresentation, deception or other unethical conduct" sufficient to state a claim for relief under the LUTPA.<sup>258</sup> Defendants' *Motion* is denied as to this theory of recovery under the LUTPA.

#### 5. Suit on an Open Account

Plaintiff argues that it has adequately pled a suit on an open account under La. R.S. § 2871, and as such is entitled to attorney's fees if its suit is successful.<sup>259</sup> Defendants argue that this is not a suit on an open account

US Fire Pump Company, LLC v. Alert Disaster Control (Middle East) Ltd., Slip Copy (2021)

because an open account “requires ‘a line of credit [ ] running and is open to future modification because of the expectations of prospective business dealings [where s]ervices are recurrently granted over a period of time.’ ”<sup>260</sup> Plaintiffs cite the Louisiana Supreme Court’s decision in *Frey Plumbing Co., Inc. v. Foster* for the proposition that “ ‘La. R.S. 9:2781(D)<sup>261</sup> must be applied as written. Under a plain reading of that statute, there is no requirement that there must be one or more transactions between the parties, nor is there any requirement that the parties must anticipate future transactions.’ ”<sup>262</sup> Plaintiffs point out that *Flavor-Pic Tomato*, quoted by Defendants, relies on a pre-*Frey* Louisiana court of appeal case.<sup>263</sup>

\*22 An examination of *Frey* informs the analysis. In *Frey*, the appellate court below held that the plaintiff-plumber’s work order was not an open account because either (1) there was only one transaction between the parties and no inclination they intended more or, alternatively, (2) the work order for plumbing services did not fall within the definition of a professional services contract for the purposes of the statute.<sup>264</sup> The Louisiana Supreme Court addressed both arguments with the plain language of the statute, which does not require multiple transactions, anticipated future transactions, or that the account be for professional services.<sup>265</sup> The court’s conclusion that “La. R.S. 9:2781(D) must be applied as written” must be read in context.

The majority of Louisiana courts to examine the issue, both federal and state, have concluded that *Frey* did not create a right to attorney’s fees for every breach of contract action.<sup>266</sup> Rather, while *Frey* overruled prior case law that required multiple transactions and/or that the parties anticipate future transactions, it did not affect the basic distinction between an action on an open account and an action on a contract.<sup>267</sup> An open account is characterized by an indeterminacy of a term, especially total price.<sup>268</sup>

Plaintiff argues that an open account exists because Defendants purported to seek a long-term business relationship, Defendants ordered multiple items over several days, and Plaintiff created multiple invoices.<sup>269</sup> These allegations are not sufficient to allege that the account between the parties was an open account. The defining characteristic of an open account, indeterminacy of total price, is absent as is evidenced by the invoices, quotes, and proposals attached to the *Amended Complaint*. Moreover, there is no indeterminacy as to any of the terms of the alleged contracts based on the

invoices, quotes, and proposals. Plaintiff has failed to allege that this is a suit on an open account, so the claim is dismissed.

Plaintiff alleges that Alert Middle East is liable for the actions of Allcorn/Alert Middle East under a single business enterprise theory.<sup>270</sup> Defendants argue that Plaintiff’s required showing is under foreign law.<sup>271</sup> Defendants are correct.

\*23 The Fifth Circuit has held that under Louisiana law the state of incorporation governs the determination of whether to pierce the corporate veil.<sup>272</sup> It follows that either Cyprus (Alert Middle East’s state of incorporation) or Singapore law (Alert Asia’s) controls the analysis. The parties have not provided the Court with the resources necessary for it to rule based on foreign law. Thus, the Court orders supplemental briefing on the choice of law issue and the application of Singapore or Cyprus law, as appropriate, to the single business enterprise theory.

Defendants also seek to dismiss Plaintiff’s request of specific performance as a remedy;<sup>273</sup> Plaintiff opposes.<sup>274</sup> In terms of both procedure and discovery, this case is in its infancy, and the Court will defer ruling on remedies until the parties have further developed the facts.

### III. CONCLUSION

For the reasons set forth above, Defendants’ *Motion to Dismiss*<sup>275</sup> under Rule 12(b)(2) and Rule 12(b)(5) is DENIED. Defendants’ *Partial Motion to Dismiss*<sup>276</sup> under Rule 12(b)(6) is GRANTED in part and DENIED in part. The Court requests supplemental briefing on: (1) what country’s law controls the single business enterprise theory issue, and (2) the application of that law to the facts of this case. Defendants shall have 20 days from the date of this *Ruling* to address these arguments. Plaintiff will have 10 days from the filing of Defendants’ supplemental brief to respond. The Parties will attach as exhibits every document referenced therein.

**IT IS SO ORDERED.**

### All Citations

Slip Copy, 2021 WL 296073

Footnotes

US Fire Pump Company, LLC v. Alert Disaster Control (Middle East) Ltd., Slip Copy (2021)

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- 1 Rec. Doc. No. 44.
- 2 Rec. Doc. No. 45. Despite being styled a “Motion for Partial Dismissal” Defendants’ requested relief is dismissal of the entire  
*Amended Complaint*. Rec. Doc. No. 45-1, p. 8.
- 3 Rec. Doc. No. 46; Rec. Doc. No. 47.
- 4 Rec. Doc. No. 52; Rec. Doc. No. 53.
- 5 Rec. Doc. No. 44.
- 6 Rec. Doc. No. 45.
- 7 Rec. Doc. No. 38, p. 1
- 8 *Id.* at p. 12.
- 9 Rec. Doc. No. 44-2, p. 2.
- 10 *Id.*
- 11 Rec. Doc. No. 38, p. 5 (cleaned up).
- 12 *Id.* at pp. 4–5; Rec. Doc. No. 46-4, p. 2; Rec. Doc. No. 46-3, p. 1.
- 13 Rec. Doc. No. 44-2, pp. 1–2.
- 14 *Id.* at p. 3.
- 15 Rec. Doc. No. 38, p. 13.
- 16 *Id.* at pp. 13–29.
- 17 *Id.* at p. 11.
- 18 Rec. Doc. No. 38, pp. 27–28; Rec. Doc. No. 38-5.
- 19 Rec. Doc. No. 38, pp. 27–28.
- 20 *Id.* at pp. 28–29.
- 21 *Id.* at pp. 30–47.
- 22 *Id.* at pp. 48–49.
- 23 Plaintiff argues that the minimum contacts test differs depending on the theory of liability. Rec. Doc. No. 46, pp. 11–16.

US Fire Pump Company, LLC v. Alert Disaster Control (Middle East) Ltd., Slip Copy (2021)

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- 24 *Id.* at pp. 16–18.
- 25 *Petroleum Helicopters, Inc. v. Avco Corporation*, 834 F.2d 510, 512 (5th Cir.1987).
- 26 Plaintiff does not allege general jurisdiction.
- 27 *Luv N’ Care, Ltd., v. Insta–Mix, Inc.*, 438 F.3d 465, 469 (5th Cir. 2006) (internal citations omitted).
- 28 *Choice Healthcare, Inc. v. Kaiser Found. Health Plan of Colo.*, 615 F.3d 364, 368 (5th Cir. 2010) (quoting *Walk Haydel & Assocs., Inc. v. Coastal Power Prod. Co.*, 517 F.3d 235, 243 (5th Cir.2008)).
- 29 *Seifert v. Helicopteros Atuneros, Inc.*, 472 F.3d 266, 271 (5th Cir. 2006).
- 30 *Ruston Gas Turbines, Inc. v. Donaldson Co., Inc.*, 9 F.3d 415, 419 (5th Cir. 1993) (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980)). *See also Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (“This ‘purposeful availment requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of ‘random,’ ‘fortuitous,’ or ‘attenuated’ contacts.”) (citations omitted); *In re Chinese Manufactured Drywall Products Liability Litigation*, 742 F.3d 576, 588 (5th Cir. 2014).
- 31 *Seifert*, 472 F.3d at 271.
- 32 *Ruston Gas Turbines*, 9 F.3d at 421 (internal citations omitted).
- 33 *Stuart v. Spademan*, 772 F.2d 1185, 1192 (5th Cir. 1985).
- 34 *Trinity Indus., Inc. v. Myers & Assoc., Ltd.*, 41 F.3d 229, 230–31 (5th Cir. 1995).
- 35 *D.J. Inv., Inc. v. Metzeler Motorcycle Tire Agent Gregg, Inc.*, 754 F.2d 542, 546 (5th Cir. 1985).
- 36 *Walk Haydel & Assocs., Inc. v. Coastal Power Prod. Co.*, 517 F.3d 235, 241–42 (5th Cir. 2008) (holding that the district court erred in requiring a plaintiff to establish more than a *prima facie* case even after a limited pretrial evidentiary hearing) (internal citations and quotations omitted).
- 37 *Id.*
- 38 Rec. Doc. No. 46, p. 11; Rec. Doc. No. 38, p. 13.
- 39 Rec. Doc. No. 44-1, p. 5–6.
- 40 *Id.*; Rec. Doc. No. 44-3.
- 41 Rec. Doc. No. 44-3, p. 2.
- 42 *Id.*
- 43 *Id.* at p. 3. Defendants introduced David Jackson’s affidavit into the record. *See also*, Rec. Doc. No. 38-11, p. 2.
- 44 Rec. Doc. No. 38-1, p. 1; The first email in the chain is from David Jackson of ESS to Allcorn with Plaintiff’s staff cc’d directing

US Fire Pump Company, LLC v. Alert Disaster Control (Middle East) Ltd., Slip Copy (2021)

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Allcorn to contact those staff members regarding pricing and delivery. One hour and twenty-six minutes later, Allcorn sent his first email to Plaintiff.

45 *Id.* at p. 5.

46 *Id.* at p. 7. “Further to our call earlier this evening ...” *Id.*

47 *Id.* at pp. 11–15. Which bound Allcorn personally.

48 *Id.*

49 The Court uses the term “Defendants” loosely. The pictures depict “Alert” pumps and monitors but do not indicate which Alert company they belong to.

50 Presumably so that Plaintiff knew exactly what Defendants wanted.

51 Rec. Doc. No. 38-1, p. 16.

52 *Id.* at p. 25.

53 The Emirates National Oil Company.

54 *Id.* at p. 26.

55 *Id.*

56 *Id.* at p. 28.

57 *Id.* at pp. 67–72.

58 *Id.* at p. 73.

59 *Id.* at p. 79.

60 Rec. Doc. No. 38-15, pp. 1–19.

61 Rec. Doc. No. 38-2, pp. 1–6.

62 *Id.* at p. 6.

63 *Id.* at p. 16.

64 Rec. Doc. No. 38-3, p. 16. This is indicative of there having been a phone call or some other communication prior. Rec. Doc. No. 47, p. 16.

65 *Id.* at p. 15.

66 Rec. Doc. No. 38-6, pp. 1–6.

US Fire Pump Company, LLC v. Alert Disaster Control (Middle East) Ltd., Slip Copy (2021)

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- 67 Rec. Doc. No. 38-11, pp. 1–4.
- 68 Rec. Doc. No. 46, pp. 11–18.
- 69 *Id.* at p. 11. Plaintiff’s heading reads, “1. Sufficient Minimum Contacts: Contract Claims v. Alert Middle East, Allcorn”.
- 70 *Escoto v. U.S. Lending Corp.*, 95-2692 (La. App. 4 Cir. 5/22/96), 675 So. 2d 741, 745, *writ denied*, 96-1634 (La. 9/27/96), 679 So. 2d 1343 (quoting *Cobb Industries, Inc. v. Hight*, 469 So.2d 1060, 1063 (La. App. 2nd Cir.1985)).
- 71 *Id.*
- 72 Rec. Doc. No. 44-2, p. 1.
- 73 *Fryar v. Westside Habilitation Ctr.*, 479 So. 2d 883, 890 (La. 1985).
- 74 *Id.*
- 75 Rec. Doc. No. 46-3, p. 1; Rec. Doc. No. 44-2, p. 1; Rec. Doc. No. 38, p. 4.
- 76 Rec. Doc. No. 38-1, p. 6.
- 77 Rec. Doc. No. 38-11, p. 2.
- 78 Rec. Doc. No. 44-2, p. 1.
- 79 *D.J. Inv., Inc. v. Metzeler Motorcycle Tire Agent Gregg, Inc.*, 754 F.2d 542, 546 (5th Cir.1985).
- 80 Rec. Doc. No. 38-2, pp. 1–6; Rec. Doc. No. 38-1, p. 79.
- 81 Rec. Doc. No. 44-1, p. 8.
- 82 700 F.2d 1026 (5th Cir. 1983); Rec. Doc. No. 44-1 pp. 8–11.
- 83 Rec. Doc. No. 46, pp. 10–15.
- 84 700 F.2d 1027 (5th Cir. 1983).
- 85 *Id.* at 1027–1029.
- 86 *Id.*
- 87 *Id.*
- 88 *Id.*

US Fire Pump Company, LLC v. Alert Disaster Control (Middle East) Ltd., Slip Copy (2021)

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- 89 “Considerations such as the quality, nature, and extent of the activity in the forum, the foreseeability of consequences within the forum from activities outside it, and the relationship between the cause of action and the contacts, relate to whether to can be said that the defendant’s actions constitute ‘purposeful ailment.’ ” *Id.*
- 90 *Id.* at 1028–30.
- 91 *Id.*
- 92 *Id.*
- 93 *Id.*
- 94 *Id.* The court was distinguishing *Product Promotions, Inc. v. Cousteau* 495 F.2d 483 (5th Cir.1974) wherein the nonresident defendant had to deliver the product in the forum state, and the court concluded that sufficed to establish minimum contacts.
- 95 Rec. Doc. No. 44-3, pp. 1–3. Defendants argue that because Plaintiff’s agent made the first contact, Plaintiff made first contact. Defendants provide no support for this assertion, and while the Court is cognizant that to some extent the actions of an agent within the scope of his authority are imputed to the principal, application of that legal fiction in the instant case ignores the undisputed fact that ESS contacted Defendants, then Defendants contacted Plaintiff. Absent a showing that Plaintiff explicitly directed ESS to contact Defendants, the Court is not willing to accept that Plaintiff’s agent’s contact of Defendants, apparently unbeknownst to Plaintiff, has the same legal effect as Plaintiff contacting Defendants directly.
- 96 Rec. Doc. No. 44-3, p. 2. The Court “must resolve all undisputed facts submitted by the plaintiff, as well as all facts contested in the affidavits, in favor of jurisdiction.” *Luv N’ Care, Ltd. v. Insta-Mix, Inc.*, 438 F.3d 465, 469 (5th Cir. 2006).
- 97 *Hydrokinetics*, 700 F.2d at 1030.
- 98 444 U.S. 286, 297 (1980).
- 99 *Pervasive Software Inc. v. Lexware GmbH & Co. KG*, 688 F.3d 214, 227–29 (5th Cir. 2012).
- 100 *Id.* at 228 (internal citations omitted).
- 101 *Id.* (internal citations omitted).
- 102 681 F.2d 1003 (5th Cir. 1982); Rec. Doc. No. 46, pp. 21–22.
- 103 *Id.* at 1004.
- 104 *Id.* at 1005.
- 105 *Id.*
- 106 *Id.*
- 107 *Id.* at 1007 (quoting *Marathon Metallic Building Co. v. Mountain Empire Construction Co.*, 653 F.2d 921, 923 (5th Cir. 1981)). See also, *Cent. Freight Lines Inc. v. APA Transp. Corp.*, 322 F.3d 376, 382 (5th Cir. 2003).
- 108 *Mississippi Interstate*, 681 F. 2d at 1008.

US Fire Pump Company, LLC v. Alert Disaster Control (Middle East) Ltd., Slip Copy (2021)

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- 109 *Id.* at 1009.
- 110 *Id.*
- 111 *Id.*
- 112 Rec. Doc. No. 46, p. 7.
- 113 Rec. Doc. No 38-1, p. 6.
- 114 Rec. Doc. No. 53, p. 5. Its unclear exactly what the relationship between the Spanish manufacturer and Plaintiff is, but the invoices and email chain indicate that the foam in Spain was to be purchased from Plaintiff.
- 115 Rec. Doc. No. 38-2, pp. 2–5.
- 116 Rec. Doc. No. 38-2, pp. 1–6; Rec. Doc. No. 38-1, p. 79.
- 117 *Nuovo Pignone, SpA v. STORMAN ASIA M/V*, 310 F.3d 374, 378 (5th Cir. 2002).
- 118 *Ruston Gas Turbines*, 9 F.3d at 421 (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)).
- 119 *Nuovo Pignone*, 310 F.3d at 378.
- 120 *Paz v. Brush Engineered Materials, Inc.*, 445 F.3d 809, 814 (5th Cir. 2006) (citing *Ruston Gas Turbines*, 9 F.3d at 421).
- 121 *Johnston v. Multidata Sys. Int’l Corp.*, 523 F.3d 602, 615 (5th Cir. 2008) (citing *Wien Air Alaska, Inc. v. Brandt*, 195 F.3d 208, 215 (5th Cir. 1999)).
- 122 Rec. Doc. No. 44-1, p. 12.
- 123 472 F.3d 266 (5th Cir. 2006).
- 124 *Id.* at 274.
- 125 *Id.* at 275.
- 126 *Opti-Com Mfg. Network, LLC v. Champion Fiberglass, Inc.*, No. CV 18-9647, 2019 WL 1904894, at \*6 (E.D. La. Apr. 29, 2019).
- 127 *Sutton v. Advanced Aquaculture Sys., Inc.*, 621 F. Supp. 2d 435, 442 (W.D. Tex. 2007) (emphasis in original). The Fifth Circuit held in *Wien Air Alaska, Inc. v. Brandt*, 195 F.3d 208, 213 (5th Cir. 1999) that “[w]hen the actual content of communications with a forum gives rise to intentional tort causes of action, this alone constitutes purposeful availment.” Plaintiff relies on this principle to support its argument that the Court has personal jurisdiction over Allcorn/Alert Middle East under a tortious theory of minimum contacts. Plaintiff is correct, given the conclusion below that Plaintiff has adequately pled a claim for fraudulent inducement.
- 128 Rec. Doc. No. 46, pp. 16–19.
- 129 Rec. Doc. No. 44-1, p. 13.

US Fire Pump Company, LLC v. Alert Disaster Control (Middle East) Ltd., Slip Copy (2021)

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- 130 But foreign law applies to the substantive issue of whether Allcorn/Alert Middle East's potential liabilities can be imputed to Alert Asia under a single business enterprise theory.
- 131 [2017 WL 1476595](#), (E.D. L.A. 2017).
- 132 Rec. Doc. No. 44-1, p. 13.
- 133 *Patin v. Thoroughbread Power Boats, Inc.*, 294 F.3d 640, 647 (5<sup>th</sup> Cir. 2002).
- 134 [2017 WL 1476595](#), \*10 (E.D.L.A. 2017).
- 135 *Id.* The court applied Louisiana law anyway because it concluded that the result did not differ from the result under Chinese law.
- 136 *Jackson v. Tanfoglio Giuseppe, S.R.L.*, 615 F.3d 579, 587 (5th Cir. 2010).
- 137 *Id.*
- 138 *Int'l Bancorp, L.L.C. v. Societe Des Baines De Mer Et Du Cercle Des Etrangers A Monaco*, 192 F. Supp. 2d 467, 477 (E.D. Va. 2002), *aff'd on other grounds sub nom, Int'l Bancorp, LLC v. Societe des Bains de Mer et du Cercle des Etrangers a Monaco*, 329 F.3d 359 (4th Cir. 2003).
- 139 *Id.*
- 140 As a matter of policy, the practical consequences of allowing other nations to fashion laws that prevent the exercise of jurisdiction by U.S. courts are concerning.
- 141 *In re Chinese-Manufactured Drywall Products Liability Litigation*, [2017 WL 1476595](#), at \*33 (E.D. La. 2017).
- 142 *Id.* at 19.
- 143 *Jackson v. Tanfoglio Giuseppe, S.R.L.*, 615 F.3d 579, 587 (5th Cir. 2010) (citing *Hollowell v. Orleans Reg'l Hosp. LLC*, 217 F.3d 379, 385-89 (5th Cir. 2000); *Green v. Champion Ins. Co.*, 577 So.2d 249, 258 (La. Ct. App. 1 Cir. 1991)).
- 144 *Trinity Indus., Inc. v. Myers & Assoc., Ltd.*, 41 F.3d 229, 230-31 (5th Cir. 1995) (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472-73 (1985)).
- 145 *D.J. Inv., Inc. v. Metzeler Motorcycle Tire Agent Gregg, Inc.*, 754 F.2d 542, 546 (5th Cir.1985).
- 146 *Hargrave v. Fibreboard Corp.*, 710 F.2d 1154, 1161 (5th Cir. 1983).
- 147 Rec. Doc. No. 44-2, pp. 2-6; Rec. Doc. 46-3, pp. 1-2; Rec. Doc. No. 47-1, pp. 1-3.
- 148 Rec. Doc. No. 44-2, p. 6.
- 149 *Id.*
- 150 Rec. Doc. No. 38, at pp. 1-2.
- 151 Rec. Doc. No. 44-2, p. 4.

US Fire Pump Company, LLC v. Alert Disaster Control (Middle East) Ltd., Slip Copy (2021)

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- 152 Rec. Doc. No. 38-1, p. 26.
- 153 *D.J. Inv., Inc. v. Metzeler Motorcycle Tire Agent Gregg, Inc.*, 754 F.2d 542, 546 (5th Cir.1985).
- 154 Rec. Doc. No. 38-1, pp. 6–8.
- 155 Alert Middle East, Alert Asia, and other affiliated companies “strictly observe corporate formalities and have separate assets, liabilities, operations and legal existences.” Rec. Doc. No. 44-2, p. 4.
- 156 Rec. Doc. No. 46, p. 17.
- 157 Rec. Doc. No. 38-1, p. 5.
- 158 Rec. Doc. No. 44-2, pp. 5–6.
- 159 Indeed, based on the exhibits attached to the *Amended Complaint*, the first time Plaintiff knew it was dealing with Alert Middle East rather than Alert Asia was when Allcorn requested that the draft contract be changed to reflect that fact. Even after this, Allcorn continued to use the Alert Asia signature line. Every email Allcorn sent on behalf of Alert Middle East contained the signature line: “Michael E. Allcorn – Managing Director [;] Alert Disaster Control (Asia) PTE. LTD.” Every email he sent was from the email address mallcorn@alert.com.sg and included only a Singapore address. See Rec. Doc. No. 38-1.
- 160 This is not a conclusion as to Alert Asia’s potential liability under a single business enterprise theory.
- 161 Rec. Doc. No. 44-1, p. 17; Rec. Doc. No. 53, p. 9.
- 162 Rec. Doc. No. 46-1; Rec. Doc. No. 49-1, respectively.
- 163 Rec. Doc. No. 46, p. 25.
- 164 *Aetna Business Credit, Inc. v. Universal Décor & Interior Design, Inc.*, 635 F.2d 434, 435-36 (5th Cir. 1981); see also *People’s United Equip. Fin. Corp. v. Hartmann*, 447 F. App’x 522, 524 (5th Cir. 2011).
- 165 Rec. Doc. No. 46, p. 24.
- 166 *Id.* at p. 25.
- 167 See the Hague Conference on Private International Law’s list of signatories, accessible at <https://www.hcch.net/en/instruments/conventions/status-table/?cid=17>.
- 168 See Singapore Rules of Court General Order 60, Rule 1–6, accessible at <https://sso.agc.gov.sg/SL/322-R5?DocDate=20200729#PO62-pr1->.
- 169 See Rec. Doc. Nos. 46-1, 46-2.
- 170 Fed. R. Civ. P. 4(1)(2)(B).
- 171 See the Hague Conference on Private International Law’s list of signatories, accessible at <https://www.hcch.net/en/instruments/conventions/status-table/?cid=17>.
- 172 See Rec. Doc. No. 46-3, p. 10.

US Fire Pump Company, LLC v. Alert Disaster Control (Middle East) Ltd., Slip Copy (2021)

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- 173 *United States v. Islip*, 22 C.I.T. 852, 864 (1998).
- 174 *Id.*
- 175 Additionally, Plaintiff effected service under Fed. R. Civ. P. 4(f)(2)(A) by serving Alert Middle East in accordance with the Cyprus Civil Procedure Rules, Order 7, Parts 1–3 and proved service with the signed summons under Fed. R. Civ. P. 4(l)(2)(B).
- 176 Rec. Doc. No. 46, p. 25.
- 177 Rec. Doc. No. 53, p. 9.
- 178 Rec. Doc. No. 46-1 pp. 4–6; Plaintiff’s process server also attested that when he served Alert Asia at its registered address in October 2019, he delivered process to a Caucasian man who identified himself as “Mr. Mike” but denied he was Michael Allcorn. The process server later identified Allcorn as “Mr. Mike” based on a photograph of Allcorn. Rec. Doc. 46-1, pp. 4, 19–21.
- 179 Rec. Doc. No. 53, p. 9.
- 180 *West v. Rieth*, No. CV 15-2512, 2016 WL 195945, at \*2 (E.D. La. Jan. 15, 2016); *In re Chinese-Manufactured Drywall Prod. Liab. Litig.*, No. CV 09-02047, 2015 WL 13387769, at \*6 (E.D. La. Nov. 9, 2015).
- 181 *Brockmeyer v. May*, 383 F.3d 798, 805 (9th Cir. 2004) (internal citations omitted).
- 182 *Rio Properties, Inc. v. Rio Int’l Interlink*, 284 F.3d 1007, 1015 (9th Cir. 2002).
- 183 *In re Chinese-Manufactured Drywall Prod. Liab. Litig.*, No. CV 09-02047, 2015 WL 13387769, at \*5 (E.D. La. Nov. 9, 2015) (internal citations omitted). “Imposing such a threshold requirement has been viewed as necessary in order to prevent parties from whimsically seeking alternate means of service and thereby increasing the workload of the courts.” *Id.* (internal citations omitted).
- 184 *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).
- 185 In *Nagravision SA v. Gotech Int’l Tech. Ltd.*, 882 F.3d 494, 498 (5th Cir. 2018), the Fifth Circuit affirmed the district court’s order of service by email on a nonresident defendant noting that the defendant had not shown that service via email was prohibited by an international agreement.
- 186 Rec. Doc. No. 44-2, p. 3.
- 187 Alert USA was named in a previous complaint but has since been dismissed.
- 188 Rec. Doc. No. 44-2; *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).
- 189 “Service upon a foreign defendant’s United States-based counsel is a common form of service under Rule 4(f)(3).” *In re Chinese-Manufactured Drywall Prod. Liab. Litig.*, No. CV 09-02047, 2015 WL 13387769, at \*5 (E.D. La. Nov. 9, 2015); “Repeatedly, courts around the country have found that service upon a foreign defendant through counsel is appropriate ‘to prevent further delays in litigation.’ ” (quoting *LG Elecs., Inc. v. Asko Appliances, Inc.*, No. 08–828, 2009 WL 1811098, at \*4 (D. Del. June 23, 2009)).
- 190 Rec. Doc. No. 44.
- 191 Rec. Doc. No. 45-1, p. 8.

US Fire Pump Company, LLC v. Alert Disaster Control (Middle East) Ltd., Slip Copy (2021)

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- 192 Rec. Doc. No. 38, pp. 30–50.
- 193 *Id.*
- 194 *Id.* at 30–41.
- 195 *In re Katrina Canal Breaches Litigation*, 495 F.3d 191, 205 (5th Cir. 2007) (quoting *Martin v. Eby Constr. Co. v. Dallas Area Rapid Transit*, 369 F.3d 464, 467 (5th Cir. 2004)).
- 196 *Randall D. Wolcott, M.D., P.A. v. Sebelius*, 635 F.3d 757, 763 (5th Cir. 2011) (internal citations omitted).
- 197 *In re Katrina Canal Breaches Litigation*, 495 F.3d at 205 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007)).
- 198 *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (internal citations and brackets omitted).
- 199 *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal citations omitted) (hereinafter “*Iqbal*”).
- 200 *Id.*
- 201 *Id.*
- 202 *Taha v. William Marsh Rice Univ.*, 2012 WL 1576099 at \*2 (S.D. Tex. 2012) (quoting *Southland Sec. Corp. v. Inspire Ins. Solutions, Inc.*, 365 F.3d 353, 361 (5th Cir. 2004)).
- 203 *Twombly*, 550 U.S. at 555 (quoting *Papasan v. Allain*, 478 U.S. 265, 286 (1986)).
- 204 Rec. Doc. No. 45-1, p. 2, n. 4.
- 205 Rec. Doc. No. 47-2, pp. 2–3 (citing Rec. Doc. No. 38, pp. 13–41 (citing Rec. Doc. Nos. 38-1–38-8)).
- 206 Attached as Rec. Doc. No. 38-1.
- 207 *Randall D. Wolcott, M.D., P.A. v. Sebelius*, 635 F.3d 757, 763 (5th Cir. 2011). Defendants do not contest its validity.
- 208 Rec. Doc. 38-1, p. 5. The term “Defendants” is used loosely here. At this point, Allcorn had been communicating under an Alert email address that did not specify the branch, and his signature said Alert Asia with the Singapore address. He subsequently made it clear to Plaintiff that the contract would be between Alert Middle East and Plaintiff. *Id.* at p. 26. Plaintiff’s *Opposition* cites to a significant portion of its *Amended Complaint*. The *Amended Complaint* cites to the vast majority of the email chain, although generally to specific pages. For ease of reference, the Court will cite directly to the email chain.
- 209 *Id.* at pp. 11–14.
- 210 *Id.* at p. 26. This is the point in time where Allcorn makes it clear that Plaintiff was dealing with Alert Middle East.
- 211 *Id.* at p. 79.
- 212 Rec. Doc. No. 38-2, p. 6.

US Fire Pump Company, LLC v. Alert Disaster Control (Middle East) Ltd., Slip Copy (2021)

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- 213 Rec. Doc. No. 38-3, p. 15.
- 214 Rec. Doc. No. 38, p. 27.
- 215 Rec. Doc. No. 38-1, pp. 13–15.
- 216 *Id.* at p. 26.
- 217 Rec. Doc. No. 47, pp. 10–12.
- 218 Rec. Doc. No. 52, p. 3.
- 219 Rec. Doc. 45-1, pp. 3–4.
- 220 *Castille v. St. Martin Par. Sch. Bd.*, 2016-1028 (La. 3/15/17), 218 So. 3d 52, 56–57.
- 221 Rec. Doc. 47, p. 11.
- 222 These allegations are more appropriately considered in the context of a fraudulent inducement claim, as Plaintiff alleges below.
- 223 *Twombly*, 550 U.S. at 570. Especially since La. Civ. Code art. 1997 imposes enhanced damages on obligors in bad faith.
- 224 *Guidry v. U.S. Tobacco Co.*, 188 F.3d 619, 627 (5th Cir. 1999); *Kadlec Med. Ctr. v. Lakeview Anesthesia Assocs.*, 527 F.3d 412, 418 (5th Cir. 2008).
- 225 La. Civ. Code art. 1953.
- 226 *Dorsey v. Portfolio Equities, Inc.*, 540 F.3d 333, 338–39 (5th Cir.2008) (“state-law fraud claims are subject to the pleading requirements of Rule 9(b)”).
- 227 Fed. R. Civ. P. 9(b).
- 228 *U.S. ex rel. Willard v. Humana Health Plan of Texas Inc.*, 336 F.3d 375, 385 (5th Cir. 2003) (citing *ABC Arbitrage v. Tchuruk*, 291 F.3d 336, 350 (5th Cir.2002)).
- 229 *Benchmark Elecs., Inc. v. J.M. Huber Corp.*, 343 F.3d 719, 724 (5th Cir.), *opinion modified on denial of reh’g*, 355 F.3d 356 (5th Cir. 2003) (cleaned up).
- 230 *Id.*
- 231 This section of Plaintiff’s *Opposition*, like most of it, is lacking in citations to any authorities, much less controlling ones.
- 232 Rec. Doc. No. 47, pp. 12–17.
- 233 Rec. Doc. No. 38-15, pp. 1–19.
- 234 *Associated Builders, Inc. v. Alabama Power Co.*, 505 F.2d 97, 100 (5th Cir. 1974) (internal citations omitted); *Carter v. Target Corp.*, 541 F. App’x 413, 417 (5th Cir. 2013).

US Fire Pump Company, LLC v. Alert Disaster Control (Middle East) Ltd., Slip Copy (2021)

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- 235 A claim for fraudulent inducement is a type of fraud claim. Both emanate from La. Civ. Code art. 1953, and the elements are the same. See *Davis v. Karl*, No. CIV.A. 10-875, 2010 WL 3312587, at \*3 (E.D. La. Aug. 19, 2010) and the cases cited therein. *Shelton v. Standard/700 Associates*, 798 So.2d 60, 64 (La. 2001).
- 236 Rec. Doc. No. 47, p. 13.
- 237 *U.S. ex rel. Willard v. Humana Health Plan of Texas Inc.*, 336 F.3d 375, 386 (5th Cir.2003) (cleaned up).
- 238 *Id.*
- 239 Rec. Doc. No 45-1, p. 5; Rec. Doc. No. 52, p. 3.
- 240 Rec. Doc. No. 47, pp. 17–18.
- 241 Rec. Doc. No. 38-1, p. 20.
- 242 Rec. Doc. No. 38-2, p. 6; Rec. Doc. No. 38-9, p. 1–3.
- 243 *U.S. ex rel. Willard v. Humana Health Plan of Texas Inc.*, 336 F.3d 375, 386 (5th Cir. 2003).
- 244 Which is why Plaintiff’s other fraud theory failed.
- 245 *U.S. ex rel. Willard v. Humana Health Plan of Texas Inc.*, 336 F.3d 375 at 386.
- 246 Rec. Doc. No. 38, p. 37; Rec. Doc. No. 38-8, p. 1.
- 247 Rec. Doc. No. 38, pp. 15–18; Rec. Doc. No. 38-1, pp. 4, 20–24, 26–27; Rec. Doc. No. 38-2, pp. 6–7.; Rec. Doc. No. 38-3, pp. 15–16.
- 248 Rec. Doc. No. 38-11, pp. 3–4; Rec. Doc. No. 38-8, p. 1.
- 249 Fed. R. Civ. P. 9(b).
- 250 La. R.S. § 51:1401 *et seq.*
- 251 Rec. Doc. No. 47, p. 19; 2009-1633 (La. 4/23/10), 35 So.3d 1053.
- 252 See *Chaney v. Travelers Ins. Co.*, 249 So. 2d 181, 184 (La. 1971) (holding that Louisiana courts of appeals are not bound by opinion of Louisiana Supreme Court not joined by a majority of the justices).
- 253 *Doctor’s Hosp. of Slidell, LLC v. United HealthCare Ins. Co.*, No. CV 10-3862, 2011 WL 13213620, at \*7 (E.D. La. Apr. 27, 2011) (declining to apply *Cheramie* and instead relying on *Turbos de Acero de Mexico, S.A. v. American International Investment Corp.*, 292 F.3d 471, 480 (5th Cir. 2002) which held the opposite); *Swoboda v. Manders*, No. CV 14-19-SCR, 2015 WL 8493988, at \*2 (M.D. La. Dec. 9, 2015), on reconsideration, No. CV 14-19-EWD, 2016 WL 1611477 (M.D. La. Apr. 21, 2016) (holding the same, then reversing on reconsideration).
- 254 Rec. Doc. No. 52, p. 4.
- 255 Rec. Doc. No. 47, pp. 19–20. Plaintiff primarily relies on an erroneously labeled “Fifth Circuit” case, *Andretti Sports Marketing Louisiana, LLC v. Nola Motorsports Host Committee, Inc*, which was actually an Eastern District of Louisiana case. *Andretti*

US Fire Pump Company, LLC v. Alert Disaster Control (Middle East) Ltd., Slip Copy (2021)

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- Sports Mktg. Louisiana, LLC v. Nola Motorsports Host Comm., Inc.*, 147 F. Supp. 3d 537, 570 (E.D. La. 2015).
- 256 *Cheremie Servs., Inc. v. Shell Deepwater Prod., Inc.*, 2009-1633 (La. 4/23/10), 35 So. 3d 1053, 1059–1060.
- 257 Rec. Doc. No. 38-15, pp. 1–19.
- 258 *Cheremie Servs., Inc. v. Shell Deepwater Prod., Inc.*, 2009-1633 (La. 4/23/10), 35 So. 3d 1053, 1059–1060 (quoting *Dufau v. Creole Engineering, Inc.*, 465 So.2d 752, 758 (La. App. 5 Cir.), writ denied, 468 So.2d 1207 (La.1985)).
- 259 Rec. Doc. No. 47, pp. 21–23.
- 260 Rec. Doc. No. 45-1, pp. 7–8 (quoting *Flavor-Pic Tomoato Co., Inc. v. Gambino*, 2016 WL 1268359 (E.D. La. March 31, 2016)).
- 261 Providing the definition of an open account. La. R.S. 9:2781(D) defines an open account as “any account for which a part or all of the balance is past due, whether or not the account reflects one or more transactions and whether or not at the time of contracting the parties expected future transactions.”
- 262 Rec. Doc. No. 47, p. 21 (quoting 2007-1091 (La. 2/26/08); 996 So.2d 969).
- 263 Rec. Doc. No. 47, pp. 21–22.
- 264 *Frey Plumbing Co. v. Foster*, 2007-1091 (La. 2/26/08), 996 So. 2d 969, 972–73.
- 265 *Id.* “In summary, we conclude La. R.S. 9:2781(D) must be applied as written. Under a plain reading of that statute, there is no requirement that there must be one or more transactions between the parties, nor is there any requirement that the parties must anticipate future transactions. To the extent the prior case law has imposed any requirements which are inconsistent with the clear language of La. R.S. 9:2781(D), those cases are overruled.” *Id.*
- 266 *Cong. Square Ltd. P’ship v. Polk*, No. CIV.A. 10-317, 2011 WL 837144, at \*4–5 (E.D. La. Mar. 4, 2011); *Shamrock Mgmt., LLC v. GOM Fabricators, LLC*, 2018-0491 (La. App. 1 Cir. 7/10/19), writ denied, 2019-01255 (La. 10/21/19), 280 So. 3d 1171; *Wood Materials LLC v. Berkley Ins. Co.*, No. CV 17-10955, 2018 WL 560473, at \*3 (E.D. La. Jan. 24, 2018); *Doerle Food Servs., L.L.C. v. River Valley Foods, L.L.C.*, 52,601 (La. App. 2 Cir. 5/22/19), 273 So. 3d 656, 662, reh’g denied (June 20, 2019), writ denied, 2019-01188 (La. 10/15/19), 280 So. 3d 602.
- 267 *Cong. Square Ltd. P’ship*, 2011 WL 837144, at \*4–5; *Shamrock Mgmt., LLC*, 280 So. 3d at 1171; *Wood Materials LLC*, 2018 WL 560473, at \*3; *Doerle Food Servs., L.L.C.*, 273 So. 3d at 662.
- 268 *Cong. Square Ltd. P’ship*, 2011 WL 837144, at \*4–5; *Shamrock Mgmt., LLC*, 280 So. 3d at 1171; *Wood Materials LLC*, 2018 WL 560473, at \*3; *Doerle Food Servs., L.L.C.*, 273 So. 3d at 662.
- 269 Rec. Doc. No. 47, pp. 21–22.
- 270 Rec. Doc. No. 47, pp. 23–25.
- 271 Rec. Doc. No. 44-1, p. 13.
- 272 *Patin v. Thoroughbred Power Boats Inc.*, 294 F.3d 640, 647 (5th Cir. 2002).
- 273 Rec. Doc. No. 45-1, pp. 8–9.
- 274 Rec. Doc. No. 47, pp. 22–24.

**US Fire Pump Company, LLC v. Alert Disaster Control (Middle East) Ltd., Slip Copy (2021)**

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[275](#) Rec. Doc. No. 44.

[276](#) Rec. Doc. No. 45.

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## Exhibit 24

US Philips Corporation v. KXD Technology, Inc., Not Reported in Fed. Supp. (2014)

**H** KeyCite history available

2014 WL 12564095

Only the Westlaw citation is currently available.  
United States District Court, C.D. California.

US PHILIPS CORPORATION  
v.  
KXD TECHNOLOGY, INC., et al.

CV 05-08953 DMG (PLAx)

|  
Filed 06/24/2014

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**Proceedings: IN CHAMBERS—ORDER RE REMAND FROM NINTH CIRCUIT AND PLAINTIFF’S MOTION FOR CONTEMPT [Doc. ## 532, 456]**

[DOLLY M. GEE](#), UNITED STATES DISTRICT JUDGE

\*1 This matter comes before the Court on remand from the Ninth Circuit. [Doc. ## 512, 532.] On December 5, 2013, the Court held a hearing on the matter. Thereafter, the Court took the matter under submission pending the exhaustion of the parties’ alternative dispute resolution efforts. For the reasons discussed below, Plaintiff’s Motion for Contempt [Doc. # 456] is **GRANTED in part and DENIED in part**.

I.

#### PROCEDURAL BACKGROUND

##### A. Initial District Court Proceedings

On December 27, 2005, Plaintiff U.S. Philips Corporation (“Philips”) filed a patent infringement action against Defendant KXD Technology and its affiliates (“KXD”). [Doc. # 1.] Philips sought to enforce its “DVD+ReWritable & Design” trademark. (Supplemental Declaration of Sean O’Keefe, Exh. 42 at Philips 320 [Doc. # 528]; Declaration of Sean O’Keefe, Exh. 4 at Philips 18 [Doc. # 518].)

##### 1. Temporary Restraining Order

On July 31, 2007, Hon. Edward Rafeedie, the United States District Judge then presiding, found that KXD was liquidating and concealing its assets, and granted Philips a Temporary Restraining Order (“TRO”). [Doc. # 304.] The TRO prohibited “all persons ... in possession or control of KXD’s assets from [d]irectly or indirectly transferring ... concealing, secreting, distributing, disposing of, shipping in any way or otherwise hiding asserts and making [assets] unavailable to [Philips].” [Doc. # 304.] The Court issued an amended TRO on August 3, 2007. [Doc. # 308.] It also set an August 27, 2007 hearing for Philips’ application for a preliminary injunction. [Doc. # 308.] At the August 27 hearing, the Court took the pending motions for default judgment and a preliminary injunction under submission. [Doc. # 323.]

The July 31, 2007 and August 3, 2007 TROs were not issued with notice. (Philips’ Brief on the Issue of the Expiration Date of the TRO at 1 n.1 [Doc. # 540].) Under the version of [Federal Rule of Civil Procedure Rule 65](#) in effect in 2007, an unnoticed TRO expired ten days after issuance, excluding weekends. [Fed. R. Civ. P. 65\(b\)](#) (2007) (amended 2009); [Fed. R. Civ. P. 6](#) (2007) (“When the period of time prescribed or allowed is less than 11 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation.”).<sup>1</sup> Thus, the August 3, 2007 TRO would have expired on August 17, 2007.

There is no evidence that the TRO was extended beyond

US Philips Corporation v. KXD Technology, Inc., Not Reported in Fed. Supp. (2014)

the ten-day period under [Rule 65](#). Philips argues that because the August 3, 2007 TRO sets a hearing for August 27, 2007, at which point the preliminary injunction was taken under submission, the TRO was implicitly extended. Philips also asserts that because Defendants never paid a prejudgment bond, the TRO never expired. The relevant part of the TRO states:

\*2 Plaintiff filed an ex parte application to impose an \$80 million dollar prejudgment security bond on Defendants and to freeze Defendants' assets until they post the bond. Good cause having been shown, the Court hereby GRANTS Plaintiff's ex parte application and ORDERS ... [an] [a]sset [f]reeze [u]ntil Defendants post this prejudgment bond....

(O'Keefe Decl. ¶ 4, Exh. 3 Philips 000012-13.) The TRO by its terms, however, does not state that the standard ten-day period is extended. Nor is there any authority allowing a TRO to be extended indefinitely until a prejudgment bond is posted—certainly not without the consent of the opposing party and the reasons for the extension “entered of record.” [Doc. ## 304, 308.]

## 2. Preliminary Injunction and Default Judgment

On September 17, 2007, the Court entered a default judgment in Philips' favor. [Doc. # 358.] The default judgment permanently enjoined KXD and those acting in concert with it from “further infringement of Plaintiff's patents-in-suit.” [Doc. # 358.]

That same day, the Court also entered a preliminary injunction that, like the TRO, froze KXD's assets, but it only applied to the KXD Defendants and purported to last until Defendants posted a prejudgment bond. [Doc. # 359.] Because the default judgment, entered the same day as the preliminary injunction, disposed of the case, the Ninth Circuit held that the preliminary injunction was dissolved the same day it was entered. *U.S. Philips Corp. v. KBC Bank N.V. (“Philips I”)*, 590 F.3d 1091, 1094 (9th Cir. 2010).

On March 31, 2008, KBC Bank, a non-party, intervened and filed a Motion to Modify the Asset Freeze Order. [Doc. # 384.] While the TRO was in place, KXD maintained bank accounts at the United States and Singapore locations of KBC Bank and funds were transferred into those accounts. In the Motion to Modify, KBC claimed a right to the transferred funds. [Doc. # 384.] The district court, Hon. Manuel L. Real presiding, granted the Motion to Modify on April 28, 2008, holding that KBC could retain the funds to setoff KXD's debt.

[Doc. ## 417, 422.] On July 8, 2008, the Court denied Philips' motion to reconsider. [Doc. # 440.] Philips filed an appeal on August 6, 2008. [Doc. # 441.] It does not appear that Philips requested a stay to prevent KBC from offsetting the funds during the appeal.

## B. First Appeal to the Ninth Circuit and Remand

In January 2010, the Ninth Circuit held that the default judgment dissolved the preliminary injunction, and thus there was no order to be modified by the district court in response to KBC's Motion to Modify Asset Freeze Order. *Philips I*, 590 F.3d at 1095. It vacated the district court's modification order and remanded, noting that both parties had a claim to the funds, “Philips as a judgment creditor, and KBC Bank as a lender.” *Id.* at 1094-95. The Court “decline[d] to determine whose claim [was] superior ... because material issues of fact remain unanswered.” *Id.* The Court described those issues as follows:

These issues include: (1) when KBC Bank first had notice of the TRO, (2) whether Philips has properly executed its judgment in regard to the funds, (3) what jurisdiction the funds were transferred from, (4) what jurisdiction the funds were transferred to, (5) who transferred the funds, (6) which Defendant's account received the funds, (7) the respective rights of the KXD Defendants to funds deposited in the KBC Bank accounts in question, and (8) possibly other facts we do not list here, but that the parties or the district court may view as relevant on remand.

\*3 *Id.* at n.4. The Court also explained that its holding did not “affect Philips' continuing ability to seek damages, through contempt proceedings, for any violations of the TRO and preliminary injunction that may have occurred while those orders were in effect.” *Id.* at n.3.

On remand, Philips moved for an order to show cause why KBC should not be held in contempt for violating the TRO. [Doc. # 456.] The district court denied the motion [Doc. ## 462, 463, 466], holding KBC was not in contempt because it had a superior right to the funds. [Doc. # 466.]

## C. Second Appeal to the Ninth Circuit and Remand

Philips appealed the denial of its motion for contempt on May 29, 2010. [Doc. # 464.] The Ninth Circuit held that the district court did not abuse its discretion in denying

US Philips Corporation v. KXD Technology, Inc., Not Reported in Fed. Supp. (2014)

Philips' contempt motion regarding KBC's actions in receiving and freezing the funds. *U.S. Philips Corp. v. KBC Bank N.V. ("Phillips II")*, 466 Fed.Appx. 601, 603 (9th Cir. 2012). But it held that the district court had erred by concluding—without an evidentiary hearing—that KBC had a superior right to the funds. *Id.* The Ninth Circuit remanded, because “the district court failed to conduct an evidentiary hearing and because the record is devoid of any evidence that would support the district court’s finding that KBC Bank holds rights superior to those of Philips.” *Id.*

On remand, the district court scheduled an evidentiary hearing, but subsequently granted KBC's motion to vacate the hearing [Doc. # 503], reasoning that there were no longer any pending motions. See *In re U.S. Philips Corp. ("Phillips III")*, 526 Fed.Appx. 728, 732 (9th Cir. 2013).

**D. Third Appeal to the Ninth Circuit and Remand**

Philips appealed the district court's decision to vacate the evidentiary hearing. The Ninth Circuit reversed, holding that *Phillips II* did not fully resolve Philips' contempt motion. *Id.* at 732-33. The Court explained:

*Phillips II* explicitly left open the question of whether KBC Bank was in contempt when it attempted to retain the funds. If KBC Bank's rights to the transferred funds are not superior to those of Philips, then retaining those funds violated the TRO and PI, which prohibited KBC Bank from making unavailable to Philips any funds covered by the injunction.

*Id.* at 733 (internal quotation marks, citations, and alterations omitted) (emphasis added). The Court remanded again “so that Philips's motion for an order to show cause why KBC Bank should not be held in contempt can be fully resolved.” *Id.*

After supplemental briefing [Doc. # 512], this Court set a discovery schedule and the parties conducted discovery. [Doc. # 514.] On August 18, 2013, the parties filed a joint status report indicating that KBC had responded to Philips' discovery requests. [Doc. # 515.] After briefing by both sides, the Court held an evidentiary hearing on December 5, 2013. [Doc. # 539.] At the hearing, the Court ordered supplemental briefing and that the parties meet and confer regarding mediation. [Doc. # 539.] On March 21, 2014, the parties filed a joint status report stating that their attempts at settlement were unsuccessful. [Doc. # 553.]

II.

**MATERIAL FACTS**

**A. Material Facts Identified by the Ninth Circuit**

The parties have stipulated to the following issues, identified by the Ninth Circuit as relevant:

\*4 1. KBC in Los Angeles first had notice of the TRO on August 1, 2007.<sup>2</sup> KBC Singapore received a copy of the TRO on August 2, 2007.

2. Philips recorded the September 17, 2007 Default Judgment with the California Secretary of State, conducted a judgment debtor exam under California law, and recorded UCC-1 filings in California and in the District of Columbia. Philips did not serve a notice of levy or a writ of execution on KBC Singapore or KBC NY.

3. The funds were transferred to KBC from accounts in the United States, specifically from various bank accounts in New York and California.

4. All of the funds, with the exception of \$332,470.23, were transferred to KBC Singapore. The remaining \$332,470.23 was transferred to and frozen by KBC NY.

5. Three different entities transferred the funds: (a) LG North America Inc. transferred \$1,560,405 to KBC; (b) Thomson Sales Europe S.A. transferred \$312,855.23 to KBC; (c) Citibank NY transferred \$299,285 to KBC, which was originally wired from KXD's account at KBC Bank. This constitutes a total of \$2,172,545.23 in contention.<sup>3</sup>

6. The funds transferred to KBC Singapore were deposited into an account in the name of “KXD Digital Entertainment LTD.” The funds transferred to KBC New York were “frozen in a suspense account.”

[Doc. # 526]

## **B. Other Material Facts**

### **1. The October 23, 2006 Agreements**

On October 23, 2006, KXD Digital Entertainment LTD and KBC's Singapore Branch entered into a loan agreement in relation to a trade receivables facility of up to \$12,000,000 ("Loan Agreement.")<sup>4</sup> (Declaration of How Seen Tiat ¶ 2, Exh. 1 [Doc. # 525-2].) The KBC credit line provided KXD Digital with cash advances based on the value of its trade receivables. (*Id.*) The trade receivables covered by the Loan Agreement were the open accounts owed to KXD Digital and its related entities by its customers listed in the Loan Agreement. (*Id.* ¶ 3, Exh. 1.) Pursuant to the Loan Agreement, the receivables from the identified customers, including LG North America and Thomson Sales, were to be routed to KXD through its accounts at KBC Singapore. (*Id.* at Schedule 4.)

\*5 Under Section 13.2 of the Loan Agreement, KBC was entitled to a right to set off KXD's debts from the receivables credit line, using funds it received for KXD Digital's accounts:

The Bank may without notice to the Borrower combine, consolidate, or merge all or any of the Borrower's accounts with, and liabilities to, the Bank and may set off or transfer any sum standing to the credit of any such accounts ... in or towards satisfaction of any of the Borrower's liabilities to the Bank under this Agreement....

(How Decl. ¶ 6, Exh. 1 at p. 27, § 13.2.)

That same day, "Shenzhen KXD" provided KBC a Deed of Assignments of Receivables ("Deed"). (How Decl. ¶ 4, Exh. 2 [Doc. # 525-2].) The Deed assigns to KBC Singapore all monies and receivables due to KXD for the sale of its products from various customers.<sup>5</sup> (How Decl. ¶ 4, Exhs. 2 and 3.)

On October 23, 2006, KBC Singapore and KXD Digital, the KXD entity which the parties stipulate held the account at KBC Singapore to which the funds were transferred, also signed a "Charge of Cash and Security Agreement," providing KBC Bank Singapore the following:

HEREBY CHARGE BY WAY OF FIRST FIXED CHARGE in favour of the Bank all moneys (hereinafter called the "Deposits") in any currency now or at any time hereafter standing to the credit of all deposit account(s) or of such other account(s) of the Depositor, held in the name of the Depositor,

with any of the branches of the Bank anywhere in the world ... which are now or shall at any time be or become due, owing, payable or incurred to the Bank by the Depositor on any account whatsoever ... (such obligations and liabilities of the Depositor shall hereinafter be called the "Secured Obligations")....

[T]he security hereby created shall be a continuing security for the secured obligations and shall continue to be valid and binding for all purposes notwithstanding any intermediate payments or settlement of any account of the Depositor ... and shall extend to cover all or any sum or sums of money which shall for the time being constitute the balance due for the Depositor to the Bank on any account or otherwise.

(How Decl. ¶ 7, Exh. 4.)

### **2. KBC's Actions After Receiving Notice of the TROs**

Counsel for KBC admitted at oral argument that, while the TRO was pending, KBC Singapore used funds in KXD Digital's account to offset KXD's outstanding debt to KBC. (See *also* O'Keefe Decl. ¶ 4, Exh. 16 at Philips 171 (Internal KBC memo dated August 6, 2007 indicating that it had received notice of the TRO, it had already "offset" funds, and "recommending" further "offset of funds in [KXD's] current account against loan outstanding"); O'Keefe Decl. ¶ 4, Exh. 16 at Philips 173-74 ("Call Report and Action Plan" dated August 7, 2007, stating that "KBCSI has already utilized their funds of about US \$1.6min to offset the loan amount."). The \$332,470.23 that was transferred to KBC New York was frozen and was not offset by KBC until after Judge Real's decision on the Motion to Modify in April 2008.<sup>6</sup> (How Decl. ¶¶ 15-19; 26.)

\*6 On August 6, 2007, KBC informed KXD that it was terminating their relationship. (How Decl. ¶ 21, Exh. 10.) KBC subsequently filed a lawsuit against KXD to recoup the legal fees and expenses incurred by KBC as a result of the TRO. (*Id.* Exh. 11.)

In September and October 2007, in response to subpoenas by Philips, KBC New York produced 133 pages of documents and KBC Singapore produced 141 pages of documents relating to the funds transferred to KXD's accounts at KBC Singapore and New York. (How Decl. ¶ 23, Exhs. 12-13.) On October 18, 2007, KBC wrote to Philips asserting its superior right to the transferred funds. (*Id.* ¶ 24.) The parties were unable to resolve who had a

**US Philips Corporation v. KXD Technology, Inc., Not Reported in Fed. Supp. (2014)**

superior right to the funds on their own. (*Id.* ¶ 25.) Thus, on March 31, 2008, KBC filed a Motion to Modify the Asset Freeze Order, asserting superior rights to the funds. [Doc. # 384.]

**3. Transfers to KXD's Accounts at KBC Singapore and New York**

The following nine transfers were made into KXD accounts at various KBC Banks on or after the date that KBC received notice of the TRO:

**KBC Singapore**

- August 2, 2007 transfer to KBC Singapore from Thomson Sales in the amount of \$69,525. (Declaration of How Seen Tiat ¶ 12, Exh. 8.)
- August 3, 2007 transfer to KBC Singapore from LG North America in the amount of \$1,246,880. (*Id.* ¶ 13, Exh. 8.)
- August 3, 2007 transfer to KBC Singapore from LG North America in the amount of \$224,385. (*Id.* ¶ 14, Exh. 8.)

**KBC New York**

- August 8, 2007 transfer to KBC New York from Thomson Sales in the amount of \$150,000.00. (*Id.* ¶ 15, Exh. 9.)
- August 9, 2007 transfer to KBC New York from Thomson Sales in the amount of \$90,000. (*Id.* ¶ 16, Exh. 9.)
- August 10, 2007 transfer to KBC New York from Thomson Sales in the amount of \$130. (*Id.* ¶ 17, Exh. 9.)
- August 21, 2007 transfer to KBC New York from Thomson Sales in the amount of \$3,200.23. (*Id.* ¶ 18, Exh. 9.)

September 6, 2007 transfer to KBC New York from LG North America in the amount of \$89,140. (*Id.* ¶ 19, Exh. 9.)

**Citibank Transfer to KBC Singapore**

Philips also points to a ninth transaction, a transfer of

\$299,285 from Citibank New York to KBC Bank Singapore, asserting that the funds were originally wired from a KXD account at KBC Bank. (Stipulation ¶ 5 [Doc. # 526]; O'Keefe Decl. ¶ 5, Exh. 31, Philips 235-36 (transfer sometime between August 6, 2007 and August 10, 2007)).

As stated above, the parties stipulate that \$2,172,545.23 is at issue. (Stipulation ¶ 5 [Doc. # 526].)

**III.**

**LEGAL STANDARD**

A district court “has the power to adjudge in civil contempt any person who willfully disobeys a specific and definite order of the court.” *Gifford v. Heckler*, 741 F.2d 263, 265 (9th Cir. 1984); *see also Philips III*, 526 App'x at 733.<sup>8</sup> The party moving for “civil contempt must prove that the non-moving party has violated a court order by clear and convincing evidence.” *Ahearn ex rel. N.L.R.B. v. Int'l Longshore & Warehouse Union, Locals 21 & 4*, 721 F.3d 1122, 1129 (9th Cir. 2013) (citing *FTC v. Enforma Natural Prods., Inc.*, 362 F.3d 1204, 1211 (9th Cir. 2004)). “[A] non-party respondent must either abet the defendant in violating the court's order or be legally identified with him.” *Peterson v. Highland Music, Inc.*, 140 F.3d 1313, 1323 (9th Cir. 1998) (citing *NLRB v. Sequoia District Council of Carpenters*, 568 F.2d 628, 633 (9th Cir. 1977)) (internal quotation marks omitted). The non-party must also have notice of the order. *Id.*

**IV.**

**DISCUSSION**

**A. Jurisdiction**

\*7 A district court has subject matter jurisdiction to determine whether its TRO has been violated by a foreign bank. *Reebok Int'l Ltd. v. McLaughlin*, 49 F.3d 1387, 1390 (9th Cir. 1995). This Court also has personal jurisdiction over KBC. KBC first made an appearance in this case when it filed its Motion to Modify Asset Freeze

US Philips Corporation v. KXD Technology, Inc., Not Reported in Fed. Supp. (2014)

Order, and it did not contest jurisdiction. [Doc. # 384.] “An appearance ordinarily is an overt act by which the party comes into court and submits to the jurisdiction of the court. This is an affirmative act involving knowledge of the suit and an intention to appear.” *Id.* (internal quotation marks and citations omitted). An appearance without objection to jurisdiction waives defects in personal jurisdiction. *Benny v. Pipes*, 799 F.2d 489, 492 (9th Cir. 1986), *amended*, 807 F.2d 1514 (9th Cir. 1987) (citing [Federal Rule of Civil Procedure 12\(h\)\(1\)](#)).

**B. Issue Before this Court on Remand**

KBC asserts a superior right to the \$2,172,545.23, based on a bank’s equitable right of setoff and KBC’s contractual right of setoff, as provided in the Loan Agreement. (KBC’s Opposition at 2 [Doc. # 525].) The Ninth Circuit previously affirmed the district court’s determination that KBC did not violate the contempt order by receiving and freezing the funds. *Philips II*, 466 Fed.Appx. at 603. In *Philips III*, the Ninth Circuit clarified the question before this Court on remand: “If, in fact, Philip’s rights are superior and KBC Bank retained the funds as a set-off to KXD’s debts while the TRO and PI were in effect, KBC Bank would be in contempt.” *Philips III*, 526 Fed.Appx. at 732.

**C. KBC’s Equitable Right of Setoff<sup>9</sup>**

“If the depositor is indebted to the bank and his note is due, there is a mutuality of obligation from which flows an equitable right of setoff—the bank ordinarily may set off its debt against the depositor’s debt by appropriating funds from the depositor’s account.” *Chang v. Redding Bank of Commerce*, 29 Cal. App. 4th 673, 681, 35 Cal. Rptr. 2d 64 (1994); *see also Martin v. Wells Fargo Bank*, 91 Cal. App. 4th 489, 494, 110 Cal. Rptr. 2d 653 (2001) (same; collecting cases); *F.D.I.C. v. Mademoiselle of Cal.*, 379 F.2d 660, 663 (9th Cir. 1967) (common law right of setoff existed where “depositor’s account balance is set off against his indebtedness to the bank”).

A bank’s equitable right of setoff is independent of any contractual right. *Murphy v. F.D.I.C.*, 38 F.3d 1490, 1504 (9th Cir. 1994). This is because a bank’s right of set off “arises as a matter of law, not by reason of any agreement, written or oral, reflected in the Bank’s records or not.” *Id.*; *see also 2 Cal. Affirmative Def. § 44:3 (2d ed.)* (“The right of banks to charge or set off a debtor-depositor’s funds with the debtor-depositor’s matured indebtedness is a right of setoff based on general

principles of equity enforceable without the aid of the court.”).

Thus, KBC had an equitable right of setoff at the time the TRO was in place. As of August 1, 2007, KXD was indebted to KBC in the amount of approximately \$2.86 million. (How Decl. ¶ 9.) KBC has provided evidence that during the TRO period, at least some of this debt was due and owing. (*Id.* ¶¶ 9, Exh. 6; ¶ 20.) But Philips does not dispute this.<sup>10</sup> Instead, as stated in Philip’s Reply, the “point on which the parties diverge” is whether KBC bank may setoff “funds that were unlawfully deposited into the KXD account.”<sup>11</sup> (Philips Reply at 7-8 [Doc. # 527].)

**D. KBC’s Contractual Right of Setoff**

\*8 Even assuming, *arguendo*, that KBC lacked an equitable right of set off at the time the TRO was in place, it also had an independent, contractual right to set off the funds under the Loan Agreement.

In its Reply, Philips asserts for the first time that the Loan Agreement was void *ab initio* because a TRO issued by the United States District Court for the District of Nevada prior to the existence of the Loan Agreement rendered it invalid. (Reply at 2 n.3 [Doc. # 527].) This argument is waived. Philips knew of the Loan Agreement since KBC entered this litigation on March 31, 2008. Yet, Philips—despite years of litigation—did not raise any argument regarding the Loan Agreement’s validity until it filed its Reply on October 1, 2013, more than five years later. [Doc. ## 384, 527.]; *Bazuaye v. INS*, 79 F.3d 118, 120 (9th Cir. 1996) (“Issues raised for the first time in the reply brief are waived.”)<sup>12</sup>

The Court concludes that KBC had a contractual right of set off, in addition to and independent of its equitable right, at the time of the TRO, pursuant to the 2006 Loan Agreement.

**E. KBC’s and Philips’ Respective Rights to the Funds**

Having determined that KBC had a right of offset at the time of the TRO, the Court must decide whether that right was superior to Philips’ right to the funds both (1) when KBC Singapore set off the funds while the TRO was in effect, and (2) when KBC New York set off the funds after the TRO expired and while Philips appealed Judge

US Philips Corporation v. KXD Technology, Inc., Not Reported in Fed. Supp. (2014)

Real's order permitting the set off.

In general, “[u]nder California law, a Bank’s right of setoff against a matured debt of its creditor is superior to the rights of a third party creditor.” *Da-Green Electronics, Ltd. v. Bank of Yorba Linda*, 891 F.2d 1396, 1399 (9th Cir. 1989) (citing *Walters v. Bank of America*, 9 Cal. 2d 46, 55 (1937)) (asserting this proposition in the context of a bank’s right to set off funds owed to it by a depositor and sought by a judgment creditor);<sup>13</sup> see also 10 Am. Jur. 2d, *Banks and Financial Institutions* § 844 (“A banker’s lien ordinarily attaches in favor of the bank upon the securities of a customer deposited in the usual course of business, for advances supposed to have been made upon their credit, *not only against the customer or depositor, but against the unknown equities of all others in interest....*” (emphasis added)).

\*9 Philips asserts that the TRO extinguished any superior right KBC had to the funds. The parties do not point to, and the Court has not found, any California or Ninth Circuit case law addressing this issue.<sup>14</sup> The Court thus looks to cases from other jurisdictions to determine whether California courts would conclude that the TRO extinguished KBC’s superior right of setoff, both temporarily, while the TRO was pending, and permanently, as Philips appears to assert. See *In re Kekaouha-Alisa*, 674 F.3d 1083, 1087-88 (9th Cir. 2012) (“When interpreting state law, [a federal court is] bound by the decision of the highest state court. Absent a controlling state court decision, our duty is to predict how the highest state court would decide the issue.” (citations omitted)).

In *Gemco Latinoamerica, Inc. v. Seiko Time Corp.*, 61 F.3d 94 (1st Cir. 1995), the First Circuit held that a bank was in contempt of a court-ordered asset freeze because it offset funds while the freeze was in place. The Court reasoned that “payment of another debt patently frustrated the clear intent of the order that Watch and Gem’s money be held for [the judgment creditor].” *Id.* at 99. The Court went on to say, “we reject the bank’s contention, offered as a defense to the charge of contempt, that its claims [to the frozen assets] had priority,” noting that if the “assets were subject to claims prior to the attachment order, the proper course was to pay the money into the court and then litigate the matter.” *Id.* After affirming the district court’s finding of contempt, the First Circuit noted that, absent the bank’s waiver of the issue, remand would have been required to determine whether the bank’s claims were ultimately superior to the judgment creditor, and the amount of actual damages. *Id.* at 101. Although the First Circuit rejected the bank’s claim that it had a right to set off the funds while the asset freeze was in place, it

recognized that a contemnor could still defeat a damage award—albeit not the finding of contempt—by showing that it had a superior right to the funds.

\*10 In *Federal Trade Commission v. American Institute for Research and Development*, the Court held that a bank lacked a right to setoff funds where an *ex parte* asset freeze was in place when the bank offset the funds. 219 B.R. 639 (D. Mass. 1998). It reasoned, “to allow BayBank a right of set-off would be to undermine the integrity of the court’s power to grant effective preliminary relief.” *Id.* at 646; see also *S.E.C. v. Giacchetto*, No. 00-2502, 2000 WL 943524, \*1 (S.D.N.Y. July 10, 2000) (for a bank to exercise its right of setoff, the funds must be “unrestricted,” and funds are not unrestricted where the assets are frozen by a Court order).

KBC argues that the TRO did not diminish its superior right to the funds, but the cases it relies upon do not concern a bank’s right to offset funds without court permission while the assets are frozen. In *Martens v. Hadley Mem’l Hosp.*, 729 F. Supp. 1391 (D.D.C. 1990), the Court held that a bank had a right to offset funds even where the depositor’s account was attached by an order in favor of a judgment creditor. *Id.* at 1396. In *Martens*, however, the judgment creditor obtained an attachment order, served the order on the bank, and then the bank moved for permission to assert its right of set off—before it offset the funds. 729 F. Supp. at 1392. Despite the different factual circumstances, *Martens* supports KBC’s proposition that the asset freeze during the pendency of the TRO did not permanently derail its right of offset. KBC also cites *Victor Werlhof Aviation Ins. v. Garlick*, 237 Mont. 51, 55 (1989), where the Court held that a writ of execution by a judgment creditor does not take precedence over a bank’s right of setoff. In *Garlick*, unlike this one, the bank was entitled to exercise its right of set off because it set off the funds “at the same moment”—not after—it was presented with a writ of execution. *Id.* at 54-56 (noting that the funds set off must lack “restrictions”).

The Court finds the reasoning of the First Circuit in *Gemco* persuasive, and concludes that KBC Singapore did not have a right to offset the funds *while the funds were restricted by the court-imposed asset freeze*. (O’Keefe Decl. ¶ 4, Exh. 2 at Philips 9.) KBC Singapore’s payment of its own debts while the TRO was pending was a form of self-help which frustrated the intent of this Court’s preliminary relief in favor of Philips and an orderly determination of the parties’ respective rights. See *Gemco Latinoamerica*, 61 F.3d at 99; *American Institute*, 219 B.R. at 646. Accordingly, KBC Singapore’s actions were in direct contravention of the TRO.

US Philips Corporation v. KXD Technology, Inc., Not Reported in Fed. Supp. (2014)

Nonetheless, Philips points to no authority, and the Court has found none, to suggest that the TRO permanently extinguished KBC's rights to the funds. As stated above, a bank has a superior right to the funds of its depositor-debtor over a third party judgment debtor. *Da-Green Electronics*, 891 F.2d at 1399; cf. *Gemco*, 61 F.3d at 101. KBC thus did not violate any existing Court Order when it offset the funds at KBC New York after this Court granted its Motion to Modify and well after the TRO had expired.

In sum, KBC did not have a right to offset the funds while the asset freeze was in place, but has a superior right to the funds under California law over Philips as a judgment creditor.

**F. KBC Singapore is in Contempt of the Court's TRO**

KBC argues that even if KBC Singapore violated the TRO by offsetting the funds while the asset freeze was in place, it did not aid or abet KXD in violating the TRO, a fact which Philips must establish by clear and convincing evidence in order to hold KBC in contempt. See *Peterson*, 140 F.3d at 1323 (non-party must abet the defendant in violating the court's order or be legally identified with him to be held in contempt).

\*11 Philips asserts that KBC Singapore orchestrated the offsets while the TRO was in place, thus abetting KXD in violation of the TRO. For this proposition, it points to several emails. An email dated August 21, 2007 reads: "On the fee—on the understanding that the customer is still actively cooperating for us to get full repayment asap, yes I can agree to stop collecting for now." (O'Keefe Decl. ¶ 4, Exh 23 at Philips 201.) Another email dated September 5, 2007 has a subject line of "KXD Update" and states in relevant part, "[t]he client has been co-operative is [sic] helping to chase for [sic] payments and we are in almost daily contact with the client..." (O'Keefe Decl., Exh 23 at Philips 202.) An email dated September 10, 2007 discusses funds destined for KXD's account in Singapore that were frozen by KBC New York and states "[w]e will [i]nform the client of alternate accounts (via KBCSZ) for funds remitted... The customer is very co-operative any [sic] paying off the outstanding if there is late payment from the Obligators." (O'Keefe Decl. ¶ 4, Exh. 24 at Philips 202.)

The Court finds sufficient evidence in the record to hold KBC Singapore in contempt of the TRO. KBC admits that KBC Singapore set off the funds while the TRO was

pending and internal memos circulated while the TRO was in place support this admission. (See O'Keefe Decl. ¶ 4, Exh. 16 at Philips 171 (Internal KBC Singapore memo dated August 6, 2007 indicating that it had received notice of the TRO, it had already "offset" funds, and "recommending" further "offset of funds in [KXD's] current account against loan outstanding")); O'Keefe Decl. ¶ 4, Exh. 16 at Philips 173-74 ("Call Report and Action Plan" dated August 7, 2014, stating that "KBCSI has already utilized their funds of about US \$1.6min to offset the loan amount."). Moreover, the emails that KBC transmitted in late August and early September 2007, quoted above, although written after the TRO expired, are convincing evidence that KBC Singapore had been working and continued to work closely with KXD to arrange the "full repayment" of KXD's debt to KBC.

In contrast, KBC New York did not offset the funds until after the TRO had expired and the Court had ruled on the Motion to Modify the asset freeze. It does not appear that Philips requested a stay that would have prevented KBC New York from exercising its set off rights while the appeal was pending, and no stay was entered on the docket. [See Doc. ## 422-441.] Therefore, there is no evidence that KBC New York violated the TRO or any Court order in offsetting the funds.

Accordingly, Philips has met its burden of establishing that KBC Singapore, but not KBC New York, acted in contempt of the Court's TRO.

**G. Philips is Only Entitled to Actual Damages for Civil Contempt**

Even if KBC Singapore aided and abetted KXD in violating the TRO, Philips is only entitled to actual damages. "[A] court may impose civil contempt sanctions to (1) compel or coerce obedience to a court order, and/or (2) compensate the contemnor's adversary for injuries resulting from the contemnor's noncompliance." *Ahearn ex rel. N.L.R.B. v. Int'l Longshore & Warehouse Union, Locals 21 & 4*, 721 F.3d 1122, 1131 (9th Cir. 2013). Civil contempt sanctions are limited to actual losses sustained as a result of failure to comply. *General Signal Corp. v. Donallco, Inc.*, 787 F.2d 1376, 1380 (9th Cir. 1986). Therefore, a party facing contempt proceedings can defeat an award of damages by demonstrating that, had the Court order not been in place, it had a superior right to offset the funds. *Gemco Latinoamerica, Inc.*, 61 F.3d at 100; see also *Philips I*, 590 F.3d at 1095 (citing *Gemco Latinoamerica, Inc.*, 61 F.3d at 100, for the proposition that remand was necessary to determine which party had a

US Philips Corporation v. KXD Technology, Inc., Not Reported in Fed. Supp. (2014)

superior right to the funds).

Here, there appear to be no damages stemming from KBC's offset of the funds at issue, because it had a superior right to the funds, as discussed above. Philips also requests, however, "all reasonable attorneys' fees and costs incurred in this matter since March of 2008." [Doc. # 517.] "[A]ttorneys' fees are an appropriate component of a civil contempt award." *In re Dyer*, 322 F.3d 1178, 1195 (9th Cir. 2003); see also *Henry*, 266 B.R. 457 (Bankr. C.D. Cal. 2001) ("In imposing sanctions for civil contempt, actual damages are broadly construed to embrace consequential damages and include attorney fees incurred in the civil contempt proceeding."); *Allowance of Attorneys' Fees in Civil Contempt Proceedings*, 43 A.L.R.3d 793 ("Almost without exception it is within the discretion of the trial court to include, as an element of damages assessed against the defendant found guilty of civil contempt, the attorneys' fees incurred in the investigation and prosecution of the contempt proceedings."). The Court finds that Philips is entitled to an award of reasonable fees and costs incurred in pursuing the civil contempt proceedings.

#### **H. Philips Did Not Properly Execute the Judgment**

\*12 There is a final side note to this nine-year, tortuous litigation. It appears that Philips never properly executed the Judgment, despite its tenacious pursuit of contempt sanctions.<sup>15</sup> Federal Rule of Civil Procedure 69(a) governs executions of money judgments. It provides:

A money judgment is enforced by a writ of execution, unless the court directs otherwise. The procedure on execution—and in proceedings supplementary to and in aid of judgment or execution—must accord with the procedure of the state where the court is located, but a federal statute governs to the extent it applies.

*Fed. R. Civ. P. 69(a)* (emphasis added). The parties do not contend that the judgment directed enforcement in a manner other than by writ of execution, nor does the default judgment appear to direct otherwise.<sup>16</sup> Thus, California law governs the enforcement of the judgment.

Under California's Code of Civil Procedure, "all property of a judgment debtor is subject to enforcement of a money judgment" and is subject to "levy under a writ of execution." *Cal. Civ. Proc. Code §§ 695.010(a), 699.710*. "To levy upon a deposit account, the levying officer shall

personally serve a copy of the writ of execution and a notice of levy on the financial institution with which the deposit account is maintained." *Cal. Civ. Proc. Code § 700.140*. The Code also provides that "[i]f the service is on ... a financial institution," then "service shall be made at the office or branch that has actual possession of the property levied upon or at which a deposit account levied upon is carried." *Cal. Civ. Proc. § 684.110(a), (c)* (emphasis added). Applying California law, the Ninth Circuit has held that where the relevant bank accounts are abroad, service on a bank's local branches is ineffective to levy a bank's accounts and execute a judgment. See *Hilao v. Estate of Marcos*, 95 F.3d 848, 851 (9th Cir. 1996).

Philips admits that it has not served KBC Singapore or KBC New York with a writ of execution. (Stipulation at 1 [Doc. # 526].) It does not make any argument as to why it should be excused from this requirement. It simply asserts that after the Court granted the Motion to Modify in favor of KBC, its only recourse was the appellate process. Philips fails to explain why it did not properly seek to enforce the judgment between the time of its entry on September 17, 2007 and the time the Motion was filed in March 2008 and ruled upon in April 2008.

\*13 Thus, due to Philips' failure to properly execute the judgment, even if Philips could establish it had a superior right to the funds at issue, this Court lacks "authority to order the Bank[ ] to deposit the contested funds into the court registry." *Hilao*, 95 F.3d at 856.

V.

#### **CONCLUSION**

In light of the foregoing, the Motion for Contempt is **GRANTED in part** as to KBC Singapore and **DENIED in part** as to KBC New York. Within 21 days from the date of this Order, Philips may file a motion for fees and costs related to its Motion for Contempt as to KBC Singapore, after compliance with Local Rule 7-3.

**IT IS SO ORDERED.**

**All Citations**

Not Reported in Fed. Supp., 2014 WL 12564095

#### Footnotes

US Philips Corporation v. KXD Technology, Inc., Not Reported in Fed. Supp. (2014)

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- 1 The version of [Federal Rule of Civil Procedure 65\(b\)](#) in effect in 2007 states in relevant part:  
Every temporary restraining order granted without notice ... shall expire by its terms within such time after entry, not to exceed 10 days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be entered of record.  
[Fed. R. Civ. P. 65\(b\)](#).
- 2 The parties' stipulation states that KBC Los Angeles first had notice of the TRO on August 1, 2013. The Court finds this to be a typographical error, given that the TRO was issued in July 2007.
- 3 At the hearing, the parties stipulated that the total amount in controversy is \$2,172,545.23, as provided in stipulated fact number five. [Doc. # 526.] The parties were unable to direct the Court to the records verifying that each of the individual transactions total this amount, and the Court's own review of the evidentiary record was inconclusive. Accordingly, as the Court stated on the record at the hearing, it accepts the parties' stipulation as to the amount at issue.
- 4 Philips makes numerous objections to the How Declaration based on relevance and hearsay. (Objection of U.S. Philips Corporation to Declaration of How Seen Tiat [Doc. # 529].) The Court considers only those facts in the How Declaration it deems material to the disposition of this Motion, and to the extent it relies upon facts Philips argues are irrelevant, those objections are overruled. As the Court stated at the hearing, Philips' hearsay objections are overruled to the extent that they are based upon references to the various agreements discussed in this Order, all of which are attached to the How Declaration, authenticated, and offered as operative facts.
- 5 LG North America and Thomson Sales were each provided with a "Notice of Assignment" dated October 23, 2006 from KXD, stating that it had assigned to KBC Singapore all rights, title, and benefits, and interest in ... monies payable by you to us under the Contract." (How Decl. ¶ 5, Exh. 3.) The Notices also informed LG North America and Thomson Sales that "all payments and repayments required to be made by you under the Contract are forthwith to be paid to the following account ... [named] KXD Digital Entertainment Limited [at] KBC Bank N.V. Singapore Branch." (*Id.*)
- 6 Philips argues that the statement in the How Declaration that the funds at KBC New York were not offset until after the ruling on the Motion to Modify lacks foundation because KBC never produced documents from its New York Branch. (Objection of U.S. Philips ¶ 26.) Philips presents no evidence, however, that KBC New York did anything other than freeze the funds until after the ruling. Moreover, Philips does not object to the portion of the How Declaration asserting that documents were produced by KBC New York. (How Decl. ¶ 23, Exh. 12.)
- 7 Although the parties stipulated that KBC Los Angeles received notice of the TRO on August 1, 2007 and KBC Singapore on August 2, 2007, the parties do not address or provide evidence of when KBC New York received notice of the TRO.
- 8 A contempt sanction is civil if it seeks to compensate injured parties for actual losses caused by the contemptuous conduct. *Ahearn ex rel. N.L.R.B. v. Int'l Longshore & Warehouse Union, Locals 21 & 4*, 721 F.3d 1122, 1130 (9th Cir. 2013). Here, Philips seeks only the amount of the transfers—the actual losses caused by the allegedly contemptuous conduct—and attorneys' fees and costs.
- 9 Both parties assume California law applies to whether KBC had a right of set off, as noted in multiple pleadings. (*See, e.g.*, Philips' Brief Re Remand Order at 14 [Doc. # 517]; Philips' Reply at 5, 19, 24 [Doc. # 527]; KBC's Opposition at 2, 16, 22 [Doc. # 525].) At the evidentiary hearing, the parties agreed that California law controls the question of whether KBC had a right to set off the funds.
- 10 At the hearing, Philips reaffirmed that it does not challenge the existence of KXD's preexisting debt that was due at the time of the TRO.
- 11 Philips' Reply clarifies where it takes issue with KBC's position:  
Philips does not disagree with KBC Bank's assertion of: (i) the law giving rise to a banker's lien generally; (ii) KBC's contractual right to a banker's lien as provided by the Loan Agreement generally, and the Charge of Cash, specifically; (iii) the proper registration of the Charge of Cash under Singapore law; and (iv) *the effect of all of the above in the absence of an injunction. It is this last point on which the parties diverge.* KBC Bank asserts its banker's lien is enforceable even against funds that were unlawfully deposited into the KXD Account, as the Unlawful Transfers were.  
(Philip's Reply at 7 [Doc. # 527] (emphasis added).)
- 12 Philips also argues for the first time in its Reply that the Deed of Assignment is invalid, which provides KBC all assignments and receivables due to KXD from customers. (How Decl. ¶ 4, Exh. 2 [Doc. # 525-2].) Philips contends that the Deed is invalid because

US Philips Corporation v. KXD Technology, Inc., Not Reported in Fed. Supp. (2014)

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it was not properly registered pursuant to Singapore law. Regardless, Philips explicitly does not challenge the validity of the Charge of Cash and Security Agreement (Reply at 7 [Doc. # 527] ), which was also entered into the same day as the Loan Agreement and, like the Deed, provides KBC an interest in the funds in KXD's accounts. (How Decl. ¶ 7, Exh. 4.)

- 13 There are certain circumstances when California law restricts a bank's right to offset funds, none of which apply here. For example, a bank may not offset public benefit funds. *Miller v. Bank of Am.*, 46 Cal. 4th 630, 63-39, 46 Cal. 4th 630, 94 Cal. Rptr. 3d 31 (2009). In addition, a bank may not offset funds held in trust for a third party if the bank has knowledge that the funds are held in trust for another. *Chang v. Redding Bank of Commerce*, 29 Cal. App. 4th 673, 35 Cal. Rptr. 2d 64 (1994).
- 14 Philips cites only one case interpreting California law in support of its proposition that the TRO extinguished KBC's right of offset. In *F.T.C. v. J.K. Publications, Inc.*, No. 99-00044, 2001 WL 36086354 (C.D. Cal. Jan. 17, 2001), a bank froze funds subject to an injunction and then requested the Court's permission to use the funds to offset its customer's debt, asserting a superior right to the funds over other creditors. *Id.* at \*4. *J.K. Publications* is distinguishable from the facts of the case at bar because there the Court held that the bank could not assert an "ownership interest superior to that of the very consumers from whom the money was procured, when the money was deposited with these banks *only* by virtue of Defendants' unauthorized transactions." *Id.* at \*12 (emphasis added). Because the money came from unauthorized credit card charges, the Court reasoned "[a] thief may not convey good title, even to a bona fide purchaser." *Id.* (citing *Morgold, Inc. v. Keeler*, 891 F. Supp. 1361, 1366 (N.D. Cal. 1995)). As the *J.K. Publications* Court put it, "characterization of the funds as 'stolen' is of crucial importance." *Id.* at 12. Here, at the time of the TRO, the funds at issue were transferred to KBC by KXD customers pursuant to an outstanding debt between KXD and KBC Singapore. (See also How Decl. ¶¶ 2-3, 5; Exhs. 1, 3.) Although the funds came from KXD's customers LG North America and Thomson Sales, Philips does not present evidence that the particular funds came from criminal activities or that the customers were complicit in such illegal activities when they deposited the funds. It is therefore not clear that title to the particular funds KBC used to offset KXD's debt was *void ab initio*, as the Court held in *J.K. Publications* where the funds came from unauthorized credit card transactions. *Id.* at \*8.
- 15 The Ninth Circuit mandated that the Court address whether the judgment was properly executed on remand. *Philips I*, 590 F.3d at 1095 n.4.
- 16 A Court may not generally order enforcement of a money judgment through a contempt motion. *Hilao*, 95 F.3d at 854 (quoting *Shuffler v. Heritage Bank*, 720 F.2d 1141, 1148 (9th Cir. 1983)). In *Hilao*, the Court held that "exceptional circumstances" did not excuse the prevailing party from failure to serve a writ of execution on non-party foreign banks, even where the parties included prominent figures, the \$2 billion judgment was unusually large, and the "difficulty of enforcing th[e] judgment [wa]s ... greater than usual, given the location of the assets and the uncooperativeness of the judgment debtor." *Id.* at 855 (requiring a judgment creditor to comply with Rule 69(a) in executing money judgment on funds held at foreign banks).

## Exhibit 25

Vizio, Inc. v. LeEco V. LTD., Not Reported in Fed. Supp. (2018)

**H** KeyCite history available

2018 WL 5303078

Only the Westlaw citation is currently available.  
United States District Court, C.D. California.

VIZIO, INC.

v.

LEECO V. LTD. et al

Case No. SA CV 17-1175-DOC (JPRx)

|  
Filed 07/27/2018

Attorneys and Law Firms

**PROCEEDINGS (IN CHAMBERS): ORDER GRANTING IN PART LEECO'S MOTION TO DISMISS [47]; DENYING JIA'S MOTION TO DISMISS [62]; DENYING LELE HOLDING'S MOTION TO DISMISS [63]; AND GRANTING IN PART VIZIO'S MOTION TO DISMISS [65]**

DAVID O. CARTER, DISTRICT JUDGE

\*1 Before the Court are four motions to dismiss: (1) Defendant LeEco V. LTD.'s ("LeEco" or "Counterclaimant") Motion to Dismiss ("LeEco Motion") (Dkt. 47); (2) Defendant Yueting Jia's ("Jia") Motion to Dismiss ("Jia Motion") (Dkt. 62); (3) LeLe Holding LTD.'s ("LeLe Holding") separate Motion to Dismiss ("LeLe Motion") (Dkt. 63); and (4) Plaintiff Vizio, Inc.'s ("Vizio" or "Counterdefendant") Motion to Dismiss ("Vizio Motion") (Dkt. 65) LeEco's first and third counterclaims in its Counterclaim ("CC") (Dkt. 61). The Court finds these matters suitable for resolution without oral argument. *Fed. R. Civ. P.* 78; L.R. 7-15. Having reviewed the papers and considered the parties' arguments, the Court GRANTS IN PART LeEco's Motion, DENIES Jia and LeLe Holding's Motions, and GRANTS IN PART Vizio's Motion.

## I. Background

### A. Facts

#### 1. First Amended Complaint

Plaintiff and Counterdefendant Vizio is a California corporation with its principal place of business in Irvine, CA, and Vizio is involved in consumer electronic sales worldwide. First Amended Complaint ("FAC") (Dkt. 3) ¶ 1. Vizio brings this suit against Defendants LeEco, LeEco Global Group LTD ("Global Group"), LeLe Holding, Jia, and DOES 1-10. *Id.* LeEco is an exempted company with limited liability, incorporated under the laws of the Cayman Islands. *Id.* ¶ 2. Global Group is a corporation, organized and existing under the laws of the People's Republic of China ("PRC"). *Id.* ¶ 3. Lele Holding is a personal holding company, organized and existing under the laws of the British Virgin Islands. *Id.* ¶ 4. Jia and DOES 1-10 are individuals. *Id.* ¶¶ 1-7.

Starting in or about December 2015, and continuing through and including approximately July 6, 2016, Vizio entered into a series of negotiations regarding the proposed merger of Vizio with LeEco. *Id.* ¶ 11. On July 6, 2016, Vizio, LeEco, and Global Group, through Jia, entered into a written agreement entitled Agreement and Plan of Merger ("Merger Agreement") (Dkt 47-2 Ex. A). *Id.* ¶ 16. Under the Merger Agreement, LeEco agreed to acquire Vizio for \$2 billion with the goal of closing by April 6, 2017. *Id.* ¶ 28.

The Merger Agreement provides that in the event of termination, LeEco shall pay an \$100 million termination fee to Vizio, and this termination fee is broken into two components: a \$50 million escrow deposit, and a \$50 million remainder. *Id.* ¶¶ 22-23. The \$50 million escrow deposit was required to be (and was in fact) placed into escrow by LeEco (and related entities) upon the signing of the Merger Agreement. *Id.* The \$50 million remainder was required to be paid directly to Vizio by LeEco within three business days of a closing or valid termination of the Merger Agreement. *Id.*

Vizio alleges that LeEco was unable to finance the merger on or about April 6, 2017, as required by the Merger Agreement, thus Vizio terminated the Merger Agreement,

Vizio, Inc. v. LeEco V. LTD., Not Reported in Fed. Supp. (2018)

obligating LeEco to pay a \$100 million termination fee to Vizio. *Id.* ¶¶ 28–32.

\*2 However, LeEco entered into a new agreement with Vizio (the “Framework Agreement”) (Dkt 47-2 Ex. B), in which the parties agreed that rather than LeEco paying the \$100 million termination fee, LeEco would pay Vizio \$40 million from escrow upon the execution of the Framework Agreement, as well as contribute capital with a value of at least \$50 million to a new joint venture in China with Vizio, and within forty-five days of execution of the joint venture agreement, LeEco would pay Vizio the remaining \$10 million from escrow. *Id.* ¶ 33. Vizio alleges that the Framework Agreement also included LeEco’s promise to negotiate in good faith and execute a formal joint venture agreement within forty-five days of the execution of the Framework Agreement. *Id.* ¶¶ 33, 38. Upon execution of the Framework Agreement, LeEco made the first payment of \$40 million to Vizio. *Id.* ¶ 37. However, the parties never consummated the joint venture under the Framework Agreement. *Id.* ¶¶ 43–47. Furthermore, Vizio alleges that LeEco avoided negotiating in good faith with Vizio for the joint venture in China, and as a result Vizio demanded the second payment of \$10 million from escrow due to LeEco’s alleged failure to negotiate in good faith. *Id.* ¶¶ 44, 50–51. LeEco did not release the second payment of \$10 million, and Vizio subsequently filed this action. *Id.* ¶¶ 51–53.

Vizio further alleges that during the time in which the parties were negotiating the completion of the merger, Defendants and their affiliated corporate entities were experiencing cash flow and financial problems. *Id.* ¶ 12. Vizio claims that because of these financial problems, Defendants needed to either obtain the financial stability, credibility, and resources that a merger with Vizio would bring, or at least to create a widespread and dramatic public impression of their own financial health and well-being that would come with the announcement of an intended merger to grow or continue in business. *Id.* ¶ 14. Vizio claims that Defendants concocted a secret plan to use the publicly announced intended merger with Vizio to gain or try to obtain access to Vizio’s large corporate clients and key decision makers for Defendants’ own purposes. *Id.* ¶ 15.

## 2. Counterclaim

LeEco filed a Counterclaim. CC. LeEco alleges that the Merger Agreement could be terminated without penalty (wherein the \$100 million termination fee would not be payable) if either the United States or the PRC did not

approve the merger. *Id.* ¶ 9. However, the option to terminate without penalty would not apply if the failure to grant approval was based primarily on LeEco’s failure to “have available sufficient cash on hand, together with Committed Financing, to consummate the Merger ...” *Id.* ¶¶ 8–9. The PRC did not grant its approval of the Merger Agreement, but did not provide its reasons for withholding approval. *Id.* ¶ 10. Vizio and LeEco disputed the primary reason for the PRC’s nonapproval: Vizio contended that it was LeEco’s failure to be sufficiently capitalized as defined under Section 9.1(e) of the Merger Agreement, while LeEco contended that LeEco was sufficiently capitalized, and that the PRC’s imposition of restrictive currency controls during the relevant period was likely the reason that the PRC did not approve the merger. *Id.* ¶ 11. The parties then agreed to extend the closing date of the Merger Agreement to April 6, 2017 in order to allow themselves additional time to obtain the PRC’s approval. *Id.* ¶ 31. The PRC never gave its approval. *Id.* ¶ 13.

In order to settle their dispute, the parties agreed to the Framework Agreement discussed above, which LeEco alleges had the effect of terminating the Merger Agreement in its entirety. *Id.* ¶¶ 15–17. LeEco claims that the Framework Agreement grants LeEco—conditioned upon the receipt by Vizio of \$40 million (held in escrow under the Merger Agreement)—a full and unconditional release of all actual or potential claims that Vizio actually made, or might have been able to make under the Merger Agreement, as a result of the failure of the proposed merger to come to fruition. *Id.* ¶ 18. Vizio received \$40 million upon the execution of the Framework Agreement. *Id.* ¶ 19. LeEco claims that the remaining \$10 million in escrow was to be paid out conditionally upon the formation of a joint venture in China between the parties. *Id.* ¶ 25. Since Vizio and LeEco allegedly failed to execute, or even negotiate in good faith, the proposed China joint venture, this condition allegedly has not been met, and thus, LeEco argues that the \$10 million in escrow must be returned to LeEco. *Id.* ¶¶ 25–26. In spite of these negotiations, Vizio unilaterally requested that escrow give them the \$10 million, allegedly in breach of the Framework Agreement. *Id.* ¶ 31.

## B. Procedural History

\*3 Vizio initiated this action against LeEco on July 11, 2017. Complaint (Dkt. 1). In its initial Complaint, Vizio brought the following six claims against LeEco and LeEco Global Holding LTD: (1) breach of the Framework Agreement; (2) fraud underlying the Framework

Vizio, Inc. v. LeEco V. LTD., Not Reported in Fed. Supp. (2018)

Agreement; (3) negligent misrepresentation underlying the Framework Agreement; (4) promissory estoppel; (5) rescission of the framework agreement for fraud; and (6) breach of the Merger Agreement. Compl. ¶¶ 53–113.

On August 11, 2017, Vizio requested the entry of default against LeEco. Request for Default (Dkt. 15). On August 15, 2017, a default was entered as to LeEco. Default (Dkt. 20). That same day, LeEco filed a Motion to Set Aside Default. Motion to Set Aside Default (Dkt. 22). On September 21, 2017, the Court granted LeEco’s Motion to Set Aside Default (Dkt. 31).

On November 6, 2017, Vizio filed its First Amended Complaint (“FAC”), naming LeEco, Lele Holding, LeEco Global Group, Ltd.,<sup>1</sup> and Jia as Defendants. *See* FAC ¶ 1. In the First Amended Complaint, Vizio brings six claims (the first five are brought against all Defendants and the sixth is brought against LeEco): (1) breach of the Framework Agreement, (2) fraud underlying the Framework Agreement; (3) negligent misrepresentation underlying Framework Agreement; (4) promissory estoppel; (5) rescission of the Framework Agreement for fraud; and (6) breach of the Merger Agreement. FAC ¶¶ 55–116.

On November 20, 2017, Defendant LeEco filed the LeEco Motion to Dismiss the second through sixth claims, along with the Declaration of Robert H. Bruber (“Bruber Declaration”) (Dkt. 47-2). On December 4, 2017, Vizio filed its Opposition (“LeEco Opposition”) (Dkt. 50). On December 18, 2017, LeEco filed its Reply (“LeEco Reply”) (Dkt. 51).

On February 15, 2018, LeEco filed the Counterclaim (Dkt. 61) against Vizio, in which LeEco asserts three claims: (1) breach of the Framework Agreement, (2) breach of contract by failing to negotiate in good faith, and (3) request for declaratory relief. CC ¶¶ 18–46.

On March 1, 2018, Defendant Jia filed the Jia Motion to Dismiss the case along with the Declaration of Yueting Jia (“Jia Declaration”) (Dkt. 63-2). Also on March 1, 2018, Defendant LeLe Holding filed the LeLe Motion, along with the Declaration of Chaoying Deng (“Deng Declaration”) (Dkt. 64).

On March 8, 2018, Vizio filed the Vizio Motion to Dismiss LeEco’s first and third counterclaims. On March 12, 2018, Vizio filed its Opposition to Jia Motion (“Jia Opposition”) (Dkt. 68), Opposition to LeLe Motion (“LeLe Opposition”) (Dkt. 71), along with the Declaration of Dean M. Carroll (“Carroll Declaration”) (Dkt. 66), Declaration of Cesar Hernandez-Govea

(“Govea Declaration”) (Dkt. 67), Declaration of Christine Wessel (“Wessel Declaration”) (Dkt. 71-1), and Declaration of Jason L. Haas (“Haas Declaration”) (Dkt. 71-2).<sup>2</sup>

\*4 On March 26, 2018, Defendant and Counterclaimant LeEco filed their Opposition to Vizio Motion (“Vizio Opposition”) (Dkt. 79). On April 9, 2018, Vizio filed their Reply (“Vizio Reply”) (Dkt. 84). Also on April 9, 2018, Defendant Jia filed his Reply to Jia Opposition (“Jia Reply”) (Dkt. 85), filed concurrently with his Objections to Evidence and Request to Strike (“Jia Objection”) (Dkt. 86). Defendant LeLe Holding also filed its Reply to LeLe Opposition (“LeLe Reply”) (Dkt. 88).

## II. Legal Standard

### A. Failure to State a Claim

Under [Federal Rule of Civil Procedure 12\(b\)\(6\)](#), a complaint must be dismissed when a plaintiff’s allegations fail to set forth a set of facts that, if true, would entitle the complainant to relief. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009) (holding that a claim must be facially plausible in order to survive a motion to dismiss). The pleadings must raise the right to relief beyond the speculative level; a plaintiff must provide “more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” *Twombly*, 550 U.S. at 555 (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). On a motion to dismiss, a court accepts as true a plaintiff’s well-pleaded factual allegations and construes all factual inferences in the light most favorable to the plaintiff. *See Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008). A court is not required to accept as true legal conclusions couched as factual allegations. *Iqbal*, 556 U.S. at 678.

In evaluating a [Rule 12\(b\)\(6\)](#) motion, review is ordinarily limited to the contents of the complaint and material properly submitted with the complaint. *Van Buskirk v. Cable News Network, Inc.*, 284 F.3d 977, 980 (9th Cir. 2002); *Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc.*, 896 F.2d 1542, 1555 n.19 (9th Cir. 1990). Under the incorporation by reference doctrine, courts may also consider documents “whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleading.” *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994),

Vizio, Inc. v. LeEco V. LTD., Not Reported in Fed. Supp. (2018)

overruled on other grounds by 307 F.3d 1119, 1121 (9th Cir. 2002). Courts may treat such a document as “part of the complaint, and thus may assume that its contents are true for purposes of a motion to dismiss under Rule 12(b)(6).” *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003).

Dismissal with leave to amend should be freely given “when justice so requires.” Fed. R. Civ. P. 15(a)(2). This policy is applied with “extreme liberality.” *Morongo Band of Mission Indians v. Rose*, 893 F.2d 1074, 1079 (9th Cir. 1990); *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000) (holding that dismissal with leave to amend should be granted even if no request to amend was made). Dismissal without leave to amend is appropriate only when the court is satisfied that the deficiencies in the complaint could not possibly be cured by amendment. *Jackson v. Carey*, 353 F.3d 750, 758 (9th Cir. 2003).

#### B. Lack of Personal Jurisdiction

Under Federal Rule of Civil Procedure 12(b)(2), a defendant may seek dismissal of an action, or of particular claims, for lack of personal jurisdiction. Fed. R. Civ. P. 12(b)(2). In deciding personal jurisdiction, courts may consider evidence presented in affidavits and declarations. *Doe v. Unocal Corp.*, 248 F.3d 915, 922 (9th Cir. 2001). Plaintiffs bear the burden of showing that courts have personal jurisdiction over defendants. See *Pebble Beach Co. v. Caddy*, 453 F.3d 1151, 1154 (9th Cir. 2006). Absent formal discovery or an evidentiary hearing, “this demonstration requires that the plaintiff make only a prima facie showing of jurisdictional facts to withstand the motion to dismiss.” *Id.* (quotations omitted). To make this prima facie showing, a plaintiff can rely on the allegations in its complaint to the extent that the moving party does not controvert those allegations. See *Doe*, 248 F.3d at 922.

\*5 “The general rule is that personal jurisdiction over a defendant is proper if it is permitted by a long-arm statute and if the exercise of that jurisdiction does not violate federal due process.” *Pebble Beach*, 453 F.3d at 1154–55 (citing *Fireman’s Fund Ins. Co. v. Nat’l Bank of Coops.*, 103 F.3d 888, 893 (9th Cir. 1996) ). Under Federal Rule of Civil Procedure 4(k)(1)(A), federal district courts have personal jurisdiction over a defendant if the defendant would be “subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located,” here California. Because California’s long-arm statute authorizes jurisdiction to the full extent permitted by federal due process requirements, the Court may exercise

personal jurisdiction so long as that jurisdiction comports with due process. See *Daimler AG v. Bauman*, 571 U.S. 117, 125 (2014); *Mavrix Photo, Inc. v. Brand Techs., Inc.*, 647 F.3d 1218, 1223 (9th Cir. 2011); Cal. Civ. Proc. Code § 410.10.

“[D]ue process requires that the defendant ‘have certain minimum contacts’ with the forum state ‘such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.’ ” *Ranza v. Nike, Inc.*, 793 F.3d 1059, 1068 (9th Cir. 2015) (quoting *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) ). The Supreme Court has recognized two bases for exercising personal jurisdiction over a non-resident defendant: (1) general (or all-purpose) jurisdiction, which arises when a defendant’s “affiliations with the State in which suit is brought are so constant and pervasive ‘as to render [it] essentially at home in the forum State’ ” and thus justify the exercise of jurisdiction over it in all matters; and (2) specific (or conduct-linked) jurisdiction, which arises when the claim in question “arises out of or relates to” the defendant’s specific contacts with the forum. *Daimler*, 571 U.S. at 122, 127 (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011); *Helicopteros Nacionales de Columbia S.A. v. Hall*, 466 U.S. 408, 414 (1984) ); *Doe v. Am. Nat’l Red Cross*, 112 F.3d 1048, 1050–51 (9th Cir. 1997).

In determining whether to exercise specific jurisdiction over a non-resident defendant, the Ninth Circuit applies a three-prong test:

- (1) the defendant either purposefully direct[s] its activities or purposefully avails itself of the benefits afforded by the forum’s laws;
- (2) the claim arises out of or relates to the defendant’s forum-related activities;
- and (3) the exercise of jurisdiction comports with fair play and substantial justice, *i.e.*, it [is] reasonable.

*Williams v. Yamaha Motor Co. Ltd.*, 851 F.3d 1015, 1023 (9th Cir. 2017) (internal quotation marks and citation omitted); see also *Dole Food Co., Inc. v. Watts*, 303 F.3d 1104, 1111 (9th Cir. 2002). The plaintiff “bears the burden of satisfying the first two prongs,” and if the plaintiff does so, “the burden then shifts to [the defendant] to set forth a ‘compelling case’ that the exercise of jurisdiction would not be reasonable.” *Mavrix Photo, Inc. v. Brand Technologies, Inc.*, 647 F.3d 1218, 1228 (9th Cir. 2011) (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476–78 (1985) ).

Finally, even if a defendant is not subject to personal jurisdiction in a forum, it can waive its right to assert such a challenge, and submit itself voluntarily to the jurisdiction of the forum’s courts. *Star Fabrics, Inc. v. Zappos Retail, Inc.*, No. CV1300229MMMMRWX, 2013

Vizio, Inc. v. LeEco V. LTD., Not Reported in Fed. Supp. (2018)

WL 12124096, at \*6 (C.D. Cal. July 19, 2013) (citing *Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703 (1982) (“Because the requirement of personal jurisdiction represents first of all an individual right, it can, like other such rights, be waived.”) ). Generally, the defense of lack of personal jurisdiction must be brought in a party’s first responsive pleading or by motion before the responsive pleading. See Fed. R. Civ. P. 12(b); *Alvarez v. NBTY, Inc.*, 2017 U.S. Dist. LEXIS 201159, \*11 (S.D. Cal. Dec. 6, 2017). If it is not raised at that time, the defense is deemed waived. Fed. R. Civ. P. 12(g)(2), (h)(1); see also *Glater v. Eli Lilly & Co.*, 712 F.2d 735, 738 (1983) (“[Rule 12(h)(1)] provide[s] a strict waiver rule with respect to [the lack of personal jurisdiction] defense. ... It is clear under this rule that defendants wishing to raise [this] defense[ ] must do so in their first defensive move, be it a Rule 12 motion or a responsive pleading.”). This strict rule, however, has a narrow exception: it applies only to defenses that were “available to the party” at the time. Fed. R. Civ. P. at 12(g)(2); *Glater*, 712 F.2d at 738 (“[D]efendants do not waive the defense of personal jurisdiction if it was not available at the time they made their first defensive move.”). A defendant can show that a defense was not previously available by demonstrating that the argument that the court lacked jurisdiction over the defendant “would have been directly contrary to controlling precedent in this Circuit.” *Sloan v. Gen. Motors LLC*, 287 F. Supp. 3d 840, 854 (N.D. Cal. 2018), order clarified, No. 16-CV-07244-EMC, 2018 WL 1156607 (N.D. Cal. Mar. 5, 2018) (quoting *Gucci Am., Inc. v. Weixing Li*, 768 F.3d 122, 135–36 (2d Cir. 2014).

### C. Insufficient Service of Process

\*6 “A federal court is without personal jurisdiction over a defendant unless the defendant has been served in accordance with Federal Rule of Civil Procedure 4.” *Travelers Cas. & Sur. Co. of Am. V. Brenneke*, 551 F.3d 1132, 1135 (9th Cir. 2009). However, “Rule 4 is a flexible rule that should be liberally construed so long as a party receives sufficient notice of the complaint.” *United Food & Comm. Workers Union v. Alpha Beta Co.*, 736 F.2d 1371, 1382 (9th Cir. 1984). What is required is “substantial compliance” with Rule 4, with “neither actual notice nor simply naming the defendant in the complaint” being sufficient. *Direct Mail Specialists, Inc v. Eclat Computerized Techs., Inc.*, 840 F.2d 685, 688 (9th Cir. 1988) (quoting *Benny v. Pipes*, 799 F.2d 489, 492 (9th Cir. 1986), cert. denied, 484 U.S. 870 (1987) ).

### III. Request for Judicial Notice

LeEco requests that the Court take judicial notice of two documents from another case in this district, found at Exhibits 1 and 2 of the Request for Judicial Notice (“RJN”) (Dkt. 52), including:

- Judgment to Enforce Arbitration Award (ECF Dkt. No. 480) in *Burton Way Hotels, Ltd., et al. v. Four Seasons Hotels Limited*, C.D. Cal. Case No. 11-cv-00303-PSG (PLAx) (“*Burton*”); and
- Order Granting Four Season Hotels Limited’s Motion for Summary Disposition (ECF Dkt. No. 437-1) in *Burton*.

RJN Exs. 1–2.

“Judicial notice” is a court’s recognition of the existence of a fact without the necessity of formal proof. See *Castillo-Villagra v. I.N.S.*, 972 F.2d 1017, 1026 (9th Cir. 1992). Under Federal Rule of Evidence 201, a court may take judicial notice of court filings and other matters of public record. *Harris v. Cnty. of Orange*, 682 F.3d 1126, 1132 (9th Cir. 2012) (noting that a court may take judicial notice of “undisputed matters of public record”); see also *Reyn’s Pasta Bell a, LLC v. Visa USA, Inc.*, 442 F.3d 741, 746 n.6 (9th Cir. 2006) (taking judicial notice of pleadings, memoranda, and other court filings). In addition, judicial notice is appropriate for information obtained from government websites, see *Paralyzed Victims of Am. v. McPherson*, 2008 WL 4183981, at \*5 (N.D. Cal. Sept. 8, 2008), as well as copies of “records and reports of administrative bodies.” *United States v. Ritchie*, 342 F.3d 903, 909 (9th Cir. 2003). The Court does not, however, take judicial notice of reasonably disputed facts contained within the judicially-noticed documents. See *Lee v. City of L.A.*, 250 F.3d 668, 688–89 (9th Cir. 2001).

Therefore, the Court takes judicial notice of the existence of the documents above contained in Exhibits 1 and 2 described above, since they are court records from previous suits. See *Burbank-Glendale-Pasadena Airport Auth.*, 136 F.3d at 1364. However, the Court does not take judicial notice of the facts within these exhibits because they may be subject to reasonable dispute. See *Lee*, 250 F.3d at 690 (“On a Rule (12)(b)(6) motion to dismiss, when a court takes judicial of another court’s opinion, it may do so not for the truth of the facts recited therein, but for the existence of the opinion, which is not subject to reasonable dispute over its authenticity.” (internal quotations omitted) ).

Vizio, Inc. v. LeEco V. LTD., Not Reported in Fed. Supp. (2018)

#### IV. Discussion

First, in the LeEco Motion, LeEco urges dismissal of Vizio's second through sixth claims on the following four grounds: (1) the Framework Agreement clearly released all claims that potentially could have been brought for a violation of the Merger Agreement; (2) Vizio has failed to plead its fraud claims with sufficient particularity; (3) Vizio's promissory estoppel claim is inapplicable here because its allegations concern two written agreements in which Plaintiff relied on a "bargained for" performance; and (4) Vizio has failed to satisfy the elements of rescission. *See* LeEco Mot. Defendants Jia and LeLe Holding also join in LeEco's Motion to Dismiss. *See* Jia Mot. at 7; LeLe Holding Mot. at 16. Additionally, Jia and LeLe Holding bring separate Motions to Dismiss due to alleged improper service. *See* Jia Mot. at 4–6; LeLe Holding Mot. at 13–17. LeLe Holding further moves to dismiss on the basis of lack of personal jurisdiction. *See* LeLe Holding Mot. at 5–12. Finally, Vizio, as the counterdefendant, also brings its own Motion to Dismiss the first and third claims in LeEco's Counterclaim, on the basis that LeEco fails to sufficiently state those claims. *See* Vizio Mot. at 2–3. The Court will address each argument in turn.

##### A. Claim for Breach of Merger Agreement

\*7 Defendants first argue that Vizio's sixth claim for breach of the Merger Agreement, brought against LeEco and Does 1–10, must be dismissed pursuant to the plain language of the Framework Agreement. LeEco Mot. at 6. Defendants argue that all parties used "the clearest language imaginable" when describing the settlement in both the Merger Agreement and the subsequent Framework Agreement. *Id.* at 6–7. Specifically, Defendants argue that the Framework Agreement clearly establishes that upon Vizio's receipt of \$40 million, Defendants were released from the settlement and all claims that could have been brought for violation of the Merger Agreement, including anything concerning the negotiation of the Merger Agreement. *Id.* Therefore, because Vizio received the \$40 million, Defendants contend that they were released from the terms of the Merger Agreement. *Id.*

In support of their argument, Defendants point to section 6.2 of the Framework Agreement, which states:

6.2 Release by Company. Effective as of the Effective Time, except as expressly set forth herein, the Company, on behalf of itself and its current, former and future parents, subsidiaries, Affiliates, related entities, predecessors, successors, officers, directors, managers, members, shareholders, agents, employees and assigns (individually, each a "Company Releasor" and collectively, the "Company Releasors") hereby generally releases, remises and forever discharges Buyer, Merger Sub and each of their respective past, present and future representatives, attorneys, agents, officers, directors, managers, employees, assigns, heirs and successors in interest, and each of them (each a "Buyer Released Party") and collectively, the "Buyer Released Parties") from any and all Claims whether known or unknown, liquidated or contingent, whether brought in an individual, derivative or representative capacity, now existing or hereafter arising, under contract, tort, violation of law or any other theory of liability, that arise out of or in any way relate, directly or indirectly, to any matter, cause or thing, act or failure to act whatsoever occurring at any time or prior to the date hereof relating to or arising from (a) negotiation or entry into the Merger Agreement, (b) any breach (or claim by Company or any of its Affiliates of breach) of the Merger Agreement or any of the agreements ancillary thereto by Buyer or Merger Sub, (c) the termination of the Merger Agreement or (d) any of the transactions that have occurred pursuant to or are contemplated by the Merger Agreement or any of the agreements ancillary thereto (collectively, subclauses (a)-(d), the "Company Released Claims"); provided, however, the Company Released Claims shall not include any Claims arising from any breach by Buyer or Merger Sub of its obligations under this Agreement.

Framework Agreement, Ex. B, ¶ 6.2. Defendants argue that, "Effective as of the Effective Time," was defined as "receipt by the Company of US \$40,000,000 of the Buyer Termination Fee Deposit pursuant to Section 1.2 hereof." LeEco Mot. at 7 (citing Framework Agreement, Ex. B, ¶ 1.1). Defendants emphasize that Vizio acknowledged that the sum was received by Vizio. *Id.* at 7 (citing FAC ¶ 37 ("That \$40,000,000 sum was released from the CNB escrow and paid directly to Vizio concurrently with the execution of the Framework Agreement.")). Thus, Defendants claim that once Vizio received the \$40 million in escrow, Defendants were released from all claims that may arise from any act or failure to act under the Merger Agreement. *Id.*

Defendants also point to section 6.3 of the Framework Agreement, which stipulates that Vizio would not be able to sue under any of the released claims including under

Vizio, Inc. v. LeEco V. LTD., Not Reported in Fed. Supp. (2018)

any of the terms of the Merger Agreement:

6.3 Covenant Not to Sue. Buyer and Merger Sub, each on behalf of itself and the other Buyer Party Releasers, irrevocably covenants that neither Buyer, Merger Sub nor any of the other Buyer Party Releasers will, directly or indirectly, assert any Claim or demand, commence, institute, or voluntarily aid in any way, or cause to be commenced or instituted any proceeding of any kind against any Company Released Party in respect of any Buyer Party Released Claim. The Company, on behalf of itself and the other Company Releasers, irrevocably covenants that neither the Company nor any of the other Company Releasers will, directly, or indirectly, assert any Claim or demand, commence, institute, or voluntarily aid in any way, or cause to be commenced or instituted any proceeding of any kind against any Buyer Released Party in respect of any Company Released Claim.

\*8 *Id.* ¶ 6.3. Thus, Defendants argue that Section 6.2 and 6.3 of the Framework Agreement clearly state that Defendants are released from the terms of the Merger Agreement, and that both parties agree not to sue under these terms. LeEco Mot. at 11. Defendants contend that these provisions are clear and unambiguous, and therefore, the terms of the Framework Agreement should be given effect. *Id.* As a result, Defendants move the Court to find that the Framework Agreement precludes Vizio's sixth claim and to dismiss that claim with prejudice. *Id.*

In opposition, Vizio argues that because it was fraudulently induced to enter into the Framework Agreement, which, if valid, would have provided the release of claims under the Merger Agreement, Vizio properly seeks rescission of the Framework Agreement and breach of the "only agreement" now between the parties—the Merger Agreement. LeEco Opp'n at 22–24.

As discussed in greater detail below, Vizio alleges with specificity that the Framework Agreement was executed under fraud on the basis that specific, false promises were made on behalf of Defendants to secure the execution of the Framework Agreement. FAC ¶¶ 65–78. By statute and California public policy, LeEco and Vizio cannot agree to release Defendant LeEco from liability for fraud, regardless of any statement to the contrary in a contract. *See* Cal. Civ. Code § 1688. [California Civil Code § 1668](#) provides that "[a]ll contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law." *Id.* In other words, and as the California Court of Appeal noted:

A party to a contract who has been guilty of fraud in its inducement cannot absolve himself or herself from the effects of his or her fraud by any stipulation in the contract, either that no representations have been made, or that any right that might be grounded upon them is waived. Such a stipulation or waiver will be ignored, and parol evidence of misrepresentations will be admitted, for the reason that fraud renders the whole agreement voidable, *including the waiver provision.*

*McClain v. Octagon Plaza, LLC*, 159 Cal. App. 4th 784, 794 (2008) (citation omitted). Therefore, the Framework Agreement's release of all claims that potentially could have been brought for a violation of the Merger Agreement is invalid if it was "procured by misrepresentation, overreaching, deception, or fraud," which Vizio alleges in the FAC. *See Jiminez v. 24 Hour Fitness USA, Inc.*, 237 Cal. App. 4th 546, 563 (2015); *see also Seeger v. Odell*, 18 Cal. 2d 409, 414 (1941) (holding that one "who has been induced by fraudulent misrepresentations to enter into a contract ... may have the contract ... set aside"). Therefore, because Vizio alleges that the Framework Agreement was executed under fraud, the plain meaning of the contract, regardless of any terms or waivers, does not bar Vizio's claim for breach of the Merger Agreement.

Accordingly, the Court DENIES LeEco's Motion to Dismiss Vizio's sixth claim to the extent that the Motion is premised on the purported release contained within the Framework Agreement.

## B. Fraud Claims

Defendants next seek to dismiss Vizio's second through fifth claims for fraud underlying the Framework Agreement, negligent misrepresentation underlying Framework Agreement, promissory estoppel, and rescission of the Framework Agreement for fraud, arguing that these claims: (1) fail to meet Rule 9(b)'s particularity requirement; and (2) are barred by California's economic loss rule. LeEco Mot. at 11–20. Defendants further argue that Vizio's contractual interpretation arguments are "plainly wrong on all ... essential points." *Id.* The Court will address Rule 9(b), the economic loss rule, and the interpretation of the contract in turn.

### 1. Heightened Pleading Standard under Rule 9(b)

\*9 Defendants argue that Vizio fails to plead its second

Vizio, Inc. v. LeEco V. LTD., Not Reported in Fed. Supp. (2018)

through fifth claims with the specificity required by the heightened pleading standard for fraud under [Federal Rule of Civil Procedure 9\(b\)](#). *Id.* at 11–13. “To comply with [Rule 9\(b\)](#), allegations of fraud must be ‘specific enough to give defendants notice of the particular misconduct which is alleged to constitute the fraud charged so that they can defend against the charge and not just deny that they have done anything wrong.’ ” [Bly-Magee v. California](#), 236 F.3d 1014, 1019 (9th Cir. 2001) (quoting [Neubronner v. Milken](#), 6 F.3d 666, 672 (9th Cir. 1993) ). A pleading is sufficient under [Rule 9\(b\)](#) if it identifies the circumstances constituting fraud so that a defendant can prepare an adequate answer for the allegations. [Wool v. Tandem Computers, Inc.](#), 818 F.2d 1433, 1439 (9th Cir. 1987) (citing [Semegen v. Weidner](#), 780 F.2d 727, 734–35 (9th Cir. 1985) ). While statements as to the time, place and nature of the alleged fraudulent activities are sufficient, mere conclusory allegations of fraud are insufficient. *Id.*

Vizio claims under its second and third claims that Defendants fraudulently induced them into entering the Framework Agreement and/or negligently misrepresented the terms of the contract. *See generally* FAC. Vizio’s fourth and fifth claims for promissory estoppel and rescission are based on the allegedly fraudulently-induced contract. *See id.* Under California law, “fraudulent deceit” is defined as “one who willfully deceives another with intent to induce him to alter his position to his injury or risk” and “is liable for any damage which he thereby suffers.” [Cal. Civ. Code § 1709](#). The elements of fraud are: (1) “misrepresentation,” which includes either a “false representation, concealment or nondisclosure”; (2) “knowledge of falsity,” also referred to as “scienter”; (3) “intent to defraud,” which includes an intent “to induce reliance”; (4) “justifiable reliance”; and (5) damages. [Lazar v. Superior Court](#), 12 Cal. 4th 631, 637 (1996) (citing [Cal. Civ. Code § 1710](#)). “[F]raud allegations must include the ‘time, place, and specific content of the false representations as well as the identities of the parties to the misrepresentations.’ ” [UMG Recordings, Inc. v. Glob. Eagle Entm’t, Inc.](#), 117 F. Supp. 3d 1092, 1106 (C.D. Cal. 2015). “For corporate defendants, a plaintiff must allege the names of the persons who made the allegedly fraudulent representations, their authority to speak, to whom they spoke, what they said or wrote, and when it was said or written.” *Id.* at 1107.

Here, Vizio alleges that Defendants made specific false promises on behalf of Defendants, which Defendants did not intend to perform. FAC ¶¶ 33, 34; LeEco Opp’n at 8. Specifically, Vizio alleges:

Starting in or about December 2015, and continuing through and including approximately July 6, 2016,

(“the Serious Negotiations Period”), VIZIO by and through William Wang (“Wang”), its Chief Executive Officer, Ben Wong (“Wong”), its President, and Kurt Binder (“Binder”), its Chief Financial Officer, among others, entered into serious negotiations over the phone, electronically and in person at Irvine, California, and Beijing, People’s Republic of China, with both Lele Holding by and through JIA, its sole and controlling owner, as well as with Global Group, by and through, among others, JIA, Winston Cheng (“Cheng”), its Sr. Vice President of Finance, and Charles Hsieh (“Hsieh”), a director of Global Group, for the merger of Vizio with LeEco and merger Sub.

FAC ¶ 11. Next, Vizio alleges that

during the Serious Negotiations Period, Lele Holding and Global Group, through, inter alia, JIA, represented to one or more of Wong, Binder, and/or Wang, among others, over the phone, electronically and in person at Irvine, California, and Beijing, People’s Republic of China, that Lele Holding and Global Group and various other subsidiary or affiliated corporate entities, were financially healthy and that they had the financial wherewithal to complete a \$2,000,000,000.00, merger transaction with Vizio.

\*10 FAC ¶ 12. Vizio alleges that Defendants made these false representations, and at the time of the negotiations period, Defendants did not have the financial wherewithal to complete a \$2 billion merger with Vizio. *Id.* ¶12. Vizio also alleges that Defendants created a “secret plan” to use this publicly announced merger to obtain access to Vizio’s confidential client information. *Id.* ¶ 15. Additionally, shortly after Vizio delivered its notice of termination of the Merger Agreement to LeEco on March 30, 2017, Vizio alleges that LeLe Holding, Global Group, and LeEco, by and through Jia and other officers of LeEco, discussed with Vizio that they mutually terminate the Merger Agreement, and began negotiations for the Framework Agreement. *Id.* ¶¶ 31, 33. Vizio alleges that the promises made during the negotiations of the Framework Agreement were also false at the time they were made and that Defendants made those promises with knowledge of their falsity and the intent to induce Vizio to jointly terminate the Merger Agreement. FAC ¶ 34. Defendants allegedly falsely represented that they would be contributing \$50 million in non-cash assets to the proposed China joint venture in order for Vizio to release them from the terms of the Merger Agreement. *Id.* ¶¶ 33, 35, 66, 68; LeEco Opp’n 8–9. Defendants allegedly misrepresented that they would negotiate in good faith to establish a commercial relationship in which a 50/50 distributorship would be created to sell Vizio branded televisions at competitive rates, distributed by LeEco. *Id.* ¶ 85. Vizio alleges that this misrepresentation repeated throughout their negotiations over phone and email

Vizio, Inc. v. LeEco V. LTD., Not Reported in Fed. Supp. (2018)

repeatedly over the Framework Agreement, when Defendants had no intention to perform critical promises. *Id.* ¶¶ 11, 34, 76, 94. The misrepresentations were largely repeated in the Framework Agreement, according to Vizio. LeEco Opp'n at 9. After April 5, 2017, when the Framework Agreement was executed, Vizio alleges that there was only "radio silence" from Defendants, which indicates that Defendants had no intention to negotiate in good faith the prospective joint venture in China. FAC ¶ 43. Vizio alleges that up until the May 20, 2017 deadline, they made repeated attempts to negotiate with LeEco during the agreed upon 45-day execution period for the proposed China joint venture. *Id.* ¶¶ 43–44, 87. Therefore, Vizio claims that from this, it can be inferred that the Framework Agreement was a subterfuge in order for Defendants to reduce the \$100 million liability from the termination of the Merger Agreement to the \$40 million that was disbursed to Vizio. *Id.* ¶ 45. LeEco Opp'n 9. Thus, given these extensive allegations, Vizio has alleged the who, what, where, when, and why of the alleged fraud, and properly pleads the first three elements for a fraud claim.

For the fourth element of reliance, LeEco cites cases to argue that, as a matter of law, Vizio cannot claim reliance because both parties were represented by "sophisticated counsel" and because the agreement contains a "no representation clause" in which parties specified that they were not relying on any representation made by another. LeEco Mot. at 12–13 (citing, e.g., *Facebook, Inc. v. ConnectU, Inc.*, No. C 07-1389 JW, 2008 WL 8820476, at \*5 (N.D. Cal. June 25, 2008); *Scognamillo v. Credit Suisse First Boston LLC*, No. C.03-2061 TEH, 2005 WL 2045807, at \*6 (N.D. Cal. Aug. 25, 2005) ).

However, to the latter point, the California Court of Appeal in *Ron Greenspan Volkswagen, Inc. v. Ford Motor Land Dev. Corp.*, 32 Cal. App. 4th 985, 996 (1995) specifically held that "a contract provision stating that all representations are contained therein does not bar an action for fraud." *Ron Greenspan Volkswagen, Inc. v. Ford Motor Land Dev. Corp.*, 32 Cal. App. 4th 985, 992 (1995) (rejecting the sole contrary decision, *Fisher v. Pennsylvania Life Co.* 69 Cal. App. 3d 506 (1977), as at odds with California law).

As to the presence of sophisticated counsel, the cases cited by LeEco are not on point. First, in *Facebook*, the parties were involved in a settlement negotiation in which one party was accused of fraudulently misrepresenting Facebook's present value in the settlement agreement, thus making the contract unenforceable. *Facebook*, 2008 WL 8820476, at \*5. The court found that there was no misrepresentation because both parties proceeded

knowing they lacked potentially relevant information. *Id.* The presence of the "sophisticated counsel" was significant only because the valuation of the Facebook shares was material information that parties could have discovered easily. *Id.* Unlike the counsel in *Facebook*, Vizio here had no means to discover the falsity of the alleged promises at the time they were made, and there was justifiable reliance upon these negotiations. FAC ¶¶ 46, 61, 76, 90, 103. Specifically, Vizio claims that they relied upon the Framework Agreement negotiations by foregoing the immediate payment of the termination fee that would have been required by the Merger Agreement. FAC ¶ 46. Because Vizio would not have been able to know Defendants' intentions in proceeding with the Framework Agreement at the time of the execution, Vizio has properly pled reliance upon Defendants' promises. See *Lazar*, 12 Cal. 4th at 637. Defendants also cite *Scognamillo* for the proposition that reliance cannot be reasonable when a plaintiff was represented by counsel. *Scognamillo*, 2005 WL 2045807, at \*6. While the court in *Scognamillo* held that—even though reliance is a question of fact—based on the sophistication of the parties in the case, no set of facts would enable the plaintiff to show reliance in the negotiation, and execution of a merger agreement; here, as discussed above, Vizio plausibly alleges that there were no means to discover the falsity of the alleged promises at the time they were made, and therefore it plausibly was reasonable to rely on Defendants' representations, even though Vizio was represented by counsel. Therefore, Vizio has plausibly pled the element of reliance.

\*11 Next, as to the damages element of a fraud claim, Vizio believes that it suffered reliance and/or lost opportunity damages in the sum of \$60 million (the \$10 million still remaining in escrow and the \$50 million termination fee remaining) in damages. *Id.* ¶¶ 22, 47. Vizio claims it relied upon the allegedly false representation that Defendants were able to execute a \$2 billion merger when signing the Merger Agreement. *Id.* ¶ 22. Furthermore, Vizio claims it relied upon the promises underlying the Framework Agreement—specifically the promise of the \$50 million contribution capital in the form of non-cash assets for their proposed joint venture in China. *Id.* ¶ 33. By relying on these promises, Vizio was allegedly induced to forego the immediate payment of the \$100 million termination fee. *Id.* ¶ 34. Therefore, Vizio properly pleads the last element of damages for a claim for fraud. See *Lazar*, 12 Cal. 4th at 637.

"The elements of a cause of action for negligent misrepresentation are the same as those of a claim for fraud, with the exception that the defendant need not actually know the representation is false." *Neilson v.*

Vizio, Inc. v. LeEco V. LTD., Not Reported in Fed. Supp. (2018)

*Union Bank of California, N.A.*, 290 F. Supp. 2d 1101, 1141 (C.D. Cal. 2003). “Rather, to plead negligent misrepresentation, it is sufficient to allege that the defendant lacked reasonable grounds to believe the representation was true.” *Id.* As discussed above, Vizio sufficiently alleges a claim under fraud, and has therefore also established a claim under negligent misrepresentation.

Accordingly, the Court DENIES LeEco Motion to Dismiss Vizio’s fraud claims to the extent that Defendants argue that these claims are not pled with sufficient particularity.

## 2. California’s Economic Loss Rule

Next, Defendants claim that Vizio’s fraud-based claims are barred by California’s economic loss rule because they do not demonstrate harm above and beyond a broken contractual promise. LeEco Mot. 13–14. In response, Vizio argues that the economic loss rule does not bar claims of fraudulent inducement, which Vizio alleges here. LeEco Opp’n at 14–21.

In California, the economic loss rule generally bars tort claims for contract breaches, thereby limiting contracting parties to contract damages. *Aas v. Superior Court*, 24 Cal. 4th 627, 643 (2000) (“A person may not ordinarily recover in tort for breaches of duties that merely restate contractual obligations”). The rule “prevents the law of contract and the law of tort from dissolving one into the other.” *Robinson Helicopter Co. v. Dana Corp.*, 34 Cal. 4th 979, 988 (2004). “The term ‘economic loss’ refers to damages that are solely monetary, as opposed to damages involving physical harm to person or property.” *Giles v. General Motors Acceptance Corp.*, 494 F.3d 865, 873 (9th Cir. 2007). By preventing tort claims, the rule encourages parties to reach a “mutually beneficial private bargain.” *United Guar. Mort. Indem. Co. v. Countrywide Fin. Corp.*, 660 F. Supp. 2d 1163, 1180 (C.D. Cal. 2009).

Defendants argue that Vizio’s fraud-based claims are “exactly the kind of claims that the economic loss rule is supposed to weed out.” LeEco Mot. at 14. LeEco claims that because Vizio’s reliance and/or lost opportunity damages of \$60 million are the exact same damages that would result from a breach of contract claim, there is no difference between their breach of contract claims and their tort claims for fraud, negligent misrepresentation, and promissory estoppel, and thus the economic loss rule bars these claims as flowing solely from the breach of contract. *Id.* at 14–15; see FAC ¶¶ 77, 91, 104. Other

district courts applying California law have similarly found tort claims barred in cases in which one party breached a contract it allegedly never intended to perform because such tort claims alleged damages that are the “same economic losses arising from the alleged breach of contract.” See, e.g. *Advanced Riggers & Millwrights, LLC v. Hoist Liftruck MFG, Inc.*, No. ED-CV-151400 JLS(DTBx), 2015 WL 12860470, at \*7 (C.D. Cal. Oct. 29, 2015). Generally, unless plaintiffs can identify an independent duty that was violated, their claims are barred by the economic loss rule. *UMG Recordings, Inc. v. Global Eagle Entertainment, Inc.*, 117 F. Supp. 3d 1092, 1104 (C.D. Cal. 2015) (citing *Engalla v. Permanente Medical Group, Inc.*, 15 Cal.4th 951, 973 (1997) ). Courts have also applied the economic loss rule to bar negligent misrepresentation claims where the purportedly negligent conduct is conceptually indistinct from a contract breach. See *id.*; *United Guar. Mortg. Co.*, 660 F. Supp. 2d at 1184–85 (“For the negligence and negligent misrepresentation claims, Countrywide’s allegedly tortious conduct and representations were all made pursuant to a purely contractual duty .... Here, all the representations were made prior to, or at the moment of, contract formation. Nor were the representations collateral to the contract.”).

\*12 Nonetheless, “tort damages have been permitted in contract cases where ... the contract was fraudulently induced.” *Robinson Helicopter*, 34 Cal. 4th at 989; *Erlich v. Menezes*, 21 Cal. 4th 543, 550–51 (2004). In *Robinson Helicopter*, the Court explained that the fraudulent inducement exception to the economic loss rule is consistent with California’s public policy to permit tort recovery “when the actions that constitute the breach violate a social policy that merits the imposition of tort remedies.” *Robinson Helicopter*, 34 Cal. 4th at 992. In pursuing a valid fraud action, a plaintiff advances the public interest by punishing intentional misrepresentations and deterring future misrepresentations. *Robinson Helicopter*, 34 Cal. 4th at 992; *Lazar v. Superior Court*, 909 P.2d 981, 990 (1996). “California also has a legitimate and compelling interest in preserving a business climate free of fraud and deceptive practices.” *Robinson Helicopter*, 34 Cal. 4th at 992 (citing *Diamond Multimedia Systems, Inc. v. Superior Court*, 19 Cal. 4th 1036, 1064 (1999) ). While “[a] breach of contract remedy assumes that the parties to a contract can negotiate the risk of loss occasioned by a breach .... ‘a party to a contract cannot rationally calculate the possibility that the other party will deliberately misrepresent terms critical to that contract.’ ” *Id.* at 993 (citing Tourek et al., *Bucking the “Trend”: The Uniform Commercial Code, the Economic Loss Doctrine, and Common Law Causes of Action for Fraud and*

Vizio, Inc. v. LeEco V. LTD., Not Reported in Fed. Supp. (2018)

*Misrepresentation*, 84 Iowa L. Rev. 875, 894 (1999) ). Thus, allowing plaintiffs to pursue tort remedies for fraudulently induced contracts allows for an additional deterrence and imposes an extra measure of accountability.

Here, Vizio has pled that it was fraudulently induced into signing the Framework Agreement, and had it known that the other party had no intention of performing in good faith, Vizio would never have executed the agreement. FAC ¶¶ 61–63. Vizio alleges that not only did Defendants not have any intent of performing the contract, they also deceived Vizio into abandoning the Merger Agreement under false pretenses. FAC ¶¶ 67–68. Thus, Vizio has alleged more than a simple breach of contract, and Defendants’ allegedly reprehensible behavior goes against California’s policy of preserving a business climate free of fraud and deceptive practices. See *Robinson Helicopter*, 34 Cal. 4th at 992. Vizio asks not only for the \$10 million in escrow and the \$50 million for the proposed joint venture in China, but also requests punitive and exemplary damages for the fraud-based claims. FAC ¶ 78. For these reasons, Vizio’s separate tort claims for fraud and negligent misrepresentation under the Framework Agreement are not barred by California’s economic loss rule.

Accordingly, the Court DENIES LeEco’s Motion to Dismiss Vizio’s fraud-based claims to the extent that Defendants argue that these claims are barred by California’s economic loss rule.

### 3. Incorrect Interpretation of the Contract

Next, Defendants argue that Vizio completely misinterprets the language in the Framework Agreement, and that a plain interpretation of the contract would show that LeEco is not in breach for not paying to Vizio \$10 million from escrow. LeEco Mot. 15–20. On a motion to dismiss, “[r]esolution of contractual claims ... is proper if the terms of the contract are unambiguous.” *Monaco v. Bear Stearns Residential Mortg. Corp.*, 554 F. Supp. 2d 1034, 1040 (C.D. Cal. 2008) (quoting *Bedrosian v. Tenet Healthcare Corp.*, 208 F.3d 220 (9th Cir. 2000) ); see also *Westlands Water Dist. v. U.S. Dep’t of Interior*, 850 F. Supp. 1388, 1408 (E.D. Cal. 1994) (“A motion to dismiss cannot be granted against a complaint to enforce an ambiguous contract.”). However, at the motion to dismiss stage, “[the Court must] strive to resolve any contractual ambiguities in the [non-moving party’s] favor.” See *Int’l Auditext Network, Inc. v. Am. Tel. & Tel. Co.*, 62 F.3d 69, 72 (2d Cir. 1995). A contract provision will be

considered ambiguous when it is capable of two or more reasonable interpretations. *Safeco Ins. Co. of Amer. v. Robert S.*, 26 Cal. 4th 758, 763 (2001); *Bay Cities Paving & Grading, Inc. v. Lawyers Mut. Ins. Co.*, 5 Cal. 4th 854 (1993). Determining whether a contract provision is ambiguous depends on the facts and circumstances of the case at hand. *Bank of the West v. Superior Court*, 2 Cal. 4th 1254, 1265 (1992). “Even apparently clear language may be found to be ambiguous when read in the context of the policy and the circumstances of the case.” *Employers Reinsurance Co. v. Superior Court*, 161 Cal. App. 4th 906, 919 (2008). Where the language “leaves doubt as to the parties’ intent,” the motion to dismiss must be denied. *Consul Ltd. v. Solide Enters., Inc.*, 802 F.2d 1143, 1149 (9th Cir. 1986).

\*13 The parties dispute whether the terms of the Framework Agreement were violated on their face by LeEco’s failure to pay Vizio \$10 million. See LeEco Mot. at 17–18; LeEco Opp’n at 20. Vizio points to Section 1.1 of the Framework Agreement, which states, “the merger Agreement shall become null and void ... except for Section 6.5 (Confidentiality of Terms of Transaction, Etc.) and Article XI (Miscellaneous) of the Merger Agreement and the terms governing the release of the remaining Buyer Termination Fee Deposit.” LeEco Opp’n at 20. Vizio argues that this language in the Framework Agreement explicitly carves out exceptions to the Merger Agreement that remain in effect—specifically “the terms governing the release of the remaining Buyer Termination Fee Deposit.” *Id.* In other words, in Vizio’s view, the original \$50 million escrow deposit amount must still be paid to Vizio by LeEco, even under the terms of the Framework Agreement, regardless of whether or not the joint venture was executed. See *id.*

However, Defendants claim that if this portion of the Merger Agreement was still in effect, it would directly contradict other portions of the Framework Agreement. LeEco Mot. at 17. Specifically, Defendants argue that Section 1.2.2 of the Framework Agreement allegedly governs the \$10 million at issue and says, “Buyer agrees to concurrently with the execution of the JV Agreement (as defined below) issue with [LeEco] a Joint Release Instruction ... releasing the remaining US\$10,000,000 from the Buyer Termination Fee Escrow Account ... to the [LeEco].” *Id.* at 16. Defendants claim that this language clearly contradicts Vizio’s reasoning because it stipulates that the release of the \$10 million is to occur at the same time as the execution of the China joint venture. *Id.* at 15–16. Furthermore, Defendants assert that there is no explicit provision regarding what happens to the \$10 million if the condition of the joint venture in China does not occur. See *id.* at 16. Defendants also argue that no

Vizio, Inc. v. LeEco V. LTD., Not Reported in Fed. Supp. (2018)

language in the Framework Agreement exists in support of the theory that the Framework Agreement “carved out” sections of the Merger Agreement that were still in effect (but, contradicting Defendants’ argument, Section 1.1 says “except”). *See id.* at 15. Therefore, Defendants contend that Vizio’s argument is unsupported by the language of the Framework Agreement and is “nonsensical.” *Id.* at 15–16.

The dispute between the parties regarding the language of the Framework Agreement, specifically its terms and releases, and what remains of the Merger Agreement demonstrates the ambiguity of the language of the Framework Agreement. *See* LeEco Mot. at 17–18; LeEco Opp’n at 20. Both parties can point to language in the Framework Agreement that appears to support their claims. LeEco Opp’n at 20. Vizio points to Section 1.1, which, on its face, could reasonably allow for certain terms of the Merger Agreement to remain in effect, specifically, the terms of the release of the \$50 million termination fee deposit. *Id.* Defendants point to Section 1.2.2, which stipulates that the China joint venture would be executed with the release of the remaining termination fee deposit. LeEco Mot. at 16. Because the Framework Agreement is capable of two or more reasonable interpretations—specifically as to whether or not LeEco must pay to Vizio the \$10 million remaining in escrow if the joint venture agreement is not executed—the Framework Agreement is “ambiguous” and “leaves doubt as to the parties’ intent.” Therefore, the interpretation of the Framework Agreement is a factual matter to be determined by the circumstances, and the Court declines to resolve the contractual claims on a motion to dismiss.

Accordingly, the Court DENIES Defendant’s Motions to Dismiss Vizio’s second through fifth claims on the basis of misinterpretation of the contract.

### C. Claim for Promissory Estoppel

Additionally, Defendants argue that Vizio’s fourth claim for promissory estoppel must fail because “promissory estoppel as a legal cause of action exists only in the absence of a contract embodying bargained-for consideration, and here there is no dispute regarding whether such a contract exists, only its interpretation.” LeEco Mot. at 4. Because there are two existing contracts in dispute, Defendants contend that Vizio should not be allowed to make a claim under promissory estoppel. *Id.*

\*14 A party seeking relief under the doctrine of promissory estoppel must show: “(1) a promise clear and

unambiguous in its terms; (2) reliance by the party to whom the promise is made; (3) [the] reliance must be both reasonable and foreseeable; and (4) the party asserting the estoppel must be injured by his reliance.” *Granadino v. Wells Fargo Bank, N.A.*, 236 Cal. App. 4th 411, 416 (2015), *as modified* (Apr. 29, 2015) (internal quotation omitted). “[A] cause of action for promissory estoppel might lie if the defendant made a clear, unambiguous promise to negotiate in good faith and if the plaintiff reasonably and foreseeably relied on the promise in incurring expenditures connected with the negotiation.” *Copeland v. Baskin Robbins U.S.A.*, 96 Cal. App. 4th 1251, 1263 (2002). Here, Vizio alleges that Defendants made a promise to negotiate in good faith for the proposed China venture, Vizio relied on this promise and executed the Framework Agreement, the reliance was reasonable and foreseeable, and Vizio was harmed as a result. FAC ¶¶ 92–103. Thus, Vizio has properly alleged the elements of promissory estoppel. *See Granadino*, 236 Cal. App. 4th at 416.

Defendants also argue that because Vizio already pleads a claim for breach of contract, it cannot consistently also plead a claim under promissory estoppel. LeEco Mot. at 20–21. Vizio is correct, however, that “the Federal Rules of Civil Procedure and the applicable case law uniformly permit promissory estoppel and breach of contract claims to be pleaded in the alternative where there may be a dispute about the terms or validity of the alleged contract.” *Rowland v. JP Morgan Chase Bank, N.A.*, Case No. C14–00036LB, 2014 WL 992005, at \*7 (N.D. Cal. 2014). Rule 8(d)(2)–(3) expressly permits a party to plead alternative and even inconsistent claims. *Fed. R. Civ. P.* 8(d)(2)–(3). Therefore, Vizio’s claim for breach of contract does not bar its alternative claim under promissory estoppel.

Accordingly, the Court DENIES LeEco’s Motion to Dismiss Vizio’s fourth claim for promissory estoppel.

### D. Claim for Rescission

Defendants also claim that Vizio, in its fifth claim, fails to satisfy the elements of rescission. LeEco Mot. at 21. “A contract is extinguished by its rescission.” *Cal. Civ. Code* § 1688. *California Civil Code* § 1689(b) allows a contract to be rescinded “if the consent of the party rescinding, or of any party jointly contracting with him, was given by mistake, or obtained through duress, menace, fraud, or undue influence, exercised by or with the connivance of the party as to whom he rescinds.” *Id.* § 1689(b). As discussed above, Vizio sufficiently pleads a claim under

Vizio, Inc. v. LeEco V. LTD., Not Reported in Fed. Supp. (2018)

fraud and negligent misrepresentation because Vizio alleges that there was misrepresentation or fraud that induced it to consent to the Framework Agreement, that Vizio relied upon the terms of the Framework Agreement, and that this led to injury in lost payment and lost future business ventures. Vizio asks for relief in the form of enforcement of the previous Merger Agreement, in which the \$40 million already tendered to LeEco would become a credit for the \$100 million termination fee. FAC ¶¶ 106–07. Therefore, by stating that the contract was entered into through fraud, Vizio has sufficiently stated the elements of rescission. *See Cal. Civ. Code* § 1689(b).

In addition, Defendants argue that rescission requires the tender of what was received, which in this case would require Vizio to return the \$40 million it received under the Framework Agreement before bringing a claim for rescission. LeEco Mot. at 21. However, California law provides otherwise:

A party who has received benefits by reason of a contract that is subject to rescission and who in an action or proceeding seeks relief based upon rescission shall not be denied relief because of a delay in restoring or in tendering restoration of such benefits before judgment unless such delay has been substantially prejudicial to the other party; but the court may make a tender of restoration a condition of its judgment.”

\*15 *Cal. Civ. Code* § 1693; *see also Taylor v. Cabrera*, No. SACV151526JVSJCGX, 2015 WL 12661919, at \*7 (C.D. Cal. Nov. 20, 2015) (“But Taylor’s claim for rescission .... is a claim about the circumstances that brought about the Settlement Agreement and therefore the tender need not be made prior to determining whether Taylor actually has adequate grounds to rescind.”) (citing *Cal. Civ. Code* § 1693). Therefore, because Vizio’s claim for rescission is about the circumstances that brought about the Framework Agreement, Vizio need not tender the \$40 million before a determination of whether there are grounds to rescind. *See Taylor*, 2015 WL 12661919, at \*7.

Next, Defendants argue that rescission is solely a remedy and not a separate cause of action. LeEco Mot. at 21. Indeed, “rescission under California law is not a claim, but a remedy.” *Melcher v. Fried*, No. 16-CV-02440-BAS(BGS), 2018 WL 2411747, at \*6 (S.D. Cal. May 29, 2018) (citations omitted).

Accordingly, the Court DISMISSES WITH PREJUDICE Vizio’s fifth claim for rescission. However, provided that Vizio “can state a cognizable and appropriate underlying claim, [it] may pursue rescission as a remedy in an amended pleading.” *See id.*

### E. Improper Service on Jia

Next, Jia argues that the Court must dismiss the claims against Jia because the attempted service was deficient under [Federal Rule of Civil Procedure 4](#). Jia Mot. at 2.

Federal Rule of Civil Procedure (4)(e) provides that:

an individual ... may be served in a judicial district of the United States by: (1) following state law for serving a summons in an action brought in courts of general jurisdiction in the state where the district court is located or where service is made; or (2) doing any of the following: (a) delivering a copy of the summons and of the complaint to the individual personally; (b) leaving a copy of each at the individual’s dwelling or usual place of abode with someone of suitable age and discretion who resides there; or (c) delivering a copy of each to an agent authorized by appointment or by law to receive service of process.

*Fed. R. Civ. P.* 4(e). Under the applicable California statute, [California Code of Civil Procedure § 415.20\(a\)](#), a summons may be served in lieu of personal delivery by: (1) leaving a copy of the summons and of the complaint “during usual office hours in his or her office ... with the person who is apparently in charge thereof,” and (2) “by thereafter mailing a copy of the summons and of the complaint to the person to be served at the place where a copy of the summons and of the complaint were left.” [Cal. Civ. Proc. Code § 415.20\(a\)](#). “When service is effected by leaving a copy of the summons and complaint at a mailing address, it shall be left with a person at least 18 years of age, who shall be informed of the contents thereof.” *Id.*

“A defendant may move to dismiss or quash under [Rule 12\(b\)\(4\)](#) for a defect in the summons itself and under [Rule 12\(b\)\(5\)](#) for insufficient service of process.” *Verde Media Corp. v. Levi*, No. 14-CV-00891 YGR, 2014 WL 3372081, at \*2 (N.D. Cal. July 8, 2014). “Once service is challenged, plaintiffs bear the burden of establishing that service was valid.” *Brockmeyer v. May*, 383 F.3d 798, 801 (9th Cir. 2003). “Where it appears that effective service can be made and there is no unfair prejudice to the defendant, quashing service rather than dismissing the action is the appropriate course.” *Verde Media*, 2014 WL 3372081, at \*2. (citing *Umberhauer v. Woog*, 969 F.2d 25, 30–31 (3rd Cir. 1992) ). Upon Jia’s challenge to the propriety of service, Vizio now carries the burden of establishing that service was valid. *See Brockmeyer*, 383 F.3d at 801.

Vizio, Inc. v. LeEco V. LTD., Not Reported in Fed. Supp. (2018)

\*16 Service was effected on Jia through substitute service on January 19, 2018 at the offices of Faraday Future, located at 18455 S. Figueroa St., Gardena, CA 90249 (“Faraday Office”). *Id.* at 2–3. Vizio alleges that Jia is the Chief Executive Officer of Faraday Future, an electric automotive company. Jia Opp’n at 1–2. Defendants do not dispute this fact in any of their motions or replies, but claim that the internet articles that describe Jia as the CEO of Faraday Future should be discounted as hearsay. Jia Reply at 7–8. Jia argues that substitute service was deficient because it was received by Chaoying Deng (“Deng”), an employee at Faraday Future, who, according to Jia, was not an authorized agent who could have accepted service on Jia’s behalf. Jia Mot. at 3; Deng Decl. ¶¶ 5–7. Deng also claims that she was never given notice of the content of the service. Jia Mot. at 3; Deng Decl. ¶ 7. Moreover, Jia claims that the process servers did not do their due diligence when attempting to locate Jia’s abode, and that although they inquired into Jia’s address, they never tried to serve notice properly to his home. Jia Reply at 4–5; *see* Carroll Decl. at 2. Finally, Jia argues that process servers failed to attempt service after the holiday season at another location besides the Faraday Office. Jia Reply at 5. Therefore, Jia argues that service was improper under the Federal Rules and the applicable California statute. *Id.*

Vizio responds that service was proper under [Federal Rule of Civil Procedure 4](#) and under [California Code of Civil Procedure § 415.20](#) because the process servers tried three times to personally find Jia in his offices, and because Jia was never located, the process server gave substitute service to Deng, the Vice President of Faraday Future who was in charge of the office at the time, and a copy of the summons and complaint were mailed to the address that day. Jia Opp’n at 4–6. Therefore, the Court will determine whether substitute service was proper through Deng pursuant to [California Code of Civil Procedure § 415.20](#).

\*17 Here, Vizio asserts that Jia is the CEO of Faraday Future, Deng is an officer of Faraday Future who was in charge of the office at the time service was attempted, various attempts were made to serve Jia personally, and Deng was properly served and given notice. *See* Jia Opp’n. at 5; Govea Decl; Carroll Decl.; Proof of Service by Michael Lee (“Proof of Service on Jia”) (Dkt. 57). While Deng declares that she never received notice of the content of the summons and that she was not authorized to accept the summons, Vizio submits evidence from the process servers that contradict her statements.<sup>3</sup> *See* Deng Decl. Specifically, Vizio has submitted the Declarations of Govea and Carroll, which show that the process servers tried multiple times to personally serve Jia. Govea Decl.

(“I waited for an hour until Chaoying Deng came out and accepted the documents on behalf of Lele Holding but she stated that she could not accept the documents on behalf of Yueting Jia.”); Carroll Decl. Additionally, Vizio has submitted the Proof of Service by Michael Lee (“Lee”), in which the process server declares that he served Deng at the office address on January 19, 2018 at 9:20 a.m, and informed her of the general nature of the papers. Proof of Service on Jia at 1–4 (“I informed [Deng] of the general nature of the papers.”). Vizio has therefore established that the process servers left a copy of the summons and complaint during usual office hours at Jia’s office with the person apparently in charge thereof, informed Deng of the contents, and mailed a copy that same day. Jia Opp’n at 5; Proof of Service on Jia at 4. Thus, in accordance with California procedure, Vizio meets the burden of proof, and service of process was effective as to Jia. *See Cal. Civ. Proc. Code § 415.20(a)* (a summons may be served in lieu of personal delivery by: (1) leaving a copy of the summons and of the complaint “during usual office hours in his or her office ... with the person who is apparently in charge thereof,” and (2) “by thereafter mailing a copy of the summons and of the complaint to the person to be served at the place where a copy of the summons and of the complaint were left ... When service is effected by leaving a copy of the summons and complaint at a mailing address, it shall be left with a person at least 18 years of age, who shall be informed of the contents thereof”); Proof of Service on Jia at 4.

Accordingly, the Court DENIES Jia’s Motion to Dismiss to the extent that Jia argues that service was improper.

**F. Improper Service on and Lack of Personal Jurisdiction over LeLe Holding**

Next, LeLe Holding moves to dismiss all claims against it on two grounds: (1) that it was not served properly under the Hague Convention rules; and (2) that the Court does not have personal jurisdiction over LeLe Holding in California. LeLe Mot. at 1. Specifically, LeLe Holding claims that Deng, an officer of Faraday Future, was not a proper agent of service as to LeLe Holding. *Id.* at 3–4. Additionally, LeLe Holding also argues that there is no basis for personal jurisdiction over it because Vizio’s sole connection to LeLe Holding is through Vizio’s theory that LeEco is the alter ego of LeLe Holding (and Global Group) (and that Jia is the alter ego of LeLe Holding and Global Group), which LeLe Holding contends “has no factual support in the FAC.” *Id.* at 1, 9; *e.g.*, FAC ¶¶ 4, 5, 6, 11, 56–57. Thus, LeLe Holding argues that “Vizio cannot impute LeEco[’s] jurisdictional contacts to LeLe

Vizio, Inc. v. LeEco V. LTD., Not Reported in Fed. Supp. (2018)

based solely on a parent/subsidiary relationship.” LeLe Mot. at 1–2. Moreover, LeLe Holding argues that it has no contacts to California that could justify exercising either general or specific jurisdiction there. *Id.* Because the alter ego theory is relevant to both service of process and personal jurisdiction, the Court will first address whether LeLe Holding can be held liable for the conduct of its subsidiaries under Vizio’s alter ego theory. Subsequently, the Court will turn to service of process and personal jurisdiction.

### 1. Alter Ego Theory

In support of Vizio’s theory that LeEco is the alter ego of LeLe Holding (and Global Group), Vizio asserts that LeLe Holding and the other corporate defendants are all under the common ownership and control of Jia, and that LeLe Holding shares a principal place of business and counsel with the other corporate defendants. LeLe Opp’n at 1; e.g., FAC ¶¶ 4, 5, 6, 11 56–57 Vizio further contends that LeEco “represented to the U.S. Government that Lele was part of a common enterprise in which Jia would ultimately control Vizio and that, financially, Lele and LeEco Global are treated as virtually interchangeable and have the same assets and liabilities.” *Id.* at 1–2. Vizio further contends that Jia misrepresented that LeLe Holding’s principal place of business is in the British Virgin Islands, not China as represented in the previous merger negotiations. *Id.* at 2; Wessel Decl. Ex. 2 at 36.

“To establish a party as the alter ego of a corporation, the applicant must show ‘(1) that there [is] such unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist and (2) that, if the acts are treated as those of the corporation alone, an inequitable result will follow.’ ” *Bank of Montreal v. SK Foods, LLC*, 476 B.R. 588, 597 (N.D. Cal. 2012) *aff’d sub nom. Bank of Montreal v. Salyer*, 599 F. App’x 706 (9th Cir. 2015) (quoting *Automotriz del Golfo de California v. Resnick*, 47 Cal. 2d 792, 796 (1957) ); *see also United States v. Boyce*, 38 F. Supp. 3d 1135, 1154–55 (C.D. Cal. 2014), *appeal dismissed* (Nov. 13, 2014) (quoting *In re Schwarzkopf*, 626 F.3d 1032, 1038 (9th Cir. 2010) ). Both factors are necessary for a Court to impose alter ego liability. *Bank of Montreal*, 476 B.R. at 597.

\*18 In assessing the unity of interest prong, courts consider numerous factors, including “inadequate capitalization, commingling of funds and other assets of the two entities, the holding out by one entity that it is liable for the debts of the other, identical equitable

ownership in the two entities, use of the same offices and employees, use of one as a mere conduit for the affairs of the other, disregard of corporate formalities, lack of segregation of corporate records, and identical directors and officers.” *Virtualmagic Asia, Inc. v. Fil-Cartoons, Inc.*, 99 Cal. App. 4th 228, 245 (2002) (citations omitted); *see also Bank of Montreal*, 476 B.R. at 597–98. “No single factor is determinative, and instead a court must examine all the circumstances to determine whether to apply the doctrine.” *Virtualmagic Asia, Inc.*, 99 Cal. App. 4th at 245. Further, “[c]ommon ownership alone is insufficient to disregard the corporate form.” *Stewart*, 81 F. Supp. 3d at 961 (quoting *Sandoval v. Ali*, 34 F. Supp. 3d 1031, 1040 (N.D. Cal. 2014) ) (internal quotation marks omitted).

Here, Vizio has asserted that there is a unity of interest and ownership for LeLe Holding and LeEco, through the defendant Jia. LeLe Opp’n at 16. Vizio submits, as Exhibits 3 and 4 to the Wessel Declaration, the unaudited balance sheets of LeLe Holding, Global Group, and LeEco. Wessel Decl. Exs. 3, 4. Vizio points out that “these statements are *virtually identical* ... Lele and LeEco Global have almost no separate financial existence.” LeLe Opp’n at 17; *see* Wessel Decl. Exs. 3, 4. The balance sheets of the three companies demonstrate that these are not three separate entities, but one company with the same assets. *See id.* LeLe Holding and LeEco both share the same office address in China. Wessel Decl. Ex. 2. Le Technology, Inc. (“Le Tech”), the California Corporation that guaranteed the funds for the merger for LeEco, shares the same office address as Global Group in San Jose, California. Wessel Decl. Exs. 1, 2. Vizio also asserts that LeEco executive Charles Hsieh self-identified as the Director of Corporate Finance & Development for Le Tech. LeLe Opp’n at 5. This same executive Charles Hsieh was allegedly also a principal negotiator for Global Group, which owns LeEco. *See* Hsieh Decl. ¶¶ 2–3. Deng, the Vice President of Jia’s other company Faraday Futures, is also listed as the Chief Executive Officer for Le Tech throughout the relevant time period. LeLe Opp’n at 5; Haas Decl. Ex. 1. Vizio argues that the fact that Le Tech offered to guarantee the \$50 million termination fee for LeEco without any consideration, is telling. *See* Wessel Decl. Ex. 1, ¶ 1; LeLe Opp’n at 4–5. This shows a commingling of funds and a disregard of corporate formalities between the two companies. Throughout the parent and subsidiary companies, there is a connection and intermingling between the employees, assets, and office locations. Thus, Vizio sufficiently establishes facts in support of the proposition that LeLe Holding and LeEco are interconnected in ownership (through Jia) and through a unity of interest (through similarities in offices, employees, and intermingling of assets). Wessel Decl’n

Vizio, Inc. v. LeEco V. LTD., Not Reported in Fed. Supp. (2018)

Exs. 3–5; LeLe Opp’n at 5.

As to the second prong of the alter ego analysis (whether, if the acts are treated as those of the corporation alone, an inequitable result will follow), “the parent is not ‘exposed to liability for the obligations of [the subsidiary] when [the parent] contributes funds to [the subsidiary] for the purpose of assisting [the subsidiary] in meeting its financial obligations and not for the purpose of perpetrating a fraud.’ ” *Sonora Diamond Corp. v. Superior Court*, 83 Cal. App. 4th 523, 538 (2000) (quoting *Lowell Staats Mining Co., Inc. v. Pioneer Uravan, Inc.*, 878 F.2d at 1263). However, “when the corporate form is used to perpetrate a fraud, circumvent a statute, or accomplish some other wrongful or inequitable purpose, the courts will ignore the corporate entity and deem the corporation’s acts to be those of the persons or organizations actually controlling the corporation, in most instances the equitable owners.” *Id.* (citing *Robbins v. Blecher*, 52 Cal. App. 4th at 892; *Communist Party v. 522 Valencia, Inc.*, 35 Cal. App. 4th at 993–94). “The doctrine prevents individuals or other corporations from misusing the corporate laws by the device of a sham corporate entity formed for the purpose of committing fraud or other misdeeds.” *Id.* (citing *Associated Vendors, Inc. v. Oakland Meat Co.*, 210 Cal. App. 2d 825, 842 (1962) ).

\*19 Here, Vizio additionally alleges that the “adherence to the fiction of the separate existence of LeEco, LeLe Holding, and Global Group would permit an abuse of the corporate privilege and promote injustice” by protecting them from liability that was performed under the LeEco name. FAC ¶ 56. Vizio alleges that the acts of LeLe Holding were used to perpetuate the fraud in order to avoid the termination fee from the cancelled merger, and persuade Vizio to join the Framework Agreement. *Id.* ¶ 45. Because LeLe Holding and LeEco are intertwined in ownership and by assets, it would be unjust to allow the parent company to escape liability when it was a key player in enabling the alleged fraud of the subsidiary company. *Id.* Thus, Vizio has also established the second element of the alter ego doctrine, and Vizio has made a plausible case for finding that LeLe Holding is the alter ego of LeEco.

The Court will next look to whether service was proper and whether jurisdiction exists over LeEco’s alter ego, LeLe Holding.

## 2. Improper Service

LeLe Holding moves to dismiss under Federal [Rule](#)

12(b)(5), which “authorizes a defendant to move for dismissal resulting from insufficiency of service of process.” [Fed. R. Civ. P. 12\(b\)\(5\)](#); LeLe Mot. at 13–16. LeLe Holding argues that because it is a company domiciled in the British Virgin Islands (“BVI”), a signatory of the Hague Convention, Vizio must comply with the Hague Convention to effectuate proper service on LeLe Holding. LeLe Mot. at 15. Because neither Deng nor Faraday Futures is LeLe Holding’s registered agent for process, LeLe Holding argues that LeLe Holding was not properly served under the Hague Convention rules. *Id.*; Jia Decl. ¶ 5. Pursuant to the Hague Convention rules, LeLe Holding argues that it should have been served through its registered agent for service of process, located in BVI. LeLe Mot. at 14; Jia Decl. ¶ 2.

For service of foreign corporations, partnerships, and other unincorporated associations, [Federal Rule of Civil Procedure 4](#) provides three alternatives:

Service is effective pursuant to (1) the law of the state where the district court is located or of the state where service is effected, see [Fed. R. Civ. P. 4\(e\)\(1\)](#); (2) by delivering a copy of the summons and complaint in a judicial district of the United States to “an officer, a managing or general agent, or to any other agent authorized by appointment or by the law to receive service of process [.]” [Fed. R. Civ. P. 4\(h\)\(1\)](#); or (3) an internationally agreed method for effective service such as the Hague Convention. See *id.* at 4(f)(1).

*SVC-Napa, L.P. v. Strategy Resort Fin., Inc.*, No. C 06-03561 SI, 2006 WL 2374718, at \*1 (N.D. Cal. Aug. 16, 2006).

Vizio argues that service was proper under [Federal Rule of Civil Procedure 4\(h\)\(1\)](#), which provides that

a domestic or foreign corporation, or a partnership or other unincorporated association that is subject to suit under a common name, must be served: (1) in a judicial district of the United States:

(a) in the manner prescribed by Rule (4)(e)(1) for serving an individual; or (b) by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or any other agent authorized by appointment or by law to receive service of process and—if the agent is one authorized by statute and the statute so requires—by also mailing a copy of each to the defendant.

[Fed. R. Civ. P. 4\(h\)](#); LeLe Opp’n at 9. The Ninth Circuit has explained that

service of process is not limited solely to officially designated officers, managing agents, or agents

Vizio, Inc. v. LeEco V. LTD., Not Reported in Fed. Supp. (2018)

appointed by law for the receipt of process. The rules are to be applied in a manner that will best effectuate their purpose of giving the defendant adequate notice. Thus, the service can be made “upon a representative so integrated with the organization that he will know what to do with the papers. Generally, service is sufficient when made upon an individual who stands in such a position as to render it fair, reasonable and just to imply the authority on his part to receive service.”

\*20 *Direct Mail Specialists, Inc. v. Eclat Computerized Techs., Inc.*, 840 F.2d 685, 688 (9th Cir. 1988) (quoting *Top Form Mills, Inc. v. Sociedad Nazionale Industria Applicazioni Viscosa*, 428 F. Supp. 1237, 1251 (S.D.N.Y. 1977); *Insurance Co. of N. Am. v. S/S “Hellenic Challenger”*, 88 F.R.D. 545, 547 (S.D.N.Y. 1980) ). Thus, the Court will weigh whether it would be “fair, reasonable and just” to serve Deng as an agent of LeLe Holding. *See id.*

LeLe Holding argues that Vizio’s attempt to serve Ms. Deng failed because she is not “an officer, managing or general agent or ... other agent authorized” to accept service under [Rule 4\(h\)\(1\)](#). LeLe Mot. at 15. Both the Deng Declaration and Jia Declaration assert that Deng is not an officer, registered agent, general manager, or anybody otherwise authorized to accept service of process on behalf of LeLe Holding. Jia Decl. ¶ 5; Deng Decl ¶ 7. Furthermore, LeLe Holding claims that Faraday Future, the company whose office was served, is completely independent from LeLe Holding and the other corporate defendants named in this lawsuit. Jia Decl. ¶ 4; Deng Decl. ¶¶ 4–5.

In support of its claim that Deng is an authorized agent or officer of LeLe Holding, Vizio provides articles taken from the web that link Faraday Future to LeEco, as well as several public records that show that Deng is an agent for service of process for Le Tech and another company, LeEco Real Estate Group, LLC (“LREG”). Haas Decl. Vizio asserts that Le Tech was the entity that guaranteed Vizio payment of the \$50 million termination fee if LeEco failed to perform. LeLe Opp’n at 4–5; Wessel Decl. Ex. 1. While these documents hint at the possibility that Deng might be more involved in Jia and LeEco’s various subsidiary companies and affiliates, none of these documents link Deng to LeLe Holding directly. *See* Haas Decl.

However, Deng was also listed as the Chief Executive Officer for Le Technology, Inc. (“Le Tech”), a California corporation, during the negotiations period between Vizio and Defendants. LeLe Opp’n at 4–5; Haas Decl. Ex. 1. Vizio points to the Limited Guarantee Agreement in the Wessel Declaration, which stipulates that Le Tech would

guarantee the payment of the termination fee to Vizio should LeEco fail to execute the underlying Merger Agreement. *See* Wessel Decl. Ex. 1, ¶ 1; LeLe Opp’n at 4–5. Vizio argues that the lack of consideration for this guarantee is telling and clearly points to a substantial connection between the two companies. *Id.* Deng’s role as the CEO of Le Tech suggests that her involvement with LeEco, Jia, and LeLe Holding is greater than what she stated in her Declaration. *See* Deng Decl.

In addition, Vizio’s proofs of service provided in the Carroll and Govea Declarations state that Deng herself affirmed that she was an authorized agent for LeLe Holding while she was receiving the summons. Carroll Decl. at 2.; Govea Decl. at 2. While accepting service on behalf of LeLe Holding, she, according to the declarations, distinguished that she could not accept service on behalf of Jia, but could accept service for LeLe Holding. *See* Govea Decl. at 2. However, Deng states in her declaration the following

\*21 None of Vizio’s process servers ever asked me if I was authorized to accept service on LeLe’s behalf. One of Vizio’s process servers asked me if I could leave my office and accept service on behalf of LeLe, and I told him that I would not (because I do not have authority to accept service on LeLe’s behalf). I am not a designated agent for service of process, general or managing agent, or officer or general manager for LeLe.

Deng Decl. at 1. In contrast, the process servers’ declare that Deng represented that she could accept service for LeLe Holding: (1) “I spoke to Chaoying Deng (female) who stated that she is the agent for service of LeLe Holdings and that she can accept the documents”; and (2) “I waited for an hour until Chaoying Deng came out and accepted the documents on behalf of LeLe Holding but she stated that she could not accept the documents on behalf of Yueting Jia.” Carroll Decl. at 2.; Govea Decl. at 2. The process servers’ accounts are persuasive because they corroborate one another and because they are more unequivocal. *See also* [4A Fed. Prac. & Proc. Civ. § 1083 \(4th ed.\)](#) (“The general attitude of the federal courts is that the provisions of Federal [Rule 4](#) should be liberally construed in the interest of doing substantial justice and that the propriety of service in each case should turn on its own facts within the limits of the flexibility provided by the rule itself.”) (citing, e.g., *Direct Mail*, 840 F.2d at 685).

Vizio has met its burden to establish that it would be “fair, reasonable and just” to find that Deng is an agent of LeLe Holding for the purposes of service: (1) because Deng is closely connected to LeLe Holding, given that Le Tech (of which Deng was the CEO during the merger negotiations) acted as the guarantor for LeEco (the

Vizio, Inc. v. LeEco V. LTD., Not Reported in Fed. Supp. (2018)

plausible alter ego of LeLe Holding) for the proposed merger; and (2) because Vizio has submitted declarations persuasively stating that Deng affirmed that she can accept service on behalf of LeLe Holding. See *Direct Mail*, 840 F.2d at 688. Thus, when Vizio served Deng with a summons and complaint, service of process was effective as to LeLe Holding under Rule 4(h)(1).

Accordingly, the Court DENIES LeLe Holding's Motion to Dismiss to the extent LeLe Holding argues that service was improper.

### 3. Personal Jurisdiction

Next, LeLe Holding argues that the Court does not have jurisdiction over it because LeLe Holding is a foreign corporation with no contacts in California. LeLe Mot. at 5–13. Vizio responds by arguing that LeLe Holding is subject to personal jurisdiction both as the alter ego of LeEco and because of its direct involvement in the acts alleged in the First Amended Complaint. LeLe Opp'n at 10–14. Under the alter ego doctrine, a nonresident defendant may be subject to personal jurisdiction even if the defendant has not had any contact with the forum state, if that defendant's subsidiary had contacts, because a subsidiary's contacts with a forum are imputed to the parent when a plaintiff makes a prima facie showing that the parent and subsidiary are not really separate entities. See *Davis v. Metro Prods., Inc.*, 885 F.2d 515, 520 (9th Cir. 1989); *Doe v. Unocal Corp.*, 248 F.3d 915, 926 (9th Cir. 2001). As discussed above, Vizio has made a plausible case that LeEco is the alter ego of LeLe Holding, and thus the Court turns to whether there is personal jurisdiction over LeLe Holding in California in light of the plausible alter ego showing.

\*22 LeLe Holding is a BVI company, and is domiciled and has its sole place of business in BVI. LeLe Mot. at 4. LeLe Holding claims that it has never registered to conduct business in California; has never had any offices or facilities in California; has never owned or leased any property in California; has no business license in California; has never had any employees in California; has never opened a bank account in California, has never paid taxes in California; and otherwise has not directly invested or conducted any business activities in California, "other than through subsidiaries such as LeEco V." *Id.* at 4. Therefore, LeLe Holding claims that there are no minimum contacts with California such that the exercise of personal jurisdiction does not offend "traditional notions of fair play and substantial justice." *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

In determining whether to exercise specific jurisdiction over a non-resident defendant, the Ninth Circuit applies a three-prong test:

(1) the defendant either purposefully direct[s] its activities or purposefully avails itself of the benefits afforded by the forum's laws; (2) the claim arises out of or relates to the defendant's forum-related activities; and (3) the exercise of jurisdiction comports with fair play and substantial justice, *i.e.*, it [is] reasonable. *Williams v. Yamaha Motor Co. Ltd.*, 851 F.3d 1015, 1023 (9th Cir. 2017) (internal quotation marks and citation omitted); see also *Dole Food Co., Inc. v. Watts*, 303 F.3d 1104, 1111 (9th Cir. 2002). The plaintiff "bears the burden of satisfying the first two prongs," and if the plaintiff does so, "the burden then shifts to [the defendant] to set forth a 'compelling case' that the exercise of jurisdiction would not be reasonable." *Mavrix Photo, Inc. v. Brand Technologies, Inc.*, 647 F.3d 1218, 1228 (9th Cir. 2011) (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476–78 (1985)).

Vizio claims that LeLe Holding purposefully directed its activities toward Vizio in California in order to convince Vizio to engage in a transaction with LeLe Holding's subsidiaries in California, which would be governed by California law. LeLe Opp'n at 11–12 (citing Merger Agreement § 11.7 (California law governs); Framework Agreement § 9.4 (same)). Vizio asserts that LeLe Holding was directly involved in representing to Vizio that LeEco and Global Group were financially healthy and able to transact a \$2 billion merger. *Id.* Vizio claims that the \$50 million deposit was deposited into escrow through LeLe Holding, Global Group and/or their subsidiary or affiliated corporate entities. *Id.* at 12. Vizio argues that it may have entered into contracts with LeEco, but "Vizio would not have entered into those transactions without the backing of Lele and LeEco Global." *Id.* at 14; see Wessel Decl. Exs. 3, 4; Wang Decl. ¶¶ 8, 9. Vizio contends that LeLe Holding and Global Group were the "only entities with any assets for LeEco." LeLe Opp'n at 14. Without the funding from LeLe Holding, Vizio contends that it would not have entered into the Merger Agreement or the subsequent Framework Agreement, out of which this suit rises. *Id.* Thus, by sufficiently alleging that LeLe Group financially backed and facilitated the merger agreement, which was negotiated in California and in China, involved California entities and is governed by California law, Vizio has established that LeLe Holding purposefully availed itself of California. *Williams*, 851 F.3d at 1023. Further, the claim arises from the alleged fraud and breach of the Merger and Framework Agreements, which are the agreements that involve the contacts with California. Therefore, Vizio has

Vizio, Inc. v. LeEco V. LTD., Not Reported in Fed. Supp. (2018)

satisfied the first two prongs for specific jurisdiction—purposeful availment and claims arising from forum-related activities—based on LeLe Holdings own actions. Perhaps more significantly, the actions of LeEco and Jia, who plausibly are alter egos of LeLe Holding, warrant sufficient activity in California to extend specific jurisdiction. See *Davis*, 885 F.2d at 520. Specifically, by negotiating with Vizio in Irvine, California over the phone, electronically, and in person, and/or by entering into contracts that are governed by California law, LeEco and Jia participated directly in a substantial part of the events or omissions giving rise to Vizio’s claims for fraud and breach of contract, and LeEco and Jia do not contest personal jurisdiction in their motions. See FAC ¶¶ 11–15; LeEco Mot.; Jia Mot.; see also *Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 705 (1982) (“[T]he failure to enter a timely objection to personal jurisdiction constitutes, under Rule 12(h)(1), a waiver of the objection.”).

\*23 LeLe Holding next argues that litigation in California would be unreasonable and against fair play and justice. LeLe Mot. at 13. The Ninth Circuit has identified several factors in determining reasonableness, including: (1) the extent of the nonresident defendant’s purposeful interjection into the forum state; (2) the burden on the defendant of entering the forum; (3) the extent of conflict with the sovereignty of the defendant’s state; (4) the forum state’s interest in adjudicating the dispute; (5) the most efficient judicial resolution of the controversy; (6) the importance of the forum to plaintiff’s interest in convenient and effective relief; and (7) the existence of an alternative forum. *Pac. Atl Trading Co. v. M/M Express*, 758 F.2d 1325, 1329–31 (9th Cir. 1985). LeLe Holding argues that LeLe Holding has zero contacts with the state other than through its subsidiaries, and that it has not purposefully interjected itself into California. LeLe Mot. at 13. As a foreign defendant, the burden on LeLe Holding to defend in California is much greater. See *Asahi Metal Industry Co.*, 480 U.S. at 114 (recognizing that the “unique burdens placed upon one who must defend oneself in a foreign legal system should have significant weight in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders”); LeLe Opp’n at 13.

Vizio contends that LeLe Holding interjected itself into California, and that there is “particularly no justification for the parties to litigate in the British Virgin Islands.” *Id.* at 14–15. LeLe Holding is represented by the same counsel as LeEco and Jia, the same witnesses would have to testify on behalf of the other Defendants as LeLe Holding, and none of the witnesses or events live or have occurred in the British Virgin Islands. *Id.* Furthermore,

Vizio argues that “California has a strong interest in protecting its corporations and businesses from being exploited by undercapitalized foreign businesses that make promises they cannot keep and that then engage in fraud in an effort to avoid their contractual obligations.” *Id.* at 15.

Because LeLe Holding allegedly played a substantial role in furthering the negotiations for the Merger Agreement, because the conduct from which the claims arise occurred in California, and because California has a strong interest in protecting its businesses, the exercise of jurisdiction in California comports with fair play and justice. See *Williams*, 851 F.3d at 1023. Therefore, personal jurisdiction over LeLe Holding is proper in California based on specific jurisdiction as to LeLe Holding’s own contacts, as well as through the alter ego theory of liability.

Accordingly, the Court DENIES LeLe Holding’s Motion to Dismiss claims to the extent the Motion is brought on the basis of lack of personal jurisdiction.

Next, the Court turns to Vizio’s separate Motion to Dismiss LeEco’s first and third counterclaims.

#### G. Counterclaim for Breach of Contract

In Vizio’s Motion to Dismiss LeEco’s counterclaims, Vizio argues that LeEco’s first counterclaim for breach of the Merger Agreement is “fatally defective” because it is contingent upon the Court first ordering a rescission of the Framework Agreement. Vizio Mot. at 4. Vizio contends that because the Court would first need to order a rescission of the Framework Agreement, this first counterclaim is premature, and thus does not sufficiently state a claim upon which relief can be granted. *Id.*

However, LeEco’s counterclaim is based on an alleged breach of the Framework Agreement—not the Merger Agreement—and thus, the counterclaim is not contingent on a rescission of the Framework Agreement. See CC ¶¶ 18–23.

Accordingly, the Court DENIES Counterdefendant’s Motion to Dismiss LeEco’s first counterclaim for breach of contract.

Vizio, Inc. v. LeEco V. LTD., Not Reported in Fed. Supp. (2018)

#### H. Counterclaim for Declaratory Relief

In its third counterclaim, LeEco seeks a declaration that the terms of the Framework Agreement relating to the proposed China joint venture do not constitute a binding contract, but rather a legally unenforceable “agreement to agree” (LeEco also seeks a declaration that the \$10 million remaining in escrow should be immediately returned to LeEco, but Vizio’s Motion does not address that request). CC ¶ 34. Vizio argues that the request for a declaration that the terms of the China joint venture are unenforceable is inconsistent with the terms of the Framework Agreement on the face of the agreement, and so the third claim must be dismissed as implausible. Vizio Mot. at 4–5. Specifically, Vizio contends that the Framework Agreement shows that parties agreed to the material terms of the proposed China joint venture and the joint venture terms are enforceable. *Id.* at 2, 5–7.<sup>4</sup> Vizio also asserts that at a minimum the Framework Agreement’s joint venture terms constitute an enforceable agreement to negotiate in good faith. *Id.* at 8.

\*24 On a motion to dismiss a request for declaratory judgment to interpret a contract, the Court should only grant the motion to dismiss if “the contract language is not ambiguous.” *San Diego Unified Port Dist. v. Nat’l Union Fire Ins. Co. of Pittsburgh, PA*, No. 3:15-CV-1401-BEN-MDD, 2016 WL 3766364, at \*5 (S.D. Cal. July 6, 2016) (citations omitted). However, if a contract provision “is capable of two or more reasonable interpretations, considering the contract as a whole and the circumstances of the case ... the [C]ourt should deny the motion to dismiss.” *Id.* (citations omitted). Determining whether a contract provision is ambiguous depends on the facts and circumstances of the case at hand. *Bank of the West*, 2 Cal. 4th at 1265. “Even apparently clear language may be found to be ambiguous when read in the context of the policy and the circumstances of the case.” *Employers Reinsurance Co.*, 161 Cal. App. 4th at 919.

An agreement to agree is indefinite and thus unenforceable under California law. *Bustamante v. Intuit, Inc.*, 141 Cal. App. 4th 199, 213 (2006) (“There is no contract where the objective manifestations of intent demonstrate that the parties chose not to bind themselves until a subsequent agreement was made.” (brackets and citations omitted) ). The California Court of Appeal explained contract indefiniteness as follows:

Under California law, a contract will be enforced if it is sufficiently definite (and this is a question of law) for the court to ascertain the parties’ obligations and to determine whether those obligations have been performed or breached. To be enforceable, a promise must be definite enough that a court can determine the

scope of the duty, and the limits of performance must be sufficiently defined to provide a rational basis for the assessment of damages. Where a contract is so uncertain and indefinite that the intention of the parties in material particulars cannot be ascertained, the contract is void and unenforceable. The terms of a contract are reasonably certain if they provide a basis for determining the existence of a breach and for giving an appropriate remedy. But if a supposed contract does not provide a basis for determining what obligations the parties have agreed to, and hence does not make possible a determination of whether those agreed obligations have been breached, there is no contract.

*Id.* (internal quotation marks, brackets, and citations omitted). Where “an essential element of a promise is reserved for future agreement by both parties,” a contract is indefinite and “there is no legal obligation until such future agreement is made.” *Hotel Del Coronado Corp. v. Foodservice Equip. Distributors Ass’n*, 783 F.2d 1323, 1325 (9th Cir. 1986) (citing *Coleman Engineering Co. v. North American Aviation, Inc.*, 65 Cal. 2d 396, 405 (1966) ). “However, if the term awaiting future agreement is not essential, each party will be forced to accept a reasonable determination of the unsettled point or if possible the unsettled point may be left unperformed and the remainder of the contract be enforced.” *Id.* (internal quotation marks and citations omitted). “Whether a term is essential depends upon the relative importance and the severability of the matter left to the future; it is a question of degree.” *Id.* (internal quotation marks and citations omitted). “The importance of a term may depend in part on the intentions of the parties.” *Id.* (citations omitted). Courts may consider extrinsic evidence to determine the importance of a term and the intention of the parties. *Id.* (relying on deposition testimony to analyze the importance of a term).

In LeEco’s counterclaim for declaratory relief, LeEco raises the following allegations in support of its request for a declaration that the Framework Agreement’s joint venture terms are not enforceable:

\*25 The requirements regarding the China [joint venture (“JV”)] were that following Vizio’s receipt of \$40 million from LeEco (defined in the Framework Agreement as the “Effective Time”), “the Parties shall negotiate in good faith and use reasonable efforts to form a commercial relationship between the [Parties] for expansion efforts in the People’s Republic of China (“China”).” [Framework Agreement (“FA”)] § 3.1.

The Section of the Framework Agreement discussing the China JV begins with the heading, “The proposed terms of the China JV are as follows:” FA § 3.2.

Vizio, Inc. v. LeEco V. LTD., Not Reported in Fed. Supp. (2018)

The preamble to this Section entitled “Formation of a Joint Venture” (FA § 3.1) likewise expresses the fact that the China JV is not a binding contractual commitment between the Parties: “*The proposed commercial relationship would provide for* (i) the Company [i.e., Vizio] granting the China JV the right to sell Company televisions in China subject to the mutual consent of the Company and Buyer on branding and distribution; (ii) the Company preloading EUI and Le contents [i.e., a proposed technology exchange referenced in Section 2 of the Framework Agreement, which involves LeEco’s smart television app Leco Le App being made available on Vizio’s smart televisions and displays, and a data client, Inscape Data being made available on LeEco’s smart televisions and displays] on Company displays sold in China; and (iii) the Company and Buyer entering into the joint venture in China as described in this Section 3 (the ‘China JV’).” FA § 3.1.

None of the essential terms regarding the proposed China JV were agreed upon as of the date of Framework Agreement. For example, the fundamental commercial relationship identified in the Framework Agreement regarding the proposed China JV required a technology exchange of LeEco’s “Le App” technology [a smart television app], and Vizio’s “Inscape Data” technology. FA §§ 2.1 & 2.2.

There was no agreement on pricing for this potential technology exchange that was integral to the proposed transaction, other than a commitment to “negotiate in good faith.” FA § 2.2.3.

When it came to sales targets for the proposed transaction, the language is similarly undefined, namely that the Parties “will mutually agree on ... Sales Target[s]” set “at reasonable competitive rates that allow a reasonable margin of profit per unit sold by the China JV.” FA § 3.2.5.

The open terms identified ... above describe fundamental terms that would have to have been agreed upon for this portion of the Framework Agreement to have constituted an enforceable obligation.

The Parties did not agree upon such terms in the Framework Agreement or subsequently.

The Framework Agreement contemplates the severability of its provisions in the event any portion of the Agreement is determined to be “invalid, illegal, or incapable of being enforced ... [notwithstanding which] all other terms ... shall nevertheless remain in full force and effect ....” FA § 9.7.

The portion of the Framework Agreement relating to the creation of the China JV is incapable of being enforced, as none of the essential terms of the proposed China JV were agreed upon, including pricing, sales targets and the technology transfer contemplated by the proposed joint venture.

CC ¶¶ 36–45.

In Vizio’s Motion to Dismiss this counterclaim, Vizio first argues that LeEco’s allegations are not plausible, and should be dismissed, because “the Framework Agreement on its face clearly reflects the intention of VIZIO and LeEco to form a joint venture, with discrete details left with respect to ‘post-acquisition’ matters.” Vizio Mot. at 6. Specifically, Vizio argues that all the material terms of the joint venture were agreed to in the Framework Agreement, namely:

\*26 1) LeEco’s contribution of non-cash assets with a fair market value equal to \$50,000,000.00 to the China JV (Docket No. 61, Counterclaim, Exhibit A, ¶ 3.2.1); 2) the parties mutual execution of a formal joint venture agreement with a long-term partnership spirit to expand the VIZIO branded products (Docket No. 61, Counterclaim, Exhibit A, ¶ 3.2.2); 3) the 50/50 ownership and control of the China JV of both VIZIO and LeEco (Docket No. 61, Counterclaim, Exhibit A, ¶ 3.2.3); 4) the China JV’s promotion and marketing of VIZIO branded devices through LeEco’s distributing/omni channels in China (Docket No. 61, Counterclaim, Exhibit A, ¶ 3.2.4); and 5) the VIZIO branded devices were to be distributed exclusively in China through the China JV, with EUI and Le content as the exclusive content/streaming platform (Docket No. 61, Counterclaim, Exhibit A, ¶ 3.2.6).

*Id.* at 6–7. In contrast, Vizio contends that discrete matters for the future “merely concerned the post-acquisition management of the China JV,” namely:

the target number of televisions to be deployed from VIZIO to China, the “competitive rates” with which to sell VIZIO units, the profit on units sold by the China JV and “upon the achievement of the Sales Target...(the parties will negotiate in good faith to extend the Initial JV Term.)” (Docket No. 61, Counterclaim, Exhibit A, ¶ 3.2.5). These minor details concerning the sale and distribution of VIZIO products do not prevent the formation of the China JV.

*Id.* at 7. In addition, Vizio argues that even if there is indefiniteness in the terms, the statutory gap fillers of California’s Commercial Code (UCC) remove that uncertainty. *Id.* (citing California Com. Code § 2204(1)(c) (gap filler where price term left open) and § 2309(2) (gap filler for unstated duration) ).

Vizio, Inc. v. LeEco V. LTD., Not Reported in Fed. Supp. (2018)

In response, LeEco argues that the terms missing from the agreement, such as price, capital structure, and the length of time of the “proposed” joint venture, are essential and not mere matters of “post-acquisition management.” Vizio Opp’n at 9 (citing *Bustamante*, 141 Cal. App. 4th at 209 (affirming summary judgment in favor of the defendant on the basis that a proposed joint venture was not enforceable where parties failed to agree on material terms such as the duration of the plaintiff’s management role, his compensation, and the amount of the defendant’s royalty) ). In addition, LeEco argues that the Framework Agreement is not a contract for the sale of goods and thus the UCC (and California’s Commercial Code) does not apply. *Id.* at 7–8. Further, LeEco argues that even if the UCC applies, the UCC does not solve the problem of a lack of agreement on essential terms. *Id.*

The parties’ briefing focuses on whether or not all the essential terms of the joint venture were agreed to in the Framework Agreement (which is relevant to the ultimate question of indefiniteness) but, at the outset, on a motion to dismiss, the question to be determined is whether or not the contract language is ambiguous. See *San Diego Unified Port Dist.*, 2016 WL 3766364, at \*5 (explaining that, on a motion to dismiss a request for declaratory judgment to interpret a contract, if the contract provision at issue is ambiguous, a court should deny the motion to dismiss). Here, the language of the Framework Agreement is ambiguous as to whether or not the parties intended to obligate themselves to actually form the joint venture. See *Bustamante*, 141 Cal. App. 4th at 213 (“To be enforceable, a promise must be definite enough that a court can determine the scope of the duty, and the limits of performance must be sufficiently defined to provide a rational basis for the assessment of damages.”). Specifically, Section 3.1 of the Framework Agreement states: “Following the Effective Time, the Parties shall negotiate in good faith and use reasonable efforts to form a commercial relationship between the Company and Buyer for expansion efforts in the People’s Republic of China. The proposed commercial relationship would provide for ...” Framework Agreement § 3.1. The language of “proposed” joint venture, and “reasonable efforts,” does not suggest a firm obligation to actually form the partnership, but rather an obligation to make a good faith effort to do so. See *id.* On the other hand, Section 4 states: “Buyer and the Company shall negotiate in good faith and execute one or more agreements to document the China JV and the other commercial arrangements set forth in Sections 2 and 3 hereof with the terms specified therein within forty-five (45) days of the date hereof.” *Id.* § 4. This language is more definite, stating that the parties “shall” execute an agreement to document the joint venture. See *id.* Therefore, the contract

is ambiguous as to whether or not the parties intended to be obligated to actually form the joint venture. As a result, at this early stage of litigation, dismissal of the counterclaim, which seeks a declaration that the terms for the formation of a joint venture are unenforceable, is not warranted. See *San Diego Unified Port Dist.*, 2016 WL 3766364, at \*5.

\*27 Next, Vizio contends that the counterclaim should be dismissed to the extent that LeEco seeks a declaration that the Framework Agreement’s requirement that the parties negotiate a joint venture in good faith is unenforceable, because the agreement clearly requires good faith negotiations. Vizio Mot. at 8; Framework Agreement § 3.1 (“[F]ollowing the Effective Time, the Parties shall negotiate in good faith and use reasonable efforts to form a commercial relationship between the Company and Buyer for expansion of efforts in the People’s Republic of China. The proposed commercial relationship will provide ....”). In response, LeEco argues that the Framework Agreement’s provision for the parties to negotiate in good faith is not enforceable because the joint venture is described as a “proposed commercial relationship,” and the agreement lacks essential terms as to the joint venture. Vizio Opp’n at 11–12. However, under California law, an agreement to negotiate in good faith is independently enforceable, as the Court of Appeal explained:

A contract to negotiate the terms of an agreement is not, in form or substance, an “agreement to agree.” If, despite their good faith efforts, the parties fail to reach ultimate agreement on the terms in issue the contract to negotiate is deemed performed and the parties are discharged from their obligations. Failure to agree is not, itself, a breach of the contract to negotiate. A party will be liable only if a failure to reach ultimate agreement resulted from a breach of that party’s obligation to negotiate or to negotiate in good faith. For these reasons, criticisms of an “agreement to agree” as “absurd” and a “contradiction in terms” do not apply to a contract to negotiate an agreement. In addition, it is important to note courts which have found purported contracts to be unenforceable “agreements to agree” have focused on the enforceability of the underlying substantive contract, not on whether the agreement to negotiate the terms of that contract is enforceable in its own right.

*Copeland v. Baskin Robbins U.S.A.*, 96 Cal. App. 4th 1251, 1257 (2002). Therefore, the parties’ clear and unambiguous agreement in the Framework Agreement to negotiate the joint venture in good faith is enforceable (regardless of whether or not the parties’ agreement to form the underlying joint venture is separately enforceable). See *id.* The Framework Agreement’s good

Vizio, Inc. v. LeEco V. LTD., Not Reported in Fed. Supp. (2018)

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faith provision requires “good faith efforts” to negotiate, whether or not an ultimate agreement is reached. *Id.* Therefore, because the good faith negotiation provision is unambiguous, dismissal of the counterclaim is appropriate to the extent that LeEco seeks a declaratory judgment of unenforceability as to the Framework Agreement’s provision that the parties negotiate the joint venture in good faith. See *San Diego Unified Port Dist.*, 2016 WL 3766364, at \*5.

Accordingly, the Court DISMISSES WITH PREJUDICE LeEco’s third counterclaim to the extent that LeEco seeks a declaratory judgment of unenforceability as to the Framework Agreement’s provision that the parties negotiate the joint venture in good faith.

#### V. Disposition

For the foregoing reasons, the Court GRANTS IN PART LeEco’s Motion to Dismiss, DENIES Jia and LeLe Holding’s Motions to Dismiss, and GRANTS IN PART

#### Footnotes

- 1 According to the docket, Global Group has not been served and has not appeared in this action.
- 2 The Court permitted portions of the LeLe Opposition and Wessel Declaration to be filed under seal because this is a non-dispositive motion and because the sealed portions contain information filed by Vizio and LeEco with the Committee on Foreign Investment in the United States (“CFIUS”); and the CFIUS filings are protected as confidential pursuant to 5 U.S.C. § 552(B), 50 U.S.C. § 4565(C), 31 C.F.R. § 800.702, and 32 C.F.R. § 286. See Application to File Under Seal (Dkt. 69). However, these confidentiality requirements are subject to “limited exceptions,” and those exceptions provide that information may be made public “as may be relevant to any administrative or judicial action or proceeding.” *In re Glob. Crossing Ltd.*, 295 B.R. 720, 725 (Bankr. S.D.N.Y. 2003) (citing 50 U.S.C. § 2158, *et seq.*; 31 C.F.R. § 800.702). Accordingly, the Court will not seal its own references to this material, because the materials cited by the Court are “relevant” to this judicial action. See *id.*
- 3 Vizio filed an Evidentiary Objection to the Deng Declaration (“Evidentiary Objections”) (Dkt. 68-1) claiming that various statements by Deng contesting that she was authorized to receive personal mail for Jia and that she received notice of the contents of the service are irrelevant to determining whether service is proper. Deng Decl. ¶¶ 4, 6; Evidentiary Objections.
- 4 Vizio also argues that LeEco cannot consistently claim that the Framework Agreement is both an enforceable contract in the LeEco Motion, but unenforceable with respect to the proposed China joint venture, and that therefore LeEco should be estopped from arguing that the Framework Agreement is unenforceable. Vizio Mot. at 9–10. However, as LeEco points out, LeEco’s position is that while the termination and release portions of the Framework Agreement are binding, the portions of the Framework Agreement pertaining to a proposed joint venture constitute an unenforceable “agreement to agree”; and the Framework agreement provides that its terms may be severable. Vizio Opp’n at 13. Accordingly, LeEco is not estopped from arguing that the Framework Agreement is unenforceable with respect to the joint venture.

Vizio’s Motion to Dismiss.

The Court DISMISSES WITH PREJUDICE Vizio’s fifth claim for rescission. However, provided that Vizio can state a cognizable and appropriate underlying claim, the Court GRANTS Vizio leave to amend to pursue rescission as a remedy. Accordingly, Vizio may file a second amended complaint, if desired, **on or before August 10, 2018.**

In addition, the Court DISMISSES WITH PREJUDICE LeEco’s third counterclaim to the extent that LeEco seeks a declaratory judgment of unenforceability as to the Framework Agreement’s provision that the parties negotiate the joint venture in good faith.

The Clerk shall serve this minute order on the parties.

#### All Citations

Not Reported in Fed. Supp., 2018 WL 5303078

Vizio, Inc. v. LeEco V. LTD., Not Reported in Fed. Supp. (2018)

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## Exhibit 26

In re Vrabel, Slip Copy (2005)

**C** KeyCite citing references available

2005 WL 6960238

Only the Westlaw citation is currently available.  
United States Bankruptcy Appellate Panel  
of the Ninth Circuit.

In re Martin F. VRABEL, Debtor.  
Martin F. Vrabel and Sophie Vrabel,  
Appellants,

v.

Martha G. Bronitsky, Chapter 13 Trustee;  
Washington Mutual Bank; G. Judson  
Scott, Jr.; [Michael Quirk](#), Appellees.

BAP No. NC-04-1331-PBS.

Bankruptcy No. 04-40559.

Argued and Submitted on May 19, 2005.

Filed June 17, 2005,.

Appeal from the United States Bankruptcy Court for the  
Northern District of California, Honorable [Randall J.  
Newsome](#), Chief Bankruptcy Judge, Presiding.

Before: PERRIS, [BRANDT](#) and [SMITH](#), Bankruptcy  
Judges.

#### MEMORANDUM<sup>1</sup>

\*1 The issue in this appeal is whether the bankruptcy court erred in entering an order barring a nondebtor spouse from filing bankruptcy for 180 days after dismissal of her husband's bankruptcy case.<sup>2</sup> While there was no jurisdictional defect, the nondebtor spouse was denied due process. We therefore REVERSE and REMAND for the nondebtor spouse to be given adequate notice and opportunity to respond, if the bankruptcy court deems it appropriate to pursue a bar order against her.

#### FACTS

Martin F. Vrabel ("debtor") filed the chapter 13<sup>3</sup> petition out of which this appeal arises in February 2004. Debtor's wife, Sophie Vrabel ("Sophie"), is not listed as a joint debtor on the bankruptcy petition. Debtor and Sophie claim to have an ownership interest in a certain parcel of real property. Debtor filed his bankruptcy petition to stop an imminent foreclosure.

Appellee Washington Mutual Bank ("WMB"), which holds first and second trust deeds on the property, filed motions for relief from stay. On June 3, 2004, the court held a hearing on the motions for relief and other matters. Appellants did not provide us with a transcript of this hearing. However, there is no dispute that one of the issues discussed at the hearing was the possibility that debtor and Sophie had engaged in misconduct in connection with debtor's bankruptcy case.

The bankruptcy court continued the June 3 hearing to June 17, and entered an order to show cause, stating as follows:

Pursuant to the record established at a June 3, 2004 hearing ..., the Court hereby orders Martin F. Vrabel to appear on June 17, 2004 ... and show cause why [debtor's] bankruptcy case should not be dismissed, with prejudice.

After the June 17 continued hearing, the court entered an order granting WMB conditional relief from stay, disposing of several other matters, and stating as follows:

5. The Court's *Order to Show Cause* filed on June 4, 2004 (doc. 51) is hereby vacated. If this case is, however, subsequently dismissed for any reason, that dismissal shall be with prejudice as to the Debtor, and both the Debtor and Sophie Vrabel shall be prohibited from filing another bankruptcy case of any kind for 180 days from the date of dismissal of this case.

June 23, 2004 Order, at 2. Debtor and Sophie timely appealed.<sup>4</sup>

On January 21, 2005, debtor's case was dismissed for failure to make plan payments. We have entered an order limiting the issue on appeal to whether the bankruptcy court erred in imposing a 180-day bar against Sophie, because that is the sole issue raised by appellants on appeal that has not become moot as a result of the dismissal of debtor's case. We also expedited this appeal, because an order barring access to bankruptcy for 180 days is not subject to review after passage of 180 days. See *In re Fernandez*, 227 B.R. 174, 178 (9th Cir.BAP1998). The 180 day period expires on July 20,

In re Vrabel, Slip Copy (2005)

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2005.

157.<sup>6</sup> 1 Alan N. Resnick & Henry J. Sommer, Collier on Bankruptcy ¶ 3.01[1] (15th ed. Rev.2004). The bankruptcy court in this case had subject matter jurisdiction to enter the order on appeal, because the order flows from the court's exercise of jurisdiction over debtor's bankruptcy case.

ISSUES

1. Whether the bankruptcy court had jurisdiction.

\*2 2. Whether the bankruptcy court violated due process in imposing a 180-day bar against Sophie.<sup>5</sup>

The 180-day bar order entered against Sophie in this case is effectively an injunction entered by the court sua sponte pursuant to § 105(a).<sup>7</sup> Section 105(a) states that a bankruptcy "court may issue any order, process or judgment that is necessary or appropriate to carry out the provisions of" the Bankruptcy Code. Congress anticipated that a § 105(a) injunction would be used to enjoin nondebtors in certain circumstances. 2 Resnick & Sommer, COLLIER ON BANKRUPTCY ¶ 105.03 (15th ed. Rev.2000). See also *In re Schwimm Bicycle Co.*, 210 B.R. 747, 761 (Bankr.N.D.Ill.1997)(§ 105(a) repeatedly has been held to empower a bankruptcy court to enjoin parties other than the debtor), *aff'd*, 217 B.R. 790 (N.D.Ill.1997). Moreover, a court may enjoin a party on its own motion, if such action is necessary or appropriate to prevent an abuse of the bankruptcy system. See *In re Graves*, 279 B.R. 266, 273 (9th Cir.BAP2002).

STANDARDS OF REVIEW

Questions of jurisdiction are reviewed de novo. *In re Castlerock Properties*, 781 F.2d 159, 161 (9th Cir.1986). Whether an individual was afforded due process is a question of law, which we also review de novo. *In re Niles*, 106 F.3d 1456, 1459 (9th Cir.1997); *In re Repp*, 307 B.R. 144, 148 (9th Cir.BAP2004).

A bankruptcy court acting pursuant to § 105(a) has the power to prevent a continuing abuse of the bankruptcy system by multiple parties acting in concert. *In re Yiman*, 214 B.R. 463, 466 (Bankr.D.Md.1997); *In re Kinney*, 51 B.R. 840 (Bankr.C.D.Cal.1985). Here, the bankruptcy court found that debtor and Sophie committed fraud and engaged in other abusive conduct in connection with debtor's chapter 13 case. See Transcript of June 24, 2004 Hearing, 12:16–24. While appellants suggest that the court erred in these findings, the record provided on appeal is not sufficient to permit review of that question, because appellants did not provide us with transcripts of the June 3 and 17 hearings. An appellant is obliged to provide the appellate court with a record sufficient for meaningful review. *United States v. Vasquez*, 985 F.2d 491, 495 (10th Cir.1993). When the appellant fails to provide a complete record, we are entitled to presume that the appellant does not regard the missing portions as helpful. *In re McCarthy*, 230 B.R. 414, 417 (9th Cir.BAP1999).

DISCUSSION

1. *Jurisdiction*

An order entered without subject matter or personal jurisdiction is void. *In re Pac. Land Sales, Inc.*, 187 B.R. 302, 309 (9th Cir.BAP1995). It is not clear whether appellants contest the bankruptcy court's subject matter jurisdiction over the matter at issue in this appeal (entry of a 180-day bar order against a non-debtor) or personal jurisdiction over Sophie. Therefore, we will address both subjects.

B. *Personal Jurisdiction*

\*3 A defect in personal jurisdiction is a defense that may be waived. *In re Pac. Land Sales, Inc.*, 187 B.R. 302, 309 (9th Cir.BAP1995). Sophie submitted to the bankruptcy court's exercise of jurisdiction over her by virtue of her

A. *Subject Matter Jurisdiction*

28 U.S.C. § 1334(a) provides the federal district courts with original and exclusive jurisdiction over bankruptcy cases. The district courts have referred bankruptcy cases to the bankruptcy courts, as provided for by 28 U.S.C. §

**In re Vrabel, Slip Copy (2005)**

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extensive, voluntary participation in debtor's bankruptcy case.

Sophie affirmatively invoked the jurisdiction of the bankruptcy court on several occasions. She filed multiple motions to conduct 2004 exams of individuals claiming to hold liens on the property. She also jointly filed an opposition to WMB's motions for relief from stay, requesting sanctions against WMB under Rule 9011. Sophie did not limit her appearances before the bankruptcy court in any of the pleadings she filed in the bankruptcy court. Therefore, we conclude that she consented to the bankruptcy court's exercise of adjudicatory authority over her.

In addition, Sophie responded to the bankruptcy court's order to show cause, directly addressing the subject of the court's concerns about the propriety of her and debtor's conduct in debtor's bankruptcy case. *See* Declaration of Sophie Vrabel in Response to Order to Show Cause and Relief from Stay. Sophie's declaration is akin to a responsive pleading. Sophie did not assert a lack of personal jurisdiction in her declaration, thus waiving any defect in the court's exercise of such jurisdiction. *See Benny v. Pipes*, 799 F.2d 489, 492 (9th Cir.1986)(defect in personal jurisdiction waived by the filing of a responsive pleading that fails to contest jurisdiction), *opinion amended on other grounds*, 807 F.2d 1514 (9th Cir.1986).

## 2. Due Process

Appellants argue that Sophie was denied due process when the bankruptcy court entered a 180-day bar against her. WMB does not address appellants' due process argument in its appellate brief.

Due process requires adequate notice and an opportunity to be heard. *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 94 L.Ed. 865 (1950); *In re Colortran, Inc.*, 218 B.R. 507, 511 (9th Cir.BAP1997).

An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.

*Mullane*, 339 U.S. at 314. An order is void if entered in a manner inconsistent with due process. *In re Loloee*, 241 B.R. 655, 661 (9th Cir.BAP1999).

There is no question that, had WMB or any other third party requested entry of a bar order against Sophie, it would have had to have done so by filing an adversary complaint. *See In re Roeben*, 294 B.R. 840, 846 (Bankr.E.D.Ark.2003). Rule 7001(7) requires an adversary proceeding to obtain an injunction. Adversary proceedings in bankruptcy are commenced by the filing of a complaint, Rule 7003, which must be served in accordance with Rule 7004.

As we discuss above, a bankruptcy court can impose an injunction on its own motion pursuant to § 105(a). However,

\*4 [a] bankruptcy court acting on its own motion in a matter that ordinarily requires an adversary proceeding must, in deference to principles of due process, assure that the defendant is afforded procedural protections that inhere in an adversary proceeding because the rules of procedure generally define what process is due. *In re Graves*, 279 B.R. 266, 274 (9th Cir.BAP2002).

The bankruptcy court failed to afford Sophie due process, because there is no indication that the court gave Sophie any notice whatsoever that it was considering entry of a bar order against her, much less notice approaching the quality of that required to institute an adversary proceeding in compliance with the Rules discussed above. Immediately after the June 3 hearing, the court entered the show cause order set forth above, but that order only addressed the dismissal of debtor's case. Without prior notice, Sophie did not have an adequate opportunity to address the court's concerns or object to entry of the bar order.

## CONCLUSION

While there was no defect in the bankruptcy court's exercise of subject matter or personal jurisdiction, Sophie was not afforded due process when the court entered the 180-day bar order. Therefore, we REVERSE and REMAND for Sophie to be given adequate notice and opportunity to respond, if the bankruptcy court deems it appropriate to pursue a bar order against her.

## All Citations

Slip Copy, 2005 WL 6960238

In re Vrabel, Slip Copy (2005)

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Footnotes

- 1 This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except when relevant under the doctrines of law of the case, res judicata, or collateral estoppel. See 9th Cir. [BAP Rule 8013-1](#).
- 2 The order on appeal addresses other matters. For the reasons explained below, the only issue before us in this appeal is the propriety of entry of the 180-day bar against the debtor's spouse.
- 3 Unless otherwise indicated, all chapter, section and rule references are to the Bankruptcy Code, [11 U.S.C. §§ 101-1330](#), and to the Federal Rules of [Bankruptcy Procedure, Rules 1001-9036](#).
- 4 The notice of appeal states that only debtor "hereby appeals [.]". However, both debtor and Sophie signed the notice of appeal. Sophie also signed the opening brief on appeal, identifying herself as an appellant. We therefore conclude that Sophie is an appellant in this appeal.
- 5 Appellants state in the "Introduction" section of their opening brief that the bankruptcy court also erred in imposing a 180-day bar against debtor. This statement is not supported by any subsequent argument in appellants' appellate brief. Therefore, we deem it waived. See [Acosta-Huerta v. Estelle](#), 7 F.3d 139, 144 (9th Cir.1992)(issues raised in appellate brief but not supported by argument are deemed abandoned).
- 6 "Each district court may provide that any or all cases under title 11 ... shall be referred to the bankruptcy judges for the district." [28 U.S.C. § 157\(a\)](#).
- 7 Appellants argue that the court violated § 109(g) in entering the 180-day bar against Sophie, because she is not a debtor in the bankruptcy case out of which this appeal arises. Section 109 states as follows:
  - (g) Notwithstanding any other provision of this section, no individual or family farmer may be a debtor under this title who has been a debtor in a case pending under this title at any time in the preceding 180 days if—
    - (1) the case was dismissed by the court for willful failure of the debtor to abide by orders of the court, or to appear before the court in proper prosecution of the case; or
    - (2) the debtor requested and obtained the voluntary dismissal of the case following the filing of a request for relief from the automatic stay provided by section 362 of this title.The facts of this case indicate that the court imposed the bar order pursuant to § 105(a), not § 109(g).

## Exhibit 27

In re Wells, Not Reported in B.R. Rptr. (2017)

**H** KeyCite history available

2017 WL 4768106

Only the Westlaw citation is currently available.

**NOT FOR PUBLICATION**

United States Bankruptcy Appellate Panel of the  
Ninth Circuit.

IN RE: Gloria Dean WELLS, Debtors.  
Michael Griffith, Appellant,  
v.  
Gloria Dean Wells, Appellee.

BAP No. CC-16-1319-LSTa

Bk. No. 2:15-bk-27834-BB

Argued and Submitted on September 29, 2017

Filed October 10, 2017

Appeal from the United States Bankruptcy Court for the  
Central District of California, Honorable Sheri Bluebond,  
Chief Bankruptcy Judge, Presiding

#### Attorneys and Law Firms

Appellant Michael Griffith appeared pro se.

Barry R. Wegman argued for Appellee.

Before: LAFFERTY, SPRAKER, and TAYLOR,  
Bankruptcy Judges.

#### AMENDED MEMORANDUM\*

#### INTRODUCTION

\*1 After an evidentiary hearing to determine the fair market value of Debtor's residence for purposes of avoiding Appellant Michael Griffith's judgment lien, the bankruptcy court found that the residence was worth \$360,000 as of the petition date. On the basis of that valuation, and after deducting consensual liens and

Debtor's homestead exemption, the court found that Mr. Griffith's lien impaired Debtor's homestead exemption and entered an order avoiding the lien. On appeal, Mr. Griffith argues that he was denied due process and challenges the bankruptcy court's valuation finding. Having thoroughly reviewed the record, we find no denial of due process or clear error in the bankruptcy court's valuation finding. Accordingly, we AFFIRM.

#### FACTS

Debtor Gloria Dean Wells filed her chapter 7<sup>1</sup> petition on November 20, 2015. On Schedule A, Debtor listed her residence on Cherrywood Avenue in Los Angeles (the "Property") with a value of \$325,000. On Schedule D, Debtor listed a consensual lien in favor of Chase Bank in the amount of \$250,313.99. And on Schedule C, Debtor claimed a homestead exemption of \$175,000 under Cal. Civ. Proc. Code § 704.730(a)(3).

About a month later, Debtor filed a motion under § 522(f)(1)(A) (the "Motion") to avoid Mr. Griffith's judgment lien in the amount of \$40,527.14.<sup>2</sup> Debtor's declaration in support of the Motion contained a calculation showing that deducting the consensual lien and homestead exemption from the fair market value of \$325,000 left no available non-exempt equity to secure Mr. Griffith's judgment lien. As evidence of value, Debtor attached to her motion the declaration of appraiser Todd Turner, which authenticated a May 26, 2015 appraisal establishing a fair market value of \$325,000.

Mr. Griffith filed an opposition, arguing that the May 26 appraisal was outdated and requesting that a "third party appraisal" be performed before the court ruled on the motion. Mr. Griffith attached to his opposition a comparative market analysis dated January 7, 2016, which estimated the value of the Property at between \$617,000 and \$645,000.

At the initial hearing, the bankruptcy court, after noting that Mr. Griffith had initially been served at the wrong address, gave him additional time to hire an appraiser to value the Property. The court continued the matter for a status conference. Mr. Griffith thereafter filed a declaration and an appraisal performed by Lawrence Walsh dated April 13, 2016, which reflected a fair market value of \$505,000. At the subsequent status conference, the bankruptcy court pointed out to the parties that neither's appraisal was adequate for the court to determine the fair market value of the Property as of the

In re Wells, Not Reported in B.R. Rptr. (2017)

petition date of November 20, 2015. The court continued the matter again to give the parties time either to hire an agreed-upon independent appraiser or to have their respective appraisers adjust their numbers to reflect the value as of the petition date.

\*2 Thereafter, Debtor filed a new declaration from Mr. Turner and a new appraisal as of the petition date, which opined that the Property's value as of that date was \$360,000. Mr. Griffith also filed an updated appraisal, supported by Mr. Walsh's declaration, reflecting a petition date value of \$470,000.

The bankruptcy court set an evidentiary hearing. At that hearing, both appraisers testified as to their credentials and methodology and were examined by Debtor's counsel, Mr. Griffith, and the court. Both appraisers testified that the Property needed repairs as a result of deferred maintenance. The difference in their respective appraisals appeared to be primarily due to differences in the deductions made for that deferred maintenance. Mr. Turner concluded, based upon a May 2015 inspection, that the Property was in "fair to poor" condition and estimated a cost of \$50,000–\$100,000 for needed repairs. Mr. Walsh, on the other hand, based on an inspection performed on June 23, 2016, concluded that the Property was in average to fair condition and estimated costs to repair totaling \$8,000. Mr. Walsh testified that he did not see all of the damage noted by Mr. Turner and displayed in the color photographs included in Mr. Turner's appraisal: termite damage, dry rot, holes in the ceiling, damage to the kitchen, and leaking pipes.

At the conclusion of testimony, the bankruptcy court found that the evidentiary record was sufficient to support Mr. Turner's appraisal and that the Property was worth \$360,000 as of the petition date. On the basis of that value, the bankruptcy court concluded that it was appropriate to avoid Mr. Griffith's judicial lien against the Property as impairing Debtor's homestead exemption.

Mr. Griffith timely appealed.

## JURISDICTION

The bankruptcy court had jurisdiction pursuant to 28 U.S.C. §§ 1334 and 157(b)(2)(K). We have jurisdiction under 28 U.S.C. § 158.

## ISSUES

Whether the bankruptcy court denied Mr. Griffith due process.

Whether the bankruptcy court erred in granting Debtor's motion to avoid Mr. Griffith's judgment lien under § 522(f)(1)(A).

## STANDARDS OF REVIEW

Whether an appellant's due process rights were violated is a question of law that we review de novo. [DeLuca v. Seare \(In re Seare\)](#), 515 B.R. 599, 615 (9th Cir. BAP 2014); see [HSBC Bank USA, Nat'l Ass'n v. Blendheim \(In re Blendheim\)](#), 803 F.3d 477, 497 (9th Cir. 2015) ("Whether adequate notice has been given for the purposes of due process is a mixed question of law and fact that we review de novo.").

A fair market value determination is a finding of fact that we review for clear error. [Arnold & Baker Farms v. United States \(In re Arnold & Baker Farms\)](#), 85 F.3d 1415, 1421 (9th Cir. 1996). A factual finding is clearly erroneous only if it is illogical, implausible or without support in the record. [Retz v. Samson \(In re Retz\)](#), 606 F.3d 1189, 1196 (9th Cir. 2010). Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous. [Anderson v. City of Bessemer City, N.C.](#), 470 U.S. 564, 574 (1985).

## DISCUSSION

Mr. Griffith argues that (i) the bankruptcy court should have dismissed Debtor's case for failure to serve notice of the commencement of the case on Mr. Griffith at his correct address; (ii) the court should have denied Debtor's Motion for the same reason; (iii) the court should have denied the Motion because Debtor's appraisal was outdated; (iv) the court erred in not permitting Debtor to present evidence showing that property values in the relevant neighborhood were increasing; and (v) the court erred in "allowing" a \$125,000 adjustment to the value of the Property for costs of rehabilitation.

\*3 We make reasonable allowance for pro se litigants and construe their papers liberally. [Ozenne v. Bendon \(In re Ozenne\)](#), 337 B.R. 214, 218 (9th Cir. BAP 2006). At the same time, we do not ordinarily consider arguments not

In re Wells, Not Reported in B.R. Rptr. (2017)

raised in the trial court sufficiently for the court to have ruled on it. [O'Rourke v. Seaboard Sur. Co. \(In re E.R. Fegert, Inc.\)](#), 887 F.2d 955, 957 (9th Cir. 1989). In balancing these principles, we interpret Mr. Griffith's arguments as falling into two categories and will address both of them: first, that Mr. Griffith was denied due process; and second, that the bankruptcy court clearly erred in finding that the Property was worth \$360,000.

#### **A. The bankruptcy court did not deny Mr. Griffith due process.**

Generally speaking, a party must receive sufficient notice of any potentially adverse action and the opportunity to be heard. See [Tennant v. Rojas \(In re Tennant\)](#), 318 B.R. 860, 870 (9th Cir. BAP 2004). Here, although the Motion and supporting documents were initially served on Mr. Griffith at an incorrect address, Mr. Griffith learned of the bankruptcy filing and Debtor's Motion, filed an opposition to the Motion, and thereafter actively participated in the proceedings. The record does not reflect that he ever raised inadequate notice as a ground for either dismissal of the bankruptcy case or denial of the Motion.

##### **1. Improper notice of bankruptcy filing**

Mr. Griffith argues that the bankruptcy court should have dismissed Debtor's bankruptcy case because Debtor had listed the wrong address for Mr. Griffith on the master mailing matrix.<sup>3</sup> Mr. Griffith alleges that because of this error, he was not notified timely of the § 341 meeting of creditors or the pertinent deadlines and was thus "unable to exercise his fundamental rights in regard to deadlines, timing to seek legal advice, raise objections and ... obtain competent counsel." Mr. Griffith states that he learned of the bankruptcy filing in early January 2016.

The only matter before us in this appeal is the bankruptcy court's ruling on Debtor's Motion. As noted, Mr. Griffith did not seek relief in the bankruptcy court on grounds of inadequate notice of the bankruptcy case. If Mr. Griffith believed he was prejudiced by the lack of this notice, he should have raised the issue before the bankruptcy court. Because he failed to do so, we cannot consider this due process argument on appeal.<sup>4</sup>

##### **2. Improper notice of the Motion**

Mr. Griffith also argues that because the Motion was initially served at an incorrect address the bankruptcy court should have denied it; he contends that the bankruptcy court lacked personal jurisdiction over him. Again, Mr. Griffith did not raise this issue in the bankruptcy court, and a general appearance or responsive pleading that fails to dispute personal jurisdiction waives any defect in service. [Benny v. Pipes](#), 799 F.2d 489, 492 (9th Cir. 1986), [opinion amended](#), 807 F.2d 1514 (9th Cir. 1987) (citing Civil Rule 12(h), applicable in bankruptcy via Rule 7012). A defendant may also waive the defense as a result of his course of conduct during litigation. [Peterson v. Highland Music, Inc.](#), 140 F.3d 1313, 1318 (9th Cir. 1998). Here, Mr. Griffith filed an opposition and appeared and participated in all of the hearings on the Motion without raising the issue of personal jurisdiction; he thus waived the issue.

\*4 As for due process generally, at the initial hearing, the bankruptcy court acknowledged that Mr. Griffith had not been served at the correct address and continued the hearing to give him time to hire an appraiser. The court continued the hearing two more times to permit the parties to obtain appropriately dated appraisals, after which the court scheduled an evidentiary hearing. At that hearing, Mr. Griffith presented evidence and examined the witnesses. Accordingly, even if we consider the merits of his relevant due process argument, we cannot conclude that Mr. Griffith was deprived of a meaningful opportunity to be heard on the issues relating to the Motion; he was not denied due process or otherwise prejudiced by any error in service. See [Matthews v. Eldridge](#), 424 U.S. 319, 333 (1976) (fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner).

#### **B. The bankruptcy court did not clearly err in finding that Debtor's Property was worth \$360,000 and consequently granting the Motion.**

##### **1. The bankruptcy court did not abuse its discretion in not denying the Motion due to Debtor's submission of an outdated appraisal.**

At the initial status conference on the Motion, the court set a deadline for Mr. Griffith to file an appraisal of the Property and a further status conference. Mr. Griffith was unable to meet the deadline, and two days before it expired, he moved to extend it. He filed his appraisal a

In re Wells, Not Reported in B.R. Rptr. (2017)

few days before the continued status conference, and, at that hearing, the bankruptcy court stated that it intended to continue the hearing to give the court and Debtor's counsel time to review the late-filed appraisal. And noting that neither Debtor's nor Mr. Griffith's appraisal was dated as of the petition date, the court instructed both parties to obtain appraisals as of that date with the hope that the appraisers or the parties could reach an agreement on value. The court then commented: "But as we sit here today, I don't have a number from either party as of the operative date. So ... burden of proof is on the debtor[.] [A]s the ... evidentiary record is now, debtor loses because I don't know what the value was as of November 20."

Mr. Griffith agreed to the continuance without objection. On appeal, however, Mr. Griffith argues that the bankruptcy court abused its discretion in failing to deny the Motion based on Debtor's submission of an outdated appraisal. Again, we need not consider arguments not raised in the trial court. In any event, the decision to continue the matter was within the sound discretion of the bankruptcy court. See [Khachikyan v. Hahn \(In re Khachikyan\)](#), 335 B.R. 121, 125 (9th Cir. BAP 2005) (decisions regarding continuances are reviewed for abuse of discretion). Mr. Griffith has not persuaded us that the court abused this discretion.

**2. The bankruptcy court did not err in denying Mr. Griffith's request to present exhibits to establish that Debtor's appraiser relied on comparable properties outside the relevant area.**

Mr. Griffith argues that the bankruptcy court erred by denying him the opportunity to present certain exhibits at the evidentiary hearing. Mr. Griffith contends that the exhibits showed that property values in the Leimert Park neighborhood, where the Property was located, were increasing but that Turner's appraisal had used one comparable property outside that neighborhood in determining the value of the Property.

At the beginning of the evidentiary hearing, Mr. Griffith asked the court for time to "finish up a few exhibits." The court refused Mr. Griffith's request, noting that the only exhibits that were to be presented were the appraisals. The court had so stated in its tentative ruling for the June 29 status conference, and Mr. Griffith had not objected or asked to present additional evidence. Later, the court permitted Mr. Griffith to recall Mr. Walsh to the witness stand to ask about the locations of the comparable properties selected by Mr. Turner in his appraisal. Mr.

Walsh initially testified that Mr. Turner's appraisal included two comparable properties that were in "inferior" neighborhoods. Further questioning, however, revealed that Mr. Walsh's statement referred to Mr. Turner's initial appraisal rather than the second appraisal dated November 20, 2015. As to the latter appraisal, Mr. Walsh testified that all of the comparables used by Mr. Walsh were located in the Leimert Park neighborhood.

\*5 On appeal, Mr. Griffith contends that during Mr. Walsh's testimony, when the court asked Mr. Walsh whether any of the comparables in Mr. Turner's second appraisal were outside the Leimert Park area, the court had covered with her thumb the comparable property that was 1.4 miles outside of the Leimert Park neighborhood. The record does not reflect anything to support Mr. Griffith's assertion, but even if this statement is accurate, Mr. Griffith did not object at the hearing. Moreover, after Mr. Walsh stepped down from the witness stand, the court recalled Mr. Turner for voir dire as to his opinion regarding market appreciation in the relevant area. Mr. Turner testified that while examination of a wide range of comparables in the Leimert Park neighborhood might show appreciation due to investors "flipping" some of the homes, overall he believed that the market for homes comparable to the Property was generally stable during the relevant period.

To the extent Mr. Griffith's argument is that the bankruptcy court clearly erred in accepting Mr. Turner's valuation of the Property, Mr. Griffith has not demonstrated that the bankruptcy court's valuation finding is illogical, implausible, or without support in the record. To the contrary, Mr. Turner's appraisal and his explanations for how he reached his conclusions were logical and plausible. Under these circumstances, we cannot reverse the bankruptcy court's factual finding even if we would have decided the matter differently. See [United States v. Hinkson](#), 585 F.3d 1247, 1261 (9th Cir. 2009) (en banc) ("[T]he scope of our review limits us to determining whether the trial court reached a decision that falls within any of the permissible choices the court could have made.").

**3. The bankruptcy court did not err in accepting Mr. Turner's adjustment to the Property's value.**

Mr. Griffith argues that Mr. Turner's \$125,000 deduction from the market value of the Property for deferred maintenance was excessive. We do not find this argument persuasive. First, the \$125,000 deduction was not entirely for deferred maintenance: Mr. Turner testified that he had

In re Wells, Not Reported in B.R. Rptr. (2017)

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taken a deduction for repairs, but he also took into account the quality of construction, styling, and details of the comparable properties in arriving at his final figure. And second, as discussed above, we are not at liberty to second guess the bankruptcy court's factual findings unless they are illogical, implausible, or without support in the record. Mr. Turner's valuation is supported by the evidence, and Mr. Griffith has not convinced us that it was illogical or implausible. Accordingly, we find no error in the bankruptcy court's acceptance of Mr. Turner's opinion of value.

**CONCLUSION**

For the reasons discussed above, we AFFIRM.

**All Citations**

Not Reported in B.R. Rptr., 2017 WL 4768106

Footnotes

- \* This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have ([see Fed. R. App. P. 32.1](#)), it has no precedential value. [See](#) 9th Cir. [BAP Rule 8024-1](#).
- 1 Unless specified otherwise, all chapter and section references are to the Bankruptcy Code, [11 U.S.C. §§ 101-1532](#), all "Rule" references are to the Federal Rules of Bankruptcy Procedure, and all "Civil Rule" references are to the Federal Rules of Civil Procedure.
- 2 Debtor filed three additional motions to avoid judgment liens against her residence. None of those lienholders objected to the requested relief, and the court entered orders avoiding those liens.
- 3 As pointed out by Debtor, the address used for service on Mr. Griffith was the address listed on the abstract of judgment.
- 4 Mr. Griffith's reply brief in this appeal focuses almost entirely on an argument that Debtor filed her bankruptcy in bad faith, an issue that was never raised before the bankruptcy court.

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End of Document

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## PROOF OF SERVICE OF DOCUMENT

I am over the age of 18 and not a party to this bankruptcy case or adversary proceeding. My business address is:  
DLA Piper LLP (US)  
2000 Avenue of the Stars, Suite 400 North Tower  
Los Angeles, CA 90067-4704

A true and correct copy of the foregoing document entitled *Trustee's Opposition to Defendant Li Qi's Motion to Dismiss Counts I, II, VII, VIII, and IX of Amended Adversary Complaint* will be served or was served **(a)** on the judge in chambers in the form and manner required by LBR 5005-2(d); and **(b)** in the manner stated below:

**1. TO BE SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING (NEF):** Pursuant to controlling General Orders and LBR, the foregoing document will be served by the court via NEF and hyperlink to the document. On June 3, 2021, I checked the CM/ECF docket for this bankruptcy case or adversary proceeding and determined that the following persons are on the Electronic Mail Notice List to receive NEF transmission at the email addresses stated below:

Aaron S. Craig

United States Trustee

Matthew S. Walker

acraig@kslaw.com; lperry@kslaw.com

ustpreion16.la.ecf@usdoj.gov

matthew.walker@pillsburylaw.com;

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nortega@vedderprice.com

Scott H. Olson

Service information continued on attached page

**2. SERVED BY UNITED STATES MAIL:**

On June 3, 2021, I served the following persons and/or entities at the last known addresses in this bankruptcy case or adversary proceeding by placing a true and correct copy thereof in a sealed envelope in the United States mail, first class, postage prepaid, and addressed as follows. Listing the judge here constitutes a declaration that mailing to the judge will be completed no later than 24 hours after the document is filed.

Service information continued on attached page

**3. SERVED BY PERSONAL DELIVERY, OVERNIGHT MAIL, FACSIMILE TRANSMISSION OR EMAIL** (state method for each person or entity served): Pursuant to F.R.Civ.P. 5 and/or controlling LBR, on June 3, 2021, I served the following persons and/or entities by personal delivery, overnight mail service, or (for those who consented in writing to such service method), by facsimile transmission and/or email as follows. Listing the judge here constitutes a declaration that personal delivery on, or overnight mail to, the judge will be completed no later than 24 hours after the document is filed.

VIA HAND DELIVERY

VIA ELECTRONIC MAIL

(Party, who is being served if different, and email address for each)

Service information continued on attached page

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

June 3, 2021

William L. Countryman, Jr.

/s/ William L. Countryman, Jr.

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This form is mandatory. It has been approved for use by the United States Bankruptcy Court for the Central District of California.

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*Date*

*Printed Name*

*Signature*

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This form is mandatory. It has been approved for use by the United States Bankruptcy Court for the Central District of California.

<b><u>Service via Electronic Mail</u></b>	
<p><b>Li Qi, Truly Great Global, Ltd., Universal Leader Investment Ltd., and Glove Assets Investment Ltd.</b></p> <p>Attn.: Michael L. Bernstein                      Email: michael.bernstein@apks.com</p> <p>Attn.: Charles A. Malloy                      Email: charles.malloy@apks.com</p> <p>Attn.: Lisa Hill Fenning                      Email: lisa.fenning@apks.com</p>	<p><b>Yuntian 3 Leasing Company Designated Activity Company f/k/a Yuntian 3 Leasing Company Limited, Yuntian 4 Leasing Company Designated Activity Company f/k/a Yuntian 4 Leasing Company Limited and Minsheng Business Aviation Limited</b></p> <p>Attn.: Dan T. Moss                      Email: dtmoss@jonesday.com</p> <p>Attn.: Joshua M. Mester                      Email: jmester@jonesday.com</p> <p>Attn.: David S. Torborg                      Email: dstorborg@jonesday.com</p>
<p><b>United States Trustee</b></p> <p>Attn.: Dare Law                      Email: dare.law@usdoj.gov</p> <p>Attn.: Ron Maroko                      Email: ron.maroko@usdoj.gov</p> <p>Attn.: Jill Sturtevant                      Email: jill.sturtevant@usdoj.gov</p> <p>Attn.: Peter C. Anderson                      Email: peter.c.anderson@usdoj.gov</p>	<p><b>Export Development Canada Limited</b></p> <p>Attn.: Scott H. Olson                      Email: solson@vedderprice.com</p> <p>Attn.: Michael J. Edelman                      Email: mjedelman@vedderprice.com</p>

<b><u>Service via Mail</u></b>	
<p><b>Minsheng Financial Leasing Co., Ltd.</b></p> <p>Floor 3-6, Distinguished Guest Building                      Beijing Friendship Hotel                      One South Zhongguancun Street                      HaidianHaidian District                      Beijing, 100873</p> <p>and</p> <p>Zhongguancun South Street                      Beijing Friendship Hotel Guest House 1 2-6                      Beijing, 100873</p>	

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