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IN THE UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA

LOS ANGELES DIVISION

In re: ZETTA JET USA, LTD., a California corporation, Debtor.	Lead Case No.: 2:17-bk-21386-SK Chapter 7 Jointly Administered With: Case No.: 2:17-bk-21386-SK Adv. Proc. No. 2:19-AP-01383-SK **LI QI'S AND UL DEFENDANTS' RESPONSE TO OBJECTION AND MOTION TO STRIKE DECLARATION OF PETER FERRER IN SUPPORT OF LI QI'S MOTION TO DISMISS AND DECLARATION OF HARPRABDEEP SINGH IN SUPPORT OF UL DEFENDANTS' MOTION TO DISMISS (RELATED TO DOCS 238, 239, 255, 261, 285, & 290)**
In re: ZETTA JET PTE, LTD., a Singaporean corporation, Debtor.	Hearings: Date: June 30, 2021 Time: 9:00 a.m. (PDT)

JONATHAN D. KING, solely in his capacity as Chapter 7 Trustee of Zetta Jet USA, Inc. and Zetta Jet PTE, Ltd. Plaintiff, v. YUNTIAN 3 LEASING CO. DESIGNATED ACTIVITY CO. F/K/A YUNTIAN 3 LEASING CO. LTD., ET AL. Defendants	Place: Courtroom 1575 255 East Temple Street Los Angeles, CA 90012 Date: August 11, 2021 Time: 9:00 a.m. (PDT) Place: Courtroom 1575 255 East Temple Street Los Angeles, CA 90012

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RESPONSE TO OBJECTIONS AND MOTIONS TO STRIKE EXPERT DECLARATIONS[1]

Defendants Universal Leader Investment Limited ("UL"), Glove Assets Investment Limited ("Glove"), and Truly Great Global Limited ("TGG") (collectively, the "UL Defendants") and Li Qi hereby:

- Respond to Plaintiff's Objection and Motion to Strike [1] Declaration of Peter Ferrer in Support of Li Qi's Motion to Dismiss and [2] Declaration of Harprabdeep Singh [Dkt. 261], which seeks to strike:
  - portions of the original Declaration of Peter Ferrer [Dkt. 239-2] ("Original Ferrer Declaration"); and
  - the Declaration of Harprabdeep Singh [Dkt. 240, Ex. 15] ("Singh Declaration");
- Respond to Plaintiff's Objection and Motion to Strike Supplemental Declaration of Peter Ferrer in Support of Defendant Li Qi's Opposition to Trustee's Motion for Jurisdictional Discovery [Dkt. 285][2], which seeks to strike:
  - portions of the Supplemental Declaration of Peter Ferrer [Dkt. 274-3] ("Supplemental Ferrer Declaration") (together with the Original Ferrer Declaration, "Ferrer Declarations"); and
- In the alternative, object to the following materials filed by the Trustee (and have concurrently filed a separate objection to these declarations on that basis pursuant to LBR 9013-1(i)):
  - portions of the Witness Statement of Nicholas Charles Burkill [Dkt. 257-13] ("Burkill Declaration"); and
  - portions of Opinion of Rosalind Phelps QC [Dkt. 259-2] (the "Phelps Declaration").

[1] Defendants originally intended to file this opposition on June 30, 2021 in advance of the July 14, 2021 hearing on one of the motions to strike and the motion for jurisdictional discovery. Because the Court advanced the hearing (Dkt.292) on the motion for jurisdictional discovery to June 30 are filing this opposition on June 27, 2021.

[2] The Trustee filed an identical document at Dkt. 290.

INTRODUCTION

Li Qi submitted the Ferrer Declarations to assist the Court in understanding the British Virgin Islands ("BVI") veil piercing law applicable to his motion to dismiss. Dkts. 239-2, 274-3. The UL Defendants submitted the Singh Declaration to establish that Hong Kong courts do not convert debt obligations into equity interests. Dkt. 240, Ex. 15. The Trustee does not challenge Mr. Ferrer's or Mr. Singh's credentials. He does not challenge the relevance of their declarations to the issues the Court is required to decide. Nor does the Trustee even challenge in the motions to strike the accuracy of their declarations. The Trustee nevertheless objects to and moves to strike the Ferrer Declarations and the Singh Declaration as "inadmissible" because, in part, they apply fact to law and contain legal conclusions. Dkts. 261, 285.

The Trustee's admissibility objections are foreclosed by Federal Rule of Civil Procedure 44.1, which allows a court to consider "any relevant material or source, including testimony, whether or not … admissible under the Federal Rules of Evidence." Fed. R. Civ. P. 44.1. While the Trustee cites out-of-circuit and non-binding authority that applies a concept developed under Federal Rule of Evidence 702 prohibiting experts from offering conclusions of *domestic* law, the Ninth Circuit does not follow that approach when the issue is determining the content of *foreign* law. Indeed, the Ninth Circuit has held it is an abuse of discretion for a court to simply disregard a foreign law expert's analysis and conclusions. *E.g. Universe Sales Co. Ltd. v. Silver Castle, Ltd.*, 182 F.3d 1036, 1038-39 (9th Cir. 1999) (holding district court abused its discretion in ignoring expert's unrebutted conclusions). If a party believes a foreign law expert's analysis and conclusions are incorrect, his remedy is to inform the Court through his own expert testimony or any other "relevant material or source" why his view should prevail. *Id.* He may not, however, simply ask the Court to ignore the expert's testimony, as the Trustee does here.

The Trustee also objects and moves to strike the Supplemental Ferrer Declaration because, as background relevant to the interpretation of BVI veil piercing law, the declaration describes typical activities of BVI companies. Dkt. 285 at 5-6. The Trustee contends that, when a court interprets the law, the court cannot take into account how the law works in the foreign jurisdiction or how its rulings might impact parties subject to that jurisdiction's laws, unless the court relies only

on evidence that would be admissible under the Federal Rules of Evidence. *Id.* The Trustee is incorrect because "legislative facts"—"facts which help the tribunal decide questions of law, policy, and discretion"—are not measured by the rules of evidence. *Marshall v. Sawyer*, 365 F.2d 105, 111 (9th Cir. 1966). Only "adjudicative facts"—"facts about the parties and their activities … roughly the kind of facts that go to a jury in a jury case"—must strictly comply with the Federal Rules of Evidence. *See* Fed. R. Civ. P. 44.1 ("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*") (emphasis added). The background facts about common practices under BVI law described in the Supplemental Ferrer Declaration constitute expert opinion in support of legislative facts that the Court can and should consider in construing BVI law.

The Trustee's motions to strike are also procedurally improper. The Ninth Circuit has held that motions to strike are permitted only to strike "pleadings"—defined as complaints and answers—not declarations. *Sidney-Vinstein v. A.H. Robins Co.*, 697 F.2d 880, 885 (9th Cir. 1983). Likewise, the Local Bankruptcy Rules only authorize objections to declarations, not motions to strike. L.B.R. 9013-1(i)(2). The Trustee's serial filing of motions to strike is prejudicial because it multiplies proceedings far beyond what is contemplated by the Federal and Local Bankruptcy Rules. The Trustee's motions to strike should be denied for this reason alone.

Because the Ferrer Declarations and Singh Declaration are undisputedly relevant to the foreign law issues raised in the case, they are admissible under Federal Rule of Civil Procedure 44.1. The Court should, accordingly, overrule the Trustee's objections and deny the motions to strike.

ARGUMENT

I. The Ninth Circuit Has Held Courts Must Consider An Expert's Conclusions And Applications of Fact to Law.

Under Federal Rule of Evidence 702, an expert's application of facts to law and legal conclusions are inadmissible because they "invade[] the province of the trial judge" in instructing the jury on the law and are, therefore, also not "helpful to a clear understanding of the testimony or a fact in issue." *Nationwide Transp. Fin. v. Cass Info. Sys., Inc.*, 523 F.3d 1051, 1059 (9th Cir.

2008). These considerations are inapplicable to a situation in which the trial judge is tasked with determining and applying foreign law, rather than with instructing a jury on domestic law.

Recognizing this distinction, the Federal Rules permit a court to consider expert testimony on foreign law "whether or not …admissible under the Federal Rules of Evidence." Fed. R. Civ. P. 44.1. The Ninth Circuit has held this rule is "intended to be flexible and informal to encourage the court and counsel to regard the determination of foreign law as a cooperative venture requiring an open and unstructured dialogue among all concerned." *de Fontbrune v. Wofsy*, 838 F.3d 992, 996 (9th Cir. 2016). Thus, in the Ninth Circuit, it is not only *permissible* for a court to consider an expert's analysis and legal conclusions, it is an *abuse of discretion* for the court to simply disregard the expert's analysis and conclusions. *Universe Sales Co*. 182 F.3d at 1038-39.

In *Universe Sales*, the plaintiff submitted an expert declaration that applied facts to law to reach the ultimate legal conclusion "that Japanese contract law applies, and under that body of law, [the plaintiff] is obligated to pay royalties to [the defendant]" and to reach the additional conclusion that "[the defendant] can and has obtained proper title of the two trademarks at issue, and therefore is entitled to collect royalty payments from [the plaintiff] . . . ." 182 F.3d at 1039. The Ninth Circuit reasoned the district court was required to accept the expert's unrebutted conclusions, absent a reasoned basis not to do so:

> Although [the plaintiff] had numerous opportunities to present evidence that would rebut this portion of [the defendant expert's] declaration regarding Japanese law, [the plaintiff] introduced nothing. Also, the district court performed no independent research of Japanese law. The district court should have considered the fact that the [defendant's expert] declaration states that Japanese contract law is controlling. The district court then could have instructed the parties to present further evidence regarding the interpretation of Japanese law on that point; or, the district court may have performed its own research.

Id. Under these circumstances, the Ninth Circuit held that the district court abused its discretion by ignoring the expert's application of fact to law and failing to grant summary judgment based on the declaration. *Id.*

Similarly, in *Fabricant v. Elavon, Inc.*, the plaintiff submitted an expert declaration on Canadian law in response to the defendant's motion to dismiss for *forum non conveniens*. No. 2:20-CV-02960-SVW-MAA, 2021 WL 1593238, at *3 (C.D. Cal. Mar. 8, 2021). The defendant moved

to exclude a declaration because it "inappropriately applies foreign law to the facts of the case" by asserting that Canadian tort law would not provide a remedy for the plaintiff. *Id.* The court overruled the objection because, under the relaxed standard of Rule 44.1, a "court is free to consider a foreign law expert's opinion even on ultimate legal conclusions." *Id.*

Likewise, in *Excel Fortress Ltd. v. Wilhelm*, the defendants argued the Plaintiffs' expert declaration was "improper because his expert report provide[s] both legal conclusions and the application of the law to the facts." No. CV-17-04297-PHX-DWL, 2019 WL 163252, at *2 (D. Ariz. Jan. 9, 2019) (internal citations omitted). The court rejected this argument by citing Rule 44.1 and holding that the court "may consider any relevant material or source, . . . whether or not . . . admissible under the Federal Rules of Evidence, when determining the meaning of foreign law." *Id.* (internal citations omitted).

Under *Universe Sales* and its progeny, if the Trustee disagrees with Mr. Ferrer's and Mr. Singh's analyses and conclusions, he is free to dispute them through his own expert declarations or any other "relevant material or source" of foreign law. Fed. R. Civ. P. 44.1. However, granting the Trustee's request that the Court disregard their opinions would be an abuse of discretion.

Furthermore, the foreign law experts' opinions regarding application the relevant foreign law to the facts alleged by the Trustee are intended to be -- and Defendants submit will be -- helpful to the Court. For example, even though this Court is well-versed on U.S. bankruptcy law, it would be unhelpful if the parties were to simply point the Court to the relevant foreign law and and not address how the law applied to the facts of the case before it. When the Court is asked to determine and apply foreign law about which the Court may have little or no background, the unhelpfulness of the Trustee's approach is exponentially greater. The Trustee implicitly agrees that the approach he advocates is unhelpful: both of the Trustee's own foreign law experts apply the law to the facts, rather than leaving the Court to figure out the analysis on its own. Dkts. 257-13, 259-2.

The Trustee cites to *EduMoz, LLC v. Republic of Mozambique*, 968 F. Supp. 2d 1041, 1052 (C.D. Cal. 2013), in support of his position. However, more recent authority in the Central District has observed that *EduMoz* and similar cases are "not aligned with the relaxed standard of Rule 44.1." *Fabricant*, 2021 WL 1593238, at *3. As *Fabricant* explains, "Rule 44.1 … unshackles

courts and litigants from the evidentiary and procedural requirements that apply to factual determinations." *Id.* (quoting *de Fontbrune*, 838 F.3d at 997). To the extent the Trustee cites additional cases that refuse to consider a foreign law expert's analysis and conclusions, the Court should disregard them because they improperly import standards applicable to Federal Rule of Evidence 702, in contravention of Federal Rule of Civil Procedure 44.1 and *Universe Sales*. Indeed, the Trustee himself does not appear to believe in the viability of *EduMoz*, given that, as noted above, he has submitted two expert declarations that apply law to facts and make legal conclusions. Dkts. 257-13, 259-2.

Consistent with the approach of the Ninth Circuit and Rule 44.1, the Court has broad discretion to consider expert opinion relevant to determining foreign law without engaging in an admissibility analysis hinging on whether the expert has offered a description of law, an application of law to alleged fact, or a conclusion of law. Because all three of the declarations submitted by the Defendants meet Rule 44.1's sole admissibility criteria—namely, that they consist of a "relevant material or source, including testimony"—the Court should overrule the Trustee's objections and deny his motions to strike.

II. The Ferrer Declaration Properly Relies on Legislative Facts.

The Trustee contends that the Supplemental Ferrer Declaration is "egregious" and "entirely inappropriate" because it asks the Court to construe BVI company law in light of the common practices of BVI companies, with respect to which he is knowledgeable. Dkt. 290 at 5. The Trustee argues that the Supplemental Ferrer Declaration's description of the commercial background under which BVI law operates improperly introduces inadmissible "factual evidence." *Id.* The Trustee is mistaken. Mr. Ferrer relies only on "legislative facts," which a court is free to consider in construing the law without regard to admissibility. Dkt. 274-3 ¶ 3.17. Mr. Ferrer does not offer "adjudicative facts," which are the only types of facts subject to the rules of evidence. *Id.*

As the Ninth Circuit has explained "adjudicative facts" are:

> facts about the parties and their activities, businesses, and properties, usually answering the questions of who did what, where, when, how, why, with what motive or intent; adjudicative facts are roughly the kind of facts that go to a jury in a jury case.

Marshall v. Sawyer, 365 F.2d 105, 111 (9th Cir. 1966) (internal quotation omitted). "Legislative facts," on the other hand, "do not usually concern the immediate parties but are general facts which help the tribunal decide questions of law, policy, and discretion." *Id.* (internal quotation omitted). Courts "can take judicial notice of legislative facts without being subject to the strictures of Federal Rule of Evidence 201 [concerning judicial notice]" or other rules of evidence. *Redmond v. United States*, No. 2:15-CR-00532-SVW-2, 2021 WL 1156845, at *5 (C.D. Cal. Feb. 16, 2021); *see also Castillo-Villagra v. I.N.S.*, 972 F.2d 1017, 1026 (9th Cir. 1992) (holding argument "that notice of legislative facts may properly be taken more liberally than notice of adjudicative facts generally has been accepted") (citing Kenneth Culp Davis, *Judicial Notice*, 55 Colum. L. Rev. 945, 952 (1955)).

The reason for this substantial liberality in permitting courts to consider legislative facts is that, when courts construe the law—particularly in their role in developing judge-made common law—they must make judgments as to the practical effects of their decisions by relying on "findings or assumptions of legislative facts [that] need not, frequently are not, and sometimes cannot be supported by evidence" as contemplated by the Federal Rules of Evidence. Davis, 55 Colum. L. Rev. at 953. Thus, for example, when the Supreme Court adopted a common law rule limiting the size of punitive damages awards in admiralty cases, the Supreme Court relied on more than a dozen social science and law journal articles concerning the typical size and consistency of punitive damages awards. *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 497-501 (2008). Notably, the Supreme Court considered these facts directly. *Id.* The Supreme Court did not, as the Trustee would require, remand for trial to determine the legislative facts subject to the strictures of the Federal Rules of Evidence. *See id.*

Here, the Supplemental Ferrer Declaration does not offer adjudicative facts because it does not offer "facts about the parties and their activities" in this case. *Marshall*, 365 F.2d at 111. Instead, Mr. Ferrer offers facts about BVI companies in general, *i.e.* that most of them are holding companies without employees, bank accounts, or physical assets. Dkt. 274-3 ¶ 3.17. These are legislative facts because they "do not … concern the immediate parties"—the UL Defendants, Li Qi, and Zetta PTE—"but are general facts which help the tribunal decide questions of law, policy,

and discretion." *Marshall*, 365 F.2d at 111.

Indeed, the point of this portion of the Supplemental Ferrer Declaration is that, if the Trustee's view of BVI law were correct, then a majority of BVI companies would be subject to veil-piercing as a result of engaging in conduct that is considered normal and legitimate in the BVI. Dkt. 274-3 ¶ 3.17. Given that BVI common law permits veil-piercing only in the rarest of circumstances, the Trustee's position would result in an abrupt change in BVI law, undermining the reasonable expectations of individuals who have incorporated entities in the BVI. *Prest v. Petrodel Resources Ltd.* [2013] UKSC 34 ¶ 35 (holding veil-piercing is appropriate only in a "small residual category of cases"). Considering these types of legislative facts is well within the accepted methodology for courts to determine the content of the law. *Cf. King v. Burwell*, 576 U.S. 473, 494 (2015) (relying on factual assertion by *amicus curiae* that 87 percent of people who bought insurance on a Federal Exchange did so with tax credits to reject interpretation of statute that would abolish those tax credits on Federal Exchanges).

The Trustee is also incorrect that Mr. Ferrer has no basis for informing the Court about the common practices of BVI companies. Mr. Ferrer is a member of the BVI bar -- and a partner in a prominent BVI law firm -- who regularly advises clients and litigates in BVI courts with respect to company laws. Dkt. 239-2 ¶ 2.4. The Trustee does not explain why he believes a BVI lawyer who practices BVI company law in the BVI would not know what is common knowledge and practice in the industry. Moreover, the Trustee has retained his own BVI law expert, and, to date, the Trustee's expert *has not disagreed* with Mr. Ferrer's facts on this point. Dkt. 257-13.

The one case the Trustee cites, *Lithuanian Com. Corp. v. Sara Lee Hosiery*, 177 F.R.D. 245 (D.N.J. 1997), supports Li Qi's position, not the Trustee's. There, a Lithuanian lawyer submitted samples of advertisements to the Lithuanian Ministry of Health and obtained a report from the Ministry confirming the advertisements did not violate Lithuanian law. *Id.* at 262-63. The Magistrate ruled that the reports could not be shown or described *to the jury* because they were "essentially advisory, hearsay opinions from various Lithuanian government officials" that "will not assist the jury in making any factual determinations." *Id.* The Magistrate, however, ruled that "the plaintiff is not precluded from presenting this report *to the trial judge*, in accordance with Rule 44.1,

Fed.R.Civ.P., *to assist him on the issue of foreign law*." *Id.* (emphasis added).

Here, Li Qi is not asking to submit the Supplemental Ferrer Declaration to a jury. Instead, Li Qi submits the Supplemental Ferrer Declaration solely to assist the Court in the legal task of construing BVI common law. In its role in construing BVI law, the Court can and should consider legislative facts concerning the practical effects of its decision. The Court should, therefore, overrule the Trustee's objection and deny his motion to strike.

III. The Singh Declaration is Admissible.

The Singh Declaration states that, because Hong Kong courts look to the plain language of an agreement to determine whether it creates a debt obligation or equity interest, Hong Kong courts have never recharacterized an agreement that creates a debt obligation as an agreement that creates an equity interest. Dkt. 62-2 at 2-3. The Trustee contends that the Court may not consider this opinion, unless it cites to a case or authority stating this proposition. Dkt. 261 at 6-7. The Trustee is once again incorrect because he ignores the broad admissibility standard in Rule 44.1, which permits the Court to consider "any …material or source," so long as it is "relevant" to the issues. Fed. R. Civ. P. 44.1.

For example, in *Bauman v. DaimlerChrysler AG*, the defendant argued that the plaintiff's foreign law experts' opinions were inadmissible because they were "not adequately supported by the law." No. C-04-00194 RMW, 2005 WL 3157472, at *15 n. 6 (N.D. Cal. Nov. 22, 2005). The court rejected this argument because, under Rule 44.1, "the court may consider testimony regarding foreign law irrespective of admissibility." *Id.* The court concluded that the "lack of citation to statutory or other legal authority" was simply a factor it could consider in weighing the opinion, but not a reason to disregard the opinion entirely.

Here, it is particularly inappropriate to strike the Singh Declaration because it would place him in the impossible position of proving a negative. The point of the Singh Declaration is that, despite Mr. Singh's extensive knowledge of applicable Hong Kong law, his relevant experience practicing law in Hong Kong, and a specific search for authority supporting the Trustee's arguments, Mr. Singh found "there is no recognized basis under Hong Kong law for the court to recharacterize the arrangement as an equity investment." Dkt. No. 240 at Ex. 15 at p.3. Just as it

would be impossible for a U.S. lawyer to provide a precise citation for the absence of a non-existent provision of U.S. law, a Hong Kong lawyer cannot provide a precise citation for a recharacterization practice that does not exist in Hong Kong.

Furthermore, in his supplemental declaration, Mr. Singh provides ample authority in support of his analysis. Dkt. 281-2. He explains that the only criteria that courts consider in characterizing an obligation as debt or equity is the plain language of the agreement and the parties' characterizations as set forth in the agreement. *Id.* at 3-4 (citing *Eminent Investments (Asia Pacific) Ltd v DIO Corp* (2020) 23 HKCFAR 487). Furthermore, he explains that a Hong Kong court's focus is restricted to the agreement's legal effect, not its economic or commercial effect. *Id.* at 4 (citing *Eminent Investments*; *Secretary for Justice v Global Merchant Funding Ltd* [2016] HKC 548). And, as Mr. Singh explains, the only situation where Hong Kong courts will recognize the conversion of debt to equity is when the agreement evidencing the debt obligation expressly provides for such conversion upon the occurrence of a triggering condition agreed to by the parties -- as would be the case with a convertible debt instrument. *Id.* at 5 (citing *Pearldelta (CACV 105/2010 and CACV 106/2010*, 3 September 2010); *Sino-American* (HCCW 329/98, 9 June 2000)). Mr. Singh also affirms that he conducted additional research for authorities permitting recharacterization in the manner sought by the Trustee and that he found none "because there are none." *Id.* at 5.

Under *Universal Sales*, the Trustee's remedy if he disagrees with Mr. Singh's analysis is not to ask the Court to ignore it. *Universe Sales Co*. 182 F.3d at 1038-39. His remedy is to provide the Court contrary authority demonstrating that Mr. Singh is incorrect. *Id.* To date, however, the Trustee has provided no evidence or support for a contrary position, has not proffered his own expert on Hong Kong law, and has not cited any source even suggesting Mr. Singh is incorrect. Indeed, the Trustee has not cited any source on Hong Kong law whatsoever. The Trustee's request that the Court simply ignore the testimony of an expert on Hong Kong law whose qualifications are undisputed is improper and must be rejected.

IV. The Motions to Strike Are Procedurally Improper.

The Court should deny the Trustee's motions to strike for the independent reason that

neither the Federal Rules nor Local Bankruptcy Rules authorize motions to strike declarations. *Sidney-Vinstein v. A.H. Robins Co.*, 697 F.2d 880, 885 (9th Cir. 1983); L.B.R. 9013-1(i)(2).

Federal Rule of Civil Procedure 12(f), which governs motions to strike, "provides that 'the court may order stricken from any *pleading* any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.'" *Sideny-Vinstein*, 697 F.2d at 885 (quoting Fed. R. Civ. P. 12(f); emphasis added by Ninth Circuit"). Because the term "pleadings" is defined in Federal Rule of Civil Procedure 7(a) to include complaints and answers—but not declarations—courts have repeatedly held that the filing of evidentiary objections, rather than a motion to strike, is the proper procedure to challenge declarations. *E.g. Gulaid v. CH2M Hill, Inc.*, No. 15-CV-04824-JST, 2016 WL 5673144, at *3 (N.D. Cal. Oct. 3, 2016) (holding declaration is not a "pleading" "rendering it an improper subject of a motion to strike").[3]

While some courts have entertained motions to strike declarations, those cases are inconsistent with Ninth Circuit law, as well as with the Local Bankruptcy Rules.[4] Indeed, Local Bankruptcy 9013-1(i)(2), expressly addresses the procedure for challenging declarations, and it does not authorize the filing of motions to strike. Rather, it requires any evidentiary objection to be "set forth in a separate document" that "cites the specific Federal Rule of Evidence upon which the objection is based" and that "is filed with the response or reply." L.B.R. 9013-1(i)(2). Thus, the Local Rules contemplate an economical resolution of objections to declarations in a simple

[3] *See also Ellis v. Vial Fotheringham LLP*, No. 3:16-CV-01945-AC, 2019 WL 1553676, at *1 (D. Or. Feb. 1, 2019) ("[A]s a general rule, material outside the pleadings — including a declaration or portions of a declaration—cannot be challenged using a motion to strike."); *Herb Reed Enterprises, LLC v. Fla. Ent. Mgmt., Inc.*, No. 2:12-CV-00560-MMD, 2014 WL 1305144, at *6 (D. Nev. Mar. 31, 2014) (holding courts "are generally unwilling to construe the rule broadly and refuse to strike … affidavits"); *McGary v. Cunningham*, No. C13-5130 RBL-JRC, 2014 WL 5514383, at *1 (W.D. Wash. Oct. 31, 2014) ("Courts have held that the rule only applies to pleadings as defined in Fed.R.Civ.P. 7(a) and refused to apply the rule to affidavits or briefs."); *Renard v. San Diego Unified Port Dist.*, No. 06-CV-2665H, 2007 WL 2262853, at *1 (S.D. Cal. Aug. 6, 2007) ("Improper motions, declarations, or other material not contained in pleadings cannot be stricken under Rule 12(f).").

[4] Furthermore, courts will construe a document entitled "motion to strike" "as an invitation by the movant to consider whether [the proffered material] may properly be relied upon. *Ellis v. Vial Fotheringham LLP*, No. 3:16-CV-01945-AC, 2019 WL 1553676, at *1 (D. Or. Feb. 1, 2019). The one case the Trustee cites granting a motion to strike did not appear to actually strike the declaration from the record. *E.g. EduMoz, LLC v. Republic of Mozambique*, 968 F. Supp. 2d 1041, 1054 (C.D. Cal. 2013) ("[T]he court will disregard paragraph 16."). Thus, to the extent the Trustee is genuinely seeking to strike the declarations rather than to raise objections, the Trustee cites no authority in support of the requested relief.

"separate document," rather than through full-blown motion practice with three rounds of briefs of up to thirty-five pages each and a separately calendared hearing from the underlying motion. The Trustee's filing of multiple motions to strike not authorized by the Federal Rules or the Local Rules prejudices the UL Defendants and Li Qi, wastes the Court's time, increases expense for the parties, and is contrary to the requirement that the Federal Rules "be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding." Fed. R. Civ. P. 1.

Even if the rules permitted the striking of declarations (which they do not), the Trustee has not met the high standard for granting a motion to strike. "Motions to strike are generally not granted unless it is clear that the matter sought to be stricken could have no possible bearing on the subject matter of the litigation." *Gulaid*, 2016 WL 5673144, at *3. The reason for such a high standard is that striking a document is a drastic remedy whose presumed effect "would be to delete [the document] from the record." *Sideny-Vinsteinein*, 697 F.2d at 885. The Ninth Circuit has cautioned that "[a]pproval of …[such] action would establish a procedure that, if abused, could shield erroneous district court orders from review." *Id.* Thus, the Ninth Circuit has held that Rule 12(f) "should not be construed as allowing this undesirable result." *Id.*

Here, all three declarations easily clear the low hurdle of having some possible bearing on the subject matter of the litigation. The Ferrer Declarations explain applicable BVI law and why such law does not permit piercing the corporate veil against Li Qi. Dkts. 239-2, 285. Thus, the Ferrer Declarations are relevant to the subject matter of the Trustee's alter ego claims against Li Qi. Dkt. 232 ¶ 36. The Singh Declaration explains that Hong Kong law does not permit recharacterization of loan agreements to equity, which is the relief the Trustee seeks in Count VI of the Amended Complaint. Dkt. 240, Ex. 15. The Court should accordingly deny the motions to strike in full.

V. In the alternative, the Trustee Declarations Should Be Treated in a Similar Manner Should the Court Sustain the Trustee's Objections.

While the UL Defendants and Li Qi believe that foreign law experts may properly opine with respect to the application of the relevant foreign law to facts and state the conclusions that

follow from such applications, if the Court disagrees, it should apply the same standard to the Trustee's expert declarations.

Specifically, the Phelps Declaration applies law to facts when it discusses what facts she contends are relevant to her analysis. *See* Dkt. 259-2 ¶¶ 3-5. In addition, the Phelps Declaration asserts legal conclusions by disagreeing with the positions asserted by the UL Defendants. *See id.* ¶¶ 10, 32-33. Finally, the section entitled "The leases in the present case" in the Phelps Declaration is simply the expert's views of how she believes the laws should be applied to the facts in this case. *See id.* ¶¶ 27-30. If the Court disregards Mr. Singh's and Mr. Ferrer's analyses and conclusions, it should also disregard Ms. Phelps' analyses and conclusions.

Similarly, paragraphs 45 through 51 of the Burkill Declaration consist of application of facts to law. Dkt. No. 257-13 ¶¶ 45-51. What is more, the analysis relates to *unpleaded* claims for breach of fiduciary duty under Singapore law and a "nominee" claim under BVI law that are not properly before the Court because they are not pleaded in the Second Amended Complaint. *See id.* While the appropriate procedure is for the Court to weigh expert declarations rather than striking them, if the Court adopts the Trustee's contrary approach, it should apply the same standard to the Trustee's declarations.

CONCLUSION

For the foregoing reasons, the Court should overrule the Trustee's objections and deny the Trustee's motion to strike in full.

Respectfully submitted,

Dated: June 27, 2021

ARNOLD & PORTER KAYE SCHOLER LLP

By: /s/ *Brian K. Condon*
Brian K. Condon (Bar No. 138776)
Oscar Ramallo (Bar No. 241487)
Attorneys for Defendants
Universal Leader Investment Limited, Glove Assets Investment Limited, Truly Great Global Limited, and Li Qi

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:

Arnold & Porter Kaye Scholer, LLP
777 South Figueroa Street, Forty-Fourth Floor
Los Angeles, CA 90017-5844

A true and correct copy of the foregoing document entitled (*specify*): **LI QI'S AND UL DEFENDANTS' RESPONSE TO OBJECTION AND MOTION TO STRIKE DECLARATION OF PETER FERRER IN SUPPORT OF LI QI'S MOTION TO DISMISS AND DECLARATION OF HARPRABDEEP SINGH IN SUPPORT OF UL DEFENDANTS' MOTION TO DISMISS (RELATED TO DOCS 238, 239, 255, 261, 285, & 290)** 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 (*date*) June 27, 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:

☒ Service information continued on attached page

2. SERVED BY UNITED STATES MAIL:
On (*date*) June 27, 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.

Honorable Sandra R. Klein
United States Bankruptcy Court
for the Central District of California
255 East Temple Street, Suite 1582
Los Angeles, CA 90012

☐ 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 (*date*) June 27, 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.

☐ 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.

06/27/2021	Rebecca McNew	/s/ Rebecca McNew
Date	*Printed Name*	*Signature*

SERVICE LIST

SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING (NEF)

United States Trustee	ustpregion16.la.ecf@usdoj.gov
Minsheng Business Aviation Limited; Minsheng Financial Leasing Co., Ltd.; Wells Fargo Bank Northwest, N.A., in its Capacity as trustee to Yuntian 3 Trust dated September 20, 2016; Yuntian 3 Leasing Company Designated Activity Company; Yuntian 4 Leasing Company Designated Activity Company	jmester@jonesday.com; dtmoss@jonesday.com; dstorborg@jonesday.com
Jonathan D. King as Chapter 7 Trustee	john.lyons@us.dlapiper.com
Export Development Canada	mjedelman@vedderprice.com; hudson@vedderprice.com; solson@vedderprice.com

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Glove Assets Investment Limited, and
Truly Great Global Limited

IN THE UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA

LOS ANGELES DIVISION

In re: ZETTA JET USA, LTD., a California corporation, Debtor.	Lead Case No.: 2:17-bk-21386-SK Chapter 7 Jointly Administered With: Case No.: 2:17-bk-21386-SK Adv. Proc. No. 2:19-AP-01383-SK **APPENDIX OF UNPUBLISHED OPINIONS CITED IN LI QI'S AND UL DEFENDANTS' RESPONSE TO OBJECTION AND MOTION TO STRIKE DECLARATION OF PETER FERRER IN SUPPORT OF LI QI'S MOTION TO DISMISS AND DECLARATION OF HARPRABDEEP SINGH IN SUPPORT OF UL DEFENDANTS' MOTION TO DISMISS**
In re: ZETTA JET PTE, LTD., a Singaporean corporation, Debtor.	Hearings: Date: June 30, 2021 Time: 9:00 a.m. (PDT)

JONATHAN D. KING, solely in his capacity as Chapter 7 Trustee of Zetta Jet USA, Inc. and Zetta Je PTE, Ltd. Plaintiff, v. YUNTIAN 3 LEASING CO. DESIGNATED ACTIVITY CO. F/K/A YUNTIAN 3 LEASING CO. LTD., ET AL. Defendants	Place: Courtroom 1575 255 East Temple Street Los Angeles, CA 90012 Date: August 11, 2021 Time: 9:00 a.m. (PDT) Place: Courtroom 1575 255 East Temple Street Los Angeles, CA 90012

In accordance with Local Bankruptcy Rule 9013-2(b)(4), Defendants Universal Leader Investment Limited, Glove Assets Investment Limited, Truly Great Global Limited and Li Qi hereby submit copies of unpublished judicial opinions cited in Li Qi's and UL Defendants' Response to Objection and Motion to Strike Declaration of Peter Ferrer in Support of Li Qi's Motion to Dismiss and Declaration of Harprabdeep Singh in Support of UL Defendants' Motion to Dismiss. The unpublished judicial opinions cited in the Response are attached hereto as follows:

1. Exhibit A: *Bauman v. DaimlerChrysler AG*, No. C-04-00194 RMW, 2005 WL 3157472 (N.D. Cal. Nov. 22, 2005).
2. Exhibit B: *Ellis v. Vial Fotheringham LLP*, No. 3:16-CV-01945-AC, 2019 WL 1553676 (D. Or. Feb. 1, 2019)
3. Exhibit C: *Eminent Investments (Asia Pacific) Ltd v DIO Corp* (2020) 23 HKCFAR 487
4. Exhibit D: *Excel Fortress Ltd. v. Wilhelm*, No. CV-17-04297-PHX-DWL, 2019 WL 163252 (D. Ariz. Jan. 9, 2019)
5. Exhibit E: *Fabricant v. Elavon, Inc.*, No. 2:20-CV-02960-SVW-MAA, 2021 WL 1593238 (C.D. Cal. Mar. 8, 2021)
6. Exhibit F: *Gulaid v. CH2M Hill, Inc.*, No. 15-CV-04824-JST, 2016 WL 5673144 (N.D. Cal. Oct. 3, 2016)
7. Exhibit G: *Herb Reed Enterprises, LLC v. Fla. Ent. Mgmt., Inc.*, No. 2:12-CV-00560-MMD, 2014 WL 1305144 (D. Nev. Mar. 31, 2014)
8. Exhibit H: *McGary v. Cunningham*, No. C13-5130 RBL-JRC, 2014 WL 5514383 (W.D. Wash. Oct. 31, 2014)
9. Exhibit I: *Prest v. Petrodel Resources Ltd.* [2013] UKSC 34
10. Exhibit J: *Redmond v. United States*, No. 2:15-CR-00532-SVW-2, 2021 WL 1156845 (C.D. Cal. Feb. 16, 2021)
11. Exhibit K: *Renard v. San Diego Unified Port Dist.*, No. 06-CV-2665H, 2007 WL 2262853 (S.D. Cal. Aug. 6, 2007)
12. Exhibit L: *Secretary for Justice v Global Merchant Funding Ltd* [2016] HKC 548
13. Exhibit M: *Pearldelta (CACV 105/2010 and CACV 106/2010*, 3 September 2010)

14. Exhibit N: *Sino-American* (HCCW 329/98, 9 June 2000))

Dated: June 27, 2021

ARNOLD & PORTER KAYE SCHOLER LLP

By: /s/ *Brian K. Condon*
Brian K. Condon (Bar No. 138776)
Oscar Ramallo (Bar No. 241487)
Attorneys for Defendants
Universal Leader Investment Limited, Glove Assets Investment Limited, Truly Great Global Limited, and Li Qi

Exhibit A

2005 WL 3157472
Only the Westlaw citation is currently available.
United States District Court,
N.D. California.

Barbara BAUMAN, et al., Plaintiffs,
v.
DAIMLERCHRYSLER AG, and Does
1 thorough 50, inclusive, Defendants.

No. C-04-00194 RMW.
|
Nov. 22, 2005.

Attorneys and Law Firms

Kim E. Card, Daniel M. Kovalik, Kathryn Chris Palamountain, Derek J. Baxter, Mark Andrew Chavez, Terry Collingsworth, for Plaintiffs.

Peter J. Messrobian, Matthew J. Kemner, for Defendant.

ORDER TENTATIVELY GRANTING DEFENDANT'S MOTION TO DISMISS

WHYTE, J.

[Re Docket No. 36]

***1** Specially-appearing defendant DaimlerChrysler AG ("DCAG") filed a motion to quash service and dismiss for lack of personal jurisdiction. Plaintiffs oppose the motion. The motion to dismiss was heard on June 17, 2005. The motion to quash was withdrawn. The court has reviewed the parties' papers filed before the hearing and considered their arguments. The court has also reviewed plaintiffs' post-hearing notice of filing of supplemental authority but sustains defendant's objection to its consideration. For the reasons set forth below, the court tentatively grants DCAG's motion to dismiss for lack of personal jurisdiction but allows plaintiffs some limited jurisdictional discovery.

I. BACKGROUND

Plaintiffs are twenty-three people, one of whom is a citizen of Chile and the rest of whom are citizens of Argentina. Amend. Compl. ¶¶ 3-21. Plaintiffs allege that Mercedes-Benz Argentina ("MBA")-now known as DaimlerChrysler Argentina ("DCA")-collaborated with the Argentine government to kidnap, detain, torture, or kill plaintiffs or plaintiffs' relatives during Argentina's military regime of 1976 to 1983, known as the "Dirty War." *Id.* ¶¶ 1-21. Claiming that DCA is either a division or wholly-owned subsidiary of DCAG, plaintiffs bring this action against DCAG under the Alien Tort Claims Act ("ATCA"), 28 U.S.C. § 1350, and the Torture Victims Protection Act ("TVPA"), 28 U.S.C. § 1350. *Id.*

In 1998, Chrysler Corporation and Daimler-Benz AG became wholly-owned subsidiaries of DCAG. Louann Van Der Wiele Decl. Supp. DCAG's Mot. ("Wiele Decl.") ¶ 2. Consequently, Chrysler Corporation, which had its principal place of business in Auburn Hills, Michigan, changed its name to DaimlerChrysler Corporation ("DCC"). *Id.* DCC maintains the same headquarters as Chrysler Corporation had maintained before. *Id.;* Miller Decl., Ex. 1.

DCAG contends that it is a German stock company with headquarters located in Stuttgart, Germany. *Id.;* Amend. Compl. ¶ 22. DCAG is not qualified or authorized to do business in California and does not import, manufacture, sell, service, or warranty cars in California. It manufactures Mercedes-Benz vehicles in Germany. Peter Waskonig Decl. Supp. DCAG's Mot. ("Waskonig Decl.") ¶ 3. A separate Delaware corporation, Mercedes-Benz United States, LLC ("MBUSA") purchases Mercedes-Benz cars in Germany, imports them into the United States, and distributes them throughout the United States. *Id.* ¶¶ 7, 10. MBUSA also provides all product advertisement, service and sales support for Mercedes-Benz vehicles in the United States. *Id.* ¶ 7. Plaintiffs, however, allege that DCAG is both an American and German corporation with headquarters in both countries, respectively, in the cities of Auburn Hills and Stuttgart. Brian Campbell Decl. Opp. DCAG's Mot. ("Campbell Decl."), Ex. 1, 2.

Plaintiffs originally named DCC as the defendant. Compl. ¶ 1. They subsequently amended their complaint, replacing DCC with DCAG as the defendant. Amend. Compl. ¶ 1. Plaintiffs originally believed that DCAG had its sole headquarters in Stuttgart, Germany. Compl. ¶ 22. In accord with the procedures set forth by the Hague Convention for international service of process, plaintiffs initiated service attempts upon DCAG through the German courts. Plaintiffs' Ex Parte Appl. Ct. Iss. Amend. Summons ("Appl.Amend.Summons") ¶ 1. The German district court

authorized service of process upon DCAG on July 14, 2004. Req. Jud. Not. ("RJN"), Ex. A. On September 7, 2004, however, the German appellate court halted service to determine whether service would violate Germany's sovereignty rights. If that was the case, the requested service could potentially be refused according to the Hague Convention, Article 13(1). *Id.* Whether plaintiffs' requested service in Germany will be permitted awaits resolution by Germany's highest court of a matter involving Napster and Bertelsmann AG, which poses similar issues. *Id.* On March 7, 2005, after hearing the parties' comments on the temporary suspension of service, the German appellate court reaffirmed its original stay order. RJN, Ex. B.

***2** From a proxy statement to shareholders regarding the 1998 merger of Chrysler Corporation with Daimler-Benz AG, plaintiffs discovered that DCAG purports to maintain operational headquarters at the DCC headquarters in Auburn Hills, Michigan. Appl. Amend. Summons at 3. Plaintiffs then applied for and were issued an amended summons for DCAG at the Auburn Hills location.

On January 28, 2005, plaintiffs' process server first attempted to serve DCAG at DCC headquarters but was unsuccessful. Sunny Miller Decl. Opp. DCAG's Mot. ("Miller Decl.") ¶ 3; Elizabeth Tichvon Decl. Supp. DCAG's Mot. ("Tichvon Decl.") ¶¶ 2-5. Elizabeth Tichvon, the service of process paralegal for DCC, explained to the server that she and DCC were not authorized to accept service of process on behalf of DCAG. *Id.;* Wiele Decl., Letter from Van Der Wiele to Plaintiffs' Counsel of 3/2/05, Ex. 1. On February 15, 2005, plaintiffs' process server Sunny Miller attempted to serve process on DCAG at the DCC headquarters but was not permitted to proceed any further than the reception area. Miller Decl ¶ 5; Tichvon Decl. ¶ 6. Tichvon explained to Miller that DCC and not DCAG was located at the premises. Miller Decl. ¶ 3. In addition, Tichvon reiterated her statements on January 28 to Miller and told Miller that she did not work for DCAG. Tichvon Decl. ¶ 6. Plaintiffs contend that as Tichvon walked away, Miller told her that he was leaving the papers there for DCAG. Miller Decl. ¶ 5. Miller then left the papers at the security desk in the presence of security guard Eric Uzenski, who works for Wackenhut Corporation. *Id.* The papers were returned to plaintiffs' counsel. Wiele Decl. ¶ 6.

On March 3 and March 10, 2005, plaintiffs mailed copies of the summons and complaint to the DCC headquarters by registered mail. *Id.* ¶ 7. Plaintiffs also mailed a copy of the summons and complaint to the Michigan Corporation Securities Bureau. Miller Decl. ¶ 4. The documents were addressed to Jurgen Schrempp, Chief Executive Officer ("CEO") of DCAG. Wiele Decl. ¶ 6. DCAG contends that Schrempp was not present at the DCC headquarters on March 3 and 10. *Id.* at 7; Waskonig Decl. ¶ 11. In addition, DCAG contends that Schrempp has no office in Auburn Hills but has an office in Stuttgart, Germany. Plaintiffs, however, allege that Schrempp has offices in both Auburn Hills and Stuttgart. Waskonig Decl. ¶ 11; Campbell Decl., Ex. 2. Plaintiffs further allege that the copy of the summons and complaint sent on March 10, 2005, was signed for by an agent of DCAG. Miller Decl., Ex. 3.

DCAG filed a motion to dismiss for insufficiency of service of process, pursuant to Federal Rule of Civil Procedure 12(b)(5), and to dismiss for lack of personal jurisdiction, pursuant to Federal Rule of Civil Procedure 12(b)(2). Mot. at 1. In response to plaintiffs' opposition, DCAG withdrew its challenge to service of process, but continues to assert that the court must dismiss the complaint for lack of personal jurisdiction. The parties agree that plaintiffs' claim does not arise out of or relate to DCAG's purported activity in California. Mot. at 9; Opp'n at 8. Thus, plaintiffs do not seek to establish specific jurisdiction over DCAG. *Id.*

***3** Plaintiffs submitted a notice of filing of supplemental authority and exhibits on August 8, 2005 pursuant to Federal Rule of Civil Procedure 15(d). Defendant filed an objection to its consideration. The court sustains the defendant's objection to plaintiffs' supplemental materials, which were submitted without prior court approval and in violation to Civil L.R. 7-3(d) (except for a new judicial opinion, "once a reply is filed, no additional memoranda, papers or letters may be filed without prior Court approval."). If the court considered plaintiffs' exhibits for the purpose of determining the existence of personal jurisdiction, the supplemental materials would only add marginally to the calculus in favor of jurisdiction.

II. ANALYSIS

The court may obtain personal jurisdiction over a defendant if it finds that either specific or general jurisdiction exists. Plaintiffs contend that the court has general jurisdiction over DCAG. General jurisdiction subjects a foreign defendant to suit within the forum state even on matters unrelated to its contacts with the forum. *Doe v. Unocal Corp.,* 248 F.3d 915, 923 (9th Cir.2001). General jurisdiction requires

a two-part inquiry: (1) whether defendant has "systematic and continuous contacts" with California; and (2) whether the assertion of general jurisdiction is reasonable. *Helicopteros Nacionales de Columbia, S.A. v. Hall,* 466 U.S. 408, 416 (1984); *Amoco Egypt Oil Co. v. Leonis Navigation Co., Inc.,* 1 F.3d 848, 851 (9th Cir.1993). Consequently, even if "continuous and systematic, contacts exist, the assertion of general jurisdiction must be reasonable." *Gator.com Corp. v. L.L. Bean,* 341 F.3d 1072, 1079-80 (9th Cir.2003) (citing *Amoco,* 1 F.3d at 852-53). This case presents a difficult question: can a federal court exercise personal jurisdiction over a case arising under federal subject matter jurisdiction in which plaintiffs are all foreign nationals and the defendant is a foreign corporation which has subsidiaries doing business in the United States?

Plaintiff has the burden of establishing that defendant has systematic and continuous contacts with the forum state. *See Rio Props., Inc. v. Rio Int'l Interlink,* 284 F.3d 1007, 1019 (9th Cir.2002); *Unocal,* 248 F.3d at 923. The standard for establishing general jurisdiction is "fairly high," requiring defendant's contacts in the state to be of a sort that "approximate physical presence" within the forum state. *Bancroft & Masters, Inc. v. Augusta Nat'l, Inc.,* 223 F.3d 1082, 1086 (9th Cir.2000). Conceptually, plaintiff must establish that the defendant has been conducting business in California, not merely with California. *See Bancroft,* 223 F.3d at 1086.

When a district court rules on a motion to dismiss for lack of personal jurisdiction without holding an evidentiary hearing, the plaintiff need only make a prima facie showing of the jurisdictional facts to withstand the motion. *Unocal,* 248 F.3d at 922. In order to make a prima facie showing, plaintiff must allege facts which, if true, would be sufficient to establish personal jurisdiction. *Id.* If not directly controverted, plaintiffs' version of the facts is taken as true for the purposes of the motion. *Id.* Conflicts between the facts stated in the parties' affidavits must be resolved in plaintiff's favor during a prima facie jurisdictional analysis. *Dole Food Co. v. Watts,* 303 F.3d 1104, 1108 (9th Cir.2002).

***4** Defendant has the burden of establishing that exercise of jurisdiction over it is unreasonable. *Amoco,* 1 F.3d at 851. To determine whether exercise of jurisdiction is reasonable, the following seven factors are balanced: (1) the extent of defendant's purposeful interjection into the forum; (2) the burden on the defendant of litigating in the forum; (3) the extent of conflict with the sovereignty of defendant's state; (4) the forum state's interest in adjudicating the issue; (5) the most efficient judicial resolution of the dispute; (6) the importance of the forum to plaintiff's interest in convenient and effective relief; and (7) the existence of an alternate forum. *Id.*

A. Systematic and Continuous Contacts

Courts focus on two primary areas when applying the "systematic and continuous contacts" test. First, they seek to determine whether there is "some kind of deliberate 'presence' in the forum state, including physical facilities, bank accounts, agents, registration, or incorporation." *Gator.com,* 341 F.3d at 1077. Second, courts "look at whether the company has engaged in active solicitation toward and participation in the state's markets, i.e., the economic reality of the defendant's activities in the state." *Id.* Plaintiffs seek to establish that DCAG has the requisite systematic and continuous contacts with California by arguing that (1) DCAG itself has such contacts or (2) DCAG has sufficient contacts by virtue of MBUSA, which plaintiffs contend acts as DCAG's agent. Opp'n at 8.

1. DCAG's Objections to Evidence

As a preliminary matter, DCAG objects to much of the evidence plaintiffs have submitted in support of their contention that this court has personal jurisdiction over DCAG, particularly to documents attached to the declaration of Brian Campbell. First, DCAG objects that plaintiffs have not properly authenticated certain materials submitted in support of their opposition and that the materials are thus inadmissible as lacking foundation. The materials to which DCAG objects on the basis of authentication are pages printed from the www.daimlerchrysler.com website and a proxy statement and marketing brochure purportedly distributed by DCAG.

Although some courts have refused to consider unauthenticated internet documents for purposes of any motion, *see, e.g., Wady v. Provident Life and Accident Ins. Co. of Am.,* 216 F.Supp.2d 1060 (C.D.Cal.2002) (excluding internet evidence on a summary judgment motion for these reasons), this court agrees with a recent Central District of California decision holding that the court should consider the stage of litigation when determining the admissibility of unauthenticated evidence. In *Moose Creek, Inc. v. Abercrombie & Fitch Co.,* 331 F.Supp.2d 1214 (C.D.Cal.2004), the court considered unauthenticated internet documents submitted by plaintiffs in support of their motion for preliminary injunction for trademark infringement. The court stated:

***5** Rule 901(a) defines a standard of admissibility that is rather general or elastic: the evidence must merely be 'sufficient to support a finding that the matter in question is what proponent claims.' Although Plaintiffs are correct that these internet documents are not individually authenticated, the Court finds that at this stage they satisfy Rule 901(a).

Id. at 1225 n. 4. Likewise, the court will consider plaintiffs' unauthenticated documents for purposes of determining whether DCAG is subject to personal jurisdiction.

Defendant also objects that the statements contained in the internet materials are offered for the truth of their contents and are thus hearsay. District courts have discretion to consider otherwise inadmissible evidence in ruling on an application for a temporary restraining order or preliminary injunction. *Republic of the Philippines v. Marcos,* 862 F.2d 1355, 1363 (9th Cir.1988) ("It was within the discretion of the district court to accept this hearsay for purposes of deciding whether to issue the preliminary injunction."). Other courts have held that hearsay may be considered for purposes of determining personal jurisdiction, provided it bears circumstantial indicia of reliability. *Akro Corp. v. Luker,* 45 F.3d 1541, 1546-47 (Fed.Cir.1995) ("[E]ven if Luker had objected to the hearsay nature of the statements at trial, such an objection would have been overruled, as we have held that hearsay 'bear [ing] circumstantial indicia of reliability' may be admitted for purposes of determining whether personal jurisdiction obtains.") (citing *Beverly Hills Fan v. Royal Sovereign Corp.,* 21 F.3d 1558, 1562 (Fed.Cir.1994)). The court finds that the documents printed from the www.daimlerchrysler.com website bear such circumstantial indicia of reliability, as the printouts bear the date and site from which they were printed, along with the DaimlerChrysler banner style. [1] The court will consider plaintiffs' evidence printed from the DaimlerChrysler and MBUSA websites for the purpose of determining the existence of personal jurisdiction. The documents printed from other websites, however, do not bear these circumstantial indicia of reliability. The court sustains defendant's objection to the contents of Exhibits 5, 6, 7, 9, 10, 11, 12, 14, 20, and 21 to the Campbell declaration.

1 These documents could, in the alternative, be considered party admissions.

2. DCAG's Contacts

Plaintiffs present evidence of nine of DCAG's contacts in support of their claim that DCAG has continuous and systematic contacts with California. Opp'n at 9. DCAG, however, argues that plaintiffs have incorrectly attributed five of those nine contacts to DCAG when, in fact, they are contacts by certain subsidiaries of DCAG. Reply at 3. With regard to the remaining four contacts, DCAG argues that one contact is not supported by plaintiffs' evidence and that the other three contacts are insufficient to establish that DCAG has continuous and systematic contacts with California. *Id.* at 4-5.

a. Contacts Allegedly Attributable to Subsidiaries

***6** The parent-subsidiary relationship itself is not sufficient to attribute the contacts of the subsidiary to the parent for jurisdictional purposes. [2] *Harris Rutsky & Co. Ins. Servs., Inc. v. Bell & Clements, Ltd.,* 328 F.3d 1122, 1134 (9th Cir.2003) (citing *Unocal,* 248 F.3d at 925). Thus, only contacts that can properly be attributed to DCAG, and not its subsidiaries, may be used to determine whether DCAG has systematic and continuous contacts with California.

2 An exception to this general rule occurs when the subsidiary is the alter ego or agent of the parent. Plaintiffs address this exception in the section of the analysis regarding MBUSA's systematic and continuous contacts.

DCAG contends that plaintiffs wrongly attribute five contacts to it. First, plaintiffs point to a brochure published by DCAG in 2004, entitled *DaimlerChrysler Commitment to North America.* Opp'n at 9. In the section of this brochure entitled "Direct Economic Impact in North America-2003," DCAG reported that it pays more than $64 million annually to 707 California employees, $15 million annually to 1,562 California retirees, $1 billion total to California suppliers, and $31 million annually to California in taxes. Campbell Decl., Ex. 4 at 42. Defendant, however, argues that the information in *DaimlerChrysler Commitment to North America* refers to the North American contacts of DCAG-affiliated subsidiaries and not those of DCAG. Reply at 3-4. Defendant claims that the entire brochure, including the "Direct Economic Impact in North America-2003 section," makes clear that it is discussing a group of DaimlerChrysler affiliated subsidiaries located in North America. *Id.* at 3. In further support of its argument that the brochure does not refer to DCAG's own direct impact in North America, DCAG submits that it has no offices, agents, representatives, employees, property, or bank accounts in California. Waskonig Decl. ¶¶ 3-4. Aside from

the brochure, plaintiffs have submitted no evidence to oppose DCAG's assertion.

Consolidating the activities of a subsidiary into the parent's reports is a common business practice. *Unocal,* 248 F.3d at 929 (quoting *Calvert v. Huckins,* 875 F.Supp. 674, 678 (E.D.Cal.1995)). Such consolidated statements are allowed by both the Internal Revenue Service and the Securities and Exchange Commission and recommended by generally accepted accounting principles. *Calvert,* 875 F.Supp. 679. Thus, although *DaimlerChrysler Commitment to North America* begins with a letter signed by the Chairman of DCAG, which tells the reader that "this brochure highlights many of our North American activities," the numbers published in *DaimlerChrysler Commitment to North America* do not serve to establish that DCAG itself has California contacts. [3]

[3] These numbers and documents may prove relevant to establishing DCAG's California contacts where plaintiffs seek to demonstrate that a subsidiary is an agent or alter ego of DCAG. *See, e.g., In Akzona Inc. v. E.I. Du PontNemours and Co.,* 607 F.Supp. 227, 238 (D.Del.1984), *cited in Unocal,* 248 F.3d at 928 (finding parent corporation's annual report clearly indicated parent corporation's corporate status as separate from relevant subsidiary).

Second, plaintiffs point to an expenditure reported in DCAG's 2005 SEC 20-F filing of approximately $595,000 for advertising and related marketing activities with Black Enterprise Magazine in 2004. Campbell Decl., Ex. 15. Because Black Enterprise Magazine has offices in California, plaintiffs contend that this reported expenditure evidences a DCAG contact with California. In response, DCAG presents a declaration from its media purchasing affiliate stating that the amount cited by plaintiff was spent, not on behalf of DCAG, but on behalf of three of its subsidiaries: DaimlerChrysler Motors Company LLC, MBUSA, and Mitsubishi Motors North America, Inc. Peter L. Swiecicki Decl. Supp. DCAG's Reply ("Swiecicki Reply Decl.") ¶ 3. Thus, the evidence does not support the conclusion that the reported advertising expenditure may be properly attributed to DCAG.

***7** DCAG's third alleged contact with California is its participation in the Stop Red Light Running Campaign, in which it purportedly made grants worth $200,000 to seven communities in the United States, including the City of Fresno, California. Campbell Decl., Ex. 17. Plaintiffs found the information in a press release from "Auburn Hills/Stuttgart" on the DaimlerChrysler website. *Id.* DCAG contends that it was DCC, not DCAG, that participated in the Stop Red Light Running Campaign. Louann Van Der Wiele Decl. Supp. DCAG's Reply ("Wiele Reply Decl.") ¶ 5.

Fourth, plaintiffs contend that DCAG filed for certification from the California Air Resources Board for its engines. The certification allegedly allows DCAG's products to be marketed in California. Campbell Decl., Ex. 8. DCAG, however, contends that it does not make submissions to the California Air Resources Board but that a distinct subsidiary company in the United States does so. [4] Peter Waskonig Decl. Supp. DCAG's Reply ("Waskonig Reply Decl.") ¶ 10. The filing itself does not constitute a contact of DCAG with the forum state. However, the impact of the filing, that DCAG's products may be marketed in California, may be relevant, as set forth below.

[4] DCAG does not identify which subsidiary company performs this function.

Fifth, plaintiffs allege that DCAG directly participated in the establishment of the California Fuel Cell Partnership, which involved Ferdinand Panik, Senior Vice President at DCAG, being present in California as chairperson of the organization. DCAG does not refute plaintiffs' allegation but contends first that the evidence is inadmissible and that DaimlerChrysler Research and Technology North America, Inc., is the only company in the DaimlerChrysler Group of companies that currently is a member of the California Fuel Cell Partnership. Waskonig Reply Decl. ¶ 9.

The court concludes that DCAG has presented sufficient evidence that these contacts are attributable, not to DCAG, but to subsidiaries of DCAG. Accordingly, they are not properly considered direct contacts of DCAG to California.

b. California-specific product designs

As a sixth contact with California, plaintiffs claim that DCAG designs vehicles specifically for California, which indicates purposeful availment. Opp'n at 10. In support of this argument, plaintiffs offer evidence that DCAG produces cars to meet California's air quality standards. Campbell Decl., Ex. 11-12. Plaintiffs also offer evidence that DCAG built a prototype fuel cell vehicle specifically for United Parcel Service ("UPS") to use in California and that DCAG built a fuel cell for the California Fuel Cell Partnership, which DCAG tested by driving 25,000 miles on California

roads. Campbell Decl., Ex. 13. DCAG does not deny that it produces cars to meet California's air quality standards or that it built a fuel cell for the California Fuel Cell Partnership. However, DCAG uses plaintiffs' evidence to demonstrate that Mercedes-Benz vehicles sold in California have the same design, including emission-system design, as those sold elsewhere in the United States. Reply at 4. DCAG also does not deny its activities with UPS but contends that its Mercedes-Benz hydrogen fuel cell vehicles in California do not differ in design from those elsewhere in the world and that its Mercedes-Benz hydrogen fuel cell vehicles are not sold to the public in California. *Id.* at 4-5.

***8** Designing a product specifically for the forum market has traditionally been helpful for establishing purposeful availment for specific jurisdiction. "Whether dealing with specific or general jurisdiction, the touchstone remains 'purposeful availment' ... [to] ensure[ ] that 'a defendant will not be haled into a jurisdiction solely as a result of "random," "fortuitous," or "attenuated" contacts." ' *Gator.com,* 341 F.3d at 1076 (citing *Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co.,* 284 F.3d 1114, 1123 (9th Cir.2002)). However, purposeful availment alone is not enough to establish general jurisdiction; the purposeful availment itself must be systematic and continuous. *See, e.g., Asahi Metal Indus. Co. v. Superior Ct. of Cal.,* 480 U.S. 102, 112-13 (1986); *Rockwell Int'l v. Costruzioni Aeronautiche Giovanni Agusta,* 553 F.Supp. 328, 331-32 (E.D.Pa.1982); *see also Calvert,* 875 F.Supp. at 677 (concluding that evidence used to establish specific jurisdiction does not establish general jurisdiction unless it is continuous and systematic). Although plaintiffs' unrefuted evidence establishes that DCAG designed products that could be marketed in California, among other locations, and built prototypes for testing and use on California roads by UPS and others, this purposeful availment is not sufficiently systematic and continuous for the exercise of general jurisdiction.

c. Remaining Contacts

Of the nine contacts that DCAG allegedly has with California, the three remaining are not disputed by the parties, but DCAG contends that they do not support the assertion of general jurisdiction.

First, DCAG is listed on the Pacific Stock Exchange located in San Francisco, which plaintiffs allege gives DCAG countless benefits including access to innovative electronic trading technology, increased liquidity of its assets, and higher corporate visibility. Second, plaintiffs contend that DCAG has pursued enough litigation in California to retain permanent counsel in San Francisco. This litigation includes DCAG initiating actions in the federal courts of California challenging California's clean air laws and initiating additional actions in California to protect its patent rights. Opp'n at 10. Furthermore, DCAG answered a complaint in a case unrelated to this one but within this district and cross-complained after waiving service of process. Opp'n at 10. Third, as a corporate partner in the Global Nature Fund, DCAG has been participating in the Living Lakes Project at Mono Lake in California. Campbell Decl., Ex. 16. Part of this project involved DCAG employees or their family members traveling to Mono Lake to participate in a nature camp in 2003. *Id* .

The single trip by DCAG employees or their family members to Mono Lake, California, as part of DCAG's participation in the Living Lakes Project, cannot be regarded as a contact of continuous and systematic nature. *See Helicopteros,* 466 U.S. at 416 (reasoning that "the one trip to Houston by Helicol's chief executive officer for the purpose of negotiating the transportation-service contract with Consorcio/WSH cannot be described or regarded as a contact of 'continuous and systematic' nature"). Neither is a listing on a stock exchange, without more, sufficient to confer general jurisdiction. *See Wiwa v. Royal Dutch Petroleum Co.,* 226 F.3d 88, 97 (2d Cir.2000).

***9** The lawsuits that DCAG filed in California courts to challenge California's clean air laws and protect its patents are likely central to DCAG's business functions but do not serve to establish contacts of a continuous and systematic nature sufficient to confer personal jurisdiction. For example, in *Calvert,* the district court determined that the defendant demonstrated a kind of purposeful availment similar to that necessary for the exercise of limited or specific jurisdiction by initiating a lawsuit in a California court. *Calvert,* 875 F.Supp. at 677. However, the court determined that a single defendant-initiated lawsuit does not establish general jurisdiction because it was neither continuous nor systematic. *Id.* Similarly, in *Soma Medical Int'l v. Standard Chartered Bank,* 196 F.3d 1292, 1296 (10th Cir.1999), defendant bank had filed a small number of financing statements, recorded several instruments, and filed five civil cases in the forum state to recover monies and/or foreclose on trust deeds. The court in *Soma* held that those were not the kinds of activities which courts have found necessary to subject a defendant to general jurisdiction. *Soma Medical Int'l,* 196 F.3d at 1296. While DCAG's lawsuits may be systematic in

the sense that they are part of a larger corporate business or litigation plan, there is no evidence of either a larger corporate plan or such continuous and substantial litigation as to justify finding general jurisdiction over DCAG. Furthermore, retaining permanent counsel in California is "the type of ongoing contact needed for general jurisdiction," but this contact alone is not sufficient to establish general jurisdiction over DCAG. *Calvert,* 875 F.Supp. at 677.

d. Conclusion

The court finds that plaintiffs' allegations do not establish that DCAG has continuous and systematic contacts with California. Plaintiffs have failed to establish that DCAG has contacts approximating a physical presence in California. *See, e.g., Perkins v. Benguet Consol. Mining Co.,* 342 U.S. 437 (1952) (finding general jurisdiction when president of Philippines-based corporation maintained office, kept company files, held director meetings, distributed salaries, and conducted other company business in the forum state). The contacts that plaintiffs allege in support of their contention that DCAG has continuous and systematic contacts with California are not of the pervasive nature required to find general jurisdiction over DCAG. In *Helicopteros,* for example, the defendant had purchased more than $4 million in equipment from a company in the forum state and sent management and maintenance personnel to receive training at that company in the forum state. *Helicopteros,* 466 U.S. at 411-12. During this seven-year period, the defendant had also negotiated a contract in the forum state and received $5 million in payments from a bank located within the forum state. *Id.* However, the Supreme Court held that these contacts were insufficient for establishing general jurisdiction over the defendant. *Id.* at 418-19.

***10** Plaintiffs have not demonstrated that DCAG has directly invested more in California than the defendant in *Helicopteros.* Plaintiffs also have not demonstrated that DCAG's Pacific Stock Exchange listing, California litigation, participation in the Living Lakes Project, building a fuel cell for UPS, and helping to establish the California Fuel Cell Partnership amount to contacts with the forum state that are greater than those of the defendant in *Helicopteros.* In *Metropolitan Life Ins. Co. v. Robertson-Ceco Corp.,* 84 F.3d 560, 573-74 (2d Cir.1995) the court found that while the defendant's contacts standing alone were not continuous and systematic, together they were sufficient to establish general jurisdiction. However, this is not the case here: even when DCAG's California contacts are considered as a whole, as the court did in *Metropolitan Life Ins. Co.,* they fall short of establishing the systematic and continuous contacts necessary for this court to have general jurisdiction over DCAG.

3. Agency Relationship with MBUSA

Plaintiffs alternatively contend that DCAG has continuous and systematic contacts with California through MBUSA's contacts. Opp'n at 17. MBUSA has its principal place of business in New Jersey and is wholly-owned by DaimlerChrysler North America Holding Company ("DCNAHC"), a Delaware corporation. DCNAHC is a subsidiary of DCAG. Waskonig Decl. ¶ 8. MBUSA serves the United States market as DCAG's exclusive Mercedes-Benz importer and sales agent for the United States. Waskonig Decl. ¶ 7. Plaintiffs point out that MBUSA is the single largest supplier of luxury vehicles to the California car market, and that over 10 percent of all new vehicle sales in the United States take place in California. [5] Furthermore, MBUSA has a regional office in Costa Mesa, California, a Vehicle Preparation Center in Carson, California, and a Classic Center in Irving, California. Campbell Decl., Ex. 19. DCAG does not dispute that MBUSA is subject to general jurisdiction in California but argues that MBUSA's contacts cannot be imputed to DCAG.

5 This point is, however, unsupported by admissible evidence because the web pages provided by plaintiffs supply only unauthenticated hearsay. However, as DCAG does not directly refute this evidence, the court will consider it for purposes of determining whether DCAG has sufficient minimum contacts through MBUSA.

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. *Rutsky,* 328 F.3d at 1134. How the courts determine whether a subsidiary is an alter ego or agent of the parent has undergone a gradual evolution. *See, e.g., Unocal,* 248 F.3d at 925 (delineating two separate tests for alter ego and agency); *Chan v. Soc'y Expeditions, Inc.,* 39 F.3d 1398, 1405-06 (9th Cir.1994); *Kramer Motors, Inc. v. Br. Leyland, Ltd.,* 628 F.2d 1175, 1177-78 (9th Cir.1980) (finding that day-to-day control over the subsidiary by the parent was required to find a subsidiary to be an alter ego or agent of the parent); *Wells Fargo & Co. v. Wells Fargo Express Co.,* 556 F.2d 406, 422-24 (9th Cir.1977) ("The common law requirements of a 'general agency' demand that such substantial activities be carried on for the benefit of the principal that, in some cases, those same

activities may indeed be sufficient to render the principal himself 'present' under the 'continuous and systematic' test of *Perkins v. Benguet Consol. Mining Co.,* 342 U.S. 437, 445-46, 72 S.Ct. 413, 96 L.Ed. 485 (1952).").

a. Alter Ego

***11** To establish that the subsidiary is the alter ego of the parent corporation, the plaintiffs "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." ' *Rutsky,* 328 F.3d at 1134 (quoting *Unocal,* 248 F.3d at 926). Plaintiffs do not seek to demonstrate that MBUSA is an alter ego of DCAG.

b. Agency

The Ninth Circuit in *Rutsky* described the agency test:

> To satisfy the agency test, plaintiffs must make a prima facie showing that the subsidiary represents the parent corporation by performing services "sufficiently important to the [parent] corporation that if it did not have a representative to perform them, the [parent] corporation ... would undertake to perform similar services." The agency test permits the imputation of contacts where the subsidiary was either "established for, or is engaged in, activities that, but for the existence of the subsidiary, the parent would have to undertake itself."

Rutsky, 328 F.3d at 1135 (citations omitted) (quoting *Chan v.. Soc'y Expeditions, Inc.,* 39 F.3d 1398, 1405 (9th Cir.1994)). In determining whether a subsidiary satisfies the agency test, the following factors may be relevant: (1) what percentage of the parent corporation's business comes from the subsidiary; (2) whether the parent corporation's only agent in the United States is the subsidiary; and (3) whether the parent corporation conducts marketing activities in the United States. *Chan,* 39 F.3d at 1406. Furthermore, while a parent corporation's day-to-day control over the subsidiary's activities may contribute to an agency finding, it is not the *sine qua non* of the agency test. *Modesto City Sch. v. Riso Kagaku Corp.,* 157 F.Supp.2d 1128, 1134 (E.D.Cal.2001) (analyzing *Unocal*); *see also Synopsys v. Ricoh Co.,* 343 F.Supp.2d 883, 887 (N.D.Cal.2003). As noted by the Ninth Circuit in *Unocal,* " '[t]he question to ask is not whether the American subsidiaries can formally accept orders for their parent, but rather whether, in the truest sense, the subsidiaries' presence substitutes for the presence of the parent." ' *Unocal,* 248 F.3d at 928-29 (quoting *Bulova Watch Co., Inc. v. K. Hattori & Co., Ltd.,* 508 F .Supp. 1322, 1342 (E.D.N.Y.1981)).

Plaintiffs' evidence regarding the factors suggested in *Chan* is inconclusive. Based upon DCAG's declaration that MBUSA is the exclusive distributor of Mercedes-Benz vehicles in the United States, the court can infer that MBUSA must provide a significant amount of business to DCAG through the American automobile market. It is clear that MBUSA is not DCAG's only subsidiary in the United States (or even in California), however, it is certainly a subsidiary that engages in substantial activity by selling Mercedes-Benz products in the United States. Furthermore, DCAG argues that it does no advertising in the United States-all such advertising is performed by its subsidiaries. With regard to day-to-day control, plaintiffs have provided no evidence whatsoever that DCAG exercises operational control over MBUSA.

***12** Thus, the court again turns to the question of whether MBUSA's presence in California "substitutes for the presence of" DCAG. To make this determination, a court should look to the main business of the parent and subsidiary. *See, e.g., Unocal,* 248 F.3d at 929. If the business of the parent is carried out entirely at the parent level, the subsidiary's activities are not imputable to the parent. *Id.* DCAG argues its business is manufacturing Mercedes-Benz vehicles and parts. MBUSA is not involved in this manufacturing but purchases Mercedes-Benz vehicles in Germany (where title passes) and imports them into the United States. Waskonig Decl. ¶ 10. DCAG has no control over the ultimate destination of the products in the United States and none of the dealerships at which the vehicles are sold is a subsidiary of Mercedes-Benz. *Id.* DCAG also points out that even before MBUSA (and its predecessor entities) came into existence, independent non-subsidiary companies distributed Mercedes-Benz vehicles in the United States. *Id.* Plaintiffs, on the other hand, argue that without MBUSA or another similar entity to import and sell its products into the United States, DCAG would not be able to sell vehicles in the United States market.

On somewhat analogous facts, a Northern District of California court found an agency relationship between Ricoh Company, a Japanese corporation with no sales in or other direct contacts with California, and Ricoh Corporation, a subsidiary of Ricoh Company that functioned as its main marketing and distribution arm for North and South America. *Synopsys, Inc. v. Ricoh Co., Ltd.,* 343 F.Supp.2d 883 (N.D.Cal.2003). The court found Ricoh Company subject

to personal jurisdiction in California and concluded that "it is evident that Defendant's multifaceted operations are necessary to its viability in the forum and represent tasks Defendant would have to perform itself but for the existence of its subsidiaries based in this forum or registered to do business here." *Id.* at 887. In the present case, without MBUSA or another distributor, DCAG would not be able to sell Mercedes-Benz vehicles in California. However, it is not clear that it would be required to perform such functions itself to avail itself of the California, luxury-vehicle market. In contrast, Ricoh Company had three subsidiaries in California and another registered to do business here. It appears the tasks performed by these subsidiaries were ones the court felt Ricoh Company would have had to perform itself but for the existence of its subsidiaries. No evidence suggested these operations were ones that could be performed, for example, by a wholly independent company. Although admittedly a close question, the court concludes that the activities of MBUSA should not be imputed to defendant for the purpose of establishing personal jurisdiction over DCAG.

B. Reasonableness

Even assuming the existence of sufficient minimum contacts with the forum state to support the exercise of general jurisdiction, exercise of personal jurisdiction must nonetheless be reasonable. "For jurisdiction to be reasonable, it must comport with 'fair play and substantial justice." ' *Panavision Int'l, L.P. v. Toeppen,* 141 F.3d 1316, 1322 (9th Cir.1998) (quoting *Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 476 (1985)). As set forth above, the court considers seven factors in determining whether the exercise of personal jurisdiction is reasonable. *Amoco,* 1 F.3d at 851. DCAG claims that all seven factors militate against the exercise of jurisdiction.

1. Purposeful Interjection into California

***13** The first factor of the scope of defendant's purposeful interjection into the forum state favors exercising jurisdiction. "When a corporation 'purposefully avails itself of the privilege of conducting activities within the forum State,' it has clear notice that it is subject to suit there." *World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286, 297 (1980). By initiating lawsuits in California courts to challenge the state's clean air laws and to protect DCAG's patents and other business interests, DCAG has purposefully availed itself of the privilege of conducting business within California. *See Calvert,* 675 F.Supp. at 677 (citing *Vorys, Sater, Seymour, & Pease v. Ryan,* 154 Cal.App.3d 91, 94 (1984)). Additionally, the Supreme Court in *World-Wide Volkswagen* indicated that a corporation demonstrates purposeful availment when the sale of its product "is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve, directly or indirectly, the market for its product in other states." *World-Wide Volkswagen Corp.,* 444 U.S. at 297. Given that California consumers account for 10 percent of new vehicles purchased in the United States and that one of DCAG's subsidiaries is the single largest supplier of luxury vehicles to California, it is reasonable to infer that the sale of DCAG's vehicles, including Mercedes-Benz vehicles, in California is not an isolated occurrence but arises from the efforts of DCAG to serve the California market. Thus, on the basis of purposeful availment, exercise of personal jurisdiction over DCAG would not be unreasonable.

2. Burden on DCAG of Litigating in California

The second factor tips in DCAG's favor. None of the events in question occurred in California, and there is no contention that any discovery will be conducted in California nor that any potential witnesses are located here. *See Rocke v. Can. Auto. Sport Club,* 660 F.2d 395, 399 (9th Cir.1981) (concluding that the occurrence of the alleged acts in Canada created substantial burden for the defendant to litigate in California because of the location of potential evidence and witnesses). DCAG will be further burdened because this court will be unable to compel the attendance of any Argentine witness who is not a party in the case and not a current DCAG employee, for either trial or deposition testimony. *See Doe v.. Sun Int'l Hotels, Ltd.,* 20 F.Supp.2d 1328, 1330 (S.D.Fla.1998) (noting, in *forum non conveniens* context, that witnesses who are defendant's employees are under defendant's control); *Duha v. Agrium, Inc.,* 340 F.Supp.2d 787, 796 (E.D.Mich.2004) (noting, in *forum non conveniens* context, that the court cannot compel attendance of unwilling witnesses). Lastly, as DCAG is a German corporation, it may incur unique burdens in defending itself in the United States legal system. *Asahi,* 480 U.S. at 113.

DCAG's burden of having to defend itself under the United States' legal system, however, will likely be minimal as it is a sophisticated, global business, has previously litigated in California, retains permanent counsel in California, and has subsidiaries in California. *See Wiwa,* 226 F.3d at 99 (finding that defendant foreign corporations would not be subject to great inconvenience in litigating in the forum state, despite the fact that the disputed events did not occur in the forum state, because defendants controlled a wealthy and far-flung business empire, had a physical presence in the forum state,

had access to enormous resources, faced little or no language barrier, had litigated in the country on previous occasions, had a four-decade long relationship with one of the nation's leading law firms, were the parent companies of one of America's largest corporations, and had to defend themselves in New York City, which was "a major world capital"). It is not clear that the burden on DCAG of litigating in California presents an "inconvenience [that] is so great as to constitute a deprivation of due process." *Caruth v. Int'l Psychoanalytical Ass'n,* 59 F.3d 126, 128-29 (9th Cir.1995). Thus, the burden alone will not overcome otherwise clear justifications for the exercise of jurisdiction. *Id.*

3. Conflict with Sovereignty of Argentina or Germany

***14** Potential conflicts with another state's sovereignty, the third factor, also militate against the exercise of jurisdiction over DCAG. This factor is given greater importance where the events giving rise to the suit occurred on the foreign state's territory and when a foreign state has explicitly voiced a sovereign interest in the case. *See Harris Rutsky,* 328 F.3d at 1133 (finding sovereignty considerations cut against jurisdiction where alleged tortious conduct of British defendants occurred in London); *Pac. Atl. Trading Co., Inc. v. M/V Main Exp.,* 758 F.2d 1325, 1330 (9th Cir.1985) (finding Malaysia's sovereign interest weighed against jurisdiction "since the contract was executed in Malaysia by Malaysian citizens on forms supplied by a Malaysian bank"). On the other hand, sovereignty considerations are given less importance where the defendant has manifested an intent to serve and benefit from the United States market, for example, where a foreign defendant maintains a continuing business relationship with its United States agent. *Sinatra v. Nat'l Enquirer, Inc.,* 854 F.2d 1199, 1200 (9th Cir.1988). Moreover, "the factor of conflict with the sovereignty of the defendant's state 'is not dispositive because, if given controlling weight, it would always prevent suit against a foreign national in a United States court." ' *Id.* at 1199 (citing *Gates Learjet Corp. v. Jensen,* 743 F.2d 1325, 1333 (9th Cir.1984)).

In this case, DCAG argues that Germany has expressed concern that this suit may violate its sovereignty rights by delaying service under the Hague Convention. Mot. at 13. Additionally, the conduct giving rise to the suit occurred entirely outside of California. These facts increase the importance of "the conflict with sovereignty factor," while DCAG's manifested intent to serve and benefit from the United States market by maintaining continuing business relationships with its multiple United States subsidiaries decreases its importance. Thus, the court concludes that this factor cuts slightly against the exercise of jurisdiction over DCAG.

4. California's Interest in Adjudicating the Dispute

The fourth factor requires consideration of California's interest in adjudicating the issue. California has little direct interest in adjudicating this suit. None of the plaintiffs is a California citizen, DCAG is not a California corporation, and the DCAG subsidiary allegedly involved in the human rights violations at issue has absolutely no demonstrated connection with California. However, Congress has expressed that human rights violations are the business of federal courts. *See Wiwa,* 226 F.3d at 106 (reasoning, in *forum non conveniens* context, from TVPA legislative history that "Congress has expressed a policy of U.S. law favoring the adjudication of such suits in U.S. courts"); *see also Presbyterian Church of Sudan v. Talisman Energy, Inc.,* 244 F.Supp.2d 289, 339 (S.D.N.Y.2003). Thus, although the court concludes that California has at least an abstract interest in adjudicating plaintiffs' dispute, its interest is only in a general goal of world-wide preservation of human rights. On balance, this factor weighs against the exercise of personal jurisdiction.

5. Absence of an Alternative Forum

***15** Although typically listed as the seventh factor in the Ninth Circuit reasonableness analysis, the court next evaluates the absence of an alternative forum because plaintiffs contend that this factor influences the remaining two factors, efficient judicial resolution of the dispute and convenience and effectiveness of relief for plaintiffs. The plaintiffs bear the burden of showing the absence of an alternative forum. *Harris Rutsky,* 328 F.3d at 1133 . [6]

6 In performing this evaluation, 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. Accordingly, the court may consider expert testimony in determining the law of a foreign jurisdiction. *See also Lockman Foundation v. Evangelical Alliance Mission,* 930 F.2d 764, 768 (9th Cir.1991) (moving party may demonstrate adequacy of alternative forum's law through affidavits and declarations of experts); *accord Zipfel v. Halliburton Co.,* 832 F.2d 1477 (9th Cir.1987). DCAG objects to the admissibility of the testimony of plaintiffs' foreign law experts,

> arguing that plaintiffs' experts' opinions are not adequately supported by the law. DCAG submits competing expert declarations on Argentine and German law. Because the court may consider testimony regarding foreign law irrespective of admissibility, the court considers the foreign law declarations submitted by both sides, but notes plaintiffs' experts' lack of citation to statutory or other legal authority.

Plaintiffs claim that United States courts are the only courts that are empowered to hear their claims against DCAG and that will allow them to obtain "necessary" evidence. Opp'n at 19. In support of this argument, plaintiffs contend that both Argentina and Germany are unsuitable fora and will provide no effective relief for plaintiffs' claims. *Id.* They further contend that there exists no other alternative forum in which plaintiffs can proceed against DCAG and obtain effective relief. *Id.* at 19-20. DCAG, however, asserts that Germany and Argentina provide alternative fora, especially since the Argentine claims process is still open for victims of "Dirty War" crimes, like the plaintiffs in this case. Mot. at 14-15.

a. Argentina as an Alternative Forum

Plaintiffs allege that they cannot bring their claims against DCAG in the Argentine legal system because Argentine courts do not permit lawsuits against "juridical persons" like corporations and require a court entrance fee of three percent of the total claim, which plaintiffs cannot afford. Ricardo Sans Decl. Opp. DCAG's Mot. ("Sans Decl.") ¶¶ 5, 14. Specifically in regard to their claims of human rights violations by DCAG, plaintiffs allege that the Argentine claims process, to which defendant refers, provides relief only for illegal conduct by its government during the "Dirty War" but not for illegal conduct by private parties during that period. *Id.* ¶ 6. In addition, plaintiffs allege that Argentina has amnesty laws protecting entities like DCAG that are accused of committing human rights violations during the "Dirty War." *Id.* ¶ 9. Plaintiffs support their contentions with the declaration of Mr. Monner Sans, their expert on Argentine law. Sans' declaration cites no legal basis for his assertions. *Id.* ¶ 6 ("[T]here are no legal provisions in force under Argentine law to sue a corporation for its responsibility in the violation of human rights.").

DCAG, however, submits expert testimony on Argentine law by Jorge Daniel Ortiz that plaintiffs can bring their claims against DCAG in the Argentine legal system because Argentina courts permit corporations to be sued for "quasi-delicts" or "delicts," which may be either a criminal offense or a civil wrong. [7] Ortiz Decl. ¶¶ 6-7. DCAG also asserts that Argentine law may exempt plaintiffs from paying the court entrance fee through a procedure called "benefit to litigate without affording court fees." *Id.* ¶ 9. Specifically with regard to plaintiffs' human rights claims, DCAG provides citations to statutory authority supporting its contention that Argentina provides causes of action similar to those available in the United States for human rights violations by corporations. *Id.* ¶ 8. Furthermore, DCAG contends that the Argentine amnesty laws to which plaintiffs refer were annulled by the Argentine Congress in August of 2003. *Id.* ¶ 16. The court concludes that DCAG has cited sufficient authorities to refute plaintiffs' contention that they may not bring their claims in Argentina.

[7] Pursuant to Article 1072 of the Argentine Civil Code, DCAG's Argentine law expert describes delicts as "every illicit act executed knowingly and with intent to damage another person or his rights." Pursuant to Articles 1107-1123 of the Civil Code, the expert describes quasi-delicts as illicit acts committed with fault or negligence, including vicarious tort liability imposed upon employers. Jorge Ortiz Decl. Supp. DCAG's Reply ("Ortiz Decl.") ¶ 7.

***16** However, plaintiffs allege that even if they were able to bring their claims in Argentina, they would not be able to obtain evidence necessary to pursue their claims because Argentina cannot order discovery or witness testimony from DCAG, and individuals located in Germany are beyond the reach of Argentine courts. Sans Decl. ¶¶ 5, 15. DCAG, however, claims that plaintiffs would be able to collect and present the evidence necessary to pursue their claims, although this procedure is not termed "discovery" in the Argentine legal system. Ortiz Decl. ¶ 11. Discovery procedures that are not identical to those in the United States but that are nonetheless adequate do not render an alternative forum inadequate. *See Lockman Found. v. Evangelical Alliance Mission,* 930 F.2d 764, 768 (9th Cir.1991) (holding, for *forum non conveniens* motion, that Japanese forum was adequate although discovery procedures were not identical to those in the United States); *Zipfel v. Halliburton Co .,* 832 F.2d 1477, 1484 (9th Cir.1987) (finding, for *forum non conveniens* motion, that Singapore was an adequate forum although depositions were allowed only in certain circumstances); *Mercier v.. Sheraton Int'l, Inc.,* 981 F.2d 1345, 1352-53 (1st Cir.1992) (reasoning, for *forum non conveniens* motion, that an alternative forum ordinarily is not considered inadequate

merely because its courts afford different or less generous discovery procedures than are available under American rules).

Finally, plaintiffs allege that the Argentine judiciary is subject to rampant corruption, that judicial resolution is severely hindered in various ways, and that the plaintiffs, judges and witnesses involved in the case would likely be subject to violent intimidation. Sans Decl. ¶¶ 10-12. Opp'n at 21-22. They also contend that the Argentine subsidiary of DCAG is a major contributor to Argentina's economy and would thus be subject to favorable treatment by the Argentine courts. Sans Decl. ¶ 8. In response, DCAG submits expert testimony refuting Sans' statement that "the most recent Report on Human Rights of the U.S. State Department" is the 2003 version. Ortiz states that the most recent version is the 2004 Report on Human Rights of the U.S. State Department ("2004 Report"), which lacks "any reference to reports that security forces are attempting to intimidate the judiciary, witnesses, or human rights organizations." Ortiz Decl. ¶¶ 12-13. Ortiz further points out that the 2004 Report recognizes the Argentine government's continued pursuit of anti-corruption measures and accountability for human rights violations that occurred during the "Dirty War," with a Supreme Court ruling that crimes against humanity were not subject to statutes of limitations. *Id.* ¶ 14.

United States courts "have been reluctant to find foreign courts 'corrupt' or 'biased' " for the purpose of deeming the foreign forum inadequate. *See, e.g., Monegasque De Reassurances S.A.M. v. Nak Naftogaz of Ukr.,* 311 F.3d 488, 499 (2d Cir.2002) (quoting *Blanco v. Banco Indus. de Venez., S.A.,* 997 F.2d 974, 981-82 (2d Cir.1993)). In *Blanco,* plaintiffs alleged that the Venezuelan justice system contained systemic corruption and was biased in favor of defendants. Furthermore, plaintiffs in Blanco submitted evidence of political unrest in Venezuela. The court, however, concluded that Venezuela was a suitable alternative forum because "no convincing showing ha[d] been made of those 'rare circumstances' that render the proposed alternative forum 'clearly unsatisfactory." ' *Blanco,* 997 F.2d at 982 (quoting *Piper Aircraft v. Reyno,* 454 U.S. 235, 254 n. 22 (1981)).

***17** Considering the number of cases that have concluded that the foreign forum is adequate may be helpful in determining the adequacy of alternative fora. *See Blanco,* 997 F.2d at 981-82; *Lockman Found.,* 930 F.2d at 769 n. 3 (considering other courts' findings as to whether alternative forum is adequate). DCAG cites a number of courts that have found Argentina to be a suitable forum, [8] however, none of these cases evaluated suitability of the forum in a human rights context. *See, e.g., Wiwa,* 226 F.3d at 88 (recognizing that dismissal of ATCA claims on *forum non conveniens* grounds frustrates Congress' intent to address human rights abuses).

8 *See, e.g., Satz v. McDonnell Douglas Corp.,* 244 F.3d 1279, 1284 (11th Cir.2001) (concerning product liability actions against aircraft manufacturer); *Duha,* 340 F.Supp.2d at 801 (concerning various contract and tort actions arising from employment termination).

The suggestion by DCAG's Argentine law expert that the 2004 Report indicates that judiciary and witnesses in Argentina are not subject to intimidation is not supported by the text of the report. Most notably, the 2004 Report states, "Threats and beatings allegedly aimed to intimidate witnesses were common and, in some cases, occurred in connection with killings believed committed by members of security forces or their criminal allies," and "[t]here were credible allegations of efforts by members of security forces and others to intimidate the judiciary and witnesses ... [with] [a]llegations of corruption in provincial courts ... more frequent than at the federal level, reflecting strong connections between some of the governors and judicial powers in their provinces." Ortiz Decl., Ex. A at 5.

These persisting conditions cause the court concern. The question is whether this concern is sufficient to find the Argentine forum inadequate. For the court to find an alternative forum inadequate, that forum must be characterized by a complete absence of due process or an inability of the forum to offer any satisfactory remedy. *See, e.g., Rasoulzadeh v. Associated Press,* 574 F.Supp. 854, 861 (S.D.N.Y.1983), *aff'd,* 767 F.2d 908 (2d Cir.1985) (mem.); *see also Piper Aircraft,* 454 U.S. at 254. Here, the plaintiffs are asserting human rights violations by a corporation in cooperation with the Argentine military. Although there is a possibility that the Argentine security forces may want to keep certain witnesses from testifying to DCAG's alleged acts, plaintiffs have not alleged a strong rationale for why witnesses in a case against the corporation might be subject to such treatment.

DCAG has convincingly argued that plaintiffs would be able to file similar claims to those asserted here, obtain the equivalent of adequate discovery, and receive appropriate

damages. Even in light of the potential intimidation, plaintiffs have not made out a prima facie case that "the remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all." *Piper Aircraft,* 454 U.S. at 254. Thus, Argentina provides plaintiffs an alternative forum, although, as set forth in further detail below, it may not be the most favorable forum for obtaining relief.

b. Germany as an Alternative Forum

***18** Plaintiffs also contend that they cannot bring their claims in German courts because German courts fail to recognize either human rights actions against corporations or equitable tolling, without which plaintiffs' claims would be barred by the statute of limitations. Opp'n at 22; Wolfgang Kaleck Decl. Opp. DCAG Mot. ("Kaleck Decl.") ¶ 5. Plaintiffs additionally contend that Argentine citizens will not have access to German courts for the purpose of filing suit against a German corporation for its illegal actions in Argentina. Kaleck Decl. ¶ 5. Even if plaintiffs were able to file suit in Germany, plaintiffs point out that German courts cannot order document production. *Id.;* Opp'n at 19-20, 22-23.[9] DCAG denies plaintiffs' assertion that German courts fail to recognize human rights actions against corporations, contending that German courts recognize causes of action for human rights violations similar to those recognized in the United States. Stefan Rutzel Decl. Supp. DCAG's Reply ("Rutzel Decl.") ¶¶ 6-26. DCAG's German law expert, Dr. Stefan Rutzel, further concludes that "none of [plaintiffs'] relevant causes of action causes an exclusive jurisdiction of a court which would bar the jurisdiction of the German court." *Id.* ¶ 6. Of significance, however, DCAG does not refute plaintiffs' contention that their actions would be barred by the statute of limitations in Germany.

9 Plaintiffs contend that DCAG made these arguments before the German courts in their effort to halt service of process under the Hague Convention. Aside from their expert's assertion, there is no other evidence on the record that this is so.

Preclusion of a claim by the alternative forum's statute of limitations renders the alternative forum inadequate. *See Miracle v. N.Y.P. Holdings, Inc.,* 87 F.Supp.2d 1060 (D.Haw.2000); *Crimson Semiconductor, Inc. v. Electronum,* 629 F.Supp. 903, 909 (S.D.N.Y.1986) (ruling, in *forum non conveniens* motion, that foreign forum was unsatisfactory where statute of limitations bar in foreign forum did not simply go to the merits of plaintiffs' claim or to the quantum of damages but to the very existence of the claim). In the present case, undisputed expert testimony suggests that the assertion of plaintiffs' claims in Germany would be barred by the lack of equitable tolling provisions for this type of claim under German law. Thus, Germany does not appear to be an alternative forum available to the plaintiffs.

6. Efficient Judicial Resolution of the Dispute

The court next evaluates the efficiency of alternative fora. Here, as set forth above, that alternative forum is Argentina. In evaluating this factor, courts have looked primarily at where the witnesses and evidence are likely to be located. *Ziegler v. Indian River County,* 64 F.3d 470, 475-76 (9th Cir.1995) (quoting *Core-Vent Corp. v. Nobel Indus. AB,* 11 F.3d 1482, 1489 (9th Cir.1983)). As noted earlier, it is undisputed that plaintiffs' alleged injuries did not occur in California, and plaintiffs do not contend that relevant evidence is located in California. Thus, a consideration of the location of the dispute and evidence does not initially favor California as the proper forum.

***19** Plaintiffs also argue that this court provides the most efficient forum because proceedings here will be conducted in English. Opp'n at 20. According to plaintiffs, DCAG officially conducts business in English, thus making it efficient for the parties to adjudicate this dispute in United States courts versus Argentine courts. *Id.* Were the dispute to be adjudicated in Argentina, DCAG's evidence would have to be translated into Spanish. Even assuming that DCAG conducts business in English, however, this does not account for the fact that plaintiffs are all Spanish speakers and that many of the alleged events occurred in Argentina. Thus, if adjudicating in the United States, all Spanish language evidence would need to be translated into English. This argument does not support plaintiffs' contention that the United States provides the most efficient forum for resolution of this dispute.

However, the court notes that the 2004 Report states "while the judiciary is nominally independent and impartial, some judges and judicial personnel were inefficient and, at times, subject to, and apt to exercise political manipulation. [ ] The system was hampered by inordinate delays, procedural logjams, changes of judges, inadequate administrative support, and incompetence." Ortiz Decl., Ex. A at 4. Thus, DCAG's own evidence supports a conclusion that this court would provide the more efficient and trustworthy judicial system for resolution of the present dispute. On the other

hand, the witnesses and evidence are not located here but are located in Argentina. This factor is difficult to balance.

7. Convenient and Effective Relief to Plaintiff

Consideration of convenient and effective relief to plaintiffs favors jurisdiction, although it is generally not given as much weight as the other factors. *See Panavision,* 141 F.3d at 1316; *Core-Vent,* 11 F.3d at 1490. As before, plaintiffs contend that only United States courts will hold DCAG accountable for its alleged participation in the "Dirty War." Thus, plaintiffs conclude that this forum will provide them with the most convenient and effective relief. Although this court does not agree with plaintiffs' contention that the United States is the only adequate forum for their claims and, in fact, has found that Argentina presents an alternative forum for plaintiffs' claims, the possibility of plaintiffs encountering intimidation in Argentina for bringing a human rights suit involving actions by the Argentine government during its "Dirty War" tips this factor in favor of plaintiffs.

8. Conclusion

Although the question is a close one, the court tentatively concludes that this court does not have personal jurisdiction over DCAG. However, before making a final decision, limited jurisdictional discovery will be allowed on whether an agency relationship exists between DCAG and MBUSA and the ability of plaintiffs to pursue their claims in Germany (e.g., is the claim barred by the statute of limitations?) or Argentina (e.g. does Argentine law allow human rights claims against private parties acting in concert with the government?)

III. ORDER

***20** For the foregoing reasons, the court tentatively grants DCAG's motion to dismiss for lack of personal jurisdiction. However, before making a final decision, limited jurisdictional discovery may be undertaken. The parties may each submit up to twenty-five interrogatories and a narrowly tailored set of requests for production on the jurisdictional issues. A further hearing on the motion is hereby set for March 24, 2006, at 9:00 a.m. Any further briefing by plaintiff must be submitted by March 3, 2006, and any further briefing by defendant by March 10, 2006.

All Citations

Not Reported in F.Supp.2d, 2005 WL 3157472

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Exhibit B

2019 WL 1553676
Only the Westlaw citation is currently available.
United States District Court, D. Oregon,
Portland Division.

Kayla ELLIS, an individual, Plaintiff,
v.
VIAL FOTHERINGHAM LLP, an Oregon Limited Liability Partnership, Defendant.

Case No. 3:16-cv-01945-AC
|
Signed 02/01/2019

Attorneys and Law Firms

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Lisa C. Brown, Bullard Law, Portland, OR, for Defendant.

FINDINGS AND RECOMMENDATION

JOHN V. ACOSTA, United States Magistrate Judge

Introduction

***1** Plaintiff Kayla Ellis ("Ellis") seeks monetary damages from Defendant Vial Fotheringham LLP ("Vial") for alleged violations of the Family Medical Leave Act (29 U.S.C. §§ 2601-2654)("FMLA") and common law wrongful discharge. Before the court is Vial's Motion for Summary Judgment ("Motion"), pursuant to Federal Rule of Civil Procedure ("Rule") 56. (Def.'s Mot. Summ. J., ECF No. 36, ("Motion").) Vial filed this Motion, alleging: (1) Ellis was not an eligible employee as defined by FMLA; 2) Ellis cannot prove essential elements of her FMLA claim; and 3) Ellis never exercised a job-related right as she never sought to take medical leave under FMLA. Ellis opposes Vial's Motion. Because Ellis has not provided sufficient evidence to demonstrate there is a genuine issue of material fact for trial, Vial's Motion for Summary Judgment should be GRANTED.

Preliminary Procedural Matters

I. Motion to Strike

Vial moves to strike portions of Ellis's declaration, arguing the challenged statements: 1) lack foundation; 2) are not based on personal knowledge; and 3) are inconsistent with her prior deposition testimony. (Def.'s Mot. to Strike, ECF No. 59, ("Mot. to Strike"), 2.) Ellis responds Vial "misunderstands the function of a motion to strike," and "makes meritless arguments" in support of its motion. (Pl.'s Resp. To Def.'s Mot. to Strike, ECF No. 62, ("Pl.'s Resp. Mot. to Strike"), 1.)

The use of a motion to strike is limited by the Federal Rules of Civil Procedure. Rule 12(f) authorizes a trial court to "strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." FED.R.CIV.P. 12(f). By its express language, Rule 12(f) thus applies exclusively to material contained in a "pleading." *See Sidney-Vinstein v. A.H. Robins Co.*, 697 F.2d 880, 885 (9th Cir. 1983) ("only pleadings are subject to motions to strike"). Motions, briefs, affidavits, and memoranda are not "pleadings" as defined by the Rules. *See* FED. R. CIV. P. 7(a)(1)–(7) (defining "pleadings" as a complaint, a third party complaint, or an answer; and a counterclaim, a cross claim, or a reply to an answer). Therefore, as a general rule, material outside the pleadings — including a declaration or portions of a declaration—cannot be challenged using a motion to strike. *See Act Now to Stop War & End Racism Coal. v. D.C.*, 286 F.R.D. 117, 125 (D.D.C. 2012), vacated sub nom; *Act Now to Stop War & End Racism Coal. & Muslim Am. Soc'y Freedom Found. v. D.C.*, 846 F.3d 391 (D.C. Cir. 2017) (vacated on other grounds) ("motions, affidavits, briefs, and other documents outside of the pleadings are not subject to Rule 12(f)"); *VanDanacker v. Main Motor Sales Co., 109* F. Supp. 2d 1045, 1047 (D. Minn. 2000) ("motion to strike is not the proper avenue for challenging plaintiffs' memorandum in opposition to the motion for attorney fees").

The proper vehicle for striking material outside of the pleadings is an evidentiary objection. *See Natural Resources Defense Council v. Kempthorne*, 539 F. Supp. 2d 1155, 1161 (E.D. Cal. 2008) A trial court may regard a motion to strike non-pleadings "as an invitation by the movant to consider whether [the proffered material] may properly be relied upon." *Id.* (citing *U.S. v. Crisp*, 190 F.R.D. 546, 551 (E.D. Cal. 1999) ("[A] motion to strike has sometimes been used to call courts' attention to questions about the admissibility of proffered material in [ruling on motions]")). The court, therefore, interprets Vial's Motion to Strike as a request to rule on the admissibility of certain statements in Ellis's declaration, and accepts the opportunity to do so.

II. Ellis's Declaration

***2** Affidavits or declarations submitted in support of or opposition to a motion for summary judgment must "be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated." FED. R. CIV. P. 56(c)(4). The facts underlying a declaration must be "of a type that would be admissible as evidence," but the declaration itself need not be in a form that would be admissible at trial. *Hughes v. United States*, 953 F.2d 531, 543 (9th Cir. 1992) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986)). Courts, therefore, evaluate the admissibility of a declaration's contents rather than the form in which it is presented. *Fraser v. Goodale*, 342 F.3d 1032, 1036 (9th Cir. 2003) (citing *Block v. City of Los Angeles*, 253 F.3s 410, 418-19 (9th Cir. 2001) ("To survive summary judgment, a party does not necessarily have to produce evidence in a form that would be admissible at trial, as long as the party satisfies the requirements of [Rule] 56")).

A. Paragraph 3

Vial urges the court to strike paragraph 3 of Ellis's declaration, which states:

> Throughout my employment, (i.e. 2013 and 2014), defendant employed 50 or more employees at the Tigard (in 2013) and later Lake Oswego (in 2014) locations where I was employed.

(Decl. Of Kayla Ellis ("Ellis Decl."), ECF No. 55, ¶ 3.) Paragraph 3 also lists 52 individuals, including Ellis, who Ellis alleges were Vial employees during the course of her employment. (*Id.*) Vial argues paragraph 3 must be stricken because the payroll method is used to determine who is counted as an employee for FMLA eligibility, and Ellis lacks personal knowledge as to who was listed on Vial's payroll at any point during 2014. (Mot. to Strike, 5.) Further, Vial contends the list of alleged employees included in paragraph 3 is speculative and unsupported by evidence in the record. (*Id.*)

Conclusory, speculative testimony in affidavits and moving papers is insufficient to raise genuine issues of fact and defeat summary judgment. *Thornhill Publ'g Co., Inc. V. GTE Corp.*, 594 F.2d 730, 738 (9th Cir. 1979). Here, paragraph 3 provides only a list of names — in some instances only first names — to support Ellis's contention that Vial had 50 or more employees throughout the course of her employment. Ellis has provided no facts to verify if and when the individuals listed began working at Vial, or the duration of their employment.

More importantly, Ellis has failed to include facts within her personal knowledge to suggest the names provided in paragraph 3 also appeared on Vial's payroll. Ellis admits the list of names is based on her memory of who she worked with during her time at Vial, and she does not claim to have personal knowledge of Vial's payroll. (Pl.'s Resp. Mot. to Strike, 2.) However, Ellis argues it "should go without saying that people routinely gain personal knowledge of the employment status of their coworkers." (*Id.*) The sufficiency of such knowledge, Ellis contends, "is painfully obvious." (*Id.*)

The court disagrees for two reasons. First, Ellis seems to equate merely working in Vial's office with meeting the statutory requirements for qualifying as an employee for the purpose of determining FMLA eligibility. Though she may be able to recall the names of people she worked with in Vial's office during her employment, a person's physical presence does not conclusively establish that he or she is counted as an employee under FMLA eligibility standards. Because the facts provided do not show Ellis's personal knowledge extends beyond simply naming her coworkers at Vial, she can only speculate as to whether the individuals listed in paragraph 3 appeared on Vial's payroll and thus qualify as employees under FMLA. Second, contrary to Ellis's assertion that people routinely gain personal knowledge of their coworkers's employment status, there are no facts in paragraph 3 suggesting 51 of her coworkers discussed their employment status under FMLA with her, and Ellis has not suggested how she would have learned such information otherwise.

***3** Ellis thus has failed to include sufficient facts to meet the requirements of Rule 56(c)(4). She can only speculate whether the individuals named were listed on Vial's payroll, and she has provided no specific facts to verify the names listed in paragraph 3 are actual Vial employees at the time of her hospitalization. Because Ellis has failed to lay a sufficient factual foundation for her assertion that Vial employed 50 or more employees throughout her employment, the court will not consider paragraph 3.

B. Reference to Unidentified Person Hired to Fill Ellis's Position

Vial urges the court to strike a portion of paragraph 7, in which Ellis asserts, "Shortly after my termination, my position was filled by newly hired employee." (Ellis Decl., ¶ 7.) Vial argues Ellis's statement fails to establish she has personal knowledge of the name, date of hire, or the position filled by the "newly hired employee" referenced in paragraph 7, and contends the only basis on which Ellis can claim a new employee filled her position is through inadmissible hearsay. (Mot. to Strike, 5.) Ellis dismisses Vial's arguments as going to the weight of the evidence rather than admissibility, and argues a declarant need not "provide an exhaustive list of bases" demonstrating the validity of the information asserted in a declarative statement. (Pl.'s Resp. Mot. to Strike, 3.)

The court does not agree with Ellis. Despite her argument to the contrary, a declarant must lay a factual foundation for her statements and may not escape summary judgment by submitting baseless accusations, conclusory statements, and legal arguments in the form of a declaration. Though an "exhaustive list" of bases is not required to prove the veracity of the information alleged beyond a reasonable doubt, Rule 56(c)(4) requires a declarant to provide the court with at least enough facts to demonstrate the matter asserted is within her personal knowledge.

Here, Ellis has provided nothing more than a bare assertion that Vial hired a new employee to fill her position shortly after she was laid off. Paragraph 7 includes no specific facts within Ellis's personal knowledge to support the contention that Vial hired someone to replace her. Once she was laid off from Vial, Ellis could only speculate or learn by hearsay whether a new employee was hired as her replacement, or whether a new employee was hired at all. Rule 56(c)(4) requires more. *See Thornhill Pub. Co., Inc v. General Tel. & Electronics Corp.*, 594 F.2d 730, 738 (9th Cir. 1978) (quoting *Donnelly v. Guion*, 467 F.2d 290, 293 (2d Cir. 1972) (" 'If, indeed, evidence is available to underpin (the) conclusory statement, Rule 56 require[s the party] to come forward with it' ")). The challenged portion of paragraph 7, therefore, is insufficient under Rule 56(c)(4) and will not be considered.

C. Sham Declarations

Though not addressed in its Motion to Strike, Vial's summary judgment briefing identifies inconsistencies between Ellis's deposition testimony and her subsequent declaration submitted in opposition to Vial's motion for summary judgment. The court will determine *sua sponte* whether Ellis's declaration contradicts her deposition testimony and, if so, which portions are appropriately considered for the purposes of this motion.

The Supreme Court has recognized the "virtual unanimity" of circuit courts that "a party cannot create a genuine issue of fact sufficient to survive summary judgment simply by contradicting his or her own previous sworn statement (by, say, filing a later affidavit that flatly contradicts that party's earlier sworn deposition) without explaining the contradiction or attempting to resolve the disparity." *Cleveland v. Policy Mgmt. Sys. Corp.*, 526 U.S. 795, 806 (1999). The Ninth Circuit follows this rule, reasoning that: " 'If a party who has been examined at length on deposition could raise an issue of fact simply by submitting an affidavit contradicting his own prior testimony, this would greatly diminish the utility of summary judgment as a procedure for screening out sham issues of fact.' " *Kennedy v. Allied Mut. Ins. Co.*, 952 F.2d 262, 266 (9th Cir. 1991) (internal citations omitted) (quoting *Foster v. Arcata Associates*, 772 F.2d 1453, 1462 (9th Cir. 1985), *cert. denied*, 475 U.S. 1048 (1986)); *See also Noga v. Costco Wholesale Corp.*, 583 F. Supp. 2d 1245, 1252 (D. Or. 2008). However, the "rule is in tension with the principle that a court's role in deciding a summary judgment motion is not to make credibility determinations or weigh conflicting evidence" and " 'should be applied with caution.' " *Van Asdale v. Int'l Game Tech.*, 577 F.3d 989, 998 (9th Cir. 2009) (quoting *Sch. Dist. No. 1J v. ACandS, Inc., 5* F.3d 1255, 1264 (9th Cir. 1993)).

***4** This rule does not extend to cases "in which a contradictory affidavit is introduced to explain portions of earlier deposition testimony. Rather, [the rule is] concerned with 'sham' testimony that flatly contradicts earlier testimony in an attempt to 'create' an issue of fact and avoid summary judgment." *Id.* at 267. "The non-moving party is not precluded from elaborating upon, explaining or clarifying prior testimony elicited by opposing counsel on deposition; minor inconsistencies that result from an honest discrepancy, a mistake, or newly discovered evidence afford no basis for excluding an opposition affidavit." *Messick v. Horizon Indus., Inc.*, 62 F.3d 1227, 1231 (9th Cir. 1995). Therefore, the district court must determine whether the contradictory testimony was given in an honest effort to clarify, or was an intentional alteration, designed to create a genuine issue of material fact. *Melendez v. Morrow Cnty. Sch. Dist.*, No. 07-785-AC, 2009 WL 4015426, at *14–15 (D. Or. Nov. 19, 2009) (declaration statements did not directly contradict prior

testimony and, therefore, were admissible to create a genuine issue of material fact).

Paragraph 5 of Ellis's declaration provides:

> At approximately 3:30 a.m. or about September 30, 2014, I had a serious epileptic seizure that required immediate hospitalization. By approximately 5:00 a.m., I notified my supervisor, Ryan Carter, that I had been hospitalized and would be missing more work due to my condition and my need to receive treatment.

In her previous deposition, Ellis testified as follows with respect to the hospital's findings regarding the seizure she allegedly suffered September 30, 2014:

> Q. And when you were -- we were just looking at that recent summary from your doctor. It sounds like when you were talking with him you weren't sure -- they weren't sure you actually had a seizure on September 30, 2014. Is that true?
>
> A. Yes.

(Ellis Dep., 163:19–24.) Ellis provides no explanation as to how, between the time of her deposition and the execution of her declaration, it was determined the medical event that occurred on September 30, 2014, was indeed a "serious epileptic seizure." This is an important discrepancy because whether or not Ellis was hospitalized due to a serious medical condition is at the heart of her claims. There is no indication new evidence has surfaced or a mistake was made at the time of her deposition testimony. Rather, Ellis's assertion that she suffered "a serious epileptic seizure" contradicts her previous testimony in an apparent effort to establish that her hospital visit was due to serious medical condition.

Ellis also testified regarding whether she needed to receive further treatment for her condition following her hospital visit:

> Q. Did anybody, any doctor, ever tell you that you needed to take time off from work to address any of they concerns they had about your health on September 30th, 2014?
>
> A. No.
>
> ....
>
> Q. Did your healthcare providers give you anything in writing suggesting that you needed additional time off beyond September 30th to recover from your seizure?
>
> A. They give you a -- They gave me a few papers just explaining what happens and treatment at home, but nothing for extended care, no.
>
> Q. And just to be clear, though, is it accurate that there wasn't anything in the paperwork indicating that you could not return to work; is that right?
>
> A. No.
>
> Q. And that's no, there was nothing in the paperwork?
>
> A. No, nothing that said I can't work.

(*Id.*, at 165:8–12; 92:13–93:1.) Ellis's deposition testimony that she was released from the hospital with no restrictions and no instructions to take time off of work in addition to her testimony that her attending physicians were unsure if she had actually had a seizure, further calls into question her assertion that she suffered a "serious epileptic seizure" on September 30, 2014.

Finally, Ellis's testimony regarding the text message allegedly sent to her supervisor, Ryan Carter ("Carter"), provides:

> Q. And to the best of your recollection, do you remember what you think the text message said even though you don't have it?
>
> ***5** A. I'm in the hospital because I had a seizure. I'm not going to make it in to work.

(*Id.*, at 163:14–18.) Ellis's declaration is consistent with her deposition testimony insofar as she alleges the text message notified Carter of her hospitalization. However, it clearly contradicts her deposition testimony regarding the extent to which the text message notified Carter of her need for FMLA leave. Contrary to Ellis's assertion in paragraph 5 that she let Carter know she "would be missing more work" because of her "need to receive treatment," she testified at her deposition that the text message merely notified Carter she would not "make it in to work" that day. Ellis's deposition testimony regarding the text message makes no mention of a prolonged absence from work nor does it mention her need

for further treatment. Ellis does not explain how her memory of the text message in question might have been refreshed and there is no evidence it was recovered during the period between her deposition testimony and the execution of her declaration. Indeed, Ellis expressly admitted that a copy of the text message allegedly sent to Carter does not exist because her cellular provider was unable to recover it. (*Id.* at 90:12–22.) Thus, the text message detailed in paragraph 5 is clearly an attempt to establish Ellis provided proper notice that she required medical leave.

Paragraph 5, when fairly viewed, does not provide clarification of her previous testimony nor does it offer a valid explanation for the inconsistencies between her deposition testimony and her declaration. Rather, paragraph 5 appears to be little more than an attempt to escape summary judgment. Therefore, the court declines to accept, for the purposes of this motion, that an epileptic seizure was the definitive cause of Ellis's hospitalization on September 30, 2014, that Ellis needed continuing treatment that required her absence from work following her hospitalization, and that she informed Carter she would need to miss "more work" due to her condition and to receive additional treatment for her epilepsy.

Background

On April 8, 2013, Ellis began working for Vial, a law firm with offices in Oregon, Idaho, Utah, Arizona, and Colorado. (Compl., ECF No. 1, ("Compl"), ¶¶ 6–7; Decl. Of Lisa Brown, ECF No. 37, ("Brown Decl."), Ex. A ("Ellis Dep."), 43.) She was hired as a file room clerk, which involved handling the mail, making copies, and running various errands for Vial's attorneys. (Ellis Dep., 43.) By September 2013, Ellis was promoted to the collections department. (*Id.* 45.) While working in collections, Ellis filled in for a coworker in the accounting department who was on maternity leave. (*Id.* 51–2.) Ellis was subsequently reassigned, and began working in the accounting department full time in January 2014. (*Id.* 52.)

Ellis suffers from epilepsy, a neurological condition that causes seizures. (*Id.* 46.) While working at Vial, Ellis spoke openly about her medical condition with other members of Vial's staff. (*Id.*) For the duration of her employment, Ellis did not suffer any seizures at work, and her epilepsy did not otherwise hinder her ability to perform her job duties. (*Id.* 46–7.) Though her epilepsy did not disrupt her work life, Ellis was granted leave from work to attend doctor's appointments related to managing her condition. (Ellis Dep., 47, 94.) While employed at Vial, Ellis was never denied time off when she requested it. (*Id.* 94.)

***6** Once she began working in Vial's accounting department, Ellis was supervised by Vial's Chief Financial Officer ("CFO"), Ryan Carter ("Carter"). (Decl. Of Ryan Carter, ECF No. 38, ("Carter Decl."), 3–4.) During her time in accounting, Carter observed serious and repetitive deficiencies in Ellis's performance. (*Id.* ¶ 6.) In emails to Denese Jensen ("Jensen"), Vial's Office Administrator, Carter noted that Ellis had difficulty accurately performing her job duties despite ample and continuous training. (*Id.* Ex. A, 1–3.) Specifically, Carter reported that Ellis repeatedly deposited checks in the wrong accounts, failed to follow protocol, and neglected to "be more careful and double check her work" despite frequently being asked to do so. (*Id.* Ex. A, 2.) After counseling Ellis about his concerns in mid-August 2014, (*Id.* ¶ 5), Carter advised Jensen he was "running out of patience" because the volume and frequency of Ellis's mistakes were "definitely outside the acceptable range," and were "costing [him] and other accounting staff members way too much time to fix." (*Id.*)

Contemporaneously, Vial was experiencing a period of financial stress. (*Id.* ¶ 7; Decl. Of Thomas Johnson, ECF No. 39, ("Johnson Decl."), ¶ 5.) After growing rapidly in 2014, the firm suffered several consecutive months of operating losses. (Johnson Decl., ¶ 5.) Vial's managing partner, Tom Johnson ("Johnson"), determined a reduction in staff was necessary to soothe the firm's financial woes. (*Id.*)In August 2014, Johnson instructed Vial's managers to identify which employees, if any, could be terminated without significantly impacting operations. (*Id.*) Because Ellis did not generate revenue and continued to make costly and time-consuming accounting errors, Carter identified Ellis as a candidate for termination. (*Id.*; Carter Decl., ¶ 7.)

Carter continued to have issues with Ellis's performance in September 2014. (Ellis Dep., 151.) On September 12, Jensen formally met with Ellis to discuss Carter's concerns. (*Id.*, 147–49.) In the meeting, Jensen stressed the repetitive nature of Ellis's mistakes, and voiced concerns that Ellis was too casual in her approach to her duties in the accounting department. (*Id.*) Ellis admitted she often made mistakes, but declined the assistance offered by Jensen to help improve her performance. (*Id.*) A summary of the meeting was subsequently shared with Carter and Johnson, confirming Ellis's struggle to satisfactorily perform her job duties continued into September 2014. (Cater Decl., ¶ 6.)

In the early morning hours of September 30, 2014, Ellis suffered what she believed to be an epileptic seizure. (Ellis Decl., ¶ 5; *but see* Ellis Dep., 163.) A neighbor brought Ellis to Legacy Meridian Park Hospital ("Legacy") in Tualatin, Oregon, where she checked in at around 5 a.m. (Supp. Decl. Of Lisa Brown, ECF No. 57, ("Supp. Brown Decl."), Ex. B, 2.) While in the emergency room, Ellis sent Carter a text message letting him know that she was in the hospital because she had a seizure and would not be able to "make it into work." (*Id.* 163.) The medical staff at Legacy, however, was unsure Ellis had in fact suffered a seizure, and she was treated and released two hours later without restrictions. (Ellis Dep., 85, 163; Supp. Brown Decl., Ex. B, 2.) Ellis's attending physician did not instruct her to take time off of work, did not provide her with written instructions or requirements for continuing care, and did not prepare a doctor's note for Ellis to give to her employer. (Ellis Dep., 86–8, 92–3, 163, 165.) Nevertheless, Ellis did not go to work on September 30, and spent the day resting in her home without any help or supervision. (*Id.* 86.)

Ellis returned to work the following day, October 1, 2014, and performed her job duties without difficulty. (*Id.* 87–8.) Though some of Ellis's coworkers asked how she was feeling, her absence the previous day went largely unaddressed. (*Id.* 88.) Other than the text message sent to Carter at 5:00 a.m. on September 30, Ellis did not formally call in sick, request paid time off to cover the workday missed following her hospitalization, or otherwise document her absence. (*Id.* 87–8.) Once back at work, Ellis did not discuss her condition with Vial's management or request additional time off related to her medical condition.

***7** On October 7, 2014, Johnson informed Ellis she was being laid off due to the firm's ongoing financial struggles. (*Id.* 103; Johnson Decl., ¶ 6.) Following Ellis's termination, two additional employees were laid off the same day. (Johnson Decl., ¶ 6.)

Ellis filed this lawsuit on October 5, 2016, alleging Vial violated FMLA and Oregon law. Ellis contends Vial interfered with her rights under FMLA, and retaliated against her by wrongfully terminating her employment when it received notice of her need for FMLA leave. On January 29, 2018, Vial filed this Motion for Summary Judgment.

Legal Standard

Summary judgment is appropriate when "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). A party seeking summary judgment bears the burden of establishing the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323. If the moving party demonstrates no issue of material fact exists, the nonmoving party must go beyond the pleadings and identify facts which show a genuine issue for trial. *Id.* at 324. A party cannot defeat a summary judgment motion by relying on the allegations set forth in the complaint, unsupported conjecture, or conclusory statements. *Hernandez v. Spacelabs Med., Inc.*, 343 F.3d 1107, 1112 (9th Cir. 2003). Summary judgment thus should be entered 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*, 477 U.S. at 322.

To determine whether summary judgment is proper, the court must view the evidence in the light most favorable to the nonmoving party. *Bell v. Cameron Meadows Land Co.*, 669 F.2d 1278, 1284 (9th Cir. 1982). All reasonable doubt as to the existence of a genuine issue of fact should be resolved against the moving party. *Hector v. Wiens*, 533 F.2d 429, 432 (9th Cir. 1976).

However, deference to the nonmoving party has limits. The nonmoving party must set forth "specific facts showing a *genuine* issue for trial." FED. R. CIV. P. 56(e) (emphasis added). The "mere existence of a scintilla of evidence in support of the plaintiff's position [is] insufficient." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). Therefore, where "the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (internal quotation marks omitted).

Discussion

I. FMLA

Ellis's First Claim for Relief alleges Vial interfered with her rights and retaliated against her under FMLA. Specifically, Ellis claims Vial interfered with her FMLA rights by failing to designate her absence on September 30, 2014 as FMLA

qualifying, failing to provide her with notice that the absence was protected by FMLA, and failing to inform her that she may have been entitled to take additional FMLA-protected leave to recover after her hospitalization. She further alleges Vial retaliated against her by wrongfully terminating her employment after she provided notice of her need for FMLA leave.

Congress enacted FMLA in 1993 to address, *inter alia*, problems stemming from "inadequate job security for employees who have serious health conditions that prevent them from working for temporary periods." 29 U.S.C. § 2601(a)(4). To alleviate such issues, FMLA "creates two interrelated substantive rights for employees." *Xin Liu v. Amway Corp.*, 347 F.3d 1125, 1132 (9th Cir. 2003) (citing *Bachelder v. America West Airlines, Inc.*, 259 F.3d 1112, 1122 (9th Cir. 2001)). First, eligible employees that are employed by a covered employer are permitted to take 12 weeks of leave per year to treat a serious health condition if the employee is unable to perform his or her job functions. 29 U.S.C. § 2612(a)(1)(D). Second, an employee who utilizes FMLA leave subsequently retains the right to be restored to his or her previous position, or a position with equivalent pay, benefits, and conditions of employment, once capable of returning to work. 29 U.S.C. § 2614(a)(1). FMLA thus protects an employee from suffering an adverse employment action as a result of taking, or attempting to take, necessary medical leave. *Xin Liu*, 347 F.3d at 1132.

***8** FMLA, however, does not provide for any rights, positions, or benefits to which the employee would not have been entitled otherwise, 29 U.S.C. § 2614(a)(3), and Congress has made clear the statute's remedial purposes must be accomplished "in a manner that accommodates the legitimate interests of employers." 29 U.S.C. § 2601(b)(3).

A. Interference Under FMLA

Employers cannot "interfere with, restrain, [ ] deny the exercise of ... [or the] attempt to exercise" an employee's rights guaranteed under FMLA. 29 U.S.C. § 2615(a)(1). FMLA's implementing regulations promulgated by the Department of Labor ("DOL") likewise prohibit "interference with an employee's rights under the law." 29 C.F.R. § 825.220(a). Explicitly, DOL's regulations specify "interference" under FMLA encompasses "not only refusing to authorize FMLA leave, but discouraging an employee from using such leave." *Id.* Furthermore, failing to notify an employee of her FMLA rights can also constitute interference if the omission affects the employee's rights under FMLA. *Xin Liu*, 347 F.3d at 1134–5.

To state a claim for interference with a statutory right under FMLA, a plaintiff must establish that: 1) she was an eligible employee; 2) her employer was covered by FMLA; 3) she was entitled to take FMLA leave; 4) she gave proper notice of her intent to take leave; and 5) her employer denied her FMLA benefits to which she was entitled. *Sanders v. City of Newport*, 657 F.3d 772, 778 (9th Cir 2011). Whether the employer acted in good faith is irrelevant to the inquiry. *Id.* at 1130 ("An employer who acts in good faith and without knowledge that its conduct violated the Act ... is still liable for actual damages regardless of its intent"). In the Ninth Circuit, a plaintiff can prove her FMLA interference claim "as one might an ordinary statutory claim, by using either direct or circumstantial evidence, or both." *Bachelder*, 259 F.3d at 1125.

FMLA, however, does not provide for a remedy "unless the employee has been prejudiced by the violation." *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 89 (2002) (explaining that FMLA's remedies are "tailored to the harm suffered"). Consequently, "even if there is a technical violation under FMLA, an employee who does not suffer any harm and receives all leave requested is not entitled to relief." *Crawford v. JP Morgan Chase NA*, 983 F.Supp.2d 1264, 1271 (W.D. Wash. 2013).

Vial argues Ellis cannot establish an interference claim because she was not an eligible employee under FMLA and cannot prove essential elements of her claim—specifically, that she was entitled to leave under FMLA, provided Vial with notice of her intent to take leave, and Vial denied her FMLA benefits to which she was entitled. (Motion, 10–2.) Ellis counters that Vial has failed to produce sufficient evidence to prove the absence of material fact concerning whether she was an eligible employee at the time of her hospitalization and subsequent termination. (Pl.'s Resp. to Def.'s Mot. Summ. J., ECF No. 54, ("Pl.'s Resp."), 4–6.) Ellis also argues she provided Vial with adequate notice of her need for FMLA leave when she sent a text message to Carter informing him of her hospitalization and absence on September 30, 2014. Finally, Ellis claims her hospitalization for epilepsy qualifies as a serious health condition entitling her to FMLA leave. The court addresses these arguments in turn.

1. Eligibility

***9** For the purpose of determining FMLA coverage, an eligible employee is an employee of a covered employer who:

> 1) Has been employed by the employer for at least 12 months; and
>
> 2) Has been employed for at least 1,250 hours of service during the 12-month period immediately preceding the commencement of the leave; and
>
> 3) Is employed at a worksite where 50 or more employees are employed by the employer within 75 miles of that worksite.

29 C.F.R. § 825.110(a). The Department of Labor ("DOL") and the courts have adopted the "payroll method" in evaluating whether the 50-employee threshold required for eligibility under FMLA is met. *Walters v. Metro. Educ. Enters., Inc.*, 519 U.S. 202, 206 (1997). Following the payroll method, "[a]ny employee whose name appears on the employer's payroll will be considered employed each working day of the calendar week, and must be counted whether or not any compensation is received for the week." 29 C.F.R. § 825.105(b). Provided they are maintained on the payroll, both full and part-time employees who are on paid or unpaid leave, have taken leaves of absence, or have been subject to disciplinary suspension are counted if the employer "has a reasonable expectation that the employee will later return to active employment." 29 C.F.R. § 825.105(c). Whether an employer has the requisite number of employees to satisfy FMLA eligibility requirements is determined at the time the employee provides notice that leave is needed. 29 C.F.R. 825.110(e).

The first two eligibility requirements are not in dispute, but the parties disagree as to whether Vial employed the 50 or more employees necessary for Ellis to qualify as an eligible employee under FMLA. Vial claims it had less than 50 employees when Ellis was hospitalized and subsequently laid off in September and October 2014. (Def.'s Reply in Support of Mot. Summ. J., ECF No. 56, ("Def.'s Rep."), 2.) Supporting its claim, Vial submitted copies of its Oregon Quarterly Tax Reports ("tax reports") with the Supplemental Declaration of Ryan Carter. (Supp. Decl. of Ryan Carter, ECF No. 60, ("Carter Supp. Decl."), Ex. A, 1–4.) The tax reports, which show "the number of employees working at the firm and maintained on the firm's payroll for each month in 2014," were prepared and submitted to the State of Oregon by Carter, Vial's CFO. (Carter Supp. Decl. ¶ 5.) Ellis denies the evidentiary adequacy of the tax reports, arguing that they are "not coextensive with the number of employees for purposes of FMLA." (Pl.'s Resp., 5.) She does not, however, elaborate on her argument, and offers nothing in rebuttal except her own assertion that Vial's evidence is insufficient to prove it had less than 50 employees on its payroll when Ellis was hospitalized.

Ellis does not challenge the accuracy of the tax reports, but simply denies their adequacy in refuting her claim that Vial had more than 50 employees as required for FMLA eligibility. In a summary judgment motion, however, the moving party is not required to submit "affidavits or other similar materials *negating* the opponent's claim ... [Rather,] the motion may, and should, be granted so long as whatever is before the district court demonstrates that the standard for the entry of summary judgment ... is satisfied." *Celotex*, 477 U.S at 320. The tax reports were submitted, authenticated, and explained by Carter. As Vial's CFO, Carter is intimately acquainted with Vial's payroll, and used it to personally prepare the tax reports. (Carter Supp. Decl. ¶ 5.) Ellis provides no valid reason for the court to believe the tax reports do not accurately demonstrate the number of employees on Vial's payroll for each month in 2014 as alleged by Carter. Mere disagreement is not enough to withstand summary judgment. *See Marks v. United States*, 578 F.2d 261, 263 (9th Cir. 1978) ("Conclusory allegations unsupported by factual data will not create a triable issue of fact") (citation omitted).

***10** Because Ellis offers no facts to rebut Vial's evidence that it had less than 50 employees at the time leave was requested, no genuine issue of material fact exists as to whether Ellis was an eligible employee under FMLA.

2. Entitlement to Leave

An eligible employee is entitled to 12 workweeks of FMLA leave for "a serious health condition that makes the employee unable to perform the functions of the position of such employee." 29 U.S.C. § 2612(a)(1)(D). A "serious health condition" under FMLA is "an illness, injury, impairment, or physical or mental condition" requiring either inpatient hospital care or continuing treatment by a healthcare provider. 29 U.S.C. § 2611(11). DOL's regulations specify that to qualify as a "serious health condition," the illness must involve "inpatient care as defined in § 825.114, or continuing treatment by a health care provider as defined in § 825.115."

29 C.F.R. § 825.113(a). The burden is on the employee to establish that she had a serious health condition as defined by FMLA at the time leave was requested. *Sims v. Alameda–Contra Costa Transit Dist.*, 2 F. Supp. 2d 1253, 1264 (N.D. Cal. 1998).

Vial alleges Ellis cannot prove that she had a serious health condition that entitled her to leave under FMLA because none of her healthcare providers indicated she needed to take time off after her two-hour hospitalization on September 30, 2014. (Def.'s Rep., 6.) Additionally, Vial points out Ellis's deposition testimony confirms the medical staff at Legacy were unsure whether she actually had a seizure, and therefore she was given no work restrictions once she was released from the hospital. (*Id.*)

In her response to Vial's motion, Ellis explicitly refers to the "inpatient care" prong of FMLA's "serious medical condition" definition. [1] (Pl.'s Resp., 10.) She argues there is "no question" her need for leave was based on upon a serious health condition because she was hospitalized due to seizure. (*Id.*)

1 Though Ellis states epilepsy is a serious medical condition, she does not argue that epilepsy is considered a "chronic serious health condition" under the "continuing treatment" prong of FMLA's definition of "serious health condition." *See* 29 C.F.R. § 825.115(c) (where any period of incapacity or treatment for such incapacity due to a chronic serious health condition qualifies as a "serious health condition" under FMLA, and a chronic serious health condition is one which 1) requires periodic visits (at least twice a year) for treatment by a healthcare provider, 2) continues over an extended period of time, and 3) may cause episodic incapacity). Because Ellis has neglected to address the "continuing treatment" prong, and has provided no evidence her epilepsy meets the requirements of a "chronic serious health condition," the court will discuss only the applicability of the "inpatient care" prong.

As defined by 29 C.F.R. § 825.114, "inpatient care" means:

> [A]n overnight stay in a hospital, hospice or residential medical care facility, including any period of incapacity as defined in § 825.113(b), or any subsequent treatment in connection with such inpatient care.

Though Ellis was hospitalized, that fact alone does not end the inquiry — her hospitalization must have been an "overnight stay."

***11** DOL's regulations do not specify what qualifies as an "overnight stay," and the Ninth Circuit has not had occasion to consider the question. However, the Third Circuit addressed the issue in *Bonkowski v. Oberg Industries, Inc.*, 787 F.3d 190 (3d Cir. 2015). In that case, the plaintiff had arrived at the hospital shortly before midnight, but was not admitted until a few minutes past. *Id.* at 192. In the district court's memorandum granting the defendant's motion for summary judgment, the court rejected the plaintiff's contention that he had a "serious medical condition" because he could not establish he had "spent the entire 'night' as an inpatient at the hospital." *Id.* at 193–4. The district court thus relied on the plain meaning of "overnight," determining an "overnight stay" meant "a stay from sunset on one day to sunrise the next day." *Id.* at 194.

After a thorough review of FMLA's statutory language, legislative history, and regulatory history, the Third Circuit rejected the district court's plain meaning "sunset-sunrise approach." *Id.* at 199–201. The court reasoned such a narrow interpretation of "overnight stay" inappropriately relied on extraneous factors such as time of year and geographic location, and appeared to result in "unfair discrimination between different individuals who have similar needs." *Id.* at 201. Instead, the court determined "overnight stay" more appropriately meant "a stay in a hospital ... for *a substantial period of time* from one calendar day to the next calendar day as measured by the individual's time of admission and time of discharge." *Id.* at 206 (emphasis added). The court noted that its interpretation was in line with Congress's intention to exclude from FMLA's protections "short-term conditions for which treatment and recovery are very brief, as Congress expected that such conditions would be covered by even the most modest of employer sick leave policies." *Id.* at 196 (quoting The Family & Medical Leave Act, 60 Fed. Reg. 2180, 2191–92 (Jan. 6, 1995) (final rule)).

Relying on the Third Circuit's sound reasoning in *Oberg*, the court finds Ellis's two-hour hospital stay the morning of September 30, 2014 was not of substantial length to qualify

as an "overnight stay." Even if this court were to reject outright the definition promulgated by the Third Circuit, a two-hour hospital visit from 5:00–7:00 a.m. hardly qualifies as "overnight" under any reasonable interpretation of the word. Rather, Ellis's condition, which required only brief hospitalization, seems more akin to the short-term conditions that Congress intended to exclude from FMLA's protections.

Furthermore, Ellis does not allege any period of prior incapacity or "subsequent treatment in connection with inpatient care" that can be counted cumulatively as part of an "overnight stay," and even if she did, she cannot include the day she spent at home after her hospitalization because her deposition testimony confirms she was released from the hospital with no restrictions, no instructions to stay home from work, and no requirements for further care. Thus, her absence from Vial on September 30, 2014 was voluntary and not part of "subsequent treatment" connected with her hospitalization.

Finally, Ellis states in her declaration that she was hospitalized for a "serious epileptic seizure." Her own deposition testimony, however, contradicts that assertion. She admits Legacy's attending medical staff was unsure whether she had a seizure at all, much less a seizure that would require an overnight hospital stay and call for extended medical leave. The record, thus, is devoid of facts, aside from Ellis's inconsistent assertions to the contrary, to establish her visit to the Legacy emergency room the morning of September 30, 2014 was prompted by "an illness, injury, impairment, or physical or mental condition" that required hospitalization.

***12** Even if Ellis could prove she had a "serious medical condition" under FMLA, she provides no evidence that she was unable to perform the functions of her job as required for entitlement to FMLA leave. As noted above, Ellis testified at her deposition that her doctors did not give her any restrictions or recommend taking time off of work. Indeed, she did not even receive a doctor's note. Furthermore, she admitted that once she was released from the hospital, she did not require help or supervision, and she was able to perform her job duties "without difficulty" when she returned to work the next day. There is nothing in the record to suggest, nor does Ellis argue, that she was unable to perform her job once she was released from the hospital the morning of September 30, 2014.

The evidence before the court shows Ellis was released from the hospital after two hours. She was released without work restrictions, instructions for further care, or a definitive diagnosis affirming she had an epileptic seizure. This evidence is not enough to establish Ellis had a "serious medical condition" under FMLA. Furthermore, Ellis cannot prove she was unable to perform her job duties following her release from the hospital. Because Ellis has failed to make a sufficient showing that she had a serious medical condition that made her unable to perform the essential functions of her job, there is no genuine issue of material fact regarding Ellis's entitlement to FMLA leave.

3. Notice

To give proper notice, an employee must, "provide sufficient information for an employer to reasonably determine whether the FMLA may apply to the leave request." 29 C.F.R. § 825.303(b). When the need for leave is unforeseeable, an employee must provide notice "as soon as practicable." 29 C.F.R. § 825.303(a). Whether the content of the notice provided by an employee is sufficient depends on the specific facts and circumstances of the particular case. 29 C.F.R. § 825.303(a). An employee is not required to explicitly invoke FMLA's protections, but need "only state that leave is needed [for a qualifying reason]." *Bachelder*, 259 F.3d at 1130 (quoting *Price v. City of Ft. Wayne*, 246 F.3d 1022, 1026 (7th Cir. 1997)). Thus, an employer is responsible, "having been notified of the reason for an employee's absence, for being aware that the absence may qualify for FMLA protection," and for inquiring further to determine if FMLA leave is appropriate. *Id.* at 1131.

Vial alleges Ellis cannot prove the notice element of her FMLA interference claim because she never requested any form of leave or notified Vial as to why she needed to take a medical leave of absence. (Motion, 12; Def.'s Rep., 5.) Ellis refutes Vial's claims, arguing that she informed her supervisor, Carter, that she had been hospitalized due to epilepsy and "would be requiring additional time off to receive further treatment." (Pl.'s Resp. 9–10.) Ellis asserts that simply informing Carter that she was hospitalized because of a seizure provided Vial with adequate notice of her need for medical leave. (*Id.*) Vial argues, however, that Ellis cannot prove she requested leave because she cannot produce the text message she allegedly sent to Carter. (Def.'s Rep., 5.)

The Ninth Circuit has not had occasion to consider the sufficiency of notice when such notice is sent by text message, but the Fifth Circuit addressed circumstances similar to those here in *Lanier v. Univ. of Texas Sw. Med. Ctr.*, 527 F.

App'x 312 (5th Cir. 2013). In that case, Lanier worked as a business analyst for the University of Texas Southwestern Medical Center ("UTSW"), a position which required Lanier to occasionally work 24-hour on-call shifts. *Id.* at 314. During her on-call rotation, Lanier sent a text message to her supervisor "to inform him her father was in the emergency room and that she would be unavailable to be on call that night." *Id.* at 315. Her supervisor found someone to cover her shift, and she was able to switch on-call rotations with another employee. *Id.* Following an unrelated incident, Lanier was terminated, and she subsequently brought suit against UTSW alleging, among other things, violations of FMLA. *Id.*

***13** Addressing the issue of notice, the Fifth Circuit noted Lanier's only request for leave was the text message she sent her supervisor following her father's admission to the emergency room. *Id.* at 316–17. Lanier argued that her supervisor should have known to inquire further because he knew her father was in poor health and of advanced age. *Id.* at 317. The court determined notice was insufficient to invoke FMLA, concluding "[i]t would be unreasonable to expect [the supervisor] to know Lanier meant to request FMLA leave ... [because] Lanier's only request was to be relieved of on-call duty that night." *Id.* Because notice was insufficient, the court affirmed summary judgment on Lanier's FMLA interference claim. *Id.*

According to her own deposition testimony, the text message Ellis claims to have sent did not state that leave was needed for additional treatment as she alleges in her response to Vial's Motion. Rather, Ellis testified the text message informed Carter that she was in the hospital because she had a seizure and would not "make it into work." Similar to the text at issue in *Lanier*, the text Ellis sent to her supervisor informed him she would not be into work *that day.* Ellis is correct that she does not have to explicitly invoke FMLA, but she must at least "state that leave is needed" for a FMLA-qualifying reason. Ellis has provided no facts, other than a conflicting statement in her declaration, to rebut her own testimony that she merely informed Carter she would not make it in to work on September 30, 2014.

Furthermore, Ellis returned to work the following day and did not request leave or explain to anyone at Vial that she had a condition that made her unable to perform the functions of her job or required medical leave. Though Ellis argues that Carter should have known to inquire further, Ellis's text did not provide Carter with enough information to conclude FMLA leave might be necessary, and it is unreasonable to expect Carter to inquire further when Ellis returned to work the following day, did not request leave or otherwise seek accommodation for her condition, and performed her job duties without difficulty.

Even if the text message allegedly sent to Carter could serve as adequate notice of Ellis's need for FMLA leave, she cannot produce the message in question. In her deposition testimony, she admitted her cell phone carrier was unable to recover the message to demonstrate she requested leave. There are no facts in the record suggesting Ellis otherwise requested leave in person, by phone, or through email following her hospitalization. Ellis, therefore, cannot prove she requested leave or that she provided Carter with enough information to inform him FMLA leave might be necessary. Because Ellis has not made a sufficient showing that she provided Vial with enough information to "reasonably determine whether the FMLA may apply to the leave request," there is no genuine issue of material fact regarding whether Ellis provided sufficient notice of her need for FMLA leave.

4. Denied Benefit

Ellis contends she was denied benefits to which she was entitled under FMLA because Vial failed to designate her absence on September 30, 2014 as FMLA qualifying, failed to provide her with notice that the absence was protected by FMLA, and failed to inform her that she may have been entitled to take additional FMLA-protected leave after her hospitalization.

As explained above, Ellis has not established she was entitled to benefits under FMLA. She failed to provide evidence that she was an eligible employee, that she was entitled to leave, and that she provided Vial with adequate notice of her need for FMLA leave.

Even if Ellis could demonstrate she was entitled to benefits under FMLA, her claim would still fail because she has failed to provide sufficient facts to demonstrate that she was prejudiced by Vial's actions. She testified in her deposition that Vial granted her leave whenever it was requested, and admits she was fully paid for all absences, including her absence on September 30, 2014. (Ellis Dep. 43–4.) Even assuming a technical violation of FMLA occurred, Ellis would not be entitled to any remedy for Vial's alleged interference with her rights under FMLA because she has suffered no harm. Therefore, Ellis has failed to establish a

genuine issue of material fact exists regarding whether Vial denied her a benefit to which she was entitled under FMLA.

5. Summary

***14** Ellis has not provided sufficient facts to shield her FMLA interference claim from summary judgment. She failed to rebut sufficient evidence that Vial had less than 50 employees, and thus she is unable to establish she was an eligible employee under FMLA when she was hospitalized. Furthermore, Ellis was unable to prove essential elements of her claim; specifically, that she was entitled to FMLA leave, provided notice of her need for leave, and was denied a benefit to which she was entitled. For the foregoing reasons, Vial is entitled to summary judgment on Ellis's FMLA interference claim.

B. Retaliation Under FMLA

Employers are prohibited from "discriminating or retaliating against an employee ... for having exercised or attempted to exercise FMLA rights." 29 C.F.R. § 825.220(c). When a plaintiff alleges an employer retaliated against her for exerting her rights under FMLA, the Ninth Circuit has specified that such a claim is properly analyzed as an interference claim. *Schultz v. Wells Fargo Bank, Nat. Ass'n*, 970 F. Supp. 2d 1039, 1052 (D. Or. 2013) (citing *Bachelder*, 259 F.3d at 1124 ("By their plain meaning, the anti-retaliation or anti-discrimination provisions do not cover visiting negative consequences on an employee simply because he has used FMLA leave. Such action, is instead, covered under § 2615(a)(1), the provisions governing "Interference with the Exercise of Rights.")). The appropriate legal frame work, therefore, "is not the burden-shifting approach of traditional anti-discrimination law, but rather the much simpler standard derived from the applicable statute and regulation." *Zsenyuk v. City of Carson*, 99 F. App'x 794, 796 (9th Cir. 2004) (citing *Bachelder*, 259 F.3d at 1124–25).

Retaliation may be construed in this context as an employer's use of "[an employee's] taking of FMLA leave as a negative factor in employment actions." 29 C.F.R. § 825.220(c). Thus, to sustain an interference claim involving retaliation, a plaintiff must show that 1) she took or requested protected leave; 2) the employer subjected her to an adverse employment action; and 3) the requesting or taking of protected leave was a "negative factor" in the adverse employment decision. *Schultz* at 1053 (citing *Bachelder*, 259 F.3d at 1125; 29 C.F.R.§ 825.220(c)). The Ninth Circuit has made clear that an "adverse employment action" includes the decision to terminate an employee. *See Bachelder*, 259 F.3d at 1122. No cause of action exists, however, if termination is the result of the employee's own performance problems. *Liston Nevada ex rel. its Dep Of Bus. & Indus.*, 311 F. App'x 1000, 1002 (9th Cir. 2009) (citing *Price*, 132 F. Supp. 2d at 1297).

Vial claims Ellis cannot prevail on her FMLA retaliation claim because she never requested leave. (Def.'s Reply, 10.) Vial also alleges Ellis has provided no evidence that her absence on September 30, 2014 was a "significant factor" in the decision to terminate her employment. (*Id.*) Ellis asserts the close proximity in time between her hospitalization and termination is enough to suggest her alleged leave request could have been a significant factor in her dismissal. (Pl.'s Resp., 7-8.) Because "[a] jury could infer, based on the close timing between the protected acts and the adverse actions," Ellis argues her FMLA retaliation claim presents a genuine issue of material fact for trial. (*Id.* at 8.)

Ellis's retaliation claim fails for two reasons. First, as the court already has discussed, Ellis has not provided sufficient facts to prove that she requested medical leave. Thus, she is unable to prove the first element of her claim. Second, Ellis relies solely on the temporal proximity of her hospitalization and termination to rebut Vial's claim that Ellis's attempt to exercise her rights under FMLA was not a significant factor in the decision to terminate her employment. While suspicious timing may be submitted as circumstantial evidence that a causal link exists between the exercise of FMLA rights and an adverse employment action, "|w]hen a moving party has carried its burden under Rule 56[ ], its opponent must do more than simply show that there is some metaphysical doubt as to the material facts." *Law v. Kinross Gold U.S.A., Inc.*, 651 F. App'x 645, 648 (9th Cir. 2016) (quoting *Matsushita Elec. Indus. Co. V. Zenith Radio Corp.*, 475 U.S. 574 (1986)). It also bears noting that "[e]ssential to a causal link is evidence that the employer was aware that the plaintiff had engaged in the protected activity." *Noga*, 583 F. Supp. 2d at 19 (quoting *Cohen v. Fred Meyer, Inc.*, 686 F.2d 793, 796 (9th Cir. 1982)).

***15** Vial has provided significant evidence of Ellis's ongoing performance issues, including Ellis's own deposition testimony that both Jensen and Carter counseled her about her poor performance. Furthermore, the declarations of Carter and Johnson demonstrate Ellis was targeted for layoff over a month before she was hospitalized, and confirm she was one of three employees to be laid off on the same day. Ellis

has offered no evidence in rebuttal, but asserts that she was terminated "for pretextual reasons," and complains that she was never told she was in danger of being laid off. (Ellis Decl., ¶ 7.) A conclusory statement that her termination was pretextual, however, is insufficient to thwart summary judgment. Additionally, Ellis has cited no authority, and the court is aware of none, requiring an employer to inform an employee they are in danger of being laid off. Even if there was such a requirement, Ellis knew Vial was unhappy with her performance when she was counseled by Carter and Jensen, and therefore should have been on notice that her job was not entirely secure.

Ellis urges the court to infer a causal link based on temporal proximity alone but such an inference is inappropriate here because Vial has offered significant evidence of its legitimate, non-discriminatory reasons for terminating Ellis's employment. *See, e.g., Zsenyuk*, 99 F. App'x at 796 (rejecting plaintiff's assertion that temporal proximity was enough to demonstrate a causal link because the actions of the employer were the result of an investigation that began before FMLA leave was requested and taken); *Law*, 651 F. App'x at 648 (determining plaintiff's evidence of temporal proximity and a clean disciplinary record raised only "metaphysical doubt" because there was overwhelming evidence his discharge was set in motion months before his unanticipated hospitalization). The court therefore cannot, on the record before it, find a causal link exists based on temporal proximity alone.

Because Ellis has failed to provide facts sufficient to establish that she requested FMLA leave and that such a request was a "significant factor" in her termination, Vial is entitled to summary judgment on Ellis's FMLA retaliation claim.

II. Wrongful Discharge

Ellis's Second Claim for Relief alleges Vial wrongfully terminated her employment in violation of Oregon law for providing notice of her need to take FMLA leave to seek treatment for a serious medical condition. (Compl. ¶ 22.) Ellis argues the existing remedies under FMLA are inadequate because they deny her the right to compensatory and punitive damages. (*Id.* ¶ 23.)

An employer is generally permitted to fire an at-will employee at any time and for any reason, unless doing so would violate a contractual, statutory or constitutional requirement. *Patton v. J.C. Penney Co.*, 301 Or. 117, 120, 719 P.2d 854 (1986). The Oregon Supreme Court first recognized the tort of wrongful discharge "to serve as a narrow exception to the at-will employment doctrine in certain limited circumstances." *Draper v. Astoria Sch. Dist. No. 1C*, 995 F. Supp. 1122, 1127 (D. Or. 1998) (citations omitted), abrogated on other grounds by *Rabkin v. Oregon Health Scis. Univ.*, 350 F.3d 967 (9th Cir. 2003); *see also Nees v. Hocks*, 272 Or. 210, 536 P.2d 512 (1975). Under Oregon law, an employee can bring a claim for wrongful discharge when: 1) she is terminated for "exercising a job-related right that reflects an important public policy; or 2) when the discharge is for fulfilling some important public duty." *Babick v. Oregon Arena Corp.*, 333 Or. 401, 407 (2002) (citations omitted).

However, even if a case fits into an exception to the at-will doctrine, the availability of a common law remedy is contingent on whether an adequate statutory remedy exists. *Delaney v. Taco Time Int'l*, 297 Or. 10, 16, 681 P.2d 114 (1984). Thus, if an adequate statutory remedy is available, a plaintiff is precluded from recovery under a common law wrongful discharge claim. *Washington v. Fort James Operating Co.*, 110 F. Supp. 2d 1325, 1334 (D. Or. 2000) (citing *Holien v. Sears Roebuck and Co.*, 298 Or. 76, 97, 689 P.2d 1292 (1984)). Here, Ellis's wrongful discharge claim is based on retaliation for asserting her need to take medical leave. Such a claim is not preempted by FMLA or OFLA because neither statutory scheme provides for punitive damages. *See Doby v. Sisters of St. Mary of Oregon Ministries Corp.*, No. 3:13-cv-0977-ST,32014 WL 3943713, at *12 (finding plaintiff's wrongful termination was not preempted by FMLA and OFLA because neither provided for punitive damages).

***16** Invoking a right to medical leave under FMLA is a job-related right that may serve as the basis for a wrongful discharge claim. *Id.* Thus, to prevail on a claim of wrongful discharge under Oregon law, Ellis must demonstrate: 1) she was discharged for exercising her rights under FMLA; and 2) there is a "causal connection" between invoking her FMLA rights and the discharge. *Estes v. Lewis & Clark College*, 152 Or. App. 372, 381, 954 P.2d 792, 797 (1998). A "causal connection" is established by demonstrating the protected activity was a "substantial factor" in the termination decision. A "substantial factor" in this context means " 'a factor that made a difference' in the discharge decision." *Id.* (quoting *Nelson v. Emerald People's Utility Dist.*, 116 Or. App. 366, 373, 840 P.2d 1384 (1992), *aff'd in part, rev'd in part*, 318 Or. 99, 982 P.2d 1293(1993)).

As discussed previously, Ellis cannot demonstrate she attempted to exercise her rights under FMLA or that she was entitled to benefits under FMLA. She has also failed to demonstrate she attempted to exercise her rights under OFLA. Furthermore, she has failed to provide sufficient evidence to establish that her termination was based on anything other than her well-documented performance problems. Thus, Vial is entitled to summary judgment on Ellis's wrongful discharge claim.

Conclusion

For the reasons stated above, Vial's motion for summary judgment (#36) should be GRANTED.

Scheduling Order

The Findings and Recommendation will be referred to a district judge. Objections, if any, are due February 15, 2019. If no objections are filed, then the Findings and Recommendation will go under advisement on that date.

If objections are filed, then a response is due within 14 days after being served with a copy of the objections. When the response is due or filed, whichever date is earlier, the Findings and Recommendation will go under advisement.

All Citations

Not Reported in Fed. Supp., 2019 WL 1553676

End of Document

Exhibit C

(2020) 23 HKCFAR 487

Eminent Investments (Asia Pacific) Ltd

and

DIO Corp

[2020] HKCFA 38

Ma CJ, Ribeiro, Fok and Cheung PJJ and Lord Collins of Mapesbury NPJ
Final Appeal No 3 of 2020 (Civil)
21 October, 3 December 2020

Contract law — construction — financial advisory agreement — transaction fee — plaintiff engaged to provide advice on fundraising — claim for transaction fee in respect of fundraising entered into after termination of agreement — completion of fundraising transaction which plaintiff contributed to as requirement for triggering entitlement to fee — plaintiff not entitled to fee for mere introduction of third party investor

Contract law — construction — approach — starting point ordinary and natural meaning — in more difficult cases, context surer guide — factors to be taken into account

D was a company listed in Korea and was looking to raise additional capital to expand its overseas business. D engaged P to act as its financial adviser pursuant to a financial advisory agreement (the FAA) which was supplemented by an addendum. P introduced X to D as a prospective investor in April 2009 and a telephone conversation involving "very general" discussions took place. By the end of April 2009, X informed P and D that it was not interested in proceeding. D did not ask P's further assistance and asked P to return a sum paid as consulting fees. P asserted that the FAA was terminated in January 2010. P ceased business in March 2010. In May 2010, a subsidiary of X approached D regarding a possible manufacturing arrangement. D engaged a former employee of P to assist in communications with X. In December 2010, a deal between X and D was announced whereby X acquired less than 20% of D's outstanding shares while a subsidiary of X acquired convertible bonds issued by D. P commenced the present proceedings against D, claiming that it was entitled to transaction fee under cl.3(i) of the FAA which should be construed as requiring the introduction of a party as opposed to introduction of a transaction. The Judge dismissed P's claim, holding that the fee was earned upon completion of any transaction for D and P failed to show that any work done by it under the FAA was the effective cause of D's deal with X. The Court of Appeal dismissed P's appeal. P appealed to the Court

of Final Appeal. Insofar as relevant, cl.3(i) of the FAA provided that, "[D] agrees that within a period of two (2) years after the termination of this Agreement, should [D] complete a transaction including and not limited to an [sic] secondary listing or fund raising with any third parties or receive funds from a financing source introduced by the Financial Advisor [P], [D] shall pay Financial Advisor [P] its fees according to this Agreement or and [sic] any executed amendments thereof ..."

Held, unanimously dismissing the appeal, that:
(*per* Ribeiro PJ and Lord Collins of Mapesbury NPJ, the other Judges agreeing)

(1) While the starting point in the interpretation of contracts was the ordinary and natural meaning of the words of the contract, in more difficult cases this approach was not particularly helpful because there could be much debate over exactly what was the ordinary or natural meaning of words. In those cases, the surer guide to interpretation was context. Where there were conflicting interpretations, account should be taken of the natural and ordinary meaning of the provision in question, the purpose of the contract and of the provision, other relevant provisions, the facts and circumstances known or assumed by the parties at the time that the contract was executed, the quality of the drafting of the instrument, and commercial common sense (*Fully Profit (Asia) Ltd v Secretary for Justice* (2013) 16 HKCFAR 351, *Wood v Capita Insurance Services Ltd* [2017] AC 1173 applied). (See paras.43–44.)

(2) Entitlement to a transaction fee during the currency of the FAA was provided for by cl.2(iv), which linked such entitlement to services provided by P of the nature referred to in cl.2(i)(4), ie advising D "on Mergers & Acquisitions, Fund Raising, private placements or shareholder restructuring prior to any IPO or Secondary Listing". Clause 2(iv) made a completed transaction pivotal for entitlement to a transaction fee by providing the fee to be a "success fee" payable "[u]pon completion of [the relevant transaction]". Thus, to earn a transaction fee, P was required not merely to introduce the third party concerned, but to put in work towards achieving the successful completion of the actual fundraising transaction. This construction was reinforced by the addendum. (See paras.51–59.)

(3) The requirement which triggered P's entitlement to a transaction fee was the same following termination of the FAA as during the FAA's currency. Under cl.3(i), D agreed that within the two-year period, fees were payable "should the Company complete a transaction". The words "introduced

by the Financial Advisor" qualified "a transaction including and not limited to [a] secondary listing or fund raising with any third parties or receive funds from a financing source". It was the transaction which was successfully completed that P had to introduce. If P introduced the third party but then played no part or an insignificant part in bringing about the fundraising transaction eventually completed, there was no entitlement to a transaction fee. This construction dovetailed with the pivotal requirement that the services rendered by P must contribute to completion of the relevant fundraising transaction. (See paras.60–64.)

(4) Where an agent was entitled to remuneration upon the happening of a future event, the entitlement did not arise until that event had occurred; and the event upon which the agent's entitlement to remuneration arose was to be ascertained from the terms of the agency contract. It followed that there was no special approach to the construction of contractual terms governing post-termination payments to financial advisers. All depended on the application of the established rules on construction of contracts to the particular case. (See paras.71–72.)

(5) In light of the above, P's entitlement to the transaction fee required it to have introduced D to the completed transaction which was announced in December 2010. It was insufficient for P simply to have introduced D to X in April 2009. (See para.92.)

合約法 — 詮釋 — 財務諮詢協議 — 交易費 — 原告人獲聘用提供融資意見 — 追討協議終止後達成的融資交易的交易費 — 原告人須有份促使融資交易完成，始有權獲得交易費 — 原告人單單引薦第三方投資者不能令原告人有權獲得交易費

合約法 — 詮釋 — 處理方法 — 起始點為通常和自然的涵義 — 在較為複雜的個案中，合約背景提供更確切的指標 — 須考慮的因素

被告人是一家在韓國上市的公司，並有意籌集額外資本，以協助擴展海外業務。被告人根據一份被附件補充的財務諮詢協議(下稱「該協議」)兼補充附件，被告人聘用原告人擔任財務顧問。2009年4月，原告人引薦一名潛在投資者(下稱X)給被告人，而各方進行涉及「非常一般」的討論的電話對話。同年4月底，X通知原告人和被告人它沒有興趣繼續討論。被告人沒有要求原告人提供進一步協助，並要求原告人歸還一筆已支付的顧問費。原告人聲稱該協議在2010年1月終止。原告人於2010年3月結業。2010年5月，X的一家附屬公司就一項潛在的生產安排接觸被告人。被告人聘用原告人的一名前僱員協助與X聯絡。2010年12月，X與被告人宣布一項交易，當中X收購少於被告人的尚存股份的20%，而X的一家附屬公司收購被告人發行的可換股債券。原告人針對被告人展開

本案的法律程序，聲稱原告人有權獲得該協議第3(i)條下的交易費，而第3(i)條應被詮釋為要求原告人引薦交易者而非引薦交易。原審法官駁回原告人的申索，並裁定交易費是替被告人完成任何交易時賺取，而原告人未能證明它在該協議下所作的任何工作是被告人與X的交易的實際原因。上訴法庭駁回原告人的上訴。原告人現上訴至終審法院。該協議第3(i)條的相關部份訂明：「[被告人]同意，於本協議終止後兩(2)年內，假如[被告人]完成一項交易，包括但不限於一項第二上市或與任何第三方的融資或從財務顧問[原告人]引薦的融資來源收取資金，則[被告人]須按照本協議或及[原文如此]其任何協定修改向財務顧問支付其費用 ...」。

裁決—一致駁回上訴：

(判詞由常任法官李義及非常任法官郝廉思勳爵作出，其餘三位法官表示贊同)

(1) 合約詮釋的起始點是合約用字的通常和自然涵義。然而，在較為困難的案件中，上述處理方法幫助不大，因為文字的通常或自然涵義正正備受爭議。在該等案件中，更為可靠的詮釋指標是背景。假如出現互不一致的詮釋，則應考慮相關條款的自然和通常涵義、相關合約和條款的目的、其他相關條款、各方達成合約時知悉或假設的事實和情況、文件草擬的質量，以及商業常理(引用 ***Fully Profit (Asia) Ltd v Secretary for Justice*** (2013) 16 HKCFAR 351，***Wood v Capita Insurance Services Ltd*** [2017] AC 1173)。[見第43至44段]

(2) 在本案中，該協議第2(iv)條訂明原告人於該協議生效期間如何有權獲得交易費。第2(iv)條把該權利與第2(i)(4)條提及的原告人提供的服務性質掛鈎，即「於任何首次公開發行或第二上市之前就合併與收購、融資、私募或股東重組」向被告人提供意見。第2(iv)條訂明一項已完成的交易是獲得交易費的關鍵條件，因為該條款規定有關費用是「當[相關交易]完成時」須支付的「成事費」。因此，要賺取交易費，原告人不但要引薦有關的第三者，而且要出力以達致實際融資交易的成功完成。這詮釋獲有關附件進一步支持。[見第51至59段]

(3) 至於該協議終止之後，觸發原告人有權獲得交易費的條件與該協議生效時相同。根據第3(i)條下，被告人同意在該兩年期間內，「若公司完成一項交易」，便須支付費用。「財務顧問引薦的」一詞限制「一項交易，包括但不限於一項第二上市或與任何第三方的融資或從.....融資來源收取資金」。原告人所須引薦的，是成功完成的交易。原告人若然引薦相關第三方，但其後在促使融資交易最終完成的過程中沒有做任何事或只做無關重要的事，便無權獲得交易費。這詮釋與原告人提供的服務必須有份促致相關融資交易完成的關鍵規定吻合。[見第60至64段]

(4) 假如代理人在一件未來事件發生時有權獲得報酬，則該權利直至該事件已經發生後才產生；而令代理人有權獲得報酬的事件為何，須從代理人合約的條款中確定。據此，對於管轄

合約終止後向財務顧問付款的合約條款，其詮釋方法並非與不同。一切仍須取決於如何把已確立的合約詮釋規則運用到特定個案中。[見第71至72段]

(5) 基於上述各點，原告人獲得交易費的權利受制於以下要求，即原告人須曾引薦被告人到該項於2010年12月宣布的已成事交易。原告人單單於2009年4月引薦被告人給X，不足以令原告人有權獲得交易費。[見第92段]

Mr Wong Yan Lung SC and Mr Jenkin Suen SC, instructed by Tang & So, for the plaintiff (appellant).

Mr Charles Sussex SC and Mr Richard Zimmern, instructed by DLA Piper Hong Kong, for the defendant (respondent).

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Win Glories Ltd v Majorluck Ltd [2019] 5 HKLRD 471

Other material mentioned in the judgment

Bowstead & Reynolds on Agency (21st ed., 2018) Article 56, para.7-013, Article 57, para.7-027

Ma CJ

1. I agree with the joint reasons for judgment of Mr Justice Ribeiro PJ and Lord Collins of Mapesbury NPJ.

Ribeiro PJ and Lord Collins of Mapesbury NPJ

2. At the hearing, this appeal was dismissed with costs. These are our reasons.

3. This appeal concerns a claim by a financial adviser for a success fee in respect of a fundraising transaction entered into by its client after termination of the advisory agreement. It raises questions concerning the proper construction of that agreement.

A. The background

4. The respondent DIO Corp (DIO), a Korean company listed on the KOSDAQ,[1] was looking to raise additional capital to expand its overseas business and was seeking international advice on fundraising. It engaged the appellant Eminent Investments (Asia Pacific) Ltd (Eminent), a Hong Kong company, to act as its financial adviser pursuant to a Financial Advisory Agreement (FAA) dated 10 October 2008. It was drafted by Eminent and supplemented by an Addendum dated 15 January 2009 (the Addendum).

5. In April 2009, Eminent introduced Dentsply International Inc (Dentsply), a US company listed on the NASDAQ, to DIO as a prospective investor. After Eminent provided Dentsply with some information on DIO, a telephone conference call involving the three parties plus UBS (an investment bank advising Dentsply) occurred on 9 April 2009.

6. The call was described by the trial judge, Mr Recorder Shieh SC, as involving discussions which were "very general" and in which no particular deals or fundraising transactions were raised.[2] While the representatives of Eminent and DIO came away from that call in an optimistic mood, in mid-April or at the end of April Dentsply informed them that it was not interested in proceeding.

7. On 30 April 2009, Charlie Lee, who had worked for Eminent left his employment. And on 8 June 2009, Eminent terminated the employment of Christopher Song and Jung Lee. All three had participated in the telephone conference with Dentsply as part of Eminent's team.

8. On 16 June 2009, Eminent asked DIO if it was still looking for capitalisation and intimated that Song and Lee had been laid off. DIO did not seek Eminent's further assistance and on 30 December 2009, it asked Eminent to return USD 70,000 which had been paid as consulting fees. DIO unsuccessfully argued at the trial that by demanding repayment it had accepted Eminent's prior repudiatory breach, terminating the FAA. However, Eminent asserts that the Agreement was terminated on or about 29 January 2010 after one month's notice.

9. It appears that Eminent ceased business in March 2010 and that Eminent and its principal named Kane Yang later pleaded guilty to breaches of the Securities and Futures Ordinance.[3]

10. The Judge found that in May 2010, Friadent GmbH (Friadent), a subsidiary of Dentsply, approached DIO regarding a possible OEM (original equipment manufacturing) arrangement for

[1] Korean Securities Dealers Automated Quotations board of the Korea Exchange, the Korean equivalent of the NASDAQ, the National Association of Securities Dealers Automated Quotations exchange, in the US.

[2] (HCA 1292/2011, [2016] HKEC 2070) (23 September 2016), 229.

[3] *Ibid.*, [50]. Pleaded guilty on 28 April 2011.

the manufacture of dental implants.[4] Charlie Lee, who had previously worked for Eminent, was engaged by DIO to assist in communications with Friadent and Dentsply.

11. In September 2010, Bret Wise, the CEO and chairman of Dentsply, visited DIO in Pusan and, having been much impressed, wanted to explore a greater partnership with DIO. The Judge found that Charlie Lee did a great deal of work liaising with DIO, Friadent and Dentsply to that end.[5]

12. On 9 December 2010, a deal between Dentsply and DIO was announced. Dentsply acquired less than 20% of DIO's outstanding shares while its German subsidiary, Dentsply Germany Investments GmbH, acquired KRW 56.6 billion worth of convertible bonds issued by DIO.[6] The Judge found that Eminent had failed to show that any work done by it under the FAA was the effective cause of this deal.[7]

B. The relevant provisions of the FAA and the Addendum

13. The following provisions of the FAA and Addendum (further discussed in Section H of these Reasons) are of present relevance. They contain numerous grammatical and spelling errors.

B.1 The FAA

14. The <u>First Recital</u>:

> WHEREAS, the Company hereto has retained the Financial Advisor on a sole and exclusive basis to advise the Company with respect to its Corporate Governance, Equity Valuation, Financial & Accounting Analysis, Corporate Financial Planning, Strategic Capital Raising and other Corporate Financing activities.

15. The <u>Second Recital</u>

> WHEREAS, the Parties hereto desire to specifically state the services mentioned above and under this agreement to be provided to the Company by the Financial Advisor, the compensation to be received by Financial Advisor [*sic*] from the Company for providing such services, and the terms and conditions that shall govern the relationship between the Parties.

16. The FAA was for a term of 18 months, terminable by either party giving 30 days prior written notice.[8]

[4] *Ibid.*, [256].
[5] *Ibid.*, [253]–[254].
[6] *Ibid.*, [33].
[7] *Ibid.*, [257].
[8] Clause 1.

17. Clause 2 is headed "ENGAGEMENT & FEE STRUCTURE" and, in Clause i) it lists the services to be provided by Eminent including the study of DIO's business operations and financial performance; assistance in preparing DIO's business plan to be presented to potential investors; assembling and discussing business, financial and legal information with accountants, lawyers and auditors; providing quarterly research reports for institutional investors and advising on investor relations and on a communications and public relations strategy. Clause 2 i)(4) in particular states that services which Eminent is to provide include:

> On a best effort basis, [advising] the Company on Mergers & Acquisitions, Fund Raising, private placements or shareholder restructuring prior to any IPO or Secondary Listing.

18. Provision is then made for the payment of three types of fees, namely retainer fees (USD 100,000 in two instalments), an independent equity research fee (USD 30,000) and importantly, in Clause 2 iv) a "TRANSACTION FEE", also referred to as a "success fee":

> Upon completion of any transaction for the Company[,] [t]he Company agrees to pay the Financial Advisor a success fee including and not limited to a three percent (3%) [*sic*] of the total transactional amount tied to any financial transaction related to Fund Raising or Private Placement or Shareholder restructuring, or Mergers & Acquisition for the Company.

19. Clause 2 iv) applies to transactions completed during the currency of the FAA. Centrally important is Clause 3 i) which has been referred to as a "tail gunner clause"[9] and which relates to success fees payable after its termination. Under the heading "OBLIGATIONS OF THE COMPANY" it provides:

> The Company agrees that within a period of two (2) years after the termination of this Agreement, should the Company complete a transaction including and not limited to an [*sic*] secondary listing or fund raising with any third parties or receive funds from a financing source introduced by the Financial Advisor, the Company shall pay Financial Advisor its fees according to this Agreement or and [*sic*] any executed amendments thereof or a generally accepted market compensation in case the transaction compensation method is not explicitly stated in this agreement.

20. Eminent also relies on Clause 4 a) which, under the heading "MISCELLANEOUS", states as follows:

[9] The expression is used in financial circles in relation to fees for transactions which complete after the termination of an adviser's engagement: see *Kilometre Capital Management Cayman v Shanda Games Limited* (HCA 2009/2014, [2015] HKEC 1373) (13 July 2015), [9].

> Financial Advisor acknowledges that the Company will be providing confidential information to Financial Advisor. The Parties hereto agree that they will cooperate with each other and provide full due diligence, and that all conversations, documentation, or work products will be kept in the utmost confidence. The Company acknowledges that Financial Advisor will be providing confidential information to the Company. Accordingly, the Company agrees that the information, including but not limited to, Financial Advisor's database of investors, methods, systems and procedures, will be kept confidential and shall not, without the prior written consent of Financial Advisor, be disclosed by the Company, except to its attorneys, accountant and Board of Directors. Financial Advisor intends to introduce the Company to its contacts, including private and institutional financing sources or strategic alliances. The Company agrees that it will respect Financial Advisor's relationships with these investors and other sources of financing and that the Company shall not participate in or permits [sic] the circumvention of any obligation to Financial Advisor created by this Agreement or any means.

B.2 The Addendum

21. The Addendum dated 15 January 2009 recites (Second Recital) that "to officially expand the role of the Financial Advisor, the Parties have agreed to amend certain terms and/or conditions of the [FAA] ...".

22. Third Recital:

> WHEREAS, the [*sic*] under this Agreement, the role of the Financial Advisor has been appointed as sole and exclusive financial advisor for Financial Scenario(s) including and not limited to Secondary Listings in an overseas stock market, backdoor listings, Public Placements, Private Placements, Mergers & Acquisitions ("M&A"), Management Buy-outs ("MBO"), Leverage [*sic*] Buy-outs ("LBO") in one or series of Transaction(s) in any form including and not limited to loans, bonds, common stock, preferred stock, convertible securities or equity linked debt instruments of any kind conducted by the Company and its subsidiaries and affiliates directly or from any registered shareholder(s) of the Company.

23. Fourth Recital:

> WHEREAS, the following fees are excluded from the foregoing Success Fee and/or Financial Advisory Fee under the terms and condition of this Agreement and the First Agreement: All legal, accounting and audit costs for transactional due diligence and any

specific circumstances required by the third parties, by law or by government regulations to retain professional services to complete a proposed transaction.

24. The Fifth Recital makes it clear that the Addendum is to be read as part of the FAA:

WHEREAS, this Agreement specifies the agreed terms and conditions which applies [*sic*] to certain roles and responsibilities that are not stated on the First Agreement [ie, the FAA] and are to be included as part of the … First Agreement.

25. Paragraph 1 adds to the ENGAGEMENT & FEE STRUCTURE provisions of Clause 2 of the FAA as follows.

26. Paragraph 1a:

Upon completion of the listing or Secondary Placement of the Company on the London Stock Exchange Alternative Investment Market or AIM (or such other stock exchange as agreed to by the Company), a success fee in cash equivalent to two percent (2%) of the transaction value will be paid to the Financial Advisor, within fourteen (14) days of the Transaction closing date …

27. Paragraph 1b:

Upon successful completion of any mergers & acquisition transaction involving the Company and a third party, the Company agrees to pay the Financial Advisor within fourteen (14) days of the Transaction closing date, a success fee in the amount equal to three percent 3% of the total transaction value in cash calculated based on enterprise value of the acquired company including any assumed liabilities.

28. Paragraph 1d:[10]

In addition to the advisory fee for the First Agreement, the Company agrees to pay the Financial Advisor another fixed retainer of … (USD 450,000), paid in four installments [*sic*] upon the execution of this agreement. First installment [*sic*], … (USD 50,000) is due within seven (7) days upon this Agreement signed by both parties. Second installment [*sic*], … (USD 85,000) is due before February 20th, 2009. Third installment [*sic*], … (USD 65,000) is due upon the completion of any of the following events: (i) the Company signs an Engagement Letter or Letter of Proposal from a Nominated Advisor …; (ii) the Company formally approves a potential mergers & acquisition transaction in the form of but not

[10] Paragraph 1 of the Addendum makes it clear that its sub-paragraphs, including a, b and d, are "an addendum to the existing 'ENGAGEMENT & FEE STRUCTURE', Section 2 on page two of the [FAA]".

limited to an Official Letter of Intent … or Memorandum of Understanding … or an Official Merger Agreement related to a mergers & acquisition transaction with a third party; (iii) the Company received and accepted the term sheet for the Transaction(s) of any of the Financial Scenario(s) under the terms and conditions of this Agreement. Fourth installment [*sic*] or final payment, … (USD 250,000) is due within seven (7) days upon the completion of any the Transaction(s) under the Financial Scenario(s).

29. Paragraph 2 of the Addendum removed the entitlement to an Independent Equity Research Fee under the FAA.

C. Eminent's construction

30. The fundamental proposition advanced by Mr Wong Yan Lung SC[11] on Eminent's behalf is that Eminent is entitled to fees under Clause 3 i) which should be construed as requiring *introduction of a party* as opposed to *introduction of a transaction*.

31. This is elaborated upon as follows:

… [Clause 3 i)] should be construed against its relevant business contexts, purposes, common sense and efficacy, which included the need to protect Eminent as the [Financial Advisor], and to hedge against the risk of DIO as Client to circumvent the obligation to pay Eminent by terminating the engagement of Eminent before closing a deal with a financial source like Dentsply who was introduced by Eminent. Plainly, [Clause 3 i)] should be construed as requiring "introduction of a party" as opposed to "introduction of a transaction".[12]

… Eminent's construction of [Clause 3 i)], *viz* "introduced by the Financial Advisor" qualifies the "counterparty" (ie a secondary stock exchange, a third party, or a financing source) with whom DIO entered into a deal or from whom DIO received funds, rather than "the transaction", is a far more natural, logical and grammatical construction (as further elaborated in Section D2.3 below). In any event, Eminent's construction must at least be an equally plausible construction, which means [Clause 3 i)] is far from clear. Even on the CA's flawed approach, the CA should have considered the business contexts in the construction exercise.[13]

The words "introduced by the Financial Advisor" qualify or describe "the counterparty" (ie (a) "a secondary listing" (ie a secondary stock exchange other than Hong Kong), or (b) "any

[11] Appearing with Mr Jenkin Suen SC.
[12] Eminent Written Case, [58].
[13] *Ibid*., [66(6)].

> third parties", or (c) "a financing source"), rather than "the transaction".[14]

32. Eminent contends that it is entitled to a Transaction Fee consequent upon DIO and Dentsply entering into the above-mentioned transaction on 9 December 2010 which occurred well within the two-year post-termination period referred to in Clause 3 i):

> In April 2009, Eminent introduced to DIO a manufacturer and distributor of professional dental products called Dentsply International Inc ("Dentsply"). The FAA was terminated on or about 29 January 2010 after one month's notice. On 9 December 2010, a deal was announced whereby Dentsply acquired shares and convertible bonds of DIO ("the Dentsply Deal"), just over 10 months (ie within 2 years) after such termination.[15]

33. At the hearing, Mr Wong SC ventured to suggest that there is an alternative basis for triggering an entitlement to a Transaction Fee, namely, by Eminent rendering the advisory and preparatory services referred to in Clause 2 i) as part of a process of "shaping up" DIO to be attractive to potential investors. He sought to argue that even without Eminent having introduced DIO to the financing source or otherwise contributed to completion of the eventual transaction, provision of the Clause 2 i) services would be sufficient to qualify Eminent for payment of the Transaction Fee if DIO completed a fundraising transaction.

34. This was a new argument since the "shaping up" process is only mentioned in Eminent's Written Case as a common feature of financial advisory agreements generally, providing "important context" for the purposes of construction.[16] The importance of introducing or "matching" the client with the investor is there maintained in line with Mr Wong SC's fundamental proposition.[17] It is fair to say that the new argument was not seriously pressed and, being singularly unconvincing, must be rejected and needs no further discussion.

D. DIO's construction

35. DIO's argument, advanced by Mr Charles Sussex SC,[18] is that the FAA should be construed as requiring "introduction to the transaction which ultimately took place (involving receipt of funds

[14] *Ibid.*, [71].
[15] *Ibid.*, [13].
[16] *Ibid.*, [34]–[38].
[17] *Ibid.*, [40]–[41].
[18] Appearing with Mr Richard Zimmern.

from a financing source)".[19] This, it is argued, "imputes a degree of causation and/or proximity between the introduction and the eventual transaction, and accords with the general rule that a commission agent is only entitled to commission on a transaction where his services are the effective cause of the transaction being brought about".[20]

36. As the Judge found that Eminent had failed to show that any work done by it under the FAA was the effective cause of the Dentsply deal announced on 9 December 2010,[21] DIO contends that no entitlement to the Transaction Fee arises. Alternatively, if contrary to DIO's primary case, Eminent's construction is preferred, DIO submits that the Court should imply an "effective cause" requirement to give business efficacy to the FAA.[22]

E. The reasoning of the Judge

37. The Judge's reasoning[23] was that the starting point was to ascertain how, for the purposes of Clause 2 iv) of the FAA, Eminent was to earn its fee during the currency of the contract, and then to ascertain the effect of Clause 3 i) on Eminent's ability to earn the Transaction Fee. The answer was that under Clause 2 iv) the fee was earned "[u]pon completion of any transaction for the Company." That connoted active involvement and participation by Eminent in the transaction. Mere introduction was not enough, and Eminent had to do something so as to enable it to say that it has completed a transaction for DIO. Consequently, Clause 2 iv) was to be interpreted as requiring Eminent to be an effective cause in completing the transaction; or alternatively a term importing such an effective cause requirement was to be implied.

38. He held that, as a matter of common sense, Eminent could not be in a better position if the transaction in question took place after termination rather than before. A number of features of Clause 3 i) supported that conclusion:

(a) the expression "[DIO] shall pay [Eminent] its fees according to this Agreement" meant Eminent's fees as claimable and calculated according to Clause 2 iv);
(b) the defining phrase was "a transaction," which could not mean any transaction, but harked back to the sort of transaction which, under the Transaction Fee clause (Clause 2 iv)), would

[19] DIO Written Case, [61].
[20] *Ibid*., Article 57 of Peter Watts and FMB Reynolds, *Bowstead & Reynolds on Agency* (21st ed., 2018) para.7-027 is cited in support of the "general rule", discussed below in Section H.7 of these Reasons.
[21] CFI, 257.
[22] DIO Written Case, [71]–[78].
[23] Summarised at CFI, [212]–[218].

have entitled Eminent to a fee had the FAA not been terminated;

(c) two of the three scenarios (secondary listing and fundraising with any third parties) did not contain any limiting phrase linking them to Eminent, and they could not be taken literally because otherwise it would mean that if DIO entered into a secondary listing transaction which had absolutely nothing to do with Eminent or work done by it, Eminent would still be able to claim a Transaction Fee against it, or if DIO succeeded in raising funds with a third party that it identified without involving Eminent in any way, Eminent would still be able to claim a Transaction Fee.

F. The reasoning of the Court of Appeal

39. Cheung JA, with whom the other members of the Court of Appeal agreed,[24] held that the language of Clause 3 i) was clear enough to construe it as requiring Eminent to have introduced to DIO a transaction which DIO completed before Eminent was entitled to receive the fee. To focus simply on the word "introduction" would require the Court to ignore the rest of the phrase, namely, DIO completing "a transaction ... introduced by" Eminent. The three transactions named in Clause 3 i) were descriptive and not exhaustive ("a transaction including and not limited to"). The contextual background was that DIO wanted to seek capital to expand its business, and the entitlement to a fee by Eminent was clearly not merely based on an introduction to DIO of a party but an introduction which led to a transaction. The fact that Clause 3 i) was only effective for two years after a termination pointed to a relation back to Clause 2 iv) of work required to be done by Eminent under the FAA, namely, the introduction of a transaction which raised funds for DIO and its completion which entitles it to receive fees. Clause 3 i) could not be looked at in isolation from the other parts of the FAA.

G. Interpretation

G.1 The arguments

40. On this appeal Eminent has argued for a "purposive" approach to interpretation and has suggested that the Court of Appeal was wrong to conclude[25] that: (1) there was still a choice between "textualism" and "contextualism"; (2) where the document was professionally prepared, sophisticated and complex, the textual

[24] Kwan V–P, Cheung and Au JJA [2019] HKCA 606, [7.5]–[7.10].
[25] CA, [7.1]–[7.4].

approach may be adopted without the need to resort to the context or factual matrix of the case, and context was relevant only to the clarification of inconsistencies or gaps. The result, according to Eminent, was that the Court of Appeal wrongly construed Clause 3 i)*in vacuo* detached from the relevant contextual considerations, with the result that: (i) it excluded the context of the FAA as a distinctive class of agreement whereby the financial adviser provided financial services to DIO in the venture capital market, which was very different from other superficially comparable agency contracts such as estate agency agreements; (ii) it wrongly leaned towards the "effective cause" requirement; and (iii) it failed to consider or analyse[26] relevant "contextual background" matters, including the submission abbreviated as "conditional embargo", and the line of cases relating to financial advisory agreements, etc.

41. DIO, on the other hand, has emphasised a "textual" approach, and has relied on the points that: (1) commercial common sense should not be invoked by the courts to undervalue the importance of the language of the provision which is to be construed; and (2) where the parties have used unambiguous language, the Court should apply it, and should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight.

G.2 General approach to interpretation

42. The highest courts in Hong Kong and in England and Wales have returned often in recent years to the principles of the interpretation of contracts.[27] Reported cases deal of course with the difficult cases and it is easy to overlook the fact that the overwhelming majority of contracts are interpreted and performed without difficulty in accordance with their terms.

43. It is a truism that the starting point is the ordinary and natural meaning of the words of the contract, and of course in the vast majority of cases that is the ending point also. But, as Ma CJ pointed out in *Fully Profit (Asia) Ltd v Secretary for Justice*,[28] in the more difficult cases it is not particularly helpful to refer to the "ordinary and natural meaning" of words because in such cases

[26] *Ibid*., [7.8]–[7.9].

[27] Including *Prenn v Simmonds* [1971] 1 WLR 1381; *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896; *Jumbo King Ltd v Faithful Properties Ltd* (1999) 2 HKCFAR 279; *Bank of Credit and Commerce International SA v Ali* [2002] 1 AC 251; *River Trade Terminal Co Ltd v Secretary for Justice* (2005) 8 HKCFAR 95; *Re Sigma Finance Corp* [2010] 1 All ER 571; *Rainy Sky SA v Kookmin Bank* [2011] 1 WLR 2900; *New World Harbourview Hotel Co Ltd v ACE Insurance Ltd* (2012) 15 HKCFAR 120; *Fully Profit (Asia) Ltd v Secretary for Justice* (2013) 16 HKCFAR 351; *Sinoearn International Ltd v Hyundai-CCECC Joint Venture* (2013) 16 HKCFAR 632; *Arnold v Britton* [2015] AC 1619; *Wood v Capita Insurance Services Ltd* [2017] AC 1173.

[28] (2013) 16 HKCFAR 351, [15].

there can be much debate over exactly what is the ordinary or natural meaning of words; and in those cases the surer guide to interpretation is context.

44. In *Wood v Capita Insurance Services Ltd*,[29] Lord Hodge JSC reviewed the many cases on interpretation and emphasised that interpretation was a unitary exercise. That is why, where there are conflicting interpretations, account should be taken of the natural and ordinary meaning of the provision in question, the purpose of the contract and of the provision, other relevant provisions, the facts and circumstances known or assumed by the parties at the time that the contract was executed, the quality of the drafting of the instrument, and commercial common sense.

45. The following points emerge from the judgment of Lord Hodge JSC:

(a) it does not matter whether the more detailed analysis commences with the factual background and the implications of rival constructions or a close examination of the relevant language in the contract, so long as the Court balances the indications given by each;

(b) the Court must be alive to the possibility that one side may have agreed to something which with hindsight did not serve its interest, or that a provision may be a negotiated compromise or that the negotiators were not able to agree more precise terms;

(c) some agreements may be successfully interpreted principally by textual analysis, for example because of their sophistication and complexity and because they have been negotiated and prepared with the assistance of skilled professionals, whereas the correct interpretation of contracts which are marked by informality, brevity or the absence of skilled professional assistance may be achieved by a greater emphasis on the factual matrix;

(d) but negotiators of complex formal contracts may often not achieve a logical and coherent text because of, for example, the conflicting aims of the parties, failures of communication, differing drafting practices, or deadlines which require the parties to compromise in order to reach agreement; and

(e) commercial common sense and surrounding circumstances should not be used to undervalue the importance of the language of the provision which is to be construed, and the mere fact that a contractual arrangement, if interpreted according to its natural language, has worked out badly for one of the parties, is not a reason for departing from the natural language.

[29] [2017] AC 1173.

46. In our view, there is no substance to Eminent's criticism of the Court of Appeal. The Court of Appeal plainly rejected[30] the notion that there was a conflict between a "textual" and a "contextual" approach, specifically relying on Lord Hodge's judgment in *Wood v Capita Insurance Services Ltd.*[31] It is true that on one reading of [7.4], the Court of Appeal may be taken to have suggested that, in the case of professionally drafted documents, the context was relevant only to dealing with inconsistencies or gaps. There is no such limitation, but a fair reading of the judgment as a whole shows that the Court of Appeal was not excluding context in the whole process of interpretation.

H. The proper construction of the FAA

47. The relevant provisions of the FAA and Addendum are set out in Section B above.

H.1 The FAA viewed overall

48. Eminent's claim rests on Clause 3 i) which must be construed in the context of the FAA as a whole. It is also to be construed on the undisputed footing that the FAA was entered into in order to provide DIO with international financial advice on fundraising with a view to DIO raising additional capital to expand its overseas business.

49. As the Second Recital declares, the FAA is an agreement appointing Eminent as Financial Advisor to render a range of services and providing for compensation to be paid to Eminent for furnishing the same. In the present context, advice on "Strategic Capital Raising and other Corporate Financing activities" are of primary relevance.

50. The FAA establishes a relationship between Eminent and DIO which is to span 18 months (unless terminated by 30 days' written notice). It envisages Eminent delving into DIO's business and performing the various tasks listed in Clause 2 i), being compensated for its work by different types of fees. We are of course focussing on a "Transaction Fee" and the discussion is as to what triggers an obligation to pay the same. However, under the FAA, Eminent is to receive compensation in the form of retainer and equity research fees whether or not a Transaction Fee is ever earned. Other fees potentially payable in stages are provided for by the Addendum. The FAA and the Addendum therefore do not constitute a simple agreement for payment of a commission upon an agent making a successful one-off business introduction.

[30] CA, [7.4].
[31] [2017] AC 1173, [13].

H.2 Entitlement to a Transaction Fee under the FAA during its currency

51. Entitlement to a Transaction Fee during the currency of the FAA is provided for by Clause 2 iv), which links such entitlement to services provided by Eminent of the nature referred to in Clause 2 i)(4), ie, advising DIO "on Mergers & Acquisitions, Fund Raising, private placements or shareholder restructuring prior to any IPO or Secondary Listing". These are different forms of transaction whereby DIO might raise funds to expand its overseas business, as intended by the parties. A merger or acquisition would thus involve combining with a suitable partner enterprise. Fundraising is a more general concept, involving potential investors putting money into DIO's business whether as equity or debt. An "IPO or Secondary Listing" and the work preparatory thereto ("private placements or shareholder restructuring prior to" such events) envisage an offering of shares in DIO to the public. Since DIO is already listed on the KOSDAQ, the possibility of a "Secondary Listing" on another stock exchange is contemplated.

52. Clause 2 iv), makes a *completed transaction* pivotal for entitlement to a Transaction Fee. Thus:

(a) The clause is headed "TRANSACTION FEE".
(b) The fee is a "success fee" payable "[u]pon completion of [the relevant transaction]".
(c) The amount of the fee is 3% of the "total transactional amount".
(d) The relevant transaction (which supplies the transactional amount for calculating the 3%) is "any financial transaction related to Fund Raising or Private Placement or Shareholder restructuring, or Mergers & Acquisition for the Company". The relevant transaction is thus one involving a form of fundraising for DIO, as seen in Clause 2 i)(4).
(e) Accordingly, a Transaction Fee is earned during the currency of the FAA upon the completion of a fundraising transaction, calculated as 3% of the amount raised, and paid to Eminent as a success fee reflecting the services it provided towards achieving completion of the transaction.

53. On the foregoing interpretation of Clause 2 iv), to earn a Transaction Fee, Eminent is required not merely to introduce the third party concerned, but to put in work towards achieving the successful completion of the actual fundraising transaction. It is inconsistent with Eminent's proposed construction that introduction of a third party (as opposed to introduction of a transaction) is all that is required. It is noteworthy that neither the word "introduce" nor any of its derivatives appear in Clause 2 iv) whereas the word "transaction" appears four times.

H.3 Entitlement to a Transaction Fee under the Addendum

54. The provisions of the Addendum are relevant and admissible to interpret the FAA because the parties expressly agreed (Fifth Recital of the Addendum) that they were to be read together.

55. The construction which stresses the pivotal nature of the fundraising transaction and its completion is reinforced by the Addendum. Thus, the Third Recital identifies Eminent's role in "Financial Scenarios" listing additional forms of fundraising and makes it plain that these are "Transaction(s) ... conducted by the Company, its subsidiaries, etc".[32] And the Fourth Recital refers to "the foregoing Success Fee" and excludes from it all "legal, accounting and audit costs for transactional due diligence and any specific circumstances required by the third parties, by law or by government regulations to retain professional services to complete a proposed transaction".

56. Paragraph 1a, provides for a success fee payable in relation to a specific potential form of fundraising involving a listing or placement on the London Stock Exchange AIM and, like Clause 2 iv), it conditions entitlement to that fee on "completion of the listing or Secondary Placement". It lays down as the amount of the fee, 2% "of the transaction value". While this transaction does not arise on the facts, the structure of this provision, fixing upon completion of the transaction, is a further indication of the contractual intent.

57. Paragraph 1b focusses on "mergers & acquisition transactions involving the Company and a third party" and promises payment to Eminent "upon successful completion" within 14 days of the transaction's closing date, of a success fee representing 3% of "the total transaction value in cash calculated based on enterprise value of the acquired company including any assumed liabilities." Payment is again of a "success fee" dependent on Eminent's contribution to a successfully completed transaction.

58. Paragraph 1d is also important. Added in January 2009 in the period running up to their exploration of Dentsply's possible interest in investing in DIO, Eminent negotiated an additional "fixed retainer" of USD 450,000 of which USD 200,000 was payable in stages (with instalments to be paid on signing; on approval of a potential M&A "transaction with a third party"; and on acceptance of "the term sheet for the Transaction(s) of any of the Financial Scenario(s)"). The final payment of USD 250,000 is conditional upon "completion of any [*sic*] the Transaction(s) under the Financial Scenario(s)".

[32] "... including but not limited to Secondary Listings in an overseas stock market, backdoor listings, Public Placements, Private Placements, Mergers & Acquisitions ('M&A'), Management Buy-outs ('MBO'), Leverage [*sic*] Buy-outs ('LBO') in one or series of Transaction(s) in any form including and not limited to loans, bonds, common stock, preferred stock, convertible securities or equity linked debt instruments of any kind conducted by the Company and its subsidiaries and affiliates directly or from any registered shareholder(s) of the Company."

59. Paragraph 1d evidently caters for the eventuality that the intended interaction with the potential investor might come to nothing so that no success fee would be payable. It provides for compensation to be paid to Eminent in stages as work is done and progress is made. It demonstrates that Eminent is intended to be actively involved in bringing about completion of the transaction and compensated for its services at each stage. Consistently with the FAA's provisions conditioning entitlement to the Transaction Fee on a completed transaction, paragraph 1d makes entitlement to the final instalment dependent on successful completion of the relevant financial transaction while affording Eminent recompense for work done along the way. There is no provision anywhere in the Addendum attaching a fee entitlement merely to "introduction" of a counterparty.

H.4 Entitlement to a Transaction Fee after termination of the FAA

60. Does the position differ regarding entitlement to a Transaction Fee under Clause 3 i)? In our view, the answer is "No". The situation differs to the extent that it deals with Eminent's entitlement to fees during the two-year period following termination of the FAA, but the requirement which triggers that entitlement is the same as during the FAA's currency. Indeed, it would be strange (as the Judge pointed out) if the entitlement to fees were different and in some way less demanding after its termination.

61. Under Clause 3 i), DIO agrees that within the two-year period, fees are payable "should the Company complete a transaction" which is described in terms echoing the description of transactions referred to in the First and Second Recitals and in Clause 2 iv). They are, as we have seen, fundraising transactions.[33]

62. The Transaction Fee payable is calculated on the same basis as during the FAA's currency, Clause 3 i) providing for Eminent to be paid "its fees according to this Agreement [the FAA] or and [*sic*] any executed amendments thereof" [including the Addendum]. There is a fall-back provision to apply "a generally accepted market compensation in case the transaction compensation method is not explicitly stated in this agreement". Thus, one would expect a Transaction Fee applicable to Clause 3 i) to represent 3% of the total transactional amount of the successful fundraising transaction, in accordance with Clause 2 iv) and paragraph 1b of the Addendum.

63. One difference between Clause 3 i) and Clause 2 iv) is that the former refers to an introduction by Eminent. It speaks of DIO completing a transaction "including and not limited to an [*sic*] secondary listing or fund raising with any third parties or receive

[33] "… [A] transaction including and not limited to an [*sic*] secondary listing or fund raising with any third parties or receive funds from a financing source introduced by the Financial Advisor".

funds from a financing source introduced by the Financial Advisor". Eminent seizes on this and, as noted above, argues that in Clause 3 i), "introduced by the Financial Advisor" qualifies "the 'counterparty' (ie a secondary stock exchange, a third party, or a financing source) with whom DIO entered into a deal or from whom DIO received funds, rather than 'the transaction'".[34]

64. We do not agree. That argument disregards crucial words in the clause. The words "introduced by the Financial Advisor" qualify "*a transaction including and not limited to* [a] secondary listing or fund raising with any third parties or receive funds from a financing source". It is the *transaction* which is successfully completed that Eminent has to introduce, being a transaction described as including but not limited to a secondary listing or fundraising, etc. If Eminent introduces the third party but then plays no part or an insignificant part in bringing about the fundraising transaction eventually completed, there is no entitlement to a Transaction Fee. This construction dovetails with the pivotal requirement that the services rendered by Eminent must contribute to completion of the relevant fundraising transaction.

65. Moreover, as a matter of language, when Clause 3 i) speaks of "[a] secondary listing … introduced by the Financial Advisor", it is not referring to Eminent introducing a counterparty. A secondary listing is a transaction — referred to as a "Financial Scenario" in the Addendum, not a person. This is reflected in the Addendum's Third Recital which includes a secondary listing as one of the "Financial Scenarios" along with "backdoor listings, Public Placements, Private Placements, Mergers & Acquisitions ('M&A'), Management Buy-outs ('MBO'), Leverage [*sic*] Buy-outs ('LBO')".

H.5 The function of Clause 3 i)

66. There is some suggestion by Eminent that making a Transaction Fee entitlement dependent on its having introduced DIO to the successfully completed transaction as opposed merely to a third party would somehow render the tail gunner clause "meaningless".[35] We do not agree.

67. Clause 3 i) guards against Eminent being unfairly deprived of a Transaction Fee which it has substantially earned. Since a completed transaction is the necessary trigger for the fee entitlement, a situation could arise where Eminent has done everything necessary to bring a fundraising deal to fruition but where, in the absence of Clause 3 i), it might be excluded from recompense by DIO deferring completion until after the FAA is terminated. Thus, Clause 3 i) provides the financial adviser with a safeguard, ensuring that the fee is payable "should the Company complete [the relevant]

[34] Eminent Written Case, [71].
[35] Eminent Written Case, [66(5)].

transaction ... introduced by [Eminent]" during the two-year post-termination period. Commercially, it is unlikely that a fundraising deal would be delayed by more than two years merely as an expedient for avoiding payment of the Transaction Fee.

H.6 Irrelevance of Clause 4(a)

68. Eminent argues that Clause 4(a) supports its construction because it stipulates that Eminent "intends to *introduce* [DIO] to its contacts, including private and institutional financing sources or strategic alliances" and DIO agrees to respect Eminent's relationships with such investors and sources of financing and to refrain from "the circumvention of any obligation to [Eminent] created by [the FAA] or any means".

69. This adds nothing to the foregoing analysis. The relevant obligation which the FAA creates is for DIO to pay Eminent the Transaction Fee where it has introduced a successfully completed transaction. If that obligation has not been triggered, there is no question of circumvention.

H.7 No presumption or implied term

70. Reliance has been placed in argument and in some of the decided cases on Article 57 in *Bowstead & Reynolds on Agency*[36] which states:

> Subject to any special terms or other indications in the contract of agency, where the remuneration of an agent is a commission on a transaction to be brought about, he is not entitled to such commission unless his services were the effective cause of the transaction being brought about.

71. However, as the commentary in *Bowstead & Reynolds* makes clear, the statement in Article 57 is no more than a particular example of the wider principle stated in the preceding Article,[37] that where an agent is entitled to remuneration upon the happening of a future event, the entitlement does not arise until that event has occurred; and the event upon which the agent's entitlement to remuneration arises is to be ascertained from the terms of the agency contract. Everything depends on the contract's construction and it is inappropriate to regard Article 57 as stating a substantive legal rule as to the existence of either a presumption or an implied term in favour of an "effective cause" requirement.

72. It follows that there is no special approach to the construction of contractual terms governing post-termination

[36] Peter Watts and FMB Reynolds, (21st ed., 2018) para.7-027.
[37] *Ibid.*, Article 56 para.7-013.

payments to financial advisers. All depends on the application of the established rules on construction of contracts to the particular case.

H.8 The authorities cited by the parties

73. The parties referred the Court to many authorities (several involving the use of the term "introduction" or "introduce") on the question whether it is necessary for the acts of an agent or adviser to be the effective cause of the contemplated transaction before the agent or adviser is entitled to a fee.

74. The basic principles emerged in connection with the activities of estate agents. In *Millar, Son & Co v Radford*,[38] Lord Collins MR said: "It was, therefore, important to point out that the right to commission did not arise out of the mere fact that agents had introduced a tenant or a purchaser. It was not sufficient to show that the introduction was a causa sine qua non. It was necessary to show that the introduction was an efficient cause in bringing about the letting or the sale." That was because "[t]he owner is offering to the agent a reward if the agent's activity helps to bring about an actual sale": *Luxor (Eastbourne) Ltd v Cooper*.[39]

75. In *Foxtons Ltd v Bicknell*,[40] Mrs Bicknell, the vendor, agreed to terms with Foxtons which provided for a commission of 2.25% of the sale price achieved, on the basis of sole agency, payable if at any time unconditional contracts were exchanged with "a purchaser introduced by us during the period of our sole agency or with whom we have had negotiations about the property during that period; or with a purchaser introduced by or offering via another agent during that period." Foxtons showed the house to a Mr Low, who was looking for a house on behalf of his former wife. He initially liked it but then lost interest when his former wife viewed it. The sole agency came to an end and Foxtons and Mrs Bicknell agreed a multiple agency agreement at a rate of 3%. Mrs Bicknell also appointed Hamptons on a multiple agency basis. Mr and Mrs Low visited the property some months later and Mrs Low purchased it. Mrs Bicknell paid Hamptons their commission. Foxtons then claimed theirs on the basis that contracts were exchanged with "a purchaser introduced by" them. The Court of Appeal decided that Foxtons were not entitled to the commission because, among other reasons (*per* Lord Neuberger of Abbotsbury): (1) the Court will readily imply a term that the agent is not entitled to commission on a contract unless his services were the effective cause of the transaction being brought about, especially in the context of a residential consumer, unless the provisions of the particular contract

[38] (1903) 19 TLR 575.
[39] [1941] AC 108, 117 (Viscount Simon LC).
[40] [2008] 2 EGLR 23.

or the facts of the case negative it; (2) the main reason for the implication of such a term is to minimise the risk of the seller having to pay two commissions; (3) the expression "a purchaser" in the phrase "a purchaser introduced by us" did not mean "a person who at some time in the future becomes a purchaser" regardless of whether his purchase or the interest which gave rise to it owed anything to Foxtons, but it meant "a person who becomes a purchaser as a result of our introduction"; and (4) the latter interpretation accorded better with the principles to be extracted from the cases, in particular the normal notion that an agent can only recover if he introduces someone who becomes a purchaser as a result of his introduction, and such an interpretation would also make it unlikely that the client would be liable for two commissions.

76. But the authorities make it clear that, although they lean towards the application of the "effective cause" principle either by interpretation of the express terms or by implication of a term to that effect, the principle will be displaced by language which points in a different direction: eg *Brian Cooper & Co v Fairview Estates (Investments)*,[41] ("We confirm that we are pleased to offer a full scale letting fee to your company should you introduce a tenant by whom you are unable to be retained, and with whom we have not been in previous communication and who subsequently completes a lease"): "I can see no necessity in this case to imply a term. On the contrary, I regard the relevant language as being inconsistent with implication of a term imposing an additional implied requirement that the estate agent must be at least an effective cause of the lease being granted" (*per* Woolf LJ (as he then was)); *County Homesearch Co (Thames & Chilterns) Ltd v Cowham*,[42] (deeming provision to the effect that a property was "introduced" if the defendant had either received particulars of the property from County Homesearch, directly or indirectly, or from any estate agent with which County Homesearch had regular contact): "express terms of the contract are inconsistent with any implied requirement that the agent be an effective cause of the transaction." (*per* Longmore LJ).

77. By contrast, in *MSM Consulting Ltd v Tanzania*,[43] MSM was retained by Tanzania to search for new premises for its High Commission. A fee was "payable by the Client upon completion of the purchase of a property which we have introduced to the client or representative of the Client." Christopher Clarke J applied *Foxtons Ltd v Bicknell* and held that MSM was not entitled to the fee because it had not been the effective cause of the transaction: the implication of an "effective cause" term arises as a result of the nature of the transaction; and where an agent is engaged upon terms

[41] [1987] 1 EGLR 18.
[42] [2008] 1 WLR 909.
[43] [2009] EWHC 121 (QB) (Christopher Clarke J).

that his commission is not payable unless a contract is concluded between his client and a purchaser and the commission is to be a percentage of the price, the nature of the transaction and the requirements of business efficiency will usually (subject to any special terms or other indications in the contract of agency) dictate that the agent should be remunerated if, but not unless, it is his efforts that have brought about the transaction in question.

78. In cases in which the transactions are closer to the present case, it has been held that the terms of the contract were inconsistent with an interpretation of the language, or the use of an implied term, to require the agent or adviser to have been the effective cause of the transaction. Thus in *Watersheds Ltd v Simms*,[44] a businessman who had entered into a seven-year contract with a company providing corporate services to help him finance, purchase, develop and then sell a business was liable to pay the company its agreed percentage of the sale proceeds even though the company had not done any work in connection with the sale. The contract was not analogous to an estate agent's contract with a seller and it would be inconsistent with the purpose of the contract to construe it as containing an implied term allowing the company to be paid only if its work had been an effective cause of the sale.

79. In two cases involving a "tail gunner clause", an adviser was held entitled to fees on transactions which were completed after termination of the advisory contract and which the adviser did not bring about.

80. In *Seymour Pierce Ltd v Grandtop International Holdings Ltd*,[45] a financial adviser gave advice to a company pursuant to a letter of engagement in connection with the acquisition of a football club and claimed a success fee. The contract provided that "in the event the engagement pursuant to this letter of engagement is terminated by the Company and an Offer for the Target is declared or becomes wholly unconditional as the result of any offer made by or in association with the Company within a period of 12 months after the effective date of termination the Company shall pay to Seymour Pierce the Success Fee in full." One of the defences to the claim was that the adviser should not be able to recover the fee because it was not involved in the ultimate acquisition. Eady J held that there was no need to imply an effective cause term as a matter of business efficacy. The clause was entirely comprehensible without any such implication.

81. So also in *Edmond De Rothschild Securities (UK) Ltd v Exillon Energy plc*,[46] the defendant agreed that "[Rothschild] has the exclusive right to act as its financial advisor in connection with the Transaction. If, notwithstanding the termination of this

[44] [2009] EWHC 713 (QB) (Burnett J).
[45] [2010] EWHC 676 (QB) (Eady J).
[46] [2014] EWHC 2165 (Comm) (Males J).

agreement, the Company completes the Transaction within a period of eighteen months from the date of such termination, the appropriate fee … shall be payable to [Rothschild]." It was held that a term that the success fee was payable in certain events was clear and that there was no need to imply a term. The natural meaning was supported by the consideration (*inter alia*) that it would generally be difficult for Rothschild to prove that its work constituted an effective cause of a sale.

82. On the other hand in *Cavendish Corporate Finance LLP v KIMS Property Co Ltd*,[47] ("In the event of a successful fundraising from the Cavendish exercise, a fee of 3.5 per cent of new monies raised ('success fee') from the investor …") the Judge interpreted the expression to mean that the success fee was payable only if Cavendish's work was an effective cause of the deal that was done.

83. Both parties relied on United States cases. Eminent cited five cases from the Southern District of New York (applying New York law) in which major investment banks sued successfully for fees notwithstanding that the client alleged that the financing envisaged under the agreement was not obtained through the investment bank.

84. In each of these cases, the Court found that the language of the financing agreement clearly had the result that the investment bank was entitled to payment: *PaineWebber Inc v Campeau Corp*,[48] ("… there is nothing ambiguous …. The bonus payment … is conditioned upon the occurrence of a well-defined event, that is, an Acquisition of Allied. There is nothing on the face of the agreement that suggests PaineWebber would have to perform additional services in order to receive the bonus payment of $5.75 million"); *Chase Manhattan Bank, NA v Remington Products, Inc*,[49] ("… Engagement Agreement provided that if a Transaction (or an agreement leading to a Transaction) was in place by the end of a one year 'tail period' …, Chase would receive a fee under the same terms and in the same manner as during the term of the Agreement … Nor does [the Agreement] condition Chase's receipt of a fee on its bringing about a Transaction or on the consummation of any particular type of Transaction. The sole prerequisite to payment listed … is the consummation of a Transaction (or the signing of an agreement that results in a Transaction"); *Lazard Frères & Co v Crown Sterling Management, Inc*[50] ("The Agreement specifically provided that Lazard would be entitled to its fees upon the occurrence of certain events, 'regardless of whether [Lazard] is responsible for arranging said events.'"); *CIBC World Markets Corp*

47 [2014] EWHC 1282 (Ch) (Mark Anderson QC).
48 670 F Supp 100 (SDNY 1987), 105.
49 865 F Supp 194 (SDNY 1994), 197 and 199.
50 901 F Supp 133 (SDNY 1995), 137.

v TechTrader, Inc,[51] ("This clause creates an unambiguous duty on the part of TT to pay the fee if the stipulated Transaction occurs").

85. In the most recent of the decisions cited by Eminent, *Deutsche Bank Securities, Inc v Rhodes*,[52] ("During the Exclusivity Period, the Company agrees that DBSI shall have the right, but not the obligation, to act as sole book-running manager, and DBSI has the right but not the obligation, to act as exclusive underwriter, initial purchaser, placement agent or syndication agent in connection with any bank or loan financing consisting of institutional and/or *pro rata* loans of, the Company or its subsidiaries during the term of this Agreement on a best efforts basis) the District Court referred to those four cases, and said (at 668–669):

> … it is not uncommon in the investment banking field for investment banks to be contractually entitled to fees even when they do not arrange or facilitate the transactions.
>
> …
>
> The cases are different, as they involve different contracts and different language. But the concepts are the same. In these cases, the language of the agreements and the totality of the circumstances showed unambiguously that the investment banks were entitled to fees, under exclusivity provisions, even if the clients obtained financing through others. Comparable language and circumstances exist here.

86. DIO does not accept that financial advisers are a well-established and specialised category of service providers, and says that in the United States authorities the clauses were wholly different from Clause 3 i), are not authority for any general proposition of industry practice of financial advisers in general, or in Hong Kong in particular.

87. Instead, DIO relies on two cases from the Third Circuit Court of Appeals (applying New Jersey law) in which it was re-affirmed that under New Jersey law there is a presumption that when a brokerage contract is silent as to the service required to earn a commission from a seller or buyer, a commission will be earned only if the broker was the "efficient producing cause" of the sale: *Inventive Music Ltd v Cohen*[53] (agent for sale of the defendant's record company); *Vanguard Telecommunications, Inc v Southern New England Telephone Co.*[54] In the latter case (agent for the sale of the defendant's fibre optic systems), the Court said (at 651):

[51] 183 F Supp 2d 605 (SDNY 2001), 611.
[52] 578 F Supp 2d 652 (SDNY 2008), 657.
[53] 617 F 2d 29, 32 (3d Cir 1980).
[54] 900 F 2d 645 (3d Cir 1990).

> New Jersey common law … presumes that when a brokerage contract is silent as to the service required to earn a commission from a seller or buyer, a commission will be earned only if the broker was the 'efficient producing cause' of the sale … This presumption is based on public policy intended to effectuate justice between the parties and is not intended to rewrite an agreement which the parties deliberately executed …
>
> To overcome this presumption, an agreement must contain language which explicitly negatives the presumption. The contract language presented must be 'without qualification, and … emphatic and specific in statement' [citing an earlier case] … Absent language which specifically abrogates the common law presumption, that presumption prevails; commissions will only be awarded to a broker who was the efficient cause of the sale.

88. The decisions in the Southern District of New York are in line with the English authorities in making it clear that the question is solely one of interpretation. It is plain from the language of presumption and the invocation of public policy that the principle applied in New Jersey does not represent the law in Hong Kong.

89. Outside the sphere of estate agents, where (especially in the residential consumer context) there is a common understanding of the agent's duties and the consequences of the absence of a presumption or of an implied term, there is little to be said for a presumption, and nothing to be said for an implied term. All will depend on the construction of the term in question in the context of the agreement as a whole and the purpose of the transaction.

H.9 Grey areas and an "effective cause"

90. A requirement that the financial adviser's contribution be an "effective cause" of the transaction may possibly arise in a different but related context. Where parties agree to a "tail gunner clause", they inevitably run the risk of creating grey areas which may give rise to controversy. Thus, the financial adviser may have gone beyond merely introducing the client to the potential investor and done a significant amount of work in promoting the deal which is eventually completed after termination of the FAA but within the run-off period. The client (or a replacement financial adviser) might however have taken up the running and made substantial contributions essential to achieving that completion. It may thus be arguable whether, on particular facts, the financial adviser has done enough to be entitled to the fee. Unless the agreement deals explicitly with that question, the issue would arise as to what the proper criterion is for determining the answer.

91. This issue does not presently arise since, on the Judge's findings, Eminent did not introduce or contribute anything at all to

the transaction entered into between DIO and Dentsply and announced on 9 December 2010. We simply mention that where such a grey area does arise, a possible approach might be to construe the contract as recognising an entitlement to a success fee where the financial adviser's advice and assistance is found to be an "effective cause" of the transaction's completion, a criterion adopted in some of the decided cases. Once again, all will depend on the interpretation of the agreement.

I. Conclusion

92. For the foregoing reasons, in agreement with the Court of Appeal, we consider the meaning of Clause 3 i) on its true construction to be clear. There is no need to consider implication of any term into the FAA for present purposes. Eminent's entitlement to the Transaction Fee claimed requires it to have introduced DIO to the completed transaction which was announced on 9 December 2010. It was insufficient for Eminent simply to have introduced DIO to Dentsply in April 2009.

93. There was accordingly no entitlement to payment under Clause 3 i) and we therefore dismissed this Appeal with costs.

Fok PJ

94. I agree with the joint reasons for judgment of Mr Justice Ribeiro PJ and Lord Collins of Mapesbury NPJ.

Cheung PJ

95. I agree with the joint reasons for judgment of Mr Justice Ribeiro PJ and Lord Collins of Mapesbury NPJ.

Ma CJ

96. For the above-mentioned reasons, the appeal was unanimously dismissed with costs.

Reported by Ken TC Lee

Exhibit D

2019 WL 163252
Only the Westlaw citation is currently available.
United States District Court, D. Arizona.

EXCEL FORTRESS LIMITED, et al., Plaintiffs,

v.

Vaughn La Verl WILHELM, et al., Defendants.

No. CV-17-04297-PHX-DWL

|

Signed 01/09/2019

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AMENDED ORDER

Dominic W. Lanza, United States District Judge

INTRODUCTION

***1** This trade secrets case was filed in April 2017. At first, Plaintiffs expressed a desire to litigate the case aggressively and requested an expedited discovery schedule to accomplish this goal. As a result, the Court set Plaintiffs' expert-disclosure deadline as November 2, 2018. The scheduling order provided that "[e]xpert reports ... must set forth 'the testimony the witness is expected to present during direct examination, together with the reasons therefor.' Full and complete disclosures of such testimony are required on or before the dates set forth above; absent truly extraordinary circumstances, parties will not be permitted to supplement their expert reports after these dates." (Doc. 55 at 2.)

In early 2018, after serving a set of overbroad discovery requests on Defendants, Plaintiffs effectively stopped litigating this case. They didn't retain a devulcanization expert, even though this is "the issue at the very heart of this case" (Doc. 87 at 2), and didn't seek judicial intervention after Defendants declined to answer many of their discovery requests on overbreadth grounds. Months and months passed with little to no action.

Finally, during the two weeks preceding the November 2, 2018 expert-disclosure deadline, there was a burst of activity. During this period, Plaintiffs (1) raised a belated objection to the discovery responses that Defendants had provided 255 days earlier (Doc. 83) and (2) asked for the case to be consolidated with a different case in which the discovery deadlines hadn't elapsed (Doc. 79). Additionally, on the afternoon of November 2, 2018, Plaintiffs (1) filed a motion seeking an extension of the expert-disclosure deadline (Docs. 87, 88) and (2) provided a bare-bones expert disclosure to Defendants (Doc. 92-1). Although this one-and-a-half-page document identified two devulcanization experts by name, it didn't purport to summarize their opinions and conclusions and didn't provide any written reports from them. (Doc. 92-1 at 3-4.)[1] Plaintiffs acknowledged this disclosure was "incomplete" but argued that Defendants were to blame, because they hadn't responded to the discovery requests propounded earlier that year. (*Id.*)

[1] The disclosure also identified a third expert, Dr. Jinzhu Yang, and provided a report from Dr. Yang. (Doc. 92-1 at 8-62.) As explained below, the Court finds that the disclosures concerning Dr. Yang were appropriate.

On November 20, 2018, the Court issued an order resolving many of these issues. (Doc. 100.) Among other things, the Court concluded that (1) essentially all of Plaintiffs' discovery requests were overbroad, and Defendants were therefore justified in declining to respond to them (*id.* at 4-9), (2) the expert-disclosure deadline would not be changed, because "Plaintiffs were not diligent in pursuing discovery and ... 'good cause' therefore does not exist to amend the scheduling order to extend the expert-disclosure deadline" (*id.* at 9-10), and (3) the consolidation request would be denied, because "the expert-disclosure deadline has already passed" and consolidation "would thus work to the detriment of ... [the] defendants in the Trade Secrets case—it would increase their litigation costs and significantly delay their case's resolution" (*id.* at 10-11).

***2** There are now three additional matters pending before the Court. First, Defendants have moved to strike the expert disclosures that Plaintiffs provided on November 2, 2018. (Doc. 92.) Second, Plaintiffs have moved to compel Defendants to supplement their responses to the revised discovery requests that Plaintiffs propounded after the Court determined the initial requests were overbroad. (Doc. 113.) Third, the parties have asked the Court to determine whether Dr. Li is a managing agent of Defendants, and thus may be required to sit for a deposition, or whether Dr. Li is a mere consultant who may submit an affidavit in lieu of being deposed. (Doc. 114.)

As explained below, the Court will deny the motion to strike (although the denial is without prejudice as to two of the three experts), deny Plaintiffs' request to compel Defendants to provide additional responses to their latest batch of discovery requests, and deny Plaintiffs' request to require Defendants to produce Dr. Li for a deposition.

DISCUSSION

I. The Motion to Strike Plaintiffs' Experts

Plaintiffs provided their expert disclosure to Defendants on November 2, 2018. (Doc. 92-1.) The disclosure identifies three experts: (1) Dr. Jinzhu Yang, who is identified as "a Chinese lawyer"; (2) Dr. Jacques Noordermeer, "an expert in rubber devulcanization"; and (3) Michael Kumbalek, "an internal expert in rubber compounds and properties." (Doc. 92-1 at 3.) With respect to Dr. Yang, Plaintiffs also provided a report that summarizes his opinions and conclusions. (Doc. 92-1 at 7-11.) No reports were provided for Dr. Noordermeer or Mr. Kumbalek. In addition, the notice does not attempt to summarize either expert's conclusions and opinions:

> Without having any information regarding Defendants' rubber devulcanization efforts related to Plaintiffs' trade secret claims, Plaintiffs' rubber devulcanization experts ... have not been able to prepare any opinions and conclusions (and a report to the extent required) regarding the similarities between Defendants' products and services and those of Plaintiffs. The disclosure is therefore incomplete and made without prejudice to Plaintiffs' ability to supplement.

(Doc. 92-1 at 3.)

In their motion to strike, Defendants ask the Court to strike all three experts. (Doc. 92.) First, Defendants argue the disclosure concerning Dr. Yang is improper because his expert report "provide[s] both legal conclusions and the application of the law to the facts." (Doc. 92 at 4.) Second, Defendants argue the disclosure concerning Dr. Noordermeer is deficient because "it is not accompanied by an expert report." (*Id.* at 5.) Third, Defendants argue the disclosure concerning Mr. Kumbalek is deficient because Plaintiffs only provided "the general subject matter of which Mr. Kumbalek is expected to testify," not "a summary of the facts and opinions to which [he] is expected to testify." (*Id.*)

In their response, Plaintiffs argue that Dr. Yang should be permitted to testify because he "will be able to assist the Court with regard to potential foreign law issues," which is permissible under Federal Rule of Civil Procedure 44.1. (Doc. 107 at 3-4.) Moreover, Plaintiffs argue that Defendants' motion to strike is premature as to Dr. Yang because the motion is "based on the proposed substance of his testimony." (*Id.* at 4-5.) With regard to Dr. Noordermeer and Mr. Kumbalek, Plaintiffs do not contend their disclosures were proper; rather, Plaintiffs argue they should be permitted to supplement these disclosures after Defendants respond to their discovery requests. (*Id.* at 5-9.) Finally, Plaintiffs argue Mr. Kumbalek should be allowed to testify about general concepts of the chemical process of rubber devulcanization even if the Court strikes his opinion testimony. (*Id.* at 9.)

A. Dr. Yang

***3** Dr. Yang is a Chinese lawyer retained by Plaintiffs to interpret provisions of a Chinese employment contract relevant to this case. In his expert report, Dr. Yang provides the following five opinions: (1) the contract's non-compete clause was accurately translated from Chinese into English, (2) two other clauses in the contract (one requiring Dr. Li and Xiao Yu Ying to maintain the confidentiality of research achievements, the other awarding ownership over such achievements to Excel) were also accurately translated from Chinese into English, (3) a different clause of the contract, which enabled Dr. Li and Xiao Yu Ying to withdraw from the contract without written notice, "only applies to the

limited two scenarios therein"; (4) assuming Plaintiffs' theory of the case is true, Dr. Li and Xiao Yu Ying breached the contract by leaving Excel without providing 60 days' written notice; and (5) the employment contract was "enforceable and acceptable under PRC [Chinese] law." (Doc. 92-1 at 9-10.)

The motion to strike Dr. Yang will be denied. Although it is true that Dr. Yang offers legal conclusions (*i.e.,* the Chinese contract is enforceable) and purports to apply the law to the facts (*i.e.,* Dr. Li was required, under the contract, to give 60 days' notice before leaving)—things that experts are usually prohibited from doing—a different set of rules and standards apply when foreign law is at issue. Federal Rule of Civil Procedure 44.1 provides that a court "may consider any relevant material or source, ... *whether or not ...admissible under the Federal Rules of Evidence*," when determining the meaning of foreign law. *Id.* (emphasis added). For this reason, the Ninth Circuit and other courts have concluded an expert may, under Rule 44.1, opine on the ultimate issue of whether a contract is enforceable under foreign law. *See, e.g., Universe Sales Co., Ltd. v. Silver Castle, Ltd.*, 182 F.3d 1036, 1038-39 (9th Cir. 1999) (holding that expert's declaration, which opined that "[u]nder Japanese law ... the License Agreement is both valid and enforceable, and as such requires that Universe make royalty payments to Sportswear," was "admissible pursuant to Federal Rule of Civil Procedure 44.1," and reversing district court for "fail[ing] properly to take the [expert's] declaration into account"); *Winn v. Schafer*, 499 F. Supp. 2d 390, 396 n.28 (S.D.N.Y. 2007) (citations omitted) ("Plaintiff objects to the court's consideration of the House Declaration, arguing that a foreign law expert may not opine as to the 'ultimate application of the (foreign) law to the facts of the case.' Under Rule 44.1, however, ... [a] court may ... consider a foreign law expert's opinion even on ultimate legal conclusions."). Thus, although the Court is not required to uncritically accept Dr. Yang's legal opinions, it will not strike him as an expert.

B. Dr. Nordermeer

Rule 26(a)(2) provides that if a witness "is one retained or specially employed to provide expert testimony," the retaining party's disclosure must be accompanied by a written report. The report must contain: (1) "a complete statement of all opinions the witness will express and the basis and reasons for them"; (2) "the facts or data considered by the witness in forming them"; (3) "any exhibits that will be used to summarize or support them"; (4) "the witness's qualifications, including a list of all publications authored in the previous 10 years"; (5) "a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition"; and (6) "a statement of the compensation to be paid for the study and testimony in the case." Fed. R. Civ. P. 26(a)(2)(B). These disclosures must be provided "at the times and in the sequence that the court orders." Fed. R. Civ. P. 26(a)(2)(D).

Here, Plaintiffs' disclosure only identified Dr. Noordermeer's name, hourly rate, and qualifications. (Doc. 92-1 at 3; *id.* at 27-62.) It did not summarize his opinions and conclusions and did not provide a report from him. Plaintiffs concede the disclosure was therefore "incomplete" under Rule 26(a). (Doc. 92-1 at 3.)

***4** The disputed issue is what consequence should flow from Plaintiffs' failure to meet their disclosure obligations. On this issue, Rule 37(c)(1) supplies the relevant test: "If a party fails to provide information ... as required by Rule 26(a) ... the party is not allowed to use that information or witness ... unless the failure was substantially justified or is harmless." *See also* Doc. 55 at 2 (scheduling order, providing that "absent truly extraordinary circumstances, parties will not be permitted to supplement their expert reports after" the specified deadlines). "[T]he burden is on the party facing sanctions" to prove the violation was either substantially justified or harmless. *Yeti by Molly, Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1107 (9th Cir. 2001).

In their motion to strike, Defendants argue (1) the delay was not justified because Plaintiffs chose to stop litigating for eight months and because Plaintiffs bear the blame for any delay in obtaining discovery due to their promulgation of overbroad discovery requests, and (2) the delay was not harmless because the case has already been pending for 18 months and granting an extension would effectively flip the expert-disclosure sequence and allow Plaintiffs' experts to delay issuing their reports until after reviewing Defendants' experts' reports. (Doc. 92 at 5-8.) In their response, Plaintiffs argue (1) the delay was justified because Defendants "failed to provide complete discovery responses" to their initial set of requests, they previously tried to settle the case, they were initially forced to file suit in Canada, and it is "very challenging" to find a rubber devulcanization expert (Doc. 107 at 1-2), (2) Defendants would not suffer any harm from a modest extension of the discovery deadlines, as Plaintiffs' experts hope to produce their reports by January 14, 2019 (Doc. 107 at 5-7 & n.1), and (3) excluding their experts would effectively result in the dismissal of their trade secrets claim, and courts should avoid imposing harsh sanctions that

interfere with the merits-based resolution of cases (Doc. 107 at 8-9).

The Court concludes that Plaintiffs have not come close to meeting their burden of showing they were "substantially justified" in failing to comply with the November 2, 2018 expert-disclosure deadline. Their main argument is that Defendants are to blame for the delay, due to their failure to provide adequate responses to Plaintiffs' initial round of discovery requests, but the Court already rejected this argument in its November 20, 2018 order. (Doc. 100 at 4-9.) Nor is the Court persuaded by Plaintiffs' "it's hard to find a devulcanization expert" argument. Plaintiffs chose to initiate this lawsuit in April 2017 knowing they'd need such an expert to meet their burden of proof.

The remaining question is whether Plaintiffs have met their burden of proving their non-compliance with the November 2, 2018 expert-disclosure deadline was "harmless." The difficulty in resolving this issue on the current record is that Dr. Noordermeer still hasn't produced his report. As a result, Plaintiffs are forced to posit a hypothetical set of circumstances and ask the Court to rule that those hypothetical circumstances wouldn't cause Defendants to suffer much prejudice. (Doc. 107 at 7 ["Assuming Defendants properly respond to Plaintiffs' more narrowly written discovery requests, Defendants' devulcanization technology will be provided on December 21, 2019. Plaintiffs will then attempt to tender a report by January 14, 2019. Defendants' disclosures would be due February 11, 2019. Plaintiffs[ ] could potentially provide a rebuttal report by February 18, 2019. All discovery does not close until March 1, 2019, leaving two weeks in which the parties could depose their respective experts."].) Defendants, meanwhile, conjure a different set of hypothetical circumstances, under which their experts would be required to disclose their reports before Dr. Noordermeer's report was produced, and argue those circumstances would be prejudicial. (Doc. 92 at 7.)

***5** The Court is disinclined to resolve the issue of harmlessness on this record. Once Dr. Noordermeer actually produces his report, the issues will become less hypothetical and it will become possible to gauge the quantum of harm suffered by Defendants with more certainty.[2] Thus, the motion to strike Dr. Noordermeer will be denied, but without prejudice to Defendants' ability to file a renewed motion after they receive Dr. Noordermeer's report (or, in any event, after the March 1, 2019 discovery cutoff).

[2] Notably, Plaintiffs' hypothetical prejudice-avoiding schedule has already broken down. That schedule was predicated on Plaintiffs' satisfaction with Defendants' discovery production on December 21, 2018. Yet Plaintiffs did not receive any new information in the December 21 production, and as discussed in Part II *infra*, no further production will be ordered. This underscores why it is preferable to wait until matters become less hypothetical before resolving the question of harmlessness.

One final point warrants emphasis. Defendants already have suffered harm arising from Plaintiffs' conduct. Civil litigation is supposed to be resolved in a "just, speedy, and inexpensive" manner, *see* Fed. R. Civ. P. 1, yet Plaintiffs' conduct has unjustifiably slowed down the resolution of this case and increased Defendants' costs. These are tangible harms. Moreover, it is not "just" for one party to take an eight-month "time out," while the other party expends time, energy, and resources litigating the case, and then permit the dilatory party to avoid any consequences for its conduct. The diligent party should be rewarded for its adherence to court orders and deadlines, not made to feel like a sucker. Nevertheless, it would be premature to grant the motion to strike at this juncture because it remains unclear whether the parties will be able—despite the delay caused by Plaintiffs' conduct—to complete expert discovery by the March 1, 2019 discovery cutoff date. The parties' 30(b)(6) depositions are scheduled to begin in late January 2019, and it's possible the information generated during those depositions may permit Dr. Noordermeer to belatedly generate his report. Also, during the January 4, 2019 telephonic hearing, Plaintiffs' counsel voiced suspicions about the accuracy of Defendants' December 21, 2018 discovery responses concerning their devulcanization process. If these serious accusations prove correct, that would also be relevant to the harmlessness inquiry.

C. **Mr. Kumbalek**

Plaintiffs' disclosure concerning Mr. Kumbalek states that he is an "internal expert in rubber compounds and properties" who serves as President of EFG Polymer, LLC and acts as a consultant for Plaintiff EFG America, LLC. (*See* Doc. 92-1 at 3.) Although the disclosure identifies the general subject matters on which Mr. Kumbalek is expected to opine —"Mr. Kumbalek is expected to testify regarding the subject matter of the chemical properties and performance of rubber, rubber compounds, carbon black, devulcanized rubber and

related products relevant to the industry in which Plaintiffs and Defendants compete"—it does not identify the substance of his opinions and conclusions on those issues. (*Id.*) The disclosure also doesn't provide a report from Mr. Kumbalek but asserts he "is not required to provide a written report because his duties as a consultant ... do not regularly involve giving expert testimony." (*Id.*)

A written report doesn't need to accompany the disclosure of an expert witness who isn't retained or specially employed to provide expert testimony. Fed. R. Civ. P. 26(a)(2)(C). Instead, "a party is required to disclose the subject matter on which the witness is expected to present evidence and a summary of the facts and opinions to which the witness is expected to testify." *Pineda v. City and County of San Francisco*, 280 F.R.D. 517, 522 (N.D. Cal. 2012) (citing Fed. R. Civ. P. 26(a)(2)(C)). "The Advisory Committee Notes explain that Rule 26(a)(2)(C) mandates 'summary disclosures of the opinions to be offered by expert witnesses who are not required to provide reports under Rule 26(a)(2)(B) and of the facts supporting those opinions.' " *Id.* at 522 (citation omitted).

***6** Here, Plaintiffs' disclosure is deficient because it doesn't provide a summary of the opinions and conclusions to which Mr. Kumbalek is expected to testify. Thus, the question before the Court is what consequence should flow from Plaintiffs' failure to meet their disclosure obligations.

Because the circumstances surrounding Mr. Kumbalek's disclosure are nearly identical to Dr. Noordermeer's disclosure, the Court will follow the same approach. The motion to strike Mr. Kumbalek will be denied, but without prejudice to Defendants' ability to file a renewed motion after they receive more information from Plaintiffs—whether in the form of a report or an amended summary [3] —concerning the substance of Mr. Kumbalek's opinions (or, in any event, after the March 1, 2019 discovery cutoff).

3 Defendants argue for the first time in their reply brief that (1) because Mr. Kumbalek is a contractor, not an employee, of EFG America, LLC, he was required to submit a written report, and (2) Mr. Kumbalek is not qualified to testify as an expert in rubber devulcanization. (Doc. 109 at 5-6.) Because Defendants did not raise these arguments in their original motion, and Plaintiffs have not been given the opportunity to respond, the Court declines to address them now. *Zamani v. Carnes*, 491 F.3d 990, 997 (9th Cir. 2007) ("The district court need not consider arguments raised for the first time in a reply brief."). Defendants may, however, raise these issues in any renewed motion to strike.

II. The Dispute Concerning Defendants' Discovery Responses

On December 28, 2018, the parties notified the Court of two outstanding discovery disputes. The first (Doc. 113) arises from Defendants' response to the amended discovery requests that Plaintiffs propounded after the issuance of the Court's November 20, 2018 order. In these discovery requests, Plaintiffs asked a series of questions about whether Defendants were utilizing a particular devulcanization process. (*See, e.g.,* Doc. 113-1 at 1:14-17 ["Please describe in detail, including all processes, formulae and chemicals used, your development or use of technology or methods for the devulcanization of rubber or similar polymers through a chemical process using high intensity mixing at a temperature of less than 150 degrees Celsius."].) In response to each such question, Defendants provided a variant of the answer "no such process exists." (Doc. 113-1 at 2:20.)

In their summary of the discovery dispute, Plaintiffs contend these answers are unsatisfactory, that they "are entitled to review the rubber devulcanization technology Defendants are using to determine whether or not it compares to Plaintiffs' trade secrets," and that a protective order can be fashioned to address any risk of misuse. (Doc. 113 at 2.) Meanwhile, Defendants contend they fairly and fully answered the particular questions that were posed to them and that what Plaintiffs are actually doing is "mak[ing] a general demand (divorced from any outstanding discovery request)." (Doc 113 at 3.) They further contend that Plaintiffs cannot assert a trade-secret claim because they revealed their manufacturing processes in a YouTube video available to the public. (*Id.*)

The Court held a telephonic hearing with the parties on January 4, 2019 to address these arguments, orally ruled during the hearing that it would deny Plaintiffs' request to compel further production, and now wishes to supplement that ruling as follows. Defendants repeatedly avowed, during the telephonic hearing, that even though their written discovery responses included various preliminary objections (including overbreadth and that Plaintiffs failed to maintain the confidentiality of their own devulcanization process), their ultimate "no such process exists" answers were unqualified and not subject to those objections. Given this representation, there is no basis to compel Defendants to provide any further response. Plaintiffs are effectively asking

the Court to compel Defendants to answer a question (*i.e.,* "what is your devulcanization process?") that is different from, and broader than, the question actually posed in the written discovery requests.

III. The Dispute Concerning Dr. Li

***7** The parties' other discovery dispute (Doc. 114) concerns whether Plaintiffs should be allowed to depose Dr. Li. Plaintiffs contend that, because Dr. Li qualifies as a managing agent of Defendants, they are entitled to depose him. (Doc. 114 at 2.) Defendants contend that Dr. Li doesn't qualify as a managing agent because his "current role" is that of a consultant rather than an employee, that he isn't the person most knowledgeable concerning Plaintiffs' technology, and that he therefore should be permitted to submit an affidavit in lieu of being deposed. (Doc. 114 at 3.)

The Court held a telephonic hearing with the parties on January 4, 2019 to address these arguments and now rules as follows. Whether Defendants may be compelled to produce Dr. Li for a deposition turns on whether Dr. Li qualifies as an officer, director, or managing agent of Defendants. This is because Dr. Li is not present in the United States and is not a citizen or national of the United States. A party seeking to depose such an individual ordinarily must follow the procedures set forth in the Hague Convention, which Plaintiffs haven't attempted to do here. *See generally Verinata Health, Inc. v. Sequenom, Inc.*, 2014 WL 1878822, *2 (N.D. Cal. 2014) ("Plaintiffs do not contend that the individuals are officers, directors, or managing agents of Sequenom.... Accordingly, the Court declines to order Sequenom to produce these individuals for deposition in the United States. If plaintiffs wish to depose these third party foreign witnesses, then they must do so in accordance with the procedures for obtaining a third party deposition under the Federal Rules of Civil Procedure and the Hague Convention."). *See also* 28 U.S.C. § 1783(a) (a federal court may only issue a subpoena to an individual in a foreign country if, *inter alia*, the person is "a national or resident of the United States").

The rules are different, however, when the non-resident foreign national is an officer, director, or managing agent of one of the parties. In that circumstance, the opposing party may seek a deposition of the individual via notice. *See, e.g., Sugarhill Records Ltd. v. Motown Record Corp.*, 105 F.R.D. 166, 169 (S.D.N.Y. 1985) (citation omitted) ("If the person to be deposed is a corporation, the party seeking discovery has the choice either to designate an appropriate individual or to describe the subject matter of the questions to be asked and allow the corporate deponent to designate its own spokesperson familiar with that subject matter. If the party seeking discovery chooses the former option, then the person designated must be 'an officer, director, or managing agent' of the corporate deponent."); *Calderon v. Experian Info. Solutions, Inc.*, 290 F.R.D. 508, 517 (D. Idaho 2013) ("Foreign nationals who qualify as managing agents of a party may be subject to deposition pursuant to notice. However, if the witness sought to be deposed in not an officer, director, or managing agent of a corporate opponent, 'the procedures of the Hague Convention or other applicable treaty must be utilized.' ").

Although the Court is sympathetic to Plaintiffs' desire to depose Dr. Li, it doesn't appear that he qualifies as a managing agent. The general rule is that "only current employees can qualify as managing agents for purposes of a Rule 30 deposition notice. A deposition notice generally does not compel the attendance of an entity's ... former employees." Steven S. Gensler, 1 Federal Rules of Civil Procedure, Rules and Commentary, Rule 30, Practice Commentary, at 864. "The determination of a deponent's status as a 'managing agent' is determined as of the time of the deposition, not as of the time when the activities disputed in the litigation occurred." *Rundquist v. Vapiano SE*, 277 F.R.D. 205, 208 (D.D.C. 2011) (citation and internal quotation marks omitted). "However, courts have made exceptions to this general rule ... when a corporation terminates an officer in light of pending litigation, plans to rehire the individual in another position, or an individual continues to act as a managing agent despite no longer being an employee." *Id.*

***8** Here, the only relevant pieces of evidence before the Court are (1) Dr. Li's employment contract, which shows that he was initially hired as an employee of Eversource Group (one of the Defendants) in November 2016 (*see* Doc. 29 [under seal]), and (2) an affidavit showing that Dr. Li's contract was modified in March 2017, upon the hiring of his daughter, and he has thereafter served as a consultant. (Doc. 114-1 at 1-2.) Plaintiffs have not suggested this contractual modification was part of a bad-faith attempt to shield Dr. Li from being deposed and the timing of the modification is inconsistent with such a suggestion—it occurred before Plaintiffs even filed suit. The affidavit further states that Dr. Li's daughter—who is subject to deposition—is currently responsible for conducting all experiments, performing all research, and managing the lab. Given this record, the Court cannot conclude Dr. Li is presently one of Defendants' managing agents.

Accordingly,

IT IS ORDERED that the motion to strike Plaintiffs' expert disclosures (Doc. 92) is **DENIED**, but without prejudice as to Dr. Noordermeer and Mr. Kumbalek.

IT IS FURTHER ORDERED that Plaintiffs' request to compel Defendants to provide additional discovery material (Doc. 113) is **DENIED**.

IT IS FURTHER ORDERED that Plaintiffs' request to compel Defendants to produce Dr. Li for a deposition (Doc. 114) is **DENIED**.

All Citations

Not Reported in Fed. Supp., 2019 WL 163252

End of Document

Exhibit E

2021 WL 1593238
Only the Westlaw citation is currently available.
United States District Court, C.D. California.

Terry FABRICANT
v.
ELAVON, INC. and 7231911 Canada Inc.

Case No. 2:20-cv-02960-SVW-MAA
|
Signed 03/08/2021

Attorneys and Law Firms

Paul M. Cruz, Deputy Clerk, Attorneys Present for Plaintiffs: N/A

N/A, Court Reporter / Recorder, Attorneys Present for Defendants: N/A

Proceedings: ORDER DENYING MOTION TO DISMISS [52] AND ORDERING PLAINTIFF TO MOVE FOR CLASS CERTIFICATION.

STEPHEN V. WILSON, U.S. DISTRICT JUDGE

I. Introduction

***1** Plaintiff Terry Fabricant ("Plaintiff") filed an amended complaint in this lawsuit on September 8, 2020 against Defendant 7231911 Canada Inc. d/b/a Digitech Payments ("Defendant"). Defendant filed a motion to dismiss for *forum non conveniens* on November 16, 2020.

For the below reasons, Defendant's motion to dismiss is DENIED.

II. Factual and Procedural Background

Plaintiff is an individual residing in California. Dkt. 48 (Plaintiff's Amended Complaint, hereinafter "Amended Compl.") at ¶ 2. Plaintiff alleges that he received an automated telemarketing call from Digitech on February 12, 2020. *Id.* at ¶ 18. Plaintiff asserts that the system that sent the call to Plaintiff qualifies as an automatic telephone dialing system ("ATDS") under the Telephone Consumer Protection Act of 1991 ("TCPA"). *Id.* at ¶ 32. The TCPA prohibits the use of an ATDS to make calls to any cellphone number unless the call is made for emergency purposes or there is prior express consent of the recipient. 47 U.S.C. § 227(b)(1). Plaintiff alleges that he did not consent to receive calls from Digitech and that the call he received on February 12 was not made for emergency purposes. Amended Compl. at ¶¶ 15, 35.

On March 30, 2020, Plaintiff filed the instant lawsuit alleging violations of the TCPA. Dkt. 1 (Plaintiff's Complaint) at ¶¶ 67–72. Plaintiff's complaint was filed on behalf of himself and a putative nationwide class of all persons whose cellphone numbers were dialed by Defendants or a third-party acting on their behalf in the four years prior to the filing of the complaint. *Id.* at ¶ 56. On September 9, 2020, Plaintiff filed the first amended complaint against Defendant. Amended Compl.

On November 16, 2020, Defendant filed a motion to dismiss for forum non conveniens. Dkt. 52-1 (Digitech's Motion to Dismiss for Forum Non Conveniens, hereinafter "Digitech MTD").

III. Defendants' Motion to Dismiss for *Forum Non Conveniens*

1) Legal Standard

The doctrine of forum non conveniens grants a district court "discretion to exercise jurisdiction in a case where litigation in a foreign forum would be more convenient for parties." *Lueck v. Sundstrand Corp.*, 236 F.3d 1137, 1142 (9th Cir. 2001) (citing *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 504 (1947)). Dismissal pursuant to the doctrine of forum non conveniens, however, is a "drastic exercise of the court's inherent power" because, unlike a transfer of venue, it leads to the dismissal of a plaintiff's case. *Carijano v. Occidental Petroleum Corp.*, 643 F.3d 1216, 1224 (9th Cir. 2011). Thus, it is considered "an exceptional tool to be employed sparingly," and "the mere fact that a case involves conduct or plaintiffs from overseas is not enough for dismissal." *Id.* (internal quotations omitted).

To prevail on a motion to dismiss based upon forum non conveniens, a defendant bears the burden of demonstrating (1) the adequacy of the alternative forum, and (2) that the balance of private and public interest factors favors dismissal. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254 n. 22, 257 (1981); *Lueck v. Sundstrand Corp.*, 236 F.3d at 1142. There is a strong presumption in favor of the plaintiff's chosen forum, which can be overcome if a defendant can establish that the chosen forum results in "oppression and vexation of a defendant as to be out of proportion to the plaintiff's convenience." *Cheng v.*

Boeing Co., 708 F.2d 1406, 1410 (9th Cir. 1983). And when the plaintiff is a United States citizen or resident, the plaintiff's choice of forum should be accorded significant deference and the defendant must satisfy a heavy burden of proof. *Id.* at 256–57; *Lueck*, 236 F.3d at 1143. "The forum non conveniens determination is committed to the sound discretion of the trial court." *Piper Aircraft Co.*, 454 U.S. at 257.

2) Adequacy of Alternative Forum

***2** The threshold requirement of dismissal of an action on ground of forum non conveniens is the existence of an adequate alternative forum. *Lockman Found. v. Evangelical Alliance Mission*, 930 F.2d 764, 768 (9th Cir. 1991). An alternative forum is deemed adequate if: (1) the defendant is amenable to process there, and (2) the other jurisdiction offers a satisfactory remedy. *Carijano*, 643 F.3d at 1225 (citing *Piper Aircraft Co.*, 454 U.S. at 254 n. 22).

Here, Defendant satisfies the first requirement. Defendant has offered to accept service of process in Canada, consent to personal jurisdiction there, and waive any statute of limitations defenses for sixty days after obtaining dismissal of the case from this Court. *See* Digitech MTD at 9. This "voluntary submission to service of process" suffices to meet the first requirement for establishing an adequate alternative forum. *Carjiano*, 643 F.3d at 1225 (citing *Tuazon v. R.J. Reynolds Tobacco Co.*, 433 F.3d 1163, 1178 (9th Cir. 2006)).

Defendant, however, fails to satisfy the second requirement. Generally, an alternative forum is considered adequate when the forum provides "some remedy" for the wrong at issue. *Lueck*, 236 F.3d at 1143. Typically, this test is considered "easy to pass" as a forum will be deemed inadequate only where the remedy provided is so "clearly inadequate or unsatisfactory, that it is no remedy at all." *Tuazon*, 433 F.3d at 1178 (quoting *Piper Aircraft Co.*, 454 U.S. at 254).

To show the existence of an adequate alternative forum, the defendant "must provide enough information to enable the District Court" to evaluate the alternative forum. *Piper Aircraft Co.*, 454 U.S. at 258. The amount of information that the defendant must provide, in supporting affidavits or other evidence, depends on the facts of the individual case. *Lacey v. Cessna Aircraft Co.*, 862 F.2d 38, 44 (3d Cir. 1988); *Trivelloni-Lorenzi v. Pan American World Airways, Inc.*, 821 F.2d 1147, 1165 n.28 (5th Cir. 1987). While a moving defendant need not submit overly detailed affidavits to carry its burden, *see Camejo v. Ocean Drilling & Exploration*, 838 F.2d 1374, 1379-80 (5th Cir. 1988)), a defendant must provide "more detailed information" if a plaintiff expresses concerns regarding the adequacy of a foreign forum or provides evidence that controverts defendant's evidence, *see id* at 1379-80 n. 17; *EIG Energy Fund XIV, L.P. v. Petróleo Brasileiro S.A.*, 246 F. Supp. 3d 52, 75 (D.D.C. 2017).

Here, Plaintiff submitted the expert declaration of Susan Brown, a practitioner in Ontario. Brown explains that, like the United States, Canada enacted a law—section 41 of the *Telecommunications Act*, S.C. 1993, c. 38—to regulate telemarketing. However, unlike the TCPA, Canada's law "does not allow for private right of action for recipients of unsolicited telemarketing calls" and "does not apply to calls made to telephone numbers outside of Canada." *See* Brown Decl. at ¶ 5.

Brown also argues that Canadian tort law would not provide a remedy for Plaintiff. In particular, Brown asserts that the tort of "intrusion upon seclusion" does not apply to telemarketing calls. *See id.* at ¶ 6. To support her argument, she explains that the *Jones* case—a Canadian case that Defendant cites to—stands for the proposition that while the tort of "intrusion upon seclusion" exists in Ontario, the cause of action is expressly limited to " 'only intrusions into matters such as one's financial or health records, sexual practices and orientation, employment, diary or private correspondence that, viewed objectively on the reasonable person standard can be described as highly offensive' and likely to induce anguish." *See id.* at ¶ 6. (quoting *Jones* at ¶ 72). Brown also explains that another case Defendant relies on, *Provincial Partitions Inc. v. Ashcor Inplant Structures Ltd.*1993 O.J. No. 4685, 41 A.C.W.S. (3d) 823, 50 C.P.R. (3d) 497, Ontario Court (General Division)—which held that a defendant "committed the tort of nuisance by invasion of privacy through abuse of telephone communications," *Jones* at ¶ 78—is inapposite. Specifically, Brown argues that *Provincial Partitions* "concerned a campaign of hundreds of 'harassing' and 'threatening' phone calls, including death threats to family members, between individuals involved in a protracted business dispute," and no Ontario case has ever expanded the "tort of intrusion upon seclusion—or any other tort—to the practice of telemarketing." Brown Decl. at ¶ 6.

***3** In light of Brown's declaration, it is Defendant's burden to offer more detailed information regarding the existence of an adequate remedy in Canada. Defendant advances three arguments in its attempt to do so, but none are persuasive.

First, Defendant moves to exclude Brown's testimony on the ground that the Brown Declaration inappropriately applies foreign law to the facts of the case. Digitech MTD at 2. Defendant relies on two district court cases, *EduMoz, LLC v. Republic of Mozambique*, 968 F. Supp. 2d 1041, 1052 (C.D. Cal. 2013) and *Krish v. Balasubramaniam*, No. 1:06–CV–01030 OWW, 2006 WL 2884794, *3 (E.D.Cal. Oct. 10, 2006), which held that "evidence from foreign law experts submitted pursuant to [Fed.R.Civ. P.] 44.1 is admissible only to aid a court's understanding of foreign law" and thus "foreign law experts may not opine to the ultimate application of the foreign law to the facts of the case."

These rulings, however, are not aligned with the relaxed standard of Rule 44.1, which governs how U.S. courts should treat issues raising foreign law. Rule 44.1 gives courts considerable discretion in deciding whether or not to consider a party's submission regarding relevant foreign law. *See, e.g., Thomson Consumer Elecs., Inc. v. Innovatron*, S.A.,3 F.Supp.2d 49, 52 (D.D.C.1998) ("When answering a question of foreign law, a federal court is authorized to look to a host of sources, including evidence in the form of expert testimony"). And under Rule 44.1, "[t]he court, in determining foreign law, 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; *see also* Fed.R.Civ.P. 44.1 Advisory Committee Note (noting that the rule was designed to avoid the fact that the ordinary rules of evidence "have in the past prevented examination of material which could have provided a proper basis for the determination. The new rule permits consideration by the court of any relevant material, including testimony, without regard to its admissibility under Rule 43 [and thus, the Federal Rules of Evidence]."); *Vincent Sicre de Fontbrune v. Wofsy*, 838 F.3d 992, 997 (9th Cir. 2016) ("Rule 44.1 thus unshackles courts and litigants from the evidentiary and procedural requirements that apply to factual determinations.").

Thus, a court is free to consider a foreign law expert's opinion even on ultimate legal conclusions. See *Winn ex Rel. Scottish re Group v. Schafer*, 499 F. Supp. 2d 390, 11396 n.28 (S.D.N.Y. 2007). It is even authorized to "engage in its own research and consider any relevant material thus found." Fed.R.Civ.P. 44.1 Advisory Committee Note. Finally, even if Rule 44.1 binds courts to the Federal Rules of Evidence, Rule 704 states that "an opinion is not objectionable just because it embraces an ultimate issue." F.R.E. 704. Accordingly, Defendant's objection to the Brown Declaration lacks merit.

Second, Defendant contends that even if the Canadian tort of intrusion upon seclusion may not apply to Plaintiff's claim, there are other more traditional common law causes of action in Canada, such as invasion of privacy, nuisance, or trespass, that may provide Plaintiff avenue for redress. Digitech Reply at 3—5. Thus, Defendant argues that because Canada seemingly provides some potential avenue of redress, Canada is an adequate forum. *Id.*

***4** However, Defendant fails to address the concerns raised by Brown's declaration that each of Defendant's proposed causes of action would not apply to telemarketing calls. And by failing to address Brown's testimony, Defendant fails to satisfy the "heavy burden" of demonstrating that Canada is an adequate forum to resolve Plaintiff's claim. *See EIG Energy Fund XIV, L.P.*, 246 F. Supp. 3d at 75 (finding that Defendant's declaration that "draws, at best, an ambiguous distinction [of law]" does not satisfy the "heavy burden" of demonstrating adequacy of forum); *see also Ridgway v. Phillips*, No. 18-cv-07822-HSG, at *7 (N.D. Cal. Apr. 18, 2019) (finding that Defendant's cursory conclusion that the United Kingdom can address the dispute alleged by the Plaintiff without reference to any legal authority is insufficient to warrant dismissal).

Finally, Defendant claims that Plaintiff has not shown that a Canadian court would decline to apply the TCPA to Plaintiff's case. Digitech MTD at 3 (citing *Cinematix, LLC v. Einthusan*, No. 19-CV-02749-EMC, 2020 WL 227180, at *2 (N.D. Cal. Jan. 15, 2020) (granting motion to dismiss pursuant to forum non conveniens in part because plaintiffs did not "argue[ ] that a court in Canada cannot apply United States copyright law.")).

That contention, however, improperly inverts the parties' respective burdens. *See Cheng*, 708 F.2d at 1411 ("the burden of proving an alternative forum is the defendant's and that the remedy must be clear before the case will be dismissed."). In other words, it is Defendant's burden to show that a Canadian court *would* apply the TCPA, not Plaintiff's burden to show that a Canadian court would not.

For the foregoing reasons, Defendant failed to provide sufficient evidence to demonstrate that Canada is an adequate alternative forum that would be able to address Plaintiff's claim. [1]

1 Plaintiff also argues that Canada is not a viable alternative forum because "there would be no

putative class if the case was transferred to Canada." Opp. at 6. Courts, however, have routinely rejected arguments that the unavailability of procedural mechanisms such as class action render a foreign forum inadequate for purposes of forum non conveniens analysis. *See, e.g., Sarei v. Rio Tinto PLC*, 221 F. Supp. 2d 1116, 1170 (C.D. Cal. 2002) ("[T]he court finds that the unavailability of class actions ... do[es] not render Papua New Guinea an inadequate forum for forum non conveniens purposes."). However, Plaintiff's inability to form a class in a foreign forum may be relevant to the balancing of the public and private interest factors. *See In re Banco Santander Secs.-Optimal Litig.*, 732 F. Supp. 2d 1305, 1334 (S.D. Fla. 2010) ("The availability of a class action procedure goes to the issue of convenience, not adequacy").

Because the Court finds that Defendant failed to meet its burden on the first prong, the Court need not address the balance of public and private factors here.

IV. Conclusion

For the foregoing reasons, Digitech's motion to dismiss is DENIED. Plaintiff is ORDERED to move for class certification within 75 days of the date of this order.

IT IS SO ORDERED.

All Citations

Slip Copy, 2021 WL 1593238

End of Document

Exhibit F

2016 WL 5673144
Only the Westlaw citation is currently available.
United States District Court, N.D. California.

Hakim GULAID, Plaintiff,
v.
CH2M HILL, INC., et al., Defendants.

Case No. 15-cv-04824-JST
|
Signed 10/03/2016

Attorneys and Law Firms

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ORDER GRANTING MOTION TO DISMISS; DENYING REQUEST TO STRIKE

Re: ECF No. 55, 64-1

JON S. TIGAR, United States District Judge

***1** Before the Court are Defendant CH2M Hill, Inc.'s Motion to Dismiss and Request to Strike. ECF Nos. 55, 64-1. For the reasons stated below, the motion to dismiss is granted and the request to strike is denied.

I. BACKGROUND

For purposes of deciding this motion and request, the Court accepts as true the following allegations from Plaintiff's First Amended Complaint, ECF No. 53 ("FAC"). Moyo v. Gomez, 40 F.3d 982, 984 (9th Cir. 1994).

Plaintiff Hakim Gulaid, appearing *pro se*, is a resident of California who alleges that he was constructively discharged from his employment with Defendant CH2M Hill, Inc. ("CH2M") on March 4, 2014 and that he was forced to resign due to discriminatory and harassing conduct. FAC at 2-3. [1] Gulaid was born in Somaliland, is Muslim, and speaks Somali as his native language, although he also now speaks English fluently. Id. at 3. He was hired by CH2M as a Project Quality Control Manager on December 30, 2013 for a construction project on the U.S. Navy base in Djibouti, Djibouti. Id. at 4. While Plaintiff was originally told he would report to Defendant Michael Weinmuller, which was in conflict with project contract requirements, CH2M subsequently changed his "reporting relationship" to Vice President David Bird, which was in harmony with those requirements. Id. However, Weinmuller "insisted that he remain Plaintiff's supervisor and prevailed," and became "Plaintiff's supervisor on a daily basis in all practical respects." Id. at 5. "Plaintiff did not enjoy a daily supervisorial relationship with Mr. Bird, but Mr. Bird would direct Plaintiff and Weinmuller from his office in California." [2] Id.

1 The Court will cite to the FAC by page number because Plaintiff assigns paragraph numbers 41-52 to more than one paragraph each. See ECF No. 53 at 6-10.

2 Defendant contends that these new allegations that Mr. Bird directed Plaintiff and Weinmuller from his office in California contradicts Plaintiff's initial complaint and should be stricken as "sham pleadings." ECF No. 55 at 12. In PAE Gov't Servs., Inc. v. MPRI, Inc., the Ninth Circuit held that:

> "[T]here is nothing in the Federal Rules of Civil Procedure to prevent a party from filing successive pleadings that make inconsistent or even contradictory allegations. Unless there is a showing that the party acted in bad faith—a showing that can only be made after the party is given an opportunity to respond under the procedures of Rule 11—inconsistent allegations are simply not a basis for striking the pleading."

514 F.3d 856, 860 (9th Cir. 2007). Defendant does not attempt to show bad faith.

Gulaid was excited about his job but it was cut short "due to unlawful discrimination, racial harassment, and retaliation

that he experienced during his employment." Id. He was "treated...so poorly that he was forced to resign" and return to the United States. Id. Gulaid alleges that "Defendants clearly...breached the terms of the Offer Letter and company policies with respect to Mr. Gulaid." Id.

Plaintiff had to leave Oakland, California and move himself and his family to Djibouti. Id. CH2M did not provide assistance that he needed on a timely basis. Id. Gulaid was excluded from important meetings with management and the client, and was not provided material information related to his job or with a properly working computer. Id. He was never formally introduced to his supervisor David Bird. Id. He was ignored at meetings by his superiors, which "created a climate whereby his co-workers would do the same." Id. He was verbally abused in front of the client, required to report to an individual in violation of the project contract (presumably, Mr. Weinmuller), and "retaliated against...for complaining" about his treatment. Id. at 6. Gulaid "resigned his position given that he and no other reasonable individual would be able to tolerate the hostile working environment created by Defendants." Id.

***2** Gulaid filed a complaint with the California Department of Fair Employment and Housing ("DFEH") on February 20, 2015, which provided him with a Right to Sue Notice on February 26, 2015. Id. He filed his action in this Court on October 20, 2015. ECF No. 1. Defendant CH2M filed a motion to dismiss on December 17, 2015, ECF No. 10, which was granted without prejudice on March 10, 2016, ECF No. 48.

Gulaid filed his FAC in this Court on April 1, 2016 and brings the following claims: (1) violation of 42 U.S.C. §§ 1981, 1983; (2) retaliation (presumably, in violation of 42 U.S.C. § 1981); (3) violation of the California Fair Employment and Housing Act ("FEHA"); (4) retaliation (presumably, in violation of the FEHA); (5) negligent hiring, retention, and supervision; (6) breach of contract; (7) fraud and misrepresentation; and (8) wrongful termination. FAC at 6-11.

On April 14, 2016, Defendant CH2M filed a motion to dismiss the FAC. ECF No. 55. Defendant also filed a request for judicial notice, ECF No. 56, of the complaint Plaintiff filed with the DFEH on February 20, 2015, ECF No. 56-1, Ex. A. On April 28, 2016, Plaintiff filed an opposition to the motion to dismiss, ECF No. 61, and submitted a declaration in support, ECF No. 62, along with three exhibits: his first offer letter from CH2M dated December 10, 2013, id., Decl. Ex. A; his offer letter from CH2M dated December 18, 2013, id., Decl. Ex. B; and a document excerpt that describes the reporting structure and responsibilities for a QC Manager position, id., Decl. Ex. C. On May 5, 2016, Defendant CH2M filed a reply to the opposition. ECF No. 64. As an attachment to the reply, Defendant also filed an objection to, and request for this Court to strike, Plaintiff's Declaration, including Declaration Exhibits A-C. ECF No. 64-1.

II. JURISDICTION

This Court has subject matter jurisdiction over Plaintiff's claims under 42 U.S.C. §§ 1981, 1983, and jurisdiction over Plaintiff's remaining claims pursuant to 28 U.S.C. § 1367.

III. REQUEST TO STRIKE

A. Legal Standard

"When ruling on a Rule 12(b)(6) motion to dismiss, if a district court considers evidence outside the pleadings, it must normally convert the 12(b)(6) motion into a Rule 56 motion for summary judgment, and it must give the nonmoving party an opportunity to respond." United States v. Ritchie, 342 F.3d 903, 907 (9th Cir. 2003). "There are, however, two exceptions to the requirement that consideration of extrinsic evidence converts a 12(b)(6) motion to a summary judgment motion." Lee v. City of Los Angeles, 250 F.3d 668, 688 (9th Cir. 2001), overruled on other grounds by Galbraith v. County of Santa Clara, 307 F.3d 1119, 1125–26 (9th Cir. 2002). First, a court evaluating a Rule 12(b)(6) motion "may take judicial notice of matters of public record." Id. at 689 (internal quotation marks and citation omitted); see Fed. R. Evid. 201. Second, a court "may consider extrinsic evidence not attached to the complaint if the document's authenticity is not contested and the plaintiff's complaint necessarily relies on it." Johnson v. Fed. Home Loan Mortgage Corp., 793 F.3d 1005, 1007 (9th Cir. 2015). "[W]here a document is incorporated by reference, it becomes part of the complaint and the court accordingly assumes the truth of its contents for the purposes of ruling on [a] motion to dismiss." In re Ubiquiti Networks, Inc. Sec. Litig., 33 F. Supp. 3d 1107, 1118 n.2 (N.D. Cal. 2014).

***3** "[A] motion to strike materials that are not part of the pleadings may be regarded as an invitation by the movant to consider whether [the materials] may properly be relied upon." Delano Farms Co. v. California Table Grape Comm'n, 623 F. Supp. 2d 1144, 1182 (E.D. Cal. 2009) (internal quotation marks and citation omitted), aff'd, 655

F.3d 1337 (Fed. Cir. 2011). "Under the express language of [Rule 12(f)], only pleadings are subject to motions to strike." Sidney–Vinstein v. A.H. Robins Co., 697 F.2d 880, 885 (9th Cir. 1983). "[A] court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. The court may act: (1) on its own; or (2) on motion made by a party." Fed. R. Civ. P. 12(f).

"Motions to strike are generally not granted unless it is clear that the matter sought to be stricken could have no possible bearing on the subject matter of the litigation." Rosales v. Citibank, Fed. Sav. Bank, 133 F. Supp. 2d 1177, 1180 (N.D. Cal. 2001); see also BJC Health Sys. v. Columbia Cas. Co., 478 F.3d 908, 917 (8th Cir. 2007) ("Striking a party's pleading...is an extreme and disfavored measure"); Waste Mgmt. Holdings, Inc. v. Gilmore, 252 F.3d 316, 347 (4th Cir. 2001) ("Rule 12(f) motions are generally viewed with disfavor because striking a portion of a pleading is a drastic remedy") (internal quotation marks and citation omitted). "With a motion to strike, just as with a motion to dismiss, the court should view the pleading in the light most favorable to the nonmoving party." Platte Anchor Bolt, Inc. v. IHI, Inc., 352 F. Supp. 2d 1048, 1057 (N.D. Cal. 2004).

B. Discussion

Defendant requests that the Court strike the entirety of Plaintiff's Declaration, including Declaration Exhibits A-C. ECF No. 64-1. Defendant argues that the declaration is "wholly improper" and that its assertions are "inadmissible on an evidentiary basis," including for reasons of relevance, improper legal conclusions, lack of foundation, hearsay, and lack of authentication. See generally id. In support of its Request to Strike, Defendant cites to Fin. Acquisition Partners LP v. Blackwell, 440 F.3d 278, 285-86 (5th Cir. 2006), which held that a district court did not abuse its discretion by granting in part a motion to strike an expert's affidavit attached to a complaint.

As a preliminary matter, Fin. Acquisition does not help the Court's analysis of the request to strike. Not only is the opinion from another circuit, it is factually inapposite. Fin. Acquisition concerned the appeal of a district court's partial granting of a motion to strike an expert affidavit attached to a complaint, and the question was whether the district court abused its discretion by issuing that order. In other words, the question was not whether a district court *could* consider an affidavit attached to a complaint, but whether it was *required* to do so. Fin. Acquisition, 440 F.3d at 285. That is not the question before this court. Moreover, the district court did not strike the declaration in its entirety, only the portions containing expert opinion. The district court actually "did consider the affidavit's 'nonconclusory, factual portions.' " Id. (quoting the district court). Thus, to the extent the case is relevant at all, it helps the Plaintiff.

Defendant does not argue that the materials are "redundant, immaterial, impertinent, or scandalous" or that they "have no possible bearing on the subject matter of the litigation." Rosales, 133 F. Supp. 2d at 1180. In addition, Defendant concedes that "Mr. Gulaid's declaration is not a 'pleading' within the meaning of Fed. R. Civ. P. 7(a)," [3] ECF No. 62 at 2, rendering it an improper subject of a motion to strike.

3 While Plaintiff's Declaration is not a "pleading" under Rule 7(a), Plaintiff's FAC is deemed to include the declaration exhibits to the extent they are incorporated into the FAC by reference. See United States v. Ritchie, 342 F.3d 903, 908 (9th Cir. 2003) (holding that "[e]ven if a document is not attached to a complaint, it may be incorporated by reference into a complaint if the plaintiff refers extensively to the document or the document forms the basis of the plaintiff's claim").

***4** The Court therefore denies Defendant's Request to Strike. Instead, the Court interprets the request as an invitation to consider the propriety of relying on the challenged documents in ruling on the motion to dismiss.

In its Reply, Defendant argues that the Court should not consider Plaintiff's Declaration in ruling on the motion to dismiss because "the assertions in Mr. Gulaid's declaration are neither referred to in his First Amended Complaint, nor are they judicially noticeable." ECF No. 64-1 at 1. The Court agrees that the declaration's assertions do not qualify for an exception to the general rule that the scope of a Rule 12(b)(6) analysis is limited to the complaint. Therefore, the Court will not consider the declaration's allegations in ruling on the motion to dismiss.

The exhibits attached to Plaintiff's Declaration, however, may properly be considered as incorporated by reference. Declaration Exhibits A (the first offer letter), B (the second offer letter), and C (the document including the QC Manager job description) are all referenced by the FAC. See FAC at 4 ("Defendants sent an Offer Letter to Plaintiff"); id. ("Plaintiff was initially told that he would report to

Michael Weinmuller, Project Manager, in conflict with the contract requirements. However, the Company subsequently changed Plaintiff's reporting relationship to Dave Bird, Vice President...This Change was in harmony with project contract requirements."); id. at 5 ("Defendants...breached the terms of the Offer Letter"); id. at 6 ("Defendants required Plaintiff to report to an individual in violation of the project contract"); id. at 10 ("Defendants breached their contract"). Additionally, Plaintiff's FAC necessarily relies on all three Declaration Exhibits because his breach of contract claim depends on the terms of Plaintiff's offer letters and on the terms of the project contract documents. See id.

While Defendant raises evidentiary objections to the admissibility of the Declaration Exhibits (arguing "relevance," "improper legal conclusion," and "inadmissible hearsay"), ECF No. 64-1 at ¶¶ 14-16, Defendant does not appear to dispute the authenticity of these documents, see generally id. Because Plaintiff's FAC necessarily relies on the declaration exhibits and because no party appears to dispute their authenticity, the Court may consider these documents in ruling on the motion to dismiss. See Johnson, 793 F.3d at 1007.

IV. MOTION TO DISMISS

A. Legal Standard

A complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief," in order to "give the defendant fair notice of what the...claim is and the ground upon which it rests." Fed. R. Civ. P. 8(a)(2); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (internal quotation marks and citation omitted). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. "Dismissal under Rule 12(b)(6) is appropriate only where the complaint lacks a cognizable legal theory or sufficient facts to support a cognizable legal theory." Mendiondo v. Centinela Hosp. Med. Ctr., 521 F.3d 1097, 1104 (9th Cir. 2008).

***5** "A document filed *pro se* is to be liberally construed and a *pro se* complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers." Erickson v. Pardus, 551 U.S. 89, 94 (2007) (internal quotation marks and citations omitted).

The Court must "accept all factual allegations in the complaint as true and construe the pleadings in the light most favorable to the nonmoving party." Knievel v. ESPN, 393 F.3d 1068, 1072 (9th Cir. 2005). "However, [a court] need not accept as true allegations contradicting documents that are referenced in the complaint or that are properly subject to judicial notice." Lazy Y Ranch Ltd. v. Behrens, 546 F.3d 580, 588 (9th Cir. 2008).

B. Discussion

Defendant argues that Plaintiff's claims under 42 U.S.C. §§ 1981, 1983, his FEHA claims, and his additional state law claims should all be dismissed. ECF No. 55 at 5. The Court discusses these claims in turn below.

1. Violation of 42 U.S.C. §§ 1981, 1983

a. 42 U.S.C. § 1981

Plaintiff alleges in his first count that Defendants violated Section 1981 by discriminating against him on the basis of race, religion, and national origin. ECF No. 53 at 6. He states that Defendants did so by "creating, fostering, and accepting, ratifying and/or otherwise failing to prevent or to remedy a hostile work environment that included, among other things, severe and pervasive harassment of Plaintiff because of [his] protected status." Id.

While Plaintiff's second count does not allege violation of any specific statute or public policy, it appears to attempt to state a claim for retaliation in violation of Section 1981. See id. at 7. He alleges that "Defendants' [*sic*] have retaliated against Plaintiff" by "failing to provide him with adequate resources," by "excluding him from meetings and other material channels for obtaining information," by "making derogatory comments and communications, both written and oral," by "failing to investigate [his] complaints of discrimination and harassment, and by not timely providing resources for relocation to and from the project from his home in the United States." Id. at 7.

Defendant argues that Plaintiff's first and second counts must fail because Section 1981 only protects "persons within the jurisdiction of the United States," 42 U.S.C. § 1981(a), and therefore "does not apply to claims of discrimination by employees working overseas," ECF No. 55 at 9. 42

U.S.C. Section 1981(a) provides that "[a]ll persons *within the jurisdiction of the United States* shall have the same right in every State and Territory...and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens" (emphasis added). "Acts of Congress normally do not have extraterritorial application unless such an intent is clearly manifested." Sale v. Haitian Centers Council, Inc., 509 U.S. 155, 188 (1993); see also ARC Ecology v. U.S. Dep't of Air Force, 411 F.3d 1092, 1097 (9th Cir. 2005) (holding that "courts must resolve restrictively any doubts concerning the extraterritorial application of a statute").

Defendant cites to Ofori-Tenkorang v. Am. Int'l Grp., Inc., 460 F.3d 296, 304 (2d Cir. 2006) (holding "nothing in the statutory language [of Section 1981] indicat[es] Congress's intent to allow those outside the territorial jurisdiction of the United States to raise Section 1981 claims") and to Tat Tohumculuk, A.S. v. H.J. Heinz Co., No. CIV 13-0773 WBS KJN, 2013 WL 6070483, at *7 (E.D. Cal. Nov. 14, 2013) (agreeing with the Ofori-Tenkorang court that Section 1981 "only covers acts of discrimination against persons within the jurisdiction of the United States").

***6** While Plaintiff correctly notes that Ofori-Tenkorang does not control here, this Court agrees with the Second Circuit that, absent the express manifestation of congressional intent to the contrary, Section 1981 only applies to claims arising from discrimination committed while a plaintiff was within the jurisdiction of the United States. 460 F.3d at 307. Other federal courts have consistently concluded that Section 1981 does not extend extraterritorially – not even to U.S. military bases overseas such as the U.S. Navy base on which Plaintiff worked in Djibouti. See, e.g., Marshall v. Exelis Sys. Corp., No. 13-CV-00545-CMA-KMT, 2014 WL 1213473, at *10 (D. Colo. Mar. 24, 2014) (finding that Section 1981 does not extend to conduct on Bagram Airfield in Afghanistan); Gallaspy v. Raytheon Tech. Servs. Co., No. EP-04-CV-0012-FM, 2005 WL 1902534, at *5 (W.D. Tex. Aug. 9, 2005) (finding that Section 1981 does not extend to Kunsan Air Base in South Korea); Collins v. CSA, Ltd., No. 3:11-CV-0179-G, 2012 WL 1059025, at *4 (N.D. Tex. Mar. 27, 2012) (finding "that United States military bases abroad are not 'within the jurisdiction of the United States' referred to in Section 1981(a)").

Plaintiff argues that he nevertheless states a claim under Section 1981 because "[he] alleges that some of the discriminatory conduct occurred while he was in California," ECF No. 61 at 6 (citing Ofori-Tenkorang, 460 F.3d at 306 ("[c]onduct that occurred while plaintiff was within the United States clearly satisfies the statute's requirement that a person be within the jurisdiction of the United States") (internal quotation marks omitted)). Plaintiff points to the following allegations from his FAC: "Plaintiff applied for the position from his residence in California," FAC at 4; Plaintiff had previously worked for Defendant in California, id. at 4 n.1; "Plaintiff was initially told that he would report to Michael Weinmuller...[h]owever, the Company subsequently changed Plaintiff's reporting relationship to Dave Bird," id. at 4; and "Defendants required Plaintiff to report to an individual in violation of the project contract," id. at 6.

Plaintiff's position is unpersuasive. Even interpreted in the light most favorable to Plaintiff, the scant allegation that Defendant decided to require that Plaintiff "report to an individual in violation of the project contract" while Plaintiff was still in California does not plausibly allege a Section 1981 civil rights violation.

Therefore, the motion to dismiss Plaintiff's first and second claims under Section 1981 is granted without prejudice.

b. 42 U.S.C. § 1983

" 'To state a claim under § 1983, a plaintiff [1] must allege the violation of a right secured by the Constitution and laws of the United States, and [2] must show that the alleged deprivation was committed by a person acting under color of state law.' Dismissal of a § 1983 claim following a Rule 12(b)(6) motion is proper if the complaint is devoid of factual allegations that give rise to a plausible inference of either element." Naffe v. Frey, 789 F.3d 1030, 1035-36 (9th Cir. 2015) (quoting West v. Atkins, 487 U.S. 42, 48 (1988)).

Defendant argues that Plaintiff's Section 1983 claim should be dismissed because Section 1983 only applies to governmental acts and "[n]o governmental entity is party to this matter." ECF No. 55 at 9 n.3. Plaintiff does not allege any facts demonstrating a Section 1983 violation, see generally ECF No. 53, and his Opposition does not appear to dispute Defendant's contention that this claim should be dismissed, see generally ECF No. 61. Accordingly, the motion to dismiss Plaintiff's claim under 42 U.S.C. § 1983 is granted without prejudice.

2. The FEHA

Plaintiff alleges in his third count that Defendant violated the FEHA through the same discriminatory conduct that supports his Section 1981 claims. ECF No. 53 at 8-9. Plaintiff's FAC newly asserts that "Mr. Bird would direct Plaintiff and Weinmuller from his office in California," that "[t]he Company's management team, *including Mr. Bird*, treated [Plaintiff] so poorly that he was forced to resign," and that "Mr. Bird failed to respond to Plaintiff's reports of discrimination and harassment, and filed [*sic*] to initiate an investigation regarding the same." Id. at 5 (emphasis added).

***7** Like his second count, Plaintiff's fourth count accuses Defendant of retaliation without alleging violation of any specific law or public policy. See id. at 7-9. Defendant construes Plaintiff's third and fourth counts as causes of action under the FEHA. ECF No. 55 at 11, and Plaintiff adopts this construction in his opposition. ECF No. 61 at 5.

Plaintiff pleads neither harassment, failure to take all reasonable steps to prevent discrimination and harassment, nor hostile work environment as additional causes of action under the FEHA. See generally ECF No. 53. But Plaintiff includes allegations of these claims in his FAC. See id. at 5 ("Plaintiff's contribution was cut short due to...racial harassment...[and] Mr. Bird failed to respond to Plaintiff's reports of discrimination and harassment"). The Court will therefore liberally construe Plaintiff's FAC to also allege these causes of action. See Litmon v. Harris, 768 F.3d 1237, 1241 (9th Cir. 2014) (holding that courts "construe pro se complaints liberally, especially in civil rights cases").

a. Administrative Exhaustion [4]

[4] Defendant filed a Request for Judicial Notice of the complaint Plaintiff filed with the DFEH on February 20, 2015. ECF No. 56. Plaintiff has not responded to or opposed the request. The Court may take judicial notice of "matters of public record." Fed. R. Evid. 201. In evaluating a motion to dismiss, the Court may also consider a document not attached to the complaint if the document's "authenticity is not contested and the plaintiff's complaint necessarily relies on it." Johnson, 793 F.3d at 1007. Defendant's Request for Judicial Notice is granted.

"Before filing a civil action alleging FEHA violations, an employee must exhaust his or her administrative remedies with DFEH. Specifically, the employee must file an administrative complaint with DFEH identifying the conduct alleged to violate FEHA." Wills v. Superior Court, 195 Cal. App. 4th 143, 153, (2011), as modified on denial of reh'g (May 12, 2011). "To exhaust his or her administrative remedies as to a particular act made unlawful by the [FEHA], the claimant must specify that act in the administrative complaint." Martin v. Lockheed Missiles & Space Co., 29 Cal. App. 4th 1718, 1724 (1994) (holding that a plaintiff could not bring legal claims for harassment, retaliation, and gender discrimination when their DFEH complaint only alleged age discrimination).

But "[t]he function of an administrative complaint is to provide the basis for an investigation into an employee's claim of discrimination against an employer, and not to limit access to the courts." Martin v. Fisher, 11 Cal. App. 4th 118, 122 (1992). Thus a legal complaint need not exactly match a prior administrative complaint and may encompass allegations "like or reasonably related to" the allegations of the administrative complaint. Oubichon v. N. Am. Rockwell Corp., 482 F.2d 569, 571 (9th Cir. 1973). [5] Whether a legal claim is "like or reasonably related" to a prior administrative complaint turns on whether the administrative agency investigation could have reasonably been expected to encompass the additional charges. Sosa v. Hiraoka, 920 F.2d 1451, 1456 (9th Cir. 1990). Employee administrative complaints should be construed "with utmost liberality since they are made by those unschooled in the technicalities of formal pleading." B.K.B. v. Maui Police Depart., 276 F.3d 1091, 1100 (9th Cir. 2002) (internal quotation marks and citation omitted).

[5] Oubichon "dealt with the federal counterpart of FEHA, title VII of the federal Civil Rights Act of 1964...[and] [s]ince the antidiscrimination objectives and public policy purposes of the two laws are the same, [courts] may rely on federal decisions to interpret analogous parts of the state statute." Okoli v. Lockheed Tech. Operations Co., 36 Cal. App. 4th 1607, 1617 (1995) (internal quotation marks and citations omitted).

***8** Defendant argues that Plaintiff's third and fourth claims fail because Plaintiff did not adequately exhaust his administrative remedies under the FEHA. ECF No. 55 at

13-14. Defendant cites to Plaintiff's DFEH Complaint, which states in pertinent part:

> From January 20, 2014 to March 4, 2014, I was harassed due to my National Origin [Somalia], Race [African], Color [Black] and Religion [Muslim] by Tom Berger, General Superintendent, Michael Weinmuller, Project Manager, and Mathew Roth, Quality Control Manager. The harassment occurred multiple times and was of a verbal nature. The harassment created a hostile work environment. I complained about the harassment to Dave Bird, VP and nothing was done. The harassment created working conditions so intolerable that I was forced to resign.

ECF No. 56-1, Ex. A at 6.

Defendant argues that Plaintiff's DFEH Complaint "makes no mention of any conduct connected to California" and that Plaintiff "cannot amend his civil lawsuit to incorporate claims of conduct in California, as he failed to exhaust his administrative remedies with regard to any such claims." ECF No. 55 at 14.

Plaintiff responds that he adequately exhausted his administrative remedies because he named David Bird in the body of his DFEH Complaint, ECF No. 61 at 9-10, and specifically alleged that he "complained about the harassment to Dave Bird, VP and nothing was done," ECF No. 56-1, Ex. A at 6. In support of his argument, Plaintiff cites to Cole v. Antelope Valley Union High Sch. Dist., 47 Cal. App. 4th 1505, 1509, 1511 (1996), which held that a plaintiff adequately exhausted administrative remedies under the FEHA "because [the defendant] was named in the body of the administrative charge as a person who discriminated against plaintiff," even though that defendant was not named in the caption of the FEHA complaint.

The Court concludes that a DFEH administrative investigation would reasonably be expected to encompass Plaintiff's potential legal claims under the FEHA for California-based discrimination, harassment, failure to take all reasonable steps to prevent discrimination and harassment, hostile work environment, and retaliation. See Sosa, 920 F.2d at 1456. While Defendant's Reply reiterates that "Plaintiff's administrative complaint to the DFEH...confirms that the only conduct violating FEHA occurred in Djibouti, by others also in Djibouti," ECF No. 64 at 5, Plaintiff's Administrative Complaint clearly accused California Supervisor David Bird of knowingly failing to remedy discrimination and harassment Plaintiff suffered. ECF No. 56-1, Ex. A at 6.

Liberally construed, Plaintiff's DFEH Complaint therefore exhausted Plaintiff's administrative remedies as to Plaintiff's FEHA claims. See Oubichon, 482 F.2d at 571.

b. Sufficiency of Pleadings

As stated above, the Court construes Plaintiff's third and fourth counts to attempt to state claims under the FEHA for discrimination, harassment, failure to take all reasonable steps to prevent discrimination and harassment, hostile work environment, and retaliation. In support of these claims, Plaintiff makes the following allegations: "Mr. Bird failed to respond to Plaintiff's reports of discrimination and harassment," ECF No. 53 at 5; "Defendants did not supply [Plaintiff] will the assistance that he needed" to relocate his family close to Djibouti on a timely basis, "excluded Plaintiff from important meetings with management and with the client," and "failed to provide material information related to the performance of the job, [and] failed to provide a properly working computer," id.; "Plaintiff never was formerly introduced to his supervisor, Dave Bird," and "was ignored by management at meetings, which...created a climate whereby his co-workers would do the same," id.; "Defendants verbally abused Plaintiff in front of the client," "required Plaintiff to report to an individual in violation of the project contract," and "retaliated against Plaintiff for complaining about the abusive treatment," id. at 6; Defendant made "derogatory comments and communications" and "embarass[ed] [Plaintiff] in front of co-workers and clients," id. at 9; and "Plaintiff's co-workers who did not share his protected status were treated significantly more favorably than Plaintiff in all aspects of employment," id. at 11.

***9** In its prior order, the Court dismissed Plaintiff's FEHA claims for failure to allege any connection to conduct in California, and advised that "[a]ny amended pleading must identify the specific California-based conduct that

was connected to the alleged discriminatory conduct." ECF No. 48 at 6. "[E]mployees located outside of California are not themselves covered by the protections of [the FEHA] if the wrongful conduct did not occur in California and it was not ratified by decision makers or participants located in California." Cal. Code Regs. tit. 2, § 11008; see Campbell v. Arco Marine, 42 Cal. App. 4th 1850, 1861 (1996). In Campbell, 42 Cal. App. 4th at 1858, the court held that the FEHA could not be applied to conduct that occurred outside of California, to a plaintiff who was a non-resident of California, and which involved no participation by any corporate officer in the Defendant company's California headquarters. Courts in this circuit have applied this extraterritoriality rule even if the plaintiff is a California resident. See, e.g., Anderson v. CRST Intern., Inc., No. CV 14-368 DSF (MANx), 2015 WL 1487074 at *5 (C.D. Cal. Apr. 1, 2015) (holding that the concept of extraterritoriality applies "regardless of the plaintiff's residency"); see also Rulenz v. Ford Motor Co., No. 10cv1791-GPC-MDD, 2013 WL 2181241 at *3 (S.D. Cal. May 20, 2013) ("Therefore, to properly plead a FEHA claim, a plaintiff must sufficiently allege the tortious conduct occurred in the state of California"); Gonsalves v. Infosys Tech., LTD., No. C 09-04112 MHP, 2010 WL 1854146 at *6 (N.D. Cal. May 6, 2010) (Plaintiff must aver "a factual nexus between [Defendant's] California-based activities and the alleged discriminatory conduct").

Plaintiff argues that he sufficiently establishes a factual nexus between David Bird's conduct in California and the discrimination Plaintiff suffered in Djibouti. ECF No. 61 at 8. He points to his allegations that "Mr. Bird would direct Plaintiff and Weinmuller from his office in California," ECF No. 53 at 5; that "Mr. Bird failed to respond to Plaintiff's reports of discrimination and harassment, and filed [*sic*] to initiate an investigation regarding the same," id.; and that "Defendant's California-based officers...discriminated against him" by various means, including "by obstructing his ability to obtain information and tools necessary to perform his job," id. at 2.

It is important to note, however, that general allegations of Defendants' conduct in California alone are not sufficient. The operative inquiry is whether Plaintiff has plausibly alleged "a factual nexus" between the California-based activities and the discriminatory conduct. The Court therefore examines Plaintiff's individual claims within this framework.

i. Discrimination

"It is an unlawful employment practice...[f]or an employer, because of [an employee's] race, religious creed, color, [or] national origin...to discriminate against [the employee] in compensation or in terms, conditions, or privileges of employment." Cal. Gov't Code § 12940. To violate the FEHA prohibition on discrimination, an employer must take "some official action with respect to the employee, such as hiring, firing, failing to promote, adverse job assignment, significant change in compensation or benefits, or official disciplinary action." Roby v. McKesson Corp., 47 Cal. 4th 686, 706 (2009), as modified (Feb. 10, 2010). "The standard by which a constructive discharge is determined is an objective one —the question is whether a reasonable person faced with the allegedly intolerable employer actions or conditions of employment would have no reasonable alternative except to quit." Woods v. Bayer Healthcare LLC, No. C 05-02871 JSW, 2006 WL 1991761, at *9 (N.D. Cal. July 14, 2006) (citations omitted).

Here, while Plaintiff does allege specific indignities he suffered (such as being excluded from meetings, being ignored at meetings, and being denied a properly working computer), FAC at 5, his factual allegations do not demonstrate that Defendants' conduct created conditions so intolerable that he had no reasonable alternative but to quit. See Jaroslawsky v. City & Cty. of San Francisco, No. C 12-04949 JSW, 2013 WL 1287431, at *2 (N.D. Cal. Mar. 28, 2013) (unpublished) (under the FEHA, "ordinary tribulations of the workplace, or trivial harms, do not constitute adverse employment actions"). More importantly, he does not plausible allege that the relevant conduct that caused these conditions occurred in California. See Gonsalves, 2010 WL 1854146, at *6 (finding allegations that a defendant's California employees "instituted, ratified and affirmed unlawful, discriminatory, and retaliatory corporate policies" to be "extremely general in nature" and insufficient for stating a claim under the FEHA).

***10** Though Plaintiff alleges that he was treated "so poorly that he was forced to resign," FAC at 5, this claim is conclusory without support from factual allegations. Therefore, even liberally construed, Plaintiff fails to allege facts from which the Court can conclude that Defendant discriminated against Plaintiff from California in violation of the FEHA.

ii. Harassment

"To prevail on a hostile workplace/harassment claim under FEHA, an employee must show that she was subjected to verbal or physical conduct related to a protected trait, that the conduct was unwelcome, and that the conduct was sufficiently severe or pervasive to alter the conditions of her employment and create an abusive work environment." Abdul-Haqq v. Kaiser Found. Hosps., No. C 14-4140 PJH, 2015 WL 1738288, at *6 (N.D. Cal. Apr. 10, 2015). "Harassment includes, but is not limited to, verbal epithets or derogatory comments, physical interference with freedom of movement, derogatory posters or cartoons, and unwanted sexual advances." Janken v. FM Hughes Electronics, 46 Cal. App. 4th 55, 63 (1996). "[C]ourts have held that acts of harassment cannot be occasional, isolated, sporadic, or trivial, rather the plaintiff must show a concerted pattern of harassment of a repeated, routine or a generalized nature." Fisher v. San Pedro Peninsula Hosp., 214 Cal. App. 3d 590, 610 (1989).

None of Plaintiff's specific factual allegations, such as that he was denied timely relocation assistance, supervised by Mr. Weinmuller in violation of the project contract, excluded from or ignored at meetings, never introduced to David Bird, and denied the information and properly working computer he needed to do his job, FAC at 5-6, constitutes harassment as defined above. To the extent Plaintiff attempts to directly allege harassment, the allegations are both conclusory and insufficient to demonstrate a "concerted pattern" of conduct. See, e.g., id. at 5 ("Defendants verbally abused Plaintiff"); id. at 7 ("Defendants made "derogatory comments and communications, both written and oral," and embarrassed Plaintiff").

Therefore, Plaintiff fails to adequately state a claim for harassment in violation of the FEHA.

iii. Failure to Take All Reasonable Steps to Prevent Discrimination and Harassment

Because Plaintiff does not sufficiently state claims for discrimination or harassment under the FEHA, as a matter of law Plaintiff therefore also does not sufficiently state a claim for failure to take all reasonable steps to prevent such conduct. See Trujillo v. N. Cty. Transit Dist., 63 Cal. App. 4th 280, 289 (1998) ("Employers should not be held liable to employees for failure to take necessary steps to prevent [discriminatory and harassing actions], except where the actions took place and were not prevented").

iv. Hostile Work Environment

"The elements for a claim of hostile environment under FEHA are: (1) the plaintiff belongs to a protected group; (2) the plaintiff was subjected to unwelcome harassment because of being a member of that group; and (3) the harassment was sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment." Landucci v. State Farm Ins. Co., 65 F. Supp. 3d 694, 703 (N.D. Cal. 2014). Because Plaintiff does not sufficiently state a claim for harassment, an essential element of this cause of action, Plaintiff likewise does not state a claim for hostile work environment.

v. Retaliation

***11** To state a claim for retaliation under the FEHA, a "[p]laintiff must show that he or she engaged in protected activity and was thereafter subjected to adverse employment action by his or her employer because of that protected activity." Wysinger v. Auto. Club of S. California, 157 Cal. App. 4th 413, 420 (2007). Protected employee activity includes complaining about "conduct that the employee reasonably believes to be discriminatory." Yanowitz v. L'Oreal USA, Inc., 36 Cal. 4th 1028 (2005).

Plaintiff has not shown that he was subject to an adverse employment action by his employer. Therefore, Plaintiff also does not sufficiently state a claim for retaliation in violation of the FEHA.

In sum, because Plaintiff does not adequately state a claim for any cause of action under the FEHA, the motion to dismiss Plaintiff's FEHA claims is granted without prejudice.

3. Remaining Claims

Plaintiff's remaining causes of action bring claims for negligent hiring, retention, and supervision; for breach of contract; for fraud and misrepresentation; and for wrongful termination. Defendant argues that all of these counts should

be dismissed for failure to state a plausible claim. The Court considers each claim in turn.

a. Negligent Hiring, Retention, and Supervision

Under California law, a defendant employer may be liable for the acts of his agents where the employer "is either negligent or reckless in the hiring or supervision of the agent." Deutsch v. Masonic Homes of Cal., Inc., 164 Cal. App. 4th 748, 783 (2008); see also Evan F. v. Hudson United Methodist Church, 8 Cal. App. 4th 828, 842 (1992) (liability attached when "the employer has not taken the care which a prudent man would take in selecting the person for the business at hand" (internal quotation marks, citation, and emphasis omitted)).

Here, the only amended allegation added to this claim in the FAC is that Defendants breached their duty to Plaintiff "to provide a workplace free of harassment and discrimination, *by negligently hiring Mr. Bird and Mr. Weinmuller.*" ECF No. 53 at 10 (emphasis added). However, Plaintiff's FAC still contains no allegations as to why Defendant's hiring of Mr. Bird and Mr. Weinmuller was negligent or reckless. Plaintiff argues in his Opposition that it can be inferred from the FAC that "Defendant should have known that Bird and Weinmuller were unfit, because of their discriminatory tendencies," ECF No. 61 at 10, but he provides no allegations identifying either individual's prior "discriminatory tendencies" or how Defendant should have known of these proclivities. Accordingly, Plaintiff's claim for negligent hiring, retention and supervision is dismissed without prejudice.

b. Breach of Contract

To prevail on a breach of contract claim, a plaintiff must prove "(1) the contract, (2) the plaintiff's performance of the contract or excuse for nonperformance, (3) the defendant's breach, and (4) the resulting damage to the plaintiff." Richman v. Hartley, 224 Cal. App. 4th 1182, 1186 (2014).

In its order of March 10, 2016, the Court dismissed Plaintiff's breach of contract claim for failing to identify contractual terms that were violated and for failing to identify specific conduct that violated those terms. ECF No. 48 at 7. In his FAC, Plaintiff alleges that Defendant's conduct towards him "clearly breached the terms of the Offer Letter and company policies." ECF No. 53 at 5; see also id. at 10 (alleging that Defendants "breached their contract and the attendant covenant of good faith and fair dealing when they discriminated and harassed Plaintiff in contravention of Company policies and practices prohibiting discrimination and harassment"). Plaintiff further alleges that "Mr. Weinmuller was Plaintiff's supervisor on a daily basis in all practical respects," id. at 5, "in conflict with the contract requirements," id. at 4.

***12** In his Opposition, Plaintiff offers two theories of breach of contract. First, he argues that Defendant breached its contract with Plaintiff by violating commitments to not engage in discrimination and retaliation, as well as by violating the duty of good faith and faith dealing. ECF No. 61 at 11. However, Plaintiff's FAC fails to support this theory by identifying specific contract terms that were violated or specific conduct by Defendant that violated its obligation of good faith and fair dealing.

Plaintiff also argues that Defendant breached its contract with Plaintiff by allowing Project Manager Weinmuller to supervise him instead of David Bird. ECF No. 61 at 11. This argument relies on Plaintiff's three Declaration Exhibits: his December 10, 2013 offer letter, ECF No. 62, Decl. Ex. A, at 6 ("As the Project Quality Control Manager, you will be Exempt Employee under the management and day-to-day supervision of the Project Manager, Michael Weinmuller"); his December 18, 2013 offer letter, ECF No. 62, Decl. Ex. B, at 14 ("In your position you will report to David Bird"); and Declaration Exhibit C, which defines the QC Manager position, ECF No. 62, Decl. Ex. C, at 22 ("The QC Manager shall manage the QC organization and shall report to an officer of the firm and shall not be subordinate to the Project Superintendent or the Project Manager").

As an initial matter, the offer letters do not support Plaintiff's claim. The December 10, 2013 offer letter provides that Plaintiff would be "under the day-to-day supervision of the Project Manager, Michael Weinmuller." ECF No. 62, Decl. Ex. A, at 6, while the December 18, 2013 offer letter provides that Plaintiff will "report to David Bird." ECF No. 62, Decl. Ex. B, at 14. Together, the letters appear to provide that Plaintiff would be supervised by both David Bird and Michael Weinmuller. Indeed, Plaintiff's allegations support this interpretation: Plaintiff alleges that "Mr. Weinmuller was Plaintiff's supervisor on a daily basis in all practical respects" but that "Mr. Bird would direct Plaintiff...from his office in California." ECF No. 53 at 5.

More importantly, through the December 10, 2013 offer letter, Defendant expressly retained "the right at all times to change any aspect of [Plaintiff's] employment (including [Plaintiff's] job responsibilities...company policies, practices, procedures...[or] management processes." ECF No. 62, Decl. Ex. A, at 10. In light of this language, the offer letters do not demonstrate how Plaintiff's supervisorial relationship with Mr. Weinmuller constituted a breach of any contract terms.

Plaintiff's Exhibit C, which states that "The QC Manager...shall report to an officer of the firm and shall not be subordinate to the Project Superintendent or the Project Manager," provides the strongest evidence that Plaintiff should not have been supervised by Project Manager Weinmuller. ECF No. 62, Decl. Ex. C, at 22. But even viewed in the light most favorable to Plaintiff, this language does not negate Plaintiff's apparent assent to the terms of the first offer letter, wherein Defendant reserved the right to modify the terms of Plaintiff's employment. See ECF No. 62, Decl. Ex. A at 10.

Plaintiff therefore fails to sufficiently state a claim for breach of contract. Accordingly, the motion to dismiss Plaintiff's claim for breach of contract is dismissed without prejudice.

c. Fraud

To plead a cause of action for fraud, a plaintiff must allege "(1) a knowingly false representation by the defendant, (2) an intent to defraud or to induce reliance, (3) justifiable reliance, and (4) resulting damages." Croeni v. Goldstein, 21 Cal. App. 4th 754, 758 (1994). Every element must be specifically pleaded. Tarmann v. State Farm Mut. Auto. Ins. Co., 2 Cal. App. 4th 153, 157 (1991).

***13** Here, Plaintiff alleges that "Defendants actively and aggressively recruited and hired Plaintiff knowing that they had animus toward Plaintiff based upon his race, religion, and national origin," and that he accepted his assignment on Djibouti over other potential opportunities "due to Defendants' representations that he would enjoy the full support of Defendant's resources related to the position that he would hold and that he would be treated in a manner consistent with this [*sic*] policies of non-discrimination and prohibition of harassment." ECF No. 53 at 11. In his Opposition, Plaintiff argues it can be inferred from his FAC that Defendants specifically represented that he would be supervised by David Bird, "but actually never intended to follow through with such a statement, but rather would assignment him to work with a team of racist white men." ECF No. 61 at 12; see ECF No. 53 at 4.

Outside of general statements, Plaintiff's FAC does not allege any conduct that indicates Defendant's knowledge that they purportedly held animus toward Plaintiff, or their related fraudulent intent. Furthermore, any reliance Plaintiff may have had on a representation that he would be supervised by David Bird appears substantially less justifiable in light of the first offer letter's terms expressly reserving Defendant's "right at all times to change any aspect of [Plaintiff's] employment," including job responsibilities and management processes. See ECF No. 62, Decl. Ex. A, at 10. Moreover, even putting the reservation of rights to one side, the Court is not aware of any authority that a general statement that an employee will be supervised by a particular person creates an enforceable obligation that the employer not be supervised by someone else.

Accordingly, the motion to dismiss Plaintiff's claim for fraud and misrepresentation is granted with leave to amend.

d. Wrongful Termination

Plaintiff's final claim is for wrongful termination. ECF No. 53 at 11. Under California law, "[t]he elements of a claim for wrongful discharge in violation of public policy are (1) an employer-employee relationship, (2) the employer terminated the plaintiff's employment, (3) the termination was substantially motivated by a violation of public policy, and (4) the discharge caused the plaintiff harm." Nosal–Tabor v. Sharp Chula Vista Med. Ctr., 239 Cal.App.4th 1224, 1234–35 (4th Dist. 2015) (internal quotation marks and citation omitted). "FEHA's provisions prohibiting discrimination may provide the policy basis for a claim for wrongful discharge in violation of public policy." Phillips v. St. Mary Reg'l Med. Ctr., 96 Cal. App. 4th 218, 227 (2002).

Defendant argues that "this claim should fail because it is entirely derivative of his statutory claims." ECF No. 55 at 16. Courts, however, have disagreed. See Rojo v. Kliger, 52 Cal. 3d 65, 73, 801 P.2d 373, 377 (1990) (holding that the FEHA supplemented, but did not supplant, common law remedies for employment discrimination). In any event, Plaintiff has not shown that he was constructively terminated and therefore has not demonstrated the elements necessary for this tort. The

motion to dismiss Plaintiff's wrongful termination claim is granted with leave to amend.

C. Leave to Amend

Leave to amend should be freely given when justice so requires. Fed. R. Civ. P. 15(a)(2). Plaintiff has amended his complaint once and this will be the second motion to dismiss granted in full against him. Nevertheless, Plaintiff has identified specific additional allegations that he could plead should this motion to dismiss be granted. See, e.g., ECF No. 61 at 6, 10-11. Accordingly, the Court concludes leave to amend is appropriate here.

CONCLUSION

For the foregoing reasons, Defendant's Motion to Dismiss is granted with leave to amend and Defendant's Request to Strike is denied. Any amended complaint must be filed within 21 days of the issuance of this order.

***14** Plaintiff is encouraged to directly attach to any amended complaint any supporting exhibits on which his claims rely so that any such exhibits are formally incorporated into the pleadings.

Plaintiff is also encouraged to seek the assistance of the Legal Help Center in amending his complaint. The Legal Help Center is located at 450 Golden Gate Avenue, 15th Floor, Room 2796, San Francisco, California. Assistance is provided by appointment only. Litigants may schedule an appointment by signing up in the appointment book located on the table outside the door of the Center or by calling the Legal Help Center appointment line at 415–782–8982. Plaintiffs may also wish to consult the Northern District of California manual, *Representing Yourself in Federal Court: A Handbook for Pro Se Litigants*, a copy of which may be downloaded at http://www.cand.uscourts.gov/prosehandbook or obtained free of charge from the Clerk's office.

IT IS SO ORDERED.

Dated: October 3, 2016.

All Citations

Not Reported in Fed. Supp., 2016 WL 5673144

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Exhibit G

2014 WL 1305144
Only the Westlaw citation is currently available.
United States District Court, D. Nevada.

HERB REED ENTERPRISES, LLC, a Massachusetts Company, Plaintiff,
v.
FLORIDA ENTERTAINMENT MANAGEMENT, INC., a Nevada Company, and Larry Marshak an individual, Defendants.

No. 2:12–cv–00560–MMD–GWF.
|
Signed March 31, 2014.

Attorneys and Law Firms

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ORDER

MIRANDA M. DU, District Judge.

I. SUMMARY

***1** Before the Court are Plaintiff Herb Reed Enterprises, LLC's ("HRE") Motion for Summary Judgment (dkt. no. 99) and Defendants Florida Entertainment Management, Inc. ("FEMI") and Larry Marshak's (collectively "Marshak") Motion for Summary Judgment (dkt. no. 106). For the reasons set forth below, Plaintiff's Motion is granted and Defendants' Motion is denied.

II. BACKGROUND

A detailed explanation of the factual and procedural background in this case is outlined in the Court's July 24, 2012, Order addressing Plaintiff's Motion for a Preliminary Injunction ("PI Order") (dkt. no. 43). The Court granted Plaintiff's Motion, preliminarily enjoining Defendants and their agents from using the mark "The Platters," and any equivalent or phonetically similar names or marks, in connection with any vocal group in any advertisements, promotional marketing, or other materials, with two narrow exceptions, as outlined in the PI Order. The Court also found that the instant suit was not barred by *res judicata* or laches. (*Id.* at 10–13.)

Defendants appealed to the Ninth Circuit Court of Appeals. On December 2, 2013, the Ninth Circuit issued an opinion ("Ninth Circuit Opinion") reversing and remanding this Court's PI Order. (Dkt. no. 128.) The Ninth Circuit affirmed this Court's determination that Plaintiff had demonstrated likelihood of success on the merits, but stated that, while this Court had articulated the correct standard for likelihood of irreparable harm, the record did not support a determination of likelihood of irreparable harm. (*See id.* at 15, 19.) The Ninth Circuit also affirmed this Court's determination that *res judicata* does not bar HRE from bringing the instant case and that HRE is not barred by laches from challenging Marshak's use of "The Platters" mark. (*See id.* at 10–13.)

On December 5, 2013, the Court ordered the parties to file a joint status report addressing the effect of the Ninth Circuit's Opinion on the status of the case and the pending motions. (Dkt. no. 129.) Not satisfied with the status report, the Court held a hearing on February 25, 2014, on the parties' pending motions. (Dkt. no. 137.)

There are few disputes remaining between the parties regarding the material facts in this case. Instead, the primary disagreement concerns the scope of the mark. In oral argument, Defendants contend that the pertinent issue is whether HRE owns the right to The Platters mark "for live musical performances." While the infringement relates to live performances, Plaintiff seeks exclusive control of the mark "The Platters" in all arenas, including live performances.

III. MOTIONS FOR SUMMARY JUDGMENT

A. Legal Standard

The purpose of summary judgment is to avoid unnecessary trials when there is no dispute as to the facts before the court. *Nw. Motorcycle Ass'n v. U.S. Dep't of Agric.*, 18 F.3d 1468, 1471 (9th Cir.1994). Summary judgment is appropriate when the pleadings, the discovery and disclosure materials on file, and any affidavits "show there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 330 (1986). An issue is "genuine" if there is a sufficient evidentiary basis on which a reasonable fact-finder could find for the nonmoving party and a dispute is "material"

if it could affect the outcome of the suit under the governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U .S. 242, 248–49 (1986). Where reasonable minds could differ on the material facts at issue, however, summary judgment is not appropriate. *Warren v. City of Carlsbad,* 58 F.3d 439, 441 (9th Cir.1995). "The amount of evidence necessary to raise a genuine issue of material fact is enough 'to require a jury or judge to resolve the parties' differing versions of the truth at trial.' " *Aydin Corp. v. Loral Corp.*, 718 F.2d 897, 902 (9th Cir.1983) (*quoting First Nat'l Bank v. Cities Service Co.*, 391 U.S. 253, 288–89 (1968)). In evaluating a summary judgment motion, a court views all facts and draws all inferences in the light most favorable to the nonmoving party. *Kaiser Cement Corp. v. Fishbach & Moore, Inc.*, 793 F.2d 1100, 1103 (9th Cir.1986).

***2** The moving party bears the burden of showing that there are no genuine issues of material fact. *Zoslaw v. MCA Distrib. Corp.*, 693 F.2d 870, 883 (9th Cir.1982). "In order to carry its burden of production, the moving party must either produce evidence negating an essential element of the nonmoving party's claim or defense or show that the nonmoving party does not have enough evidence of an essential element to carry its ultimate burden of persuasion at trial." *Nissan Fire & Marine Ins. Co. v. Fritz Cos .*, 210 F.3d 1099, 1102 (9th Cir.2000). Once the moving party satisfies Rule 56's requirements, the burden shifts to the party resisting the motion to "set forth specific facts showing that there is a genuine issue for trial." *Anderson,* 477 U.S. at 256. The nonmoving party "may not rely on denials in the pleadings but must produce specific evidence, through affidavits or admissible discovery material, to show that the dispute exists," *Bhan v. NME Hosps., Inc.*, 929 F.2d 1404, 1409 (9th Cir.1991), and "must do more than simply show that there is some metaphysical doubt as to the material facts." *Orr v. Bank of Am.*, 285 F.3d 764, 783 (9th Cir.2002) (internal citations omitted). "The mere existence of a scintilla of evidence in support of the plaintiffs position will be insufficient." *Anderson,* 477 U.S. at 252.

B. Defendants' Motion

Defendants seek summary judgment as to Defendants' affirmative defense of laches. (Dkt. no. 106.) The Court's PI Order held that laches do not bar HRE's trademark infringement claim in this case. (Dkt. no. 43 at 13.) The Ninth Circuit's Opinion affirmed that finding. (Dkt. no. 128 at 13 ("[L]aches does not preclude consideration of HRE's trademark infringement claim and request for preliminary injunction.").) In oral argument, Defendants conceded that the Ninth Circuit's Opinion denying Defendants' laches argument is the law of this case and precludes a finding that laches bar Plaintiffs suit. Defendants' Motion for Summary Judgment is therefore denied.

C. Plaintiff's Motion

Plaintiff moves for summary judgment on its trademark infringement claim. In order to succeed, Plaintiff must establish that it is "(1) the owner of a valid, protectable mark, and (2) that the alleged infringer is using a confusingly similar mark." *Grocery Outlet, Inc. v. Albertson's, Inc.*, 497 F.3d 949, 951 (9th Cir.2007).

1. Ownership

In its PI Order, the Court found that HRE was likely to succeed in establishing that Reed is the owner of the patent. "It is axiomatic in trademark law that the standard test of ownership is priority of use. To acquire ownership of a trademark it is not enough to have invented the mark first or even to have registered it first; the party claiming ownership must have been the first to actually use the mark in the sale of goods or services." *Sengoku Works Ltd. v. RMC Int'l, Ltd.*, 96 F.3d 1217, 1219 as modified, 97 F.3d 1460 (9th Cir.1996). Additionally, the party claiming ownership must establish continuousness of use. *See Dep't of Parks and Recreation for State of Cal. v. Bazaar Del Mundo, Inc.*, 448 F.3d 1118, 1125–26 (9th Cir.2006); *Casual Corner Assocs., Inc. v. Casual Stores of Nev., Inc.*, 493 F.2d 709, 711–12 (9th Cir.1974) ("[O]wnership of a mark requires both appropriation and use in trade; and [ ]ownership of a mark and the exclusive right to a mark belongs to the one who first uses the mark on goods placed on the market.")

***3** The Court found in its PI Order that Reed, as a founding member of the original group, began using the mark in 1953 and that he did not abandon the mark because he either performed as a member of The Platters and/or received royalties from The Platters' sound recordings. (Dkt. no. 43 at 18.) Marshak's only challenge on appeal regarding Reed's ownership addressed Defendants' affirmative defense of abandonment. (*See* dkt. no. 128 at 14.) The Ninth Circuit affirmed the Court's finding that Reed did not abandon the mark (dkt. no. 128 at 15), and Marshak admitted in oral argument that this finding is the law of the case.

In determining whether Reed has superior rights, it is undisputed that Reed was a founding member of the group and the only person to have remained and performed with it from its inception. (*See* dkt. no. 99 at 18 (*citing* dkt. no. 100–

2)); *see also Robi v. Reed,* 173 F.3d 736, 740 (9th Cir.1999). [1] Plaintiff also claims that Reed used the mark continuously in commerce. During briefing on the preliminary injunction Defendants argued that Plaintiff had not presented credible evidence to support the contention that Reed received royalties from 1953 to death. The Court, however, found that the declaration of Frederick Balboni was sufficient on a preliminary injunction standard. (Dkt. no. 43 at 14 n. 13.) In support of its Motion for Summary Judgment, Plaintiff submitted another declaration from Frederick Balboni stating that HRE has more than 2,500 pages of royalty records with records for every year from 1984 to 2012 and for multiple years in the 60s and 70s. (*See* dkt. no. 100 ¶ 19.) Attached to Balboni's declaration as exhibit 4 are samples of HRE business records. In their Opposition, Defendants acknowledge that Reed collects royalties from the songs recorded by the original group. (*See* dkt. no. 113 at 12.) Therefore, the Court finds that Reed continuously received royalty payments related to The Platters original recordings.

[1] There is a factual dispute between the parties regarding whether Tony Williams assigned his rights to Marshak. It is unnecessary for the Court to resolve this dispute in the instant order given that regardless of the resolution, this Court has already found that Tony Williams' rights are inferior to Reed's as Reed stayed with the group longer than Williams. (*See* dkt. no. 43 at 16–17 (*citing Robi v. Reed,* 173 F.3d 736, 736 (9th Cir.1999)).)

a. Continuous Use

Marshak argues, however, that Reed does not have superior rights because he cannot establish commercial use of The Platters mark as a single-source identifier of Reed's goods and services marketed under his exclusive control between at least 1987 and 2012. (*See* dkt. no. 113 at 22.) Specifically, Marshak asserts that neither Reed's collection of royalty payments nor his use of the mark Herb Reed and The Platters constitutes continuous use. Marshak argues that finding use of Herb Reed and The Platters to be continuous use would only be possible under a "tacking" mechanism, but the strict requirements of that doctrine are not met in this case. (*See id.* at 23.)

i. Use in Commerce

In oral argument, HRE claimed that the analysis for continuous use is the same as the analysis for abandonment and that Reed's royalty payments are sufficient to demonstrate continuous use. In order to demonstrate abandonment under 15 U.S.C. § 1127, a party must show: (1) discontinuance of trademark use; and (2) intent not to resume use. As the Ninth Circuit found in its Opinion, while non-use for three years is *prima facie* evidence of abandonment, non-use is a high standard. (*See* dkt. no. 128 at 14–15 (*citing* 15 U.S.C. § 1127).) "Even a single-instance of use is sufficient against a claim of abandonment of a mark if such use is made in good faith." *Carter–Wallace, Inc. v. Proctor & Gamble Co .,* 434 F.2d 794, 804 (9th Cir.1970).

***4** The Court does not agree with Plaintiff's contention that demonstrating Reed did not abandon the mark is sufficient to establish continuous use. Were the two standards synonymous, establishing a single-instance of use, and thus negating abandonment, would satisfy the requirements for continuous use. However, the Court finds that in this case Plaintiff's evidence negating abandonment, Reed's undisputed continuous use in commerce (see Section III.C.1 *supra*), is sufficient to demonstrate continuous use. *See Marshak v. Treadwell,* 240 F.3d 184, 200 (3d Cir.2001) ("[T]he commercial exploitation of classic ... recordings in this country constitutes use"); *Kaufhold v. Caiafa,* 872 F.Supp.2d 374, 381 (D.N.J.2012) (finding that in the Third Circuit it is well settled that receiving royalties for previously recorded material constitutes commercial use of a trademark).

Marshak asserts that use in commerce cannot be sufficient to establish continuous use as all original members receive royalty payments. Plaintiff is not claiming, however, that Reed has superior rights to the mark simply because he continuously received royalty payments. As discussed in Section III.C.1. *supra,* it is undisputed that Reed was a founding member of The Platters and the only person to have remained and performed with the original group from its inception. The fact that other original members receive royalty payments does not have an effect on whether Reed's royalty payments satisfy the continuous use requirement.

Marshak also argues that Reed does not have a superior right to the mark given that Reed did not have control over the quality of the recordings of songs from the original group. (*See* dkt. no. 113 at 25–28.) Defendants simply state that "[t]he 'royalty use' Reed relied upon here is for his purported use of THE PLATTERS mark for music performed and recorded prior to 1969" and that "[t]here is no allegation that Reed changed those recordings since that time [1969] or otherwise exerted any control or influence over same." (Dkt.

no. 113 at 26.) However, Defendants do not allege, let alone provide evidence, that anyone exerted changes to the recordings after 1969. As Plaintiff asserts, Reed, as the only member who participated in all music recorded by The Platters until the original group disbanded in 1969, had control over the quality of their original performances, captured in the recordings. (*See* dkt. no. 118 at 11.) Without Defendants introducing evidence to the contrary, therefore, Plaintiff's undisputed control over the quality of the original recordings remains.

ii. Live Performances

Marshak further argues that Reed cannot establish continuous use under the mark given that he did not perform under The Platters from 1987 through 2012, and that during that time period all of Reed's performances were under the name Herb Reed and The Platters. (*See* dkt. no. 113 at 23.) Reed responds that live performances are just one use of the mark and that "it cannot be disputed that the goodwill associated with THE PLATTERS mark is the goodwill created by the original group who recorded the hits and made the mark famous." (Dkt. no. 118 at 8.) As a result, the use of The Platters recordings trades off that goodwill. Plaintiff thus argues that while live performance and use of recordings are separate uses, it's the same goodwill.

***5** The Court agrees that the royalties that Reed receives are derived from the goodwill of the original group. The act of performing live using the mark is just one potential use of the mark and Marshak points to no case law suggesting that continuous performance is a requirement of establishing use. Given the totality of the circumstances, Reed's use of the mark in commerce demonstrates continuous use. As the Court finds that continuous live performance is not a requirement, it need not reach the question of whether Reed's performance in the composite Herb Reed and The Platters constitutes live performance using the mark. Additionally, it need not discuss Reed's control over the quality of Herb Reed and The Platters.

2. Confusingly Similar

Plaintiff claims that there is a likelihood of confusion because: (1) consumers will confuse Marshak's group with the original Platters; and (2) consumers will confuse Marshak's group with HRE's performing group, which goes by "Herb Reed and The Platters" or "Herb Reed's Platters." The Court found in its PI Motion a likelihood of success on Plaintiff's claim that Marshak's use of "The Platters" is confusingly similar to Plaintiffs use of both "The Platters" and "Herb Reed and The Platters." Marshak did not challenge this finding in its appeal to the Ninth Circuit (*see* dkt. no. 128 at 14 n. 4), nor does Marshak oppose HRE's argument regarding likelihood of confusion in HRE's Motion for Summary Judgment (*see* dkt. no. 118 at 2).

Marshak did not present any evidence that would affect the Court's analysis in its PI Order. Indeed, at oral argument, Marshak acknowledged that there is no dispute that the marks are the same to the extent that Reed is claiming rights to The Platters instead of Herb Reed and The Platters. Marshak's only argument at the hearing against finding the marks to be confusingly similar is that there is no evidence of actual confusion during the twenty years that "Herb Reed and The Platters" and "The Platters" have been coexisting. However, "[b]ecause of the difficulty in garnering such evidence, the failure to prove instances of actual confusion is not dispositive." *Sleekcraft,* 599 F.2d at 353. Indeed, Marshak admitted in oral argument that actual confusion is not a necessary factor.

As there are no disputed material facts that change the Court's analysis in its PI Order, the Court finds as a matter of law that Plaintiff has demonstrated likelihood of confusion.

3. Defendants' Legal Defenses of *Res Judicata,* Abandonment, and Laches

Plaintiff additionally seeks summary judgment on Defendants' legal defenses of *res judicata* and abandonment, and on the equitable defense of laches. The Court previously considered these defenses in its PI Order and determined that they do not bar Plaintiff's claim. The Ninth Circuit affirmed and its finding against abandonment and laches is now the law of this case. The Court therefore grants Plaintiff's Motion regarding Defendants' defenses.

D. Judgment as a Matter of Law on Defendants' Counterclaims

***6** Finally, Plaintiff argues that it is entitled to judgment as a matter of law on Defendants' counterclaims of trademark infringement and violations of the Nevada Deceptive Trade Practices Act. (*See* dkt. no. 99 at 32.) Plaintiff fails to explain clearly the basis of its request and Defendants do not seem to offer any argument in opposition, despite the fact that they titled Section V.B.2. of their brief "Plaintiff Is Not Entitled to Summary Judgment on Defendants' Defenses of Laches

and Abandonment or Defendants' Counterclaims." The Court therefore denies Plaintiff's motion without prejudice.

IV. MOTIONS TO STRIKE

Plaintiff seeks to strike Defendants' declarations in support of their Motion for Summary Judgment (dkt.nos.107, 108) and Defendants' declarations in support of their Response to Plaintiff's Motion for Summary Judgment (dkt. nos.114, 115). (Dkt.nos. 109, 119 .)

Under Rule 12(f) a court may strike from a pleading any redundant, immaterial, impertinent, or scandalous matter. However, motions to strike apply only to pleadings, and courts are generally unwilling to construe the rule broadly and refuse to strike motions, briefs, objections, affidavits, or exhibits attached thereto. *See Hrubec v. Nat'l R.R. Passenger Corp.,* 829 F.Supp. 1502, 1506 (N.D .III.1993) (denying a motion to strike a motion and its memorandum in support of that motion, holding that "[n]either of the offending items, however, constitutes a pleading."); *Bd. of Educ. of Evanston Twp. High Sen. Dist. No. 202 v. Admiral Heating & Ventilation, Inc.,* 94 F.R.D. 300, 304 (N.D.Ill.1982) (denying a motion to strike when "the offending footnote is in a memorandum, not a pleading.").

Additionally, a motion to strike is unnecessary in this case as Plaintiff was already given an opportunity to address the admissibility of Defendants' evidence in Plaintiff's response to Defendants' Motion for Summary Judgment and in Plaintiff's reply to Defendants' Response to Plaintiff's Motion for Summary Judgment.

The Court, therefore, denies Plaintiffs motions to strike.

V. MOTIONS TO SEAL

Plaintiff has filed motions seeking to seal several exhibits to both its Motion for Summary Judgment and its Response to Defendants' Motion for Summary Judgment. (Dkt.nos.104, 112.) Defendants have filed a motion to seal two exhibits to their opposition to Plaintiff's Motion to Strike (dkt. no. 109). (Dkt. no. 122.) No oppositions were filed. The documents the parties seek to seal involve trade secrets and confidential business information and fall within the protective order. The Court finds that the parties have demonstrated "compelling reasons" for sealing these documents. *See Kamakana v. City and County of Hawaii,* 447 F.3d 1172 (9th Cir.2006).

VI. CONCLUSION

The Court notes that the parties made several arguments and cited to several cases not discussed above. The Court has reviewed these arguments and cases and determines that they do not warrant discussion as they do not affect the outcome of the Motions.

***7** It is therefore ordered that Plaintiff Herb Reed Enterprises, LLC's Motion for Summary Judgment (dkt. no. 99) is granted.

It is further ordered that Defendants Florida Entertainment Management, Inc. and Larry Marshak's Motion for Summary Judgment (dkt. no. 106) is denied.

It is further ordered that Plaintiffs motions to strike (dkt.nos.109, 119) are denied.

It is further ordered that the parties' motions to seal (dkt.nos.104, 112, 122) are granted.

All Citations

Not Reported in F.Supp.3d, 2014 WL 1305144

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Exhibit H

2014 WL 5514383
Only the Westlaw citation is currently available.
United States District Court, W.D. Washington, at Tacoma.

Darnell O McGARY, Plaintiff,
v.
Kelly CUNNINGHAM, Don Gauntz, Holly Coryell, Ed Young, Bruce Duthie, Jeff Cutshaw, Reginald Woods, Matt Insley, Mark Lindquist, James Buder, Jay Inslee, Defendants.

No. C13–5130 RBL–JRC.
|
Signed Oct. 31, 2014.

Attorneys and Law Firms

Darnell O. McGary, Steilacoom, WA, pro se.

Craig B. Mingay, Gregory K. Ziser, Nicholas A. Williamson, Washington State Attorney General, Olympia, WA, for Defendants.

ORDER

J. RICHARD CREATURA, United States Magistrate Judge.

***1** The District Court has referred this 42 U.S.C. § 1983 civil rights action to United States Magistrate Judge J. Richard Creatura pursuant to 28 U.S.C. § 636(b)(1)(A) and (B), and local Magistrate Judge Rules MJR1, MJR3 and MJR4.

Plaintiff has filed motions to strike the declaration of Leslie Sziebert and portions of defendants' summary judgment motions that refer to plaintiffs escape attempt (Dkt. 135 and 139). Defendants have responded (Dkt.140), and plaintiff has replied (Dkt.142). After reviewing the pleadings the Court denies both of plaintiff's motions because plaintiff fails to show that the evidence he is trying to exclude would be properly excluded under Fed.R.Civ.P. 12(f) or that Fed.R.Civ.P. 12(f) applies to motions or affidavits.

Fed.R.Civ.P. 12(f) gives the Court the authority to strike material from pleadings that is redundant, immaterial, impertinent or scandalous. *See* Fed.R.Civ.P. 12(f). Courts have held that the rule only applies to pleadings as defined in Fed.R.Civ.P. 7(a) and refused to apply the rule to affidavits or briefs. *Hipolito v. Alliance Receivables Management Inc.*, 2005 WL 1662137 (D.C.Cal.2005); *Protect Lake Pleasant LLC v. Johnson,* 2007 WL 1486869 *3 n. 1 (D.C.Ariz.2007) (Rule 12(f) does not apply to briefs and the court declined to exercise its inherent power to strike material).

Other courts hold that a decision to strike material is available, but that the motions are disfavored. *Guthier v. U.S.,* 2011 WL 3902770 *11 (D.Mass.2011); *Leghorn v. Wells Fargo Bank N.A.,* 950 F.Supp.2d 1093, 1122 (N.D.Cal.2013); " 'A motion to strike should not be granted unless it is clear that the matter to be stricken could have no possible bearing on the subject matter of the litigation.' " *Lopez v. Wachovia Mortg.,* 2009 WL 4505919, *6 (E.D.Cal.2009), *quoting Bassett v. Ruggles,* 2009 WL 2982895, *24 (E.D.Cal.2009).

While plaintiff does not make it clear that the rule applies, the Court need not reach that issue because the motions fail on the merits. In the first motion, plaintiff asks the Court to strike the declaration of defendant Leslie Sziebert arguing that in a prior case, *McGary v. Culpepper,* C05–5376RBL–JRC, "after summary judgment, was concluded in[sic] was found that Dr. Sziebert MD, had retaliated against Plaintiff McGary." (Dkt.135, p. 1.) Plaintiff also argues that evidence he presents in his motion for partial summary judgment shows that a different medical provider, Dr. Bloom, has a different opinion as to plaintiff's mental illness or diagnosis (Dkt.135, p. 1–2). Plaintiff argues that Dr. Sziebert's declaration should be struck pursuant to Fed.R.Civ.P. 12(f) because the declaration is redundant, immaterial, and scandalous (Dkt.135, p. 3).

Defendants respond that plaintiff has mischaracterized the findings and settlement in the case of *McGary v. Culpepper.* Defendants place a copy of the settlement agreement before the Court (Dkt. 141–1, Declaration of Gregory Ziser, Attachment A). Review of the settlement agreement shows that there was no finding of guilt or liability entered against defendant Sziebert. The agreement states "that this Stipulated Settlement and Consent Judgment does not reflect an admission of liability, nonfeasance or wrongdoing by any defendant or the State of Washington." (Dkt.141–1, p. 2). The Court finds that plaintiff has mischaracterized the resolution of that case. Further, a disagreement as to a diagnosis between two mental health care provides does not render either diagnosis irrelevant or scandalous. The Court DENIES plaintiff's motion to strike the declaration of Dr. Sziebert.

***2** Plaintiff also asks the Court to strike portions of defendants' briefing and affidavits that mention an alleged escape attempt on September 28, 2013. This action was stayed by agreement of the parties because plaintiff was facing criminal charges for the crime of sexual violent predator escape (Dkt.83). Defendants' reference to the pending charges as allegations is factually accurate and not misleading. Further, plaintiff himself acknowledges that the criminal charges were the subject of plea negotiations and "have been reduced to a misdemeanor." (Dkt.91, p. 2). Defendants note that plaintiff pled guilty to Attempted Escape in the Third Degree. (Dkt. 141–2, Declaration of Gregory Ziser, Attachment B).

Plaintiff fails to show that defendants referring to the incident is scandalous or in any other way improper. The matter is relevant to show plaintiff's state of mind and to justify the actions defendants took regarding plaintiff. Plaintiff's motion to strike the reference to attempted escape is without merit and the Court DENIES plaintiff's motion.

All Citations

Not Reported in F.Supp.3d, 2014 WL 5514383

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Exhibit I

Trinity Term
[2013] UKSC 34
On appeal from: [2012] EWCA Civ 1395

JUDGMENT

Prest (Appellant) *v* Petrodel Resources Limited and others (Respondents)

before

Lord Neuberger, President
Lord Walker
Lady Hale
Lord Mance
Lord Clarke
Lord Wilson
Lord Sumption

JUDGMENT GIVEN ON

12 June 2013

Heard on 5 and 6 March 2013

Appellant	*Respondent*
Richard Todd QC Daniel Lightman Stephen Trowell (Instructed by Farrer & Co)	Tim Amos QC Oliver Wise Ben Shaw Amy Kisser (Instructed by Jeffrey Green Russell Ltd)

LORD SUMPTION

Introduction

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.

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 was the legal owner of five residential properties in the United Kingdom and 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 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 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, 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 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 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 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." His conclusion was that "as a result of the husband's abject failure to comply with his 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." 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 available assessed his net assets at £37.5 million.

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 £17.5 million 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 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 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 insofar 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.

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. 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 (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". 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.

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. 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 said that the Family Division had developed "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." 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 upon 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 and 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 *Macaura 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, at pp 626-627 said:

> "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.

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

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.

11. At the time of the marriage, and throughout the 1990, 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 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 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 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 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 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.

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" 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. 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."

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 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 and 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.

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 *In re Barcelona Traction, Light and Power Co Ltd* [1970] ICJ 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.

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:

> "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 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 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 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 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 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 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. The Vice-Chancellor 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". He followed *Adams v Cape Industries* 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, *Cape Industries* was 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 upon a divorce. In *Nicholas v Nicholas* [1984] FLR 285, the Court of Appeal (Cumming-Bruce and Dillon LJJ) overturned the decision of the judge to order the husband to 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 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*. 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. At para 21, he observed:

> "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 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 had said in *Trustor*, be "linked to the use of the company structure to avoid or conceal liability"; (v) to justify 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 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 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. 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. "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] UKSC 5; [2013] 2 WLR 398, which dismissed VTB Capital's appeal. So far as piercing the corporate veil is concerned, the court's reasons were given by Lord Neuberger. He noted the broad consensus among judges and text-book 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 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.

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.

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.

29. The first and most famous of them is *Gilford Motor Co Ltd v Horne* [1933] Ch 935. Mr EB 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." 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 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 did not explain why the injunction should issue against the company, but I think it is clear from the judgments of Lawrence and Romer LJJ, at pp 965 and 969, 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." 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*, at 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* 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.

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 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*. 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 BVI 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.

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)" 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 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.

33. In *Trustor*, as in *Gencor*, 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 Co v*

Horne and *Jones v Lipman*, for in these cases the real actors, Mr Horne and Mr Lipman, had a liability which arose independently of the involvement of the company.

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 upon 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*, where the argument was that the corporate veil 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 party to it. But the objection would have been just as strong if the liability in question had not been consensual.

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*, 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* 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.

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 upon 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". It follows that the piercing of the corporate veil cannot be justified in this case by reference to any general principle of law.

Section 24(1)(a) of the Matrimonial Causes Act 1973

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 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. On the contrary, in *Nicholas v Nicholas* [1984] FLR 285, 288, Cumming-Bruce LJ said that it could not.

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).

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." 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 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."

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 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.

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 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 & Petrochemical Co v Multinational Gas & 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, *Director of Public Prosecutions 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 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 upon 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.

44. In *British Railways Board v Herrington* [1972] AC 877, 930-931, Lord Diplock, dealing with the liability of a railway undertaking for injury suffered by trespassers on the line, said:

> "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."

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 Commissioners, Ex p TC Coombs & Co* [1991] 2 AC 283, 300:

> "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."

Cf. *Wisniewski v Central Manchester Health Authority* [1998] PIQR 324, 340.

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 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 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 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. 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.

	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.
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 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.
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.
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 £1.4 million

	and subsequently refurbished at a cost of about £1 million. 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.
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.

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.

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 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 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.

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.

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.

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.

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 paragraph 6 of the order of Moylan J so far as it required those companies to transfer them to the wife.

56. Subject to any contrary submissions as to costs, I would also restore paragraph 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.

LORD NEUBERGER

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 respondents 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 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 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] UKSC 5; [2013] 2 WLR 378, 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* [2012] 2 Lloyd's Rep 313, para 79, who suggested otherwise).

63. However, as in the recent decision of this court in *VTB*, 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 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.

66. Any discussion about the doctrine must begin with the decision in *Salomon v A Salomon and 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 extra-judicially, Lord Templeman referred to the principle in *Salomon* 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.

67. The decision in *Salomon* 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.

68. Since the decision in *Salomon*, 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 in paras 20-35 above. That discussion demonstrates, as I see it, the following:

i. The decision of the International Court of Justice in *In re Barcelona Traction, Light and Power Co, Ltd* [1970] ICJ 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 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* [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, *Woolfson 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 Court, it has been (unsurprisingly) assumed that the doctrine does apply, two recent examples being the Court of Appeal decisions in *VTB* [2012] 2 Lloyd's Rep 313 and *Alliance Bank JSC v Aquanta Corpn* [2013] 1 Lloyd's Rep 175;

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 *Gilford Motor* and *Jones* 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 *Gilford Motor*, the legal argument at first instance and on appeal seems to have concentrated on the validity of the restrictive covenant (see at [1933] Ch 935, 936-937 and 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 *Gilford Motor* 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 *Gilford Motor* 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*.

72. It is by no means inconceivable that the three members of the Court of Appeal in *Gilford Motor* were using the expression "cloak or sham" to suggest, as a matter of legal analysis, a principal and agent relationship. Lord Hanworth 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*".

73. As for *Jones*, 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 eg *Wroth v Tyler* [1974] Ch 30, 47-51. 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 £1500 to a bank (borrowed to meet half the £3000 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*.

74. The history of the doctrine over 80 years of its putative life (taking *Gilford Motor* 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;
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, but they take matters no further – see the decisions mentioned and briefly considered in *VTB* [2013] 2 WLR 398, paras 125 and 127).

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* [1997] 2 Lloyd's Rep 465, 471 said that "[t]he 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 *Constitution Insurance Co of Canada v Kosmopoulos* [1987] 1 SCR 2, 10, Justice Wilson in the Supreme Court of Canada said that "[t]he 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 (In Statutory Management)* [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 (A), 802-803, Smalberger JA observed that "[t]he law is far from settled with regard to the circumstances in which it would be permissible to pierce the corporate veil".

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 Serv Sys Inc v St Joseph Bank & Trust Co*, 855 F2d (7th Cir, 1988), 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 Corp v GC-Sun Holdings LP*, 910 A2d (2006) 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 "'[p]iercing' 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 and 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 "[t]he inherent imprecision in metaphors has resulted in a doctrinal mess".

78. This last view has some resonance with my remarks in *VTB* [2013] 2 WLR 398, para 124, about the use of pejorative expressions to mask the absence of rational analysis. It also chimes with Justice Cardozo'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 Ave Ry* 155 NE 58, 61 (1926).

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 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.

81. Having read what Lord Sumption 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".

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* because it is consistent with conventional legal principles.

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 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 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's characterisation of the doctrine: it would, if anything, serve to confirm the existence of the doctrine, albeit as an aspect of a more 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 Parliament has decided to legislate to this effect in specified and limited circumstances with protection for third parties, in provisions such as section 37 of the Matrimonial Causes Act 1973 and section 423 of the Insolvency Act 1986.

LADY HALE (with whom Lord Wilson agrees)

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 court has power to order that the companies, as bare trustees, transfer these properties to the wife.

85. The reasons for holding that these properties were beneficially owned by the husband have been amply explained by Lord Sumption. I would only emphasise the special nature of proceedings for financial relief and property adjustment under the Matrimonial Causes Act, 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 *Miller v Miller* [2006] UKHL 24, [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.

86. I also agree, for the reasons given by Lord Sumption, 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.

87. The words "entitled to any property either in possession or reversion" first appeared in the Matrimonial Causes Act 1857, 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, when extending the same power to a husband's application for restitution of conjugal rights. They were carried through, respectively, into section 191(1) and (2) of the Supreme Court of Judicature (Consolidation) Act 1925, then into section 24(1) and (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.

88. There is nothing in the language, the history, or indeed the Report of the Law Commission which led to the 1970 Act (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 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.

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 that "piercing the corporate veil" is an example of that general principle, with which family lawyers are familiar from the case of *R v Secretary of State for the Home Department, Ex p Puttick* [1981] QB 767.

90. Lord Sumption 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 and 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, Lindley LJ going so far as to say that "Mr Aron Salomon's scheme is a device to defraud creditors": [1895] 2 Ch 323, 339. 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 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.

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. In *In re Darby* [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.

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 upon the concepts of agency and of the "directing mind".

93. What we have in this case is a desire to disregard the separate legal personality of the companies in order to impose upon 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.

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.

95. *Stone & Rolls Ltd v Moore Stephens (a firm)* [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.

96. For all those reasons, in addition to those given by Lord Sumption, 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.

LORD MANCE

97. I agree that the appeal should be allowed for the reasons given by Lord Sumption, supplemented in their essence by Lord Neuberger.

98. I agree with Lord Sumption'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.

99. In the upshot, the only cases which Lord Sumption 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.

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.

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 v FG Hemisphere*

Associates LLC [2012] UKPC 27, I said at para 77 (in a context where Gécamines was a state corporation, not susceptible of being wound up):

> "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 upon 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."

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. It is certainly a different situation to those which Lord Sumption 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 easy to establish, if any exists at all. The evident absence, under the close scrutiny to which Lord Sumption has subjected the case-law, of authority for any further exception speaks for itself.

LORD CLARKE

103. I agree with the other members of the court that the appeal should be allowed for the reasons given by Lord Sumption. 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 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 upon it. I agree with Lord Mance 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 WLR 378 and adhere to it now. However, I also agree with Lord Mance 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.

LORD WALKER

104. Lord Sumption 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's observations as to the construction and effect of the Matrimonial Causes Act 1973, to which Lady Hale has added a full account of its legislative history. The appeal should be allowed in the terms proposed by Lord Sumption.

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, Lady Hale, Lord Mance and Lord Sumption.

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 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 by the House of Lords in *Salomon v A Salomon and 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). 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 (a firm),* mentioned in Lady Hale's judgment, is arguably an example.

Exhibit J

2021 WL 1156845
Only the Westlaw citation is currently available.
United States District Court, C.D. California.

Ciaran Paul REDMOND
v.
UNITED STATES of America

Case No. 2:20-cv-5170-SVW
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2:15-cr-00532-SVW-2
|
Signed 02/16/2021

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Proceedings: IN CHAMBERS ORDER GRANTING IN PART [17] MOTION TO ALTER JUDGMENT AND DENYING [1], [8] MOTIONS TO VACATE SENTENCE UNDER 28 U.S.C. § 2255.

The Honorable STEPHEN V. WILSON, U.S. DISTRICT JUDGE

***1** On June 10, 2020, Ciaran Paul Redmond ("Petitioner") filed the instant motion to vacate his conviction pursuant to 28 U.S.C. § 2255. Petitioner filed an amended motion on June 26, 2020. The United States of America ("the Government") opposed Petitioner's motions. After this Court filed an order denying both motions, Petitioner filed a motion to alter the judgment.

This order supersedes the previous order issued by the Court regarding Petitioner's motions. *See* Dkt. 16. That order is rescinded, and Petitioner's motion to alter that judgment is GRANTED IN PART. [1]

[1] Petitioner's arguments in his motion to alter the judgment are primarily addressed by the following: (1) the Court's explanation for why it would not have allowed the jury to decide the jurisdictional element of the offense, *see infra* at n.7; (2) the Court's discussion of the second *Brady* prong, *see infra* at 13; and (3) the Court's discussion regarding a certificate of appealability, *see infra* at 23–25.

For the below reasons, Petitioner's § 2255 motions are DENIED.

I. Factual and Procedural Background

In early 2011, Petitioner was an inmate at the United States Penitentiary in Victorville, California ("Victorville"). CR [2] Dkt. 163 at 44. Petitioner, who is white, characterized himself as a "decision maker" for white inmates in the prison. *Id.* at 135.

[2] "CR Dkt." citations refer to docket entries in the criminal case, 2:15-cr-532-SVW-2. Unless otherwise noted, all other citations to docket entries in this opinion refer to docket entries in the instant civil case.

Petitioner was often housed in the same unit as Garrett Rushing, another white inmate who testified that Petitioner disapproved of Rushing's interactions with black inmates at Victorville. CR Dkt. 184 at 200–201. Petitioner and Rushing engaged in a series of arguments and, eventually, Petitioner and Rushing ended up in a fistfight. *Id.* Following that fistfight, Rushing was moved to a different unit in the prison. *Id.* at 203. Rushing's unit and Petitioner's unit were not allowed to be in the cafeteria at the same time. *Id.* at 205.

However, on May 6, 2011, Petitioner and his friend Damion Johnson, another inmate, entered the cafeteria while Rushing's unit was eating breakfast. *Id.* at 205. While Rushing was seated with his back facing the line to pick up food, Johnson reached over a railing and began stabbing Johnson. Trial Ex. 1C. As Rushing crawled away, Johnson leapt over the metal rail and continued attacking Rushing. *Id.* At the same time, Petitioner sprinted towards Rushing from the other side of the cafeteria, jumped over a table, and began violently stabbing Rushing. *Id.* Petitioner continued to attack rushing for nearly 20 seconds before walking away. *Id.* Rushing suffered a ruptured kidney, slashed diaphragm, punctured liver, and stab wounds to his spinal cord. CR Dkt. 163 at 13–18.

Petitioner was charged with assault with intent to commit murder in violation of 18 U.S.C. § 113(a)(1), assault with a dangerous weapon in violation of 18 U.S.C. § 113(a)(3),

and assault resulting in a serious bodily injury in violation of 18 U.S.C. § 113(a)(6). CR Dkt. 1. Each of these charges requires that the assault occur "within the special maritime and territorial jurisdiction of the United States." 18 U.S.C. § 113(a).

***2** At trial, the Court adopted the parties' jointly proposed jury instructions. The instruction for the first count—*i.e.*, assault with intent to commit murder—included an instruction that the Government must prove beyond a reasonable doubt that Petitioner assaulted Rushing with the intent to "kill" him. CR Dkt. 145. Over the Government's objection, the Court also instructed the jury on Petitioner's self-defense and defense-of-another theories. *Id.* Finally, for each count, the Court instructed the jury that the Government must prove beyond a reasonable doubt that the assault "took place at the United States Penitentiary in Victorville, California." *Id.*

The jury returned a guilty verdict on all three counts. CR Dkt. 152. The jury expressly found that the Government proved beyond a reasonable doubt that Petitioner did not act in self-defense. *Id.*

After this Court sentenced Petitioner to 360 months in custody, *see* CR Dkt. 182, Petitioner appealed to the Ninth Circuit. Petitioner made a number of arguments on appeal, only two of which are relevant here: (1) the government presented insufficient evidence of the jurisdictional element of his offenses (*i.e.*, that the assault occurred "within the special maritime and territorial jurisdiction of the United States"); and (2) the jury instructions for the assault with intent to commit murder offense were plainly erroneous because they allowed a conviction if Petitioner harbored an intent to "kill" rather than an intent to commit "murder." *See* Appellant's Opening Brief, *United States v. Redmond*, No. 17-50004, Dkt. 15 at 9–22. As to the first, Petitioner also argued that the Ninth Circuit could not take judicial notice of Victorville's jurisdictional status because "allowing judicial notice on appeal in this context violates a defendant's jury trial and double jeopardy rights under the Fifth and Sixth Amendments." *Id.* at 7.

The Ninth Circuit rejected Petitioner's claims. The panel found that they "can and do take judicial notice that [Victorville] is within the special maritime and territorial jurisdiction of the United States" and, accordingly, they need not address Petitioner's sufficiency of the evidence claim. Dkt. 1-2 at 3. The panel also found that Petitioner could not challenge the allegedly erroneous instructions because he jointly proposed those instructions. *Id.*

On June 10, 2020, Petitioner filed a motion to vacate his sentence pursuant to 28 U.S.C. § 2255. Dkt. 1. On June 26, 2020, Petitioner amended the original motion to add a fourth claim. Dkt. 8.

After this Court issued an order denying Petitioner's motion, Petitioner filed a motion to alter the judgment. Dkt. 17.

II. Legal Standard

A prisoner in custody under sentence of this Court may petition for the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States. 28 U.S.C. § 2255(a). Even if a federal right was violated however, "that does not necessarily mean that [the prisoner] is entitled to habeas relief. In the absence of 'the rare type of error' that requires automatic reversal, relief is appropriate only if the prosecution cannot demonstrate harmlessness." *Davis v. Ayala*, 576 U.S. 257, 267 (2015). Relief is proper only if the error had a " 'substantial and injurious effect or influence in determining the jury's verdict.' " *Id.* at 268 (citing *O'Neal v. McAninch*, 513 U.S. 432, 436 (1995)). "There must be more than a 'reasonable possibility' that the error was harmful." *Id.*

Here, Petitioner claims that his sentence was imposed in violation of his constitutional rights. Pet. at 1. Specifically, he claims that (1) he received ineffective assistance of counsel when his trial attorney proposed erroneous and deficient jury instructions on the intent to commit murder element of the 18 U.S.C. § 113(a)(1) offense, *id.*; (2) he received ineffective assistance of counsel when his trial attorney failed to contest the jurisdictional element of the offenses at trial; (3) the Government violated Petitioner's rights under *Brady v. Maryland*, 373 U.S. 83 (1963), by failing to turn over documents that created reasonable doubt regarding the jurisdictional element of the offenses; and (4) the Ninth Circuit violated Petitioner's constitutional rights by taking judicial notice of the jurisdictional element of the offenses on direct appeal.

***3** The Court will address each claim in turn.

III. Petitioner Did Not Receive Ineffective Assistance of Counsel When His Trial Attorney Proposed Allegedly Erroneous and Deficient Jury Instructions.

The Sixth Amendment guarantees the right of a criminal defendant to the assistance of counsel. U.S. Const. amend. VI. Ineffective counsel violates the Sixth Amendment. *Strickland v. Washington*, 466 U.S. 668, 686 (1984). To establish ineffective assistance of counsel, a petitioner must show (1) his counsel's performance was deficient, and (2) the deficient performance caused prejudice. *Id.* at 686–88.

Counsel's performance is deficient if it falls below an objective standard of reasonableness. *Browning v. Baker*, 875 F.3d 444, 471 (9th Cir. 2017). However, "[j]udicial scrutiny of counsel's performance must be highly deferential, and a fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight." *Strickland*, 466 U.S. at 669. Accordingly, there is a " 'strong presumption' that counsel's representation [was] within the 'wide range' of reasonable professional assistance." *Harrington v. Richter*, 562 U.S. 86, 104 (2011).

Deficient performance is prejudicial if "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. However, "[t]he likelihood of a different outcome must be substantial, not merely conceivable." *Walker v. Martel*, 709 F.3d 925, 941 (9th Cir. 2013) (internal citations and quotations omitted). Counsel's errors must be "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Harrington*, 562 U.S. at 104.

Petitioner argues that his trial counsel's performance was deficient because he failed to object to allegedly erroneous and deficient jury instructions. Specifically, Petitioner notes that his trial counsel agreed to jury instructions requiring the Government to prove that Petitioner committed the assault with the intent to "kill" Rushing, even though the 18 U.S.C. § 113(a)(1) requires an intent to commit "murder." Pet. at 3–4. This is crucial, Petitioner argues, because "not all killings are murder, and an intent to kill without the requisite malice does not constitute murder." *Id.* at 4 (citing *United States v. Quintero*, 21 F.3d 885, 889–90 (9th Cir. 1994)). In other words, the jury instructions that Petitioner's trial counsel agreed to allow the jury to convict Petitioner without a finding that he had the requisite malice.

Petitioner further argues that his trial counsel was deficient because counsel failed to request an imperfect defense of another instruction or a "sudden quarrel" instruction. Pet. at 4–5. This is important, Petitioner argues, because a finding of imperfect defense of another or a finding that the killing resulted from a sudden quarrel would reduce murder to voluntary manslaughter. *Id.* at 5. Had the jury been required to find that Petitioner intended to "murder" Rushing, a finding that the attempted killing resulted from imperfect defense of another or sudden quarrel would render impossible any finding that Petitioner committed the assault with the intent to murder Rushing. *Id.*

***4** The Court is not persuaded by Petitioner's argument. At the outset, it is difficult to conclude that trial counsel acted unreasonably in agreeing to jury instructions requiring a finding that Petitioner intended to "kill" Rushing. As explained by the Ninth Circuit, "[a]ssault with intent to commit murder under 18 U.S.C. § 113(a) [ ] requires a *specific intent to kill the victim*." *United States v. Jones*, 681 F.2d 610, 611 (9th Cir. 1982) (emphasis added). That language from the Ninth Circuit could not be clearer and, in light of that authority, trial counsel's decision to agree to an instruction requiring an intent to "kill" did not fall below an objective standard of reasonableness. [3] *See Browning*, 875 F.3d at 471.

3 To be clear, Petitioner's argument is not entirely without merit. The *Jones* decision dealt with an instruction that allowed the jury to convict the defendant if it found he committed a wanton and reckless act even though he may not have intended to kill the victim. 681 F.2d at 611. The court noted that "acting with malice ... without also intending to kill the victim is not sufficient for conviction." *Id.* Conversely, one might argue that merely intending to kill the victim without malice—*e.g.*, intending to kill in self-defense or as a result of a sudden quarrel—is also insufficient for conviction. Indeed, that argument is bolstered by the plain language of the statute, which requires an intent to commit "murder." 18 U.S.C. § 113(a); *see also* 18 U.S.C. § 1111(a) ("Murder is the unlawful killing of a human being with malice aforethought."). However, in light of the unambiguous language in *Jones*, the Court cannot conclude that trial counsel's agreement with the intent to "kill" instruction is objectively unreasonable. Moreover, as discussed below, such a finding would not change the result here because Petitioner has failed to establish *Strickland* prejudice. *See infra* at 5–7.

However, even if it was objectively unreasonable for trial counsel to agree to allegedly erroneous jury instructions, Petitioner's claim would still fail because the closing arguments and evidence presented to the jury compel a finding that Petitioner cannot establish *Strickland* prejudice.

First, even if the Court had instructed the jury that they had to find Petitioner intended to "murder" Rushing—*i.e.*, that Petitioner acted with malice—there is no reasonable probability that the result would have been different. This is because the evidence of Petitioner's malice was significant. A Bureau of Prisons ("BOP") investigator testified that Petitioner admitted committing the assault because of his "prior beef" with Rushing. Dkt. 163 at 31:2-6; 30:8-14 ("You know what happened between me and [Rushing]. That's why I stabbed him."). After the assault occurred, Petitioner yelled "you've been paddywhacked" and "get that motherfucker a body bag." Dkt. 184 at 190:15-18; 214:8-15. The video of the assault reveals an extremely aggressive attack in which Petitioner sprints from one end of the cafeteria, jumps over a table, and repeatedly stabs Rushing as he was on the ground. Trial Ex. 1C. Indeed, at various moments throughout its closing argument, the Government expressly argued the case as an attempted *murder*, not just a killing. *See, e.g.*, Dkt. 163 at 176:1 ("This was a hit. This was an attempted murder."); 180:24-181:4 ("You've seen how violent this attack was. This wasn't a fight. It wasn't a scuffle. It wasn't an altercation. It was attempted murder. It was a hit, a carefully orchestrated attack on an unsuspecting victim that was deliberately designed to inflict the most lethal force in the shortest period of time."); 182:6-7 ("That's all this case is about, an assault that, but for luck, but for fortune, would have been a murder."). In light of this evidence, the Court finds that, even if the jury had been required to find that Petitioner intended to murder rushing rather than merely kill him, there is no reasonable probability that the result of the proceeding would have been different. Accordingly, Petitioner cannot establish *Strickland* prejudice for this alleged error. *See* 466 U.S. at 694.

***5** Second, even if the jury had been instructed on imperfect defense of another or a sudden quarrel theory,[4] there is no reasonable probability that the result of the proceeding would have been different. Petitioner argues that he came to the defense of Damion Johnson. However, Petitioner also testified that he "didn't even know Damion Johnson was there" and that he had "no idea who [the person standing next to him] was." Dkt. 163 at 154:6-9, 155:3-9. This suggests that Petitioner's asserted belief that he needed to defend Johnson was not genuine. *See Menendez v. Terhune*, 422 F.3d 1012, 1023 (9th Cir. 2005) (noting that imperfect defense of another requires a "genuine, albeit unreasonable, fear [that another will suffer] imminent death or great bodily injury"). Moreover, imperfect defense of another still requires that any force be proportional to that used by the aggressor. *See Melendez v. Scribner*, 2006 WL 2520301, at *4 (E.D. Cal. Aug. 30, 2006). Yet, video of the incident shows that Petitioner continued to attack Rushing well after Rushing fell to the floor. Trial Ex. 1C. Accordingly, there is no reasonable probability that an imperfect defense of another instruction would have changed the result of the proceeding.

4 Petitioner's argument assumes that the Court would have granted the requested instructions, but Petitioner makes no showing that the evidence presented at trial was sufficient to receive the instructions. *See United States v. Urena*, 659 F.3d 903, 906–07 (9th Cir. 2011) ("To be entitled to a self-defense jury instruction, a defendant must make a prima-facie case of self-defense.").

As for Petitioner's sudden quarrel argument, Petitioner does not identify exactly what provoked him. *See Antwane v. Foulk*, 2015 WL 690338, at *4 (C.D. Cal. Feb. 13, 2015) ("The terms 'sudden quarrel' and 'heat of passion' refer to the same theory of voluntary manslaughter based on provocation...."). Nor can he. Video of the incident demonstrates that Petitioner sprinted towards Rushing *after* the incident began and after Rushing was already on the floor from Johnson's initial attack. Trial Ex. 1C. There is no reasonable probability that a jury would have accepted a sudden quarrel theory.

Accordingly, Petitioner has failed to establish *Strickland* prejudice, and his first claim for ineffective assistance of counsel fails.

IV. Petitioner Did Not Receive Ineffective Assistance of Counsel When His Trial Attorney Failed to Contest the Jurisdictional Element.

A defendant can only be convicted under 18 U.S.C. § 113 if the crime occurs "within the special maritime and territorial jurisdiction of the United States." Although one might assume that all federal prisons and federal land fall within the territorial jurisdiction of the United States, that is not the case. *United States v. Davis*, 726 F.3d 357, 364 (2d Cir. 2013) ("[T]he United States does not have jurisdiction over all lands owned by the federal government within the states."). Rather, "in the absence of an explicit acceptance of jurisdiction by

the federal government, the federal government's possession is 'simply that of an ordinary proprietor.' " *Id.*

In *Davis*, the Second Circuit found that the government failed to introduce evidence at trial sufficient to establish that the federal prison where the defendant committed the assault was under the territorial jurisdiction of the United States. *Id.* Although a BOP employee testified that the relevant prison in the case was a federal prison on federal land, the government presented no evidence regarding federal jurisdiction over the prison. *Id.* at 365–66.

Importantly, however, the *Davis* Court took judicial notice of the fact that the federal prison in the case fell under federal jurisdiction. In doing so, the court distinguished "legislative facts" from "adjudicative facts," noting that courts—including district courts, *See United States v. Hernandez– Fundora*, 58 F.3d 802, 809–12 (2d Cir. 1995)—can take judicial notice of legislative facts without being subject to the strictures of Federal Rule of Evidence 201, *See Davis*, 726 F.3d at 367. The Second Circuit defined legislative facts as those "turning on a fixed legal status that does not change from case to case and involving consideration of source materials (such as deeds, statutes, and treaties) that judges are better suited to evaluate than juries." *Id.* at 368. The court explained that it was authorized to take judicial notice of the jurisdictional status of the federal prison because "whether a particular plot of land falls within the special maritime and territorial jurisdiction of the United States is a 'legislative fact' that may be judicially noticed." *Id.* By contrast, the locus of the crime—*i.e.*, whether the assault actually took place at a federal prison—was an adjudicative fact reserved for the jury to find. *Id.* Although the Ninth Circuit has not expressly stated that the jurisdictional status of land is a "legislative fact," it has held that "[a] district court may determine as a matter of law the existence of federal jurisdiction over [a] geographic area." *United States v. Warren*, 984 F.2d 325, 327 (9th Cir. 1993).

***6** In taking judicial notice, the Second Circuit relied on historical documents presented to the court by the Government on appeal, much like the Ninth Circuit did in taking judicial notice, during Petitioner's direct appeal, that Victorville falls under federal jurisdiction.[5] *See id.* at 368–69; *see also Redmond*, 748 F. App'x at 761.

[5] The Court notes that, in taking judicial notice, the Ninth Circuit likely considered the jurisdictional status of Victorville to be an adjudicative fact subject to Federal Rule of Evidence 201 rather than a legislative fact. *See Redmond*, 748 F. App'x at 761 (citing Federal Rule of Evidence 201 and language from Rule 201 regarding "sources whose accuracy cannot reasonably be questioned"). This distinction will be relevant to Petitioner's fourth claim, addressed below. *See infra* at 19–23.

Here, Petitioner argues that his trial counsel was ineffective because counsel failed to contest the jurisdictional element of the offense at trial. Pet. at 7–9. Specifically, Petitioner asserts that trial counsel should have filed a Rule 29 motion for judgment of acquittal at the end of the government's case in chief. *Id.* at 9. Petitioner argues that such a motion would have changed the result of the proceeding because, as Petitioner correctly notes, the Government's evidence on this element here is largely similar to the evidence found insufficient in *Davis*. *See id.* Alternatively, Petitioner argues that trial counsel should have at least argued the *Davis* theory to the jury. Reply at 8.

The Court begins by noting that the question of whether the failure to contest this element constitutes deficient performance is a close one. On the one hand, Petitioner's theory relies heavily on a single out-of-circuit case. The Court has been unable to identify any Ninth Circuit authority existing at the time of Petitioner's trial that discusses the issue in the manner that *Davis* does.[6] Indeed, in the most relevant case the Court found, the trial court took judicial notice that Victorville falls under territorial jurisdiction. *United States v. Inoue*, 2010 WL 11537485, at *3 (C.D. Cal. Aug. 11, 2010). Moreover, the issue of whether Victorville falls under federal jurisdiction was seemingly glossed over by all the parties in this case. In light of this limited authority and the lack of attention devoted to the issue, it is difficult to conclude that the performance of Petitioner's trial counsel fell below an objectively unreasonable standard.

[6] To the extent that the Government relies on *United States v. Read*, 918 F.3d 712 (9th Cir. 2019), the Court rejects that argument. "Claims of ineffective assistance are evaluated in light of the available authority at the time of counsel's allegedly deficient performance." *United States v. Carthorne*, 878 F.3d 458, 466 (4th Cir. 2017). *Read*—in which the Ninth Circuit found that evidence largely similar to the Government's evidence here was sufficient to satisfy the jurisdictional element—did not exist at the time of Petitioner's trial.

On the other hand, the *Davis* case is both compelling and not at all difficult to discover. Petitioner's trial counsel's failure to discover the *Davis* case—or to contest the jurisdictional element at all—is arguably a result of inattention rather than strategy. *See Wiggins v. Smith*, 539 U.S. 510, 526 (2003) (finding ineffective assistance of counsel where trial counsel's deficient performance "stemmed from inattention, not strategic judgment"). Indeed, courts often find deficient performance where trial counsel entirely fails to research an aspect of their client's case. *See, e.g.*, *Cerda v. HedgPetch, Kern State Prison*, 744 F. Supp. 2d 1058, 1072 (C.D. Cal. 2010) (declining to excuse "counsel's failure to research the issue"); *United States v. Crooker*, 360 F. Supp. 3d 1095, 1109–10 (E.D. Wash. 2019) (explaining that defense counsel "would be expected to research how the terms in [the statute] would be interpreted before advising his or her client"). Accordingly, Petitioner's argument that his trial counsel's performance was deficient is not entirely without merit.

***7** However, the Court need not resolve the reasonableness of trial counsel's performance because Petitioner has failed to establish *Strickland* prejudice. *See Rios v. Rocha*, 299 F.3d 796, 805 (9th Cir. 2002) ("Failure to satisfy either prong of the *Strickland* test obviates the need to consider the other.").

Petitioner's argument essentially boils down to this: *Strickland* prejudice exists because, had Petitioner's trial counsel filed a Rule 29 motion and brought *Davis* to this Court's attention, there is a reasonable probability that this Court would have granted the motion, thereby acquitting Petitioner of all counts and changing the result of the proceeding. [7]

[7] To the extent Petitioner argues that this Court would have allowed the jury to decide the issue, the Court rejects that argument. Had the issue been brought to this Court's attention, the Court would have decided it as a matter of law pursuant to *Warren* rather than allowing the jury to decide the issue. *See* 984 F.2d at 327. In his motion to alter the judgment, *see* Dkt. 17, Petitioner argues that, under *United States v. Mujahid*, 799 F.3d 1228 (9th Cir. 2015), this Court would have been required to allow the jury to decide the issue, *see* Dkt. 17. Not so. In *Mujahid*, the Ninth Circuit explained that it has "approved of the trial court deciding the jurisdictional component of a crime to the extent it presents a pure question of law with no disputed questions of fact underlying it." 799 F.3d at 1237. However, the *Mujahid* Court expressly left unresolved the question of whether courts can decide jurisdictional elements where there are underlying factual disputes. *See id.* at 1238 n.12 (noting that "we need not resolve" whether jurisdictional components "can be decided by the trial court even if facts are disputed"). Given that the *Mujahid* court left the question open and did not prohibit courts from deciding jurisdictional elements with underlying factual disputes, this Court would have decided the question as a matter of law and not allowed the jury to decide it.
Petitioner also argues that *Torres v. Lynch*, 136 S. Ct. 1619 (2016), would have required this Court to present the issue to the jury. In *Torres*, the Supreme Court discussed the role of jurisdictional elements in federal criminal statutes and the proof required to establish those elements. *See id.* at 1630. The Supreme Court explained that "substantive elements of a federal statute describe the evil Congress seeks to prevent; the jurisdictional element connects the law to one of Congress's enumerated powers, thus establishing legislative authority. Both kinds of elements must be proved to a jury beyond a reasonable doubt ...." *Id.* Petitioner's reliance on this language is unavailing because the language is mere dicta. Indeed, *Torres* presented the Court with an entirely different question than that suggested by the opinion's dicta: whether a "state crime counts as an aggravated felony when it corresponds to a specified federal offense in all ways but one—namely, the state crime lacks the interstate commerce element used in the federal statute to establish legislative jurisdiction (*i.e.*, Congress's power to enact the law)." 136 S. Ct. at 1623.

There are two problems with this argument. First, Petitioner does not sufficiently explain why this Court would not have followed the approach in *Davis* or *Inoue* and simply found, as a matter of law, that Victorville falls within the territorial jurisdiction of the United States. Indeed, it is more likely that the Court would have taken that approach rather than granting an acquittal outright based on an issue that the Government had not yet had an opportunity to respond to. At the very least, this Court would have given the Government an opportunity to respond, proceeded with trial, and reserved ruling on the matter until after the jury returned its verdict. [8]

8 Allowing the Government to present argument and evidence on this issue would not have required reopening the Government's case in chief because the new evidence would not be presented to a jury deciding factual issues. Instead, it would be presented to this Court, which would have been deciding what binding authority characterizes a legal issue. *See Warren*, 984 F.2d at 327. Petitioner presents no authority suggesting, contrary to *Warren*, that the court would not have been able to hear additional evidence on this legal question after the jury verdict.

***8** Petitioner counters that the Government may not have been able to procure the documents that it presented on appeal in time for this Court to review them. Reply at 7. Alternatively, Petitioner suggests that this Court may have interpreted the documents as the dissenting judge did on Petitioner's direct appeal. *Id.* at 8.

This argument reveals the second problem with Petitioner's claim: even if this Court had granted Petitioner's Rule 29 motion after the jury's verdict,[9] there is no reasonable probability that the result of the proceedings would be different because the Ninth Circuit would have reversed this Court. In assessing *Strickland* prejudice, "what would have happened on appeal, if it can be ascertained with reasonable confidence, must be taken into account." *Butcher v. United States*, 368 F.3d 1290, 1294 (11th Cir. 2004);[10] *see also United States v. McGowan*, 2013 WL 12368726, at *10 (C.D. Cal. Aug. 9, 2013) ("The 'result' of a proceeding, for purposes of evaluating prejudice, must naturally include the result in the appellate as well as the district court.").

9 As noted above, *See supra* at 10 & n.7, this Court would not have resolved the issue *before* the jury returned a verdict.

10 The Ninth Circuit has not directly addressed the issue of whether appellate rulings should be considered in determining *Strickland* prejudice. However, the Court is persuaded by the reasoning in *Butcher* that such rulings should be considered. *See* 368 F.3d at 1294–97. Indeed, the *Butcher* Court took into consideration an appellate court's ruling on a sufficiency of the evidence claim, *i.e.*, a mixed question of law and fact. The issue that would have been presented to the Court here—whether Victorville falls under the territorial jurisdiction of the United States—presents a matter of law that the Ninth Circuit would have reviewed *de novo, see Mujahid*, 799 F.3d at 137, thereby rendering the Ninth Circuit's decision on Petitioner's direct appeal even more relevant to the *Strickland* prejudice inquiry.

Here, during Petitioner's direct appeal, the Ninth Circuit took judicial notice that Victorville falls within the territorial jurisdiction of the United States. *Redmond*, 748 F. App'x at 761. The Court is therefore reasonably confident, *See Butcher*, 368 F.3d at 1294, that the Ninth Circuit would have made the same finding and reversed this Court had it granted Petitioner's Rule 29 motion after the jury's verdict. Any such reversal would have reinstated the jury verdict. *See United States v. Ramos*, 558 F.2d 545, 546 (9th Cir. 1977). Thus, there is no reasonable probability that the result of the proceeding would have been any different.

Accordingly, Petitioner has failed to establish *Strickland* prejudice for his second ineffective assistance claim.

V. The Government Did Not Violate Petitioner's Rights Under *Brady.*

Petitioner argues that the Government committed a *Brady* violation by failing to disclose, before trial, the historical documents the Government presented to the Ninth Circuit on appeal. Pet. at 12.

A *Brady* violation has three elements: (1) the evidence at issue is favorable to the defendant, (2) the evidence must have been suppressed by the state, either willfully or inadvertently, and (3) prejudice must have ensued. *Shelton v. Marshall*, 796 F.3d 1075, 1083 (9th Cir.), *amended on reh'g*, 806 F.3d 1011 (9th Cir. 2015).

***9** The Court finds that the first element is satisfied here. Evidence is "favorable" if it would be "advantageous" to the defendant, *Banks v. Dretke*, 540 U.S. 668, 691 (2004), or if it "would tend to call the government's case into doubt," *Milke v. Ryan*, 711 F.3d 998, 1012 (9th Cir. 2013). "[W]hether evidence is favorable is a question of substance, not degree, and evidence that has any affirmative, evidentiary support for the defendant's case or any impeachment value is, by definition, favorable. Although the weight of the evidence bears on whether its suppression was prejudicial, evidence is favorable to a defendant even if its value is only minimal." *Comstock v. Humphries*, 786 F.3d 701, 708– 09 (9th Cir. 2015) (internal quotations and citations omitted).

Here, one of the documents presented on appeal is a letter from the California State Lands Commission noting that, at the time the United States accepted jurisdiction over the land underlying Victorville, "California Government Code Section 120 required California's Governor to file the United States' acceptance with the county recorder in the county in which the property was located." Dkt. 1-2 at 9. However, that same letter then notes that "[t]here is no information in the Commission's files to indicated [*sic*] whether this action was taken." *Id.* Additionally, the list of properties that the United States accepted jurisdiction over includes a handwritten notation that adds "George A.F. Base see Victorville" to the list, and another handwritten notation that states that Victorville Army Air Field and Victorville Military Fields 1 and 3 [11] are "now George A.F. Base." *Id.* at 29. These handwritten notations are undated and unsigned, making it difficult to determine when they were added to the list and whether they were added by a person authorized to do so. These documents could be interpreted to cast doubt upon the claim that the transfer of jurisdiction from California to the United States was legally effectuated. The documents therefore have value to Petitioner's case and are accordingly, "by definition, favorable ... even if [the] value is only minimal." [12] *Comstock*, 786 F.3d at 709.

11 Petitioner asserts that "there was also presumably a Victorville Military Field 2, for which jurisdiction was not accepted and where the prison may be located." Pet. at 10. However, Petitioner presents no evidence to support this presumption.

12 The Court emphasizes that the Ninth Circuit held that the documents were sufficient to take judicial notice under Federal Rule of Evidence 201. *Redmond*, 748 F. App'x at 761. This Court's finding that the documents satisfy the first element of *Brady* because they are favorable to the Defendant should not be construed as a disagreement with the Ninth Circuit's holding. Rather, the Court's finding is simply a result of applying a different standard that is required under *Brady, i.e.*, that evidence is "favorable to a defendant even if its value is only minimal." *Comstock*, 786 F.3d at 709.

Petitioner also satisfies the second element of *Brady.* That element is satisfied by the inadvertent failure of the prosecutor to disclose evidence favorable to the defendant. *See Giglio v. United States*, 405 U.S. 150, 154 (1972) (("[W]hether the nondisclosure was a result of negligence or design, it is the responsibility of the prosecutor."). Moreover, "[e]xculpatory evidence cannot be kept out of the hands of the defense just because the prosecutor does not have it, where an investigating agency does." *United States v. Zuno-Arce*, 44 F.3d 1420, 1427 (9th Cir. 1995). Rather, a prosecutor is "deemed to have knowledge of and access to anything in the custody or control of any federal agency participating in the same investigation of the defendant." *Id.* (citing *United States v. Bryan*, 868 F.2d 1032, 1036 (9th Cir. 1989)).

***10** In support of his argument, Petitioner relies on *Inoue*, a case tried in 2010 by the same prosecuting agency. *See* 2010 WL 11537485, at *1. The defendant in *Inoue* was charged under the same statute as Petitioner (*i.e.*, 18 U.S.C. § 113(a)). *See id.* The assault at issue in *Inoue* occurred at the same penitentiary at issue here (*i.e.*, Victorville). And, in *Inoue*, the Government filed the exact same documents that it relied on during Petitioner's appeal. *Compare* Dkt. 1-2 at 7–30 (documents Government produced on Petitioner's direct appeal) *with Inoue*, No. 2:09-cr-380, Dkt. 112-1 at 2–25 (Government's exhibit in support of opposition to motion for new trial).

Under these circumstances, the Court finds that the Government had "knowledge of and access to" the documents at issue. *See Zuno-Arce*, 44 F.3d at 1427; *cf. Milke v. Ryan*, 711 F.3d 998, 1016 (9th Cir. 2013) (finding second prong of *Brady* satisfied where "state eventually produced some of [the] evidence in federal habeas proceedings and [ ] never claimed that it could not have disclosed it in time for [petitioner's] trial").

However, Petitioner's *Brady* claim fails because he cannot establish prejudice. Much like *Strickland* prejudice, a *Brady* violation is prejudicial if there is a reasonable probability that the result of the proceedings would have been different if the suppressed documents had been disclosed to the defense. *Strickler v. Greene*, 527 U.S. 263, 289 (1999).

Here, Petitioner cannot establish any such probability. Had Petitioner been given the documents before trial, he would have had two avenues to change the result of the proceedings: a motion to dismiss the indictment, or a Rule 29 motion for judgment of acquittal. [13] As discussed above, *See supra* at 9–11, there is no reasonable probability that the latter would have altered the result of the proceedings.

[13] This Court would not have allowed Petitioner to argue the issue to the jury. *See supra* at n.7.

A motion to dismiss the indictment would not have changed the result of the proceedings for similar reasons. Specifically, if the Court had granted the motion, the Government would have had a right to appeal the dismissal, *See United States v. Woodruff*, 50 F.3d 673, 675 (9th Cir. 1995), and the Court is reasonably confident that the Ninth Circuit would have reversed, *See Redmond*, 748 F. App'x at 761; *cf. Butcher*, 368 F.3d at 1294. [14] And if the Court had denied the motion, it presumably would have done so on the basis that the historical documents at issue were sufficient to establish, as a matter of law, that Victorville falls under the territorial jurisdiction of the United States. *See Warren*, 984 F.2d at 327.

[14] Although the reasoning in *Butcher*—explaining why, when evaluating prejudice, courts should consider what an appellate court would have done if it can be "ascertained with reasonable confidence," 368 F.3d at 1294—applied to *Strickland* prejudice, the Court sees no reason why it should not apply with equal force to *Brady* prejudice, particularly where the two standards are quite similar.

Accordingly, the Court rejects Petitioner's *Brady* claim. [15]

[15] The Court also notes that the *Brady* framework may not appropriately capture the unique circumstances of this case. Although Petitioner satisfies two of the three elements—and, as discussed below, reasonable jurists can disagree as to whether he satisfies the third, *See infra* at 25—it remains the case that, despite *Brady*, the Government is not obligated to "fish through public records and collate information which was equally available to the defense." *United States v. Flores*, 540 F.2d 432, 437 (9th Cir. 1976). Here, Petitioner essentially argues that *Brady* required the Government to gather documents and produce them to Petitioner even though those documents were filed publicly and another court presented with those documents took judicial notice of Victorville's jurisdictional status. *See Inoue*, 2010 WL 11537485, at *3. The Court is skeptical of the idea that *Brady* imposes such an extensive burden on the Government.

Finally, the Court rejects Petitioner's Rule 16 argument. Violations of law that are "neither constitutional nor jurisdictional" are ordinarily not cognizable on collateral review. *United States v. Timmreck*, 441 U.S. 780, 783 (1979); *see also United States v. Gullett-El*, 2020 WL 3963743, at *2 (C.D. Cal. July 13, 2020) ("Non-constitutional violations of federal law, such as violations of the Federal Rules of Criminal Procedure, are not cognizable for purposes of a § 2255 motion."). Although some authority suggests that such violations may be cognizable if they "resulted in a 'complete miscarriage of justice' or in a proceeding 'inconsistent with the rudimentary demands of fair procedure,' " *Timmreck*, 441 U.S. at 784, the Court finds no such circumstances here.

VI. The Ninth Circuit Did Not Violate Petitioner's Constitutional Rights by Taking Judicial Notice of the Jurisdictional Element of Petitioner's Offense on Appeal.

***11** As noted above, the Government produced historical documents during Petitioner's direct appeal in order to establish that Victorville falls under the "special maritime and territorial jurisdiction of the United States." *See* 18 U.S.C. § 113. Based on those documents, the Ninth Circuit took judicial notice that Victorville falls under special maritime and territorial jurisdiction of the United States. *See* Dkt. 1-2 at 3. Petitioner argues that the Ninth Circuit violated his constitutional rights when it took judicial notice of the jurisdictional element of his offense during his direct appeal. Supp. Pet. at 1.

The parties dispute whether this Court can review the merits of this claim. The Court finds that it can. After explaining why, the Court will turn to the merits.

A. This Court Can Review the Merits of Petitioner's Claim.

At the outset, Petitioner and the Government dispute whether this Court has the authority to rule on the merits of Petitioner's claim. Petitioner argues that the Ninth Circuit never resolved the constitutional issue—*i.e.*, whether taking judicial notice of Victorville's jurisdictional status on direct appeal violates Petitioner's constitutional rights—and instead simply took judicial notice. Reply at 9. By contrast, the Government argues that the Ninth Circuit did, in fact, resolve that issue, and this Court is accordingly barred from reviewing the Ninth Circuit's decision. Opp. at 24–25.

The Court finds that the Ninth Circuit necessarily decided this issue and that the Ninth Circuit's decision is the law of the case. "Under the 'law of the case' doctrine, a court is ordinarily precluded from reexamining an issue previously decided by the same court, or a higher court, in the same case." *Richardson v. United States*, 841 F.2d 993, 996 (9th Cir. 1988). "For the doctrine to apply, the issue in question must have been 'decided explicitly or by necessary implication in [the] previous disposition.' " *United States v. Lummi Indian Tribe*, 235 F.3d 443, 452 (9th Cir. 2000) (alteration in original). "A collateral attack is the 'same case' as the direct appeal proceedings for purposes of the law of the case doctrine." *United States v. Jingles*, 702 F.3d 494, 500 (9th Cir. 2012). Accordingly, this Court must determine "whether the panel that rejected [Petitioner's claim on] direct appeal actually decided this issue, either explicitly or by necessary implication." *Id.*

Here, the Ninth Circuit decided Petitioner's claim by necessary implication. During his direct appeal, Petitioner expressly argued that "allowing judicial notice on appeal in this context violates a defendant's jury trial and double jeopardy rights under the Fifth and Sixth Amendments." Appellant's Opening Brief, *United States v. Redmond*, No. 17-50004, Dkt. 15 at 7; *see also id.* at 12–15. In its decision, the Ninth Circuit stated as follows: "we *can* and do take judicial notice that [Victorville] is within the special maritime and territorial jurisdiction of the United States." Dkt. 1-2 at 3 (emphasis added). By expressly stating that it can take judicial notice on appeal, the Ninth Circuit necessarily decided that taking judicial notice on appeal would not violate Petitioner's constitutional rights. *See Jingles*, 702 F.3d at 500. Accordingly, that decision is the law of the case. *See id.*

Yet, contrary to the Government's arguments, *see* Opp. at 24–25, that does not end the matter. The Government argues that collateral estoppel bars Petitioner's claim. *See id.* However, the Ninth Circuit has expressly stated that "neither issue nor claim preclusion is applicable to [§ 2255] petitions; like habeas corpus and coram nobis, § 2255 is a well-established exception to the principles of res judicata." *Walter v. United States*, 969 F.2d 814, 816 (9th Cir. 1992); *see also Polizzi v. United States*, 550 F.2d 1133, 1135 (9th Cir. 1976) ("[P]rinciples of res judicata do not bar a prisoner from relitigating on habeas corpus or under § 2255 or on coram nobis issues raised in the original appeal ...."); *Sanders v. United States*, 373 U.S. 1, 8 (1963) (assessing § 2255 petition and noting that "[t]he inapplicability of res judicata to habeas ... is inherent in the very role and function of the writ.").

***12** Later, in its opposition to Petitioner's supplemental brief, the Government pivots to the rule of mandate. Supp. Opp. at 2–3. However, the Ninth Circuit has explained that the rule of mandate only applies to district court proceedings following remand. *See United States v. Van Alstyne*, 584 F.3d 803, 813 n.10 (9th Cir. 2009); *see also United States v. Thrasher*, 483 F.3d 977, 982 (9th Cir. 2007). Petitioner's case is not before this Court on remand.

Rather, as noted above, the most appropriate fit in light of the Ninth Circuit's precedents is the law of the case doctrine. *See Jingles*, 702 F.3d at 500 ("A collateral attack is the 'same case' as the direct appeal proceedings for purposes of the law of the case doctrine."). In *United States v. Manzo*, a defendant who pleaded guilty to drug distribution charges appealed his sentence to the Ninth Circuit and argued that the government breached the plea agreement. *See* 675 F.3d 1204, 1208 (9th Cir. 2012). The Ninth Circuit rejected the defendant's claim in an unpublished opinion and expressly concluded that the government did not breach the plea agreement. *Id.* The defendant then filed a § 2255 motion in the district court, once again arguing that the government breached the plea agreement. *Id.* The district court did not find that it lacked the authority to rule on the merits of the defendant's petition because of the Ninth Circuit's decision on the defendant's direct appeal. Rather, the district court ruled on the merits of the issue and found that the government did not breach the plea agreement. *See id.* at 1209; *see also United States v. Manzo*, 2010 WL 3584499, at *2 (E.D. Wash. Sept. 8, 2010) (finding that government fulfilled plea deal).

The Ninth Circuit reversed. *See Manzo*, 675 F.3d at 1213. In doing so, the Ninth Circuit did not conclude that the district erred by deciding the merits of a claim previously resolved by a Ninth Circuit panel on direct appeal. Rather, the court explained that, although the law of the case doctrine would normally bar courts from reconsidering the claim, "[a] court may depart from the law of the case if ... the first decision was clearly erroneous." *Id.* at 1211 n.3 (citing *United States v. Scrivner*, 189 F.3d 825, 827 (9th Cir. 1999)). The Ninth Circuit then found that the prior panel's ruling was clearly erroneous and that the government had breached the plea agreement. *Id.* at 1213. At no point did the Ninth Circuit suggest that the district lacked authority to rule on the defendant's petition on the merits.

Indeed, the Ninth Circuit has repeatedly explained that, although the law of the case doctrine generally forbids a court from reconsidering questions that the Court of Appeals resolved in the same case, there are some circumstances where a departure from the law of the case is acceptable. *See Scrivner*, 189 F.3d at 828; *see also United States v. Maybusher*, 735 F.2d 366, 370 (9th Cir. 1984) (explaining that law of the case doctrine "expresses only the practice of courts generally to refuse to reopen questions formerly decided, and is not a limitation of their power"); *United States v. Smith*, 389 F.3d 944, 948–49 (9th Cir. 2004) ("The doctrine is a judicial invention designed to aid in the efficient operation of court affairs ... not an inexorable command.").

For example, in *United States v. Cuddy*, a district court found that a defendant in a kidnapping case had expressly threatened a victim's life even though the Ninth Circuit had previously assessed the record and found that it "does not support a finding that [the victim's] life was ever threatened." 147 F.3d 1111, 1114 (9th Cir. 1998). In affirming the district court's finding, the Ninth Circuit explained that "the district court was justified in departing from the law of the case because our previous conclusion ... was clearly erroneous." *Id.* at 1115.

***13** Later, in *Scrivner*, a district court rejected a § 2255 petitioner's claim that his Fifth Amendment right against self-incrimination was violated at his trial by the admission of an affidavit from a prior civil forfeiture proceeding. 189 F.3d at 826. That claim was previously rejected in an unpublished decision by the Ninth Circuit during the petitioner's direct appeal. *Id.* The Ninth Circuit affirmed the district court's denial of the § 2255 petition because none of the exceptions to the law of the case doctrine applied. *See id.* at 828. In doing so, however, the Ninth Circuit explained that "[a] court may depart from the law of the case" under certain circumstances —*e.g.*, if the first decision was clearly erroneous. *Id.* at 827.

Finally, in *United States v. Jingles*, a district court rejected, on the merits, a § 2255 petitioner's claim that a constructive amendment to the indictment violated his Fifth Amendment rights. 702 F.3d 494, 499 (9th Cir. 2012); *see also United States v. Jingles*, 2007 WL 2418543, at *7 (E.D. Cal. Aug. 24, 2007) (magistrate judge recommending denial of petitioner's constructive amendment claim); *United States v. Jingles*, 2007 WL 4239814 (E.D. Cal. Nov. 29, 2007) (adopting analysis of magistrate judge and denying petitioner's constructive amendment claim). That claim was previously rejected in an unpublished decision by the Ninth Circuit during the petitioner's direct appeal. *See United States v. Jingles*, 64 Fed. Appx. 82 (9th Cir. 2003). As in *Scrivner*, the Ninth Circuit affirmed the district court's denial of the § 2255 petition because none of the exceptions to the law of the case doctrine applied. *See Jingles*, 702 F.3d at 503.

At no point in any of *Jingles, Scrivner, Cuddy*, or *Manzo* did the Ninth Circuit suggest that district courts are barred from applying the exceptions to the law of the case doctrine. To the contrary, the Ninth Circuit repeatedly explained that courts are bound by the law of the case *unless* one of the exceptions applies. *See, e.g.*, *id.* at 503; *Manzo*, 675 F.3d at 1211 n.3; *Scrivner*, 189 F.3d at 827. And in the sole case where the district court actually departed from the law of the case, the Ninth Circuit affirmed. *See Cuddy*, 147 F.3d at 1115.

The upshot of the above is that, as in *Jingles, Scrivner*, and *Manzo*, Petitioner's claim is foreclosed by the law of the case doctrine unless one of the exceptions to that doctrine applies. Those exceptions are as follows: (1) the prior decision is clearly erroneous and its enforcement would work a manifest injustice, (2) intervening controlling authority makes reconsideration appropriate, or (3) substantially different evidence is before the court. *Gonzalez v. Arizona*, 677 F.3d 383, 390 n.4 (9th Cir. 2012). [16]

16 In *Gonzalez*, the Ninth Circuit held that "exceptions to the law of the case doctrine are not exceptions to [the Ninth Circuit's] general 'law of the circuit' rule, *i.e.*, the rule that a published decision of this court constitutes binding authority which 'must be followed unless and until overruled by a body competent to do so.' " 677 F.3d at 390 n.4 (citing *Hart v. Massanari*, 266 F.3d 1155, 1170 (9th Cir. 2001)). This language suggests that courts can only depart from the law of the case if the prior ruling was unpublished.

Petitioner does not argue that new evidence requires the Court to depart from the law of the case. And, although Petitioner initially argued that an intervening change in controlling authority warranted a departure from the law of the case, the intervening authority Petitioner relied on—*United States v. Johnson*, 963 F.3d 847 (9th Cir. 2020)—was later amended and no longer supports his Double Jeopardy argument, *See United States v. Johnson*, 979 F.3d 632 (9th Cir. 2020) (amending opinion on October 26, 2020). [17]

17 Even absent the amendment, it is unlikely that *Johnson*, as it was originally published,

would warrant a departure from the law of the case. A departure from the law of the case based on intervening authority requires that the new authority be inconsistent with—or at least "undercut"—the prior authority. *See Van Alstyne*, 584 F.3d at 813 (finding departure from law of case warranted where intervening authority was "inconsistent" with and "sufficiently undercut" prior case law). Here, the original *Johnson* opinion did not undercut prior authority regarding the Double Jeopardy clause; rather, it expressly *relied* on that prior authority and essentially reaffirmed it. *See Johnson*, 963 F.3d at 851 (citing *United States v. James*, 987 F.2d 648 (9th Cir. 1993) and *United States v. Weems*, 49 F.3d 528 (9th Cir. 1995)). Moreover, the Court is skeptical regarding the applicability of this exception to the law of the case doctrine in a § 2255 proceeding. After all, under *Teague v. Lane*, new rules of constitutional law announced after a petitioner's case is final generally do not apply retroactively on collateral review. 489 U.S. 288, 310 (1989). Accordingly, it is unlikely that a court engaged in collateral review could depart from the law of the case on the basis of an intervening change in law unless that change has also been held retroactive. *See id.*

***14** Accordingly, Petitioner's claim is foreclosed by the law of the case doctrine unless the Ninth Circuit's decision was clearly erroneous and its enforcement would work a manifest injustice. *See Gonzalez*, 677 F.3d at 390 n.4. The Court will now turn to this inquiry.

B. Petitioner's Claim Fails on the Merits.

A decision is clearly erroneous if, after reviewing the record, the court is left with a definite and firm conviction that error occurred. *Van Tran v. Lindsey*, 212 F.3d 1143, 1153 (9th Cir. 2000). The clear error standard is a "highly deferential standard of review." *In re Swift Transportation Co. Inc.*, 830 F.3d 913, 916 (9th Cir. 2016) (citing *Cal. Dep't of Water Res. v. Powerex Corp.*, 533 F.3d 1087, 1092 (9th Cir. 2008)).

Before resolving the merits of Petitioner's claim, it is important to identify exactly what the Ninth Circuit decided on Petitioner's direct appeal. Specifically, it is not entirely clear whether the Ninth Circuit decided it can take judicial notice of Victorville's jurisdictional status as a legislative fact —*i.e.*, as a question of law—or as an adjudicative fact.

If the Ninth Circuit took judicial notice of Victorville's jurisdictional status as a legislative fact, no clear error occurred. In *Warren*, the Ninth Circuit held that the existence of federal jurisdiction over a geographic area is a matter of law, but the locus of the offense within that area is an issue for the trier of fact. 984 F.2d at 327. Later, in *Mujahid*, the Ninth Circuit reaffirmed its position, explaining that "we have approved of the trial court deciding the jurisdictional component of a crime to the extent it presents a pure question of law with no disputed questions of fact underlying it." 799 F.3d at 1237. And in *Davis*, the Second Circuit did exactly what Petitioner argues is clearly erroneous: it took judicial notice on appeal of a federal prison's jurisdictional status because that jurisdictional status was a legislative fact. *See* 726 F.3d at 367.

In light of this case law, this Court does not hold a definite and firm conviction that taking judicial notice of Victorville's jurisdictional status as a legislative fact on appeal based on new evidence is erroneous.[18] Accordingly, if Ninth Circuit treated Victorville's jurisdictional status as a legislative fact, that would end the matter.

18 This claim certainly raises interesting constitutional issues. For example, *Mujahid* and *Warren* both held that *district courts* could take judicial notice before trial; neither case addressed the propriety of an appellate court taking judicial notice *after* trial based on new evidence. *See Mujahid*, 799 F.3d at 1236; *Warren*, 984 F.2d at 327. Moreover, the Ninth Circuit's opinion in *Mujahid* suggests that judicial notice of jurisdictional elements may not be appropriate where—as here—disputed factual questions underlie the legal issue. *See Mujahid*, 799 F.3d at 1237 ("[W]e have approved of the trial court deciding the jurisdictional component of a crime *to the extent it presents* a pure question of law with *no disputed questions of fact underlying it.*") (emphasis added). Indeed, the *Mujahid* Court expressly left open the question of whether courts can decide the jurisdictional component of an offense where the underlying facts are disputed. *See id.* at 1238 n.12 ("Although [other authority] may well suggest that [jurisdictional components] can be decided by the trial court even if facts are disputed, we need not resolve that issue.").

> However, the inquiry here is not whether taking judicial notice on appeal based on new evidence is, in the abstract, constitutionally permissible. In other words, this Court is not conducting—and lacks the authority to conduct—a *de novo* review of that issue. Rather, the Ninth Circuit necessarily decided that issue, *See supra* at 15–16, and this Court can only depart from that decision if it was clearly erroneous, *See Manzo*, 675 F.3d at 1211 n.3. The clear error inquiry is a "highly deferential" one, *In re Swift*, 830 F.3d at 916, and the case law here does not support a finding of clear error.

***15** Yet, based on this Court's reading of the opinion, it is more likely that the Ninth Circuit treated this issue as an adjudicative fact. In finding that it could take judicial notice of Victorville's jurisdictional status on appeal, the Ninth Circuit cited to Federal Rule of Evidence ("F.R.E.") 201. *See* Dkt. 1-2 at 3. That rule is titled "Judicial Notice of Adjudicative Facts" and expressly governs "judicial notice of an adjudicative fact only, not a legislative fact." F.R.E. 201(1). Although the Ninth Circuit also cited two cases explaining that district courts can treat the existence of federal jurisdiction over a geographic area as a matter of law, *see* Dkt. 1-2 at 3 (citing *United States v. Smith*, 282 F.3d 758 (9th Cir. 2002 and *United States v. Gipe*, 672 F.2d 777 (9th Cir. 1982), the Ninth Circuit explained that it took judicial notice because "[t]he [G]overnment provided evidence from sources whose accuracy cannot reasonably be questioned" establishing that Victorville fell under federal jurisdiction, *see id.* That language is the verbatim standard used for taking judicial notice of an adjudicative fact under F.R.E. 201, which states that a court may judicially notice a fact that is not subject to reasonable dispute because it "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Finally, the only authority cited by the dissenting judge—who concluded that the Ninth Circuit lacked authority to take judicial notice—is F.R.E. 201. *See id.* at 7. Based on the foregoing, the Court finds that, in taking judicial notice of Victorville's jurisdictional status, it is more likely that the Ninth Circuit treated that status as an adjudicative fact rather than a legislative fact.

The case law regarding the propriety of judicially noticing adjudicative facts on appeal based on new evidence is somewhat less clear than that of judicially noticing legislative facts on appeal based on new evidence.

First, taking judicial notice of adjudicative facts on appeal may very well violate the Sixth Amendment right to a trial by jury. Indeed, the Ninth Circuit has expressly stated—albeit in dicta—that "[f]or a court ... to take judicial notice of an adjudicative fact after a jury's discharge in a criminal case would cast the court in the role of a fact-finder and violate [a] defendant's Sixth Amendment right to trial by jury." *United States v. Dior*, 671 F.2d 351, 358 (9th Cir. 1982). Moreover, taking judicial notice on appeal is inconsistent with the text of the rule itself, which requires courts in criminal cases to instruct the jury that it can decline to accept the judicially noticed fact. *See* F.R.E. 201(f) ("In a criminal case, the court *must* instruct the jury that it may or may not accept the noticed fact as conclusive.") (emphasis added); *but see id.*, Note to Subdivision (f) ("In accord with the usual view, judicial notice may be taken at any stage of the proceedings, whether in the trial court or on appeal."). For obvious reasons, this jury instruction requirement is impossible to satisfy if a fact is judicially noticed on appeal.

At least one circuit has expressly held that taking judicial notice of an adjudicative fact on appeal would violate the Sixth Amendment right to a trial by jury. In *United States v. Jones*, the Sixth Circuit reviewed the legislative history underlying F.R.E. 201 and concluded that taking judicial notice of an adjudicative fact on appeal would essentially eliminate the Congressional requirement that the jury be instructed that it need not accept the judicially noticed fact. 580 F.2d 219, 224 (6th Cir. 1978). The Sixth Circuit reasoned that, absent this requirement, judicial notice of adjudicative facts would violate "the spirit, if not the letter, of the constitutional right to a jury trial by effectively permitting a partial directed verdict as to facts in a criminal case." *Id.*; *but see United States v. Piggie*, 622 F.2d 486, 488 (10th Cir. 1980) (affirming conviction where district court took judicial notice of prison's jurisdictional status but failed to instruct jury that it need not accept court's conclusion).

Additionally, the Second Circuit in *Davis* noted that characterizing the jurisdictional element of the offense as a legislative fact was important to the inquiry because of authority suggesting that judicial notice of an adjudicative fact after the jury is discharged would violate the defendant's right to a jury trial. 726 F.3d at 368 n.7. And the facts in *Davis* are largely similar to those here: after presenting arguably insufficient evidence of the jurisdictional element of Petitioner's offense at trial, the Government presented new evidence on appeal, and the Ninth Circuit took judicial notice of Victorville's jurisdictional status based on that new evidence.

***16** Second, taking judicial notice of an adjudicative fact on appeal may also violate the Double Jeopardy Clause. When the government's evidence at trial is insufficient to uphold a conviction, the Double Jeopardy Clause bars a retrial and entitles defendant to a judgment of acquittal. *Burks v. United States*, 437 U.S. 1, 11 (1978). The Ninth Circuit has explained that the crux of the Double Jeopardy Clause is "denying the prosecution a second opportunity 'to supply evidence which it failed to muster in the first proceeding.' " *United States v. Weems*, 49 F.3d 528, 531 (9th Cir. 1995) (quoting *Tibbs v. Florida*, 457 U.S. 31, 41 (1982)). Accordingly, one might argue that the Double Jeopardy Clause is violated where a court of appeals relies on evidence not presented at trial to take judicial notice of an adjudicative fact.

The Government suggests that it would be "absurd" to treat the jurisdictional status of a federal prison as an adjudicative fact that must be determined by the jury unless it satisfies the requirements of F.R.E. 201. Supp. Opp. at 4 (citing *Brown v. Piper*, 91 U.S. 37, 42 (1875)). To the contrary, that is precisely what the First Circuit requires. In *United States v. Bello*, the First Circuit held that the jurisdictional status of a prison is "an element of the offense and unquestionably an adjudicative fact." *United States v. Bello*, 194 F.3d 18, 23 (1st Cir. 1999). The *Bello* Court affirmed the district court's decision to take judicial notice not because the issue presented a pure question of law but, rather, because the evidence on which the district court relied—*i.e.*, evidence presented at trial, not only on appeal—satisfied the requirements of F.R.E. 201. *Id.*

Ultimately, however, the Court finds that there was no clear error if the Ninth Circuit took judicial notice of Victorville's jurisdictional status as an adjudicative fact. First, "[i]t is well established that '[t]he absence of controlling precedent weighs strongly against a finding of clear error.' " *In re Swift*, 830 F.3d at 916–17 (citations omitted). Here, no controlling precedent addresses whether taking judicial notice of an adjudicative fact on appeal violates a criminal defendant's constitutional rights. Moreover, only one circuit has directly addressed the issue, *See Jones*, 580 F.2d at 224, and F.R.E. 201 is itself internally inconsistent about the propriety of judicially noticing adjudicative facts on appeal, *compare* F.R.E. 201(f) ("In a criminal case, the court *must* instruct the jury that it may or may not accept the noticed fact as conclusive.") (emphasis added) *with* F.R.E. 201, Note to Subdivision (f) ("In accord with the usual view, judicial notice may be taken at any stage of the proceedings, whether in the trial court or on appeal."). Given this limited authority and the lack of binding precedent, this Court does not hold a definite and firm conviction that taking judicial notice of an adjudicative fact on appeal based on new evidence is clearly erroneous.

For the foregoing reasons, the Court rejects Petitioner's final claim. *See Jingles*, 702 F.3d at 503 (affirming district court's denial of § 2255 petition where no exceptions to law of the case doctrine applied).

VII. A Certificate of Appealability is Warranted on Two of Petitioner's Four Claims.

At the Certificate of Appealability ("COA") stage, the only question is whether the applicant has shown that "jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Buck v. Davis*, 137 S. Ct. 759, 773 (2017). The court considers each claim separately, and it may grant a COA on one claim and not others. *See Mayfield v. Woodford*, 270 F.3d 915, 922 (9th Cir. 2001).

***17** The Court will not grant a COA on Petitioner's first claim. Specifically, no reasonable jurist could find that Petitioner's trial attorney was ineffective in agreeing to the jury instructions used at trial, nor could a reasonable jurist find that Petitioner established *Strickland* prejudice as a result of those instructions.

The Court also will not grant a COA on Petitioner's final claim discussed above. That claim certainly raises interesting constitutional questions. *See supra* at n.18 & 21–22. And Petitioner argues that the propriety of taking judicial notice of the jurisdictional status of a geographic area on appeal based on new evidence—either as a legislative fact or an adjudicative fact—is constitutionally "debatable." Supp. Reply at 6. Accordingly, Petitioner argues, this Court should issue a COA. *See id.*

Petitioner's argument misses the mark. The issue at this stage is not whether the constitutional issues presented are "debatable." Rather, the issue is whether reasonable jurists could disagree about this Court's resolution of the clear error inquiry. *See Buck*, 137 S. Ct. at 773 (explaining COA warranted where "jurists of reason could disagree with *the district court's resolution* of [a petitioner's] constitutional claims") (emphasis added).

As explained above, the Ninth Circuit necessarily decided that it could take judicial notice of Victorville's jurisdictional

status based on new evidence without violating Petitioner's constitutional rights. *See supra* at 15–16. That decision is the law of the case unless it is clearly erroneous. *See supra* at 16–19. In other words, Petitioner is only entitled to relief if the Ninth Circuit's decision was clearly erroneous. This Court found that the Ninth Circuit's decision to take judicial notice —either as a legislative fact or an adjudicative fact—was *not* clearly erroneous. *See supra* at 19–23. Accordingly, a COA is only warranted if reasonable jurists could disagree about this Court's resolution of the clear error inquiry.

The Court concludes that that no reasonable jurist could find that the Ninth Circuit clearly erred if it took judicial notice of Victorville's jurisdictional status as a legislative fact. Although *Warren* and *Mujahid* create room for constitutional debate about this issue in the abstract, *see supra* at n.18, they in no way create a "definite and firm conviction" that the Ninth Circuit's decision here was clearly erroneous, *See Van Tran*, 212 F.3d at 1153.

Moreover, if the Ninth Circuit took judicial notice of Victorville's jurisdictional status as an adjudicative fact, no reasonable jurist could hold a definite and firm conviction that the Ninth Circuit erred by doing so because no controlling precedent addresses the issue. *See In Re Swift*, 830 F.3d at 916–17.

Accordingly, a COA is not warranted for Petitioner's first and fourth claims.

However, the Court will issue a COA for Petitioner's second and third claims. As to the second claim, reasonable jurists could disagree as to whether Petitioner's trial counsel's failure to contest the jurisdictional element of the offense constitutes deficient performance. And, although this Court found that Petitioner failed to establish *Strickland* prejudice for the second claim, reasonable jurists could disagree. Specifically, a reasonable jurist could find—contrary to this Court's conclusion, *see supra* at n.7—that (1) *Mujahid* and *Torres* would have in fact required this Court to present the issue of Victorville's jurisdictional status to the jury, and (2) there is a "reasonable probability" that a jury would have acquitted Petitioner. *Strickland*, 466 U.S. at 694.

***18** As to Petitioner's third claim, the Court already found that Petitioner satisfied *Brady*'s first and second elements. And, although the Court rejected Petitioner's arguments regarding prejudice, reasonable jurists could find otherwise. Specifically, a reasonable jurist could conclude that (1) *Mujahid* and *Torres* would have required this Court to present the issue of Victorville's jurisdictional status to the jury, and (2) there is a "reasonable probability" that a jury would have acquitted Petitioner. *Strickler*, 527 U.S. at 289.

VIII. Conclusion.

For the foregoing reasons, the petition is DENIED. A COA will issue on Petitioner's second and third claims.

IT IS SO ORDERED.

All Citations

Slip Copy, 2021 WL 1156845

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Exhibit K

2007 WL 2262853
Only the Westlaw citation is currently available.
United States District Court,
S.D. California.

Daniel RENARD, Plaintiff,
v.
SAN DIEGO UNIFIED PORT DISTRICT, et al., Defendants.

No. 06-CV-2665 H(BLM).
|
Aug. 6, 2007.

Attorneys and Law Firms

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ORDER DENYING PLAINTIFF'S MOTION TO STRIKE AND FOR A MORE DEFINITE STATEMENT

MARILYN L. HUFF, District Judge.

***1** On May 15, 2007, Plaintiff filed his second amended complaint. (Doc. No. 79.) On June 8, 2007, Defendants filed a motion to dismiss. (Doc. No. 114.) On July 16, 2007, Plaintiff filed a motion to strike certain defenses from Defendants' motion to dismiss and asking the Court to order a more definite statement as to certain arguments in the motion to dismiss. (Doc. No. 117.) Defendants filed a response in opposition on July 26, 2007, arguing that Plaintiff's motion is inapplicable to their motion to dismiss. (Doc. No. 118.) Plaintiff filed a reply in support of his motion on August 1, 2007. (Doc. No. 119.) The Court exercises its discretion under Civil Local Rule 7.1(d)(1) and finds this matter appropriate for disposition without oral argument.

As an initial matter, Rule 7(a) of the Federal Rules of Civil Procedure sets forth the limited documents considered "pleadings" within the federal courts. [1] In contrast, Rule 7(b) describes "motions" and "other papers" contemplated by the Federal Rules.

[1] Rule 7(a) provides: "There shall be a complaint and an answer; a reply to a counterclaim denominated as such; an answer to a cross-claim, if the answer contains a cross-claim; a third-party complaint, if a person who was not an original party is summoned under the provisions of Rule 14; and a third-party answer, if a third-party complaint is served. No other pleading shall be allowed, except that the court may order a reply to an answer or a third-party answer."

A party may file a motion to strike under Rule 12(f), which provides that the court may strike "any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter" from any pleading. " '[T]he function of a 12(f) motion to strike is to avoid the expenditure of time and money that must arise from litigating spurious issues by dispensing with those issues prior to trial.' " *Fantasy, Inc. v. Fogerty,* 984 F.2d 1524, 1527 (9th Cir.1993) (*quoting Sidney-Vinstein v. A.H. Robins Co.,* 697 F.2d 880, 885 (9th Cir.1983), *rev'd on other grounds,* 510 U.S. 517 (1994)). Rule 12(f) motions to strike are generally disfavored. *See e.g., Stanbury Law Firm v. I.R.S.,* 221 F.3d 1059, 1063 (8th Cir.2000). Importantly, only pleadings are subject to a motion to strike. Improper motions, declarations, or other material not contained in pleadings cannot be stricken under Rule 12(f). *See, e.g., A.H. Robins Co.,* 697 F.2d at 885. Accordingly, Plaintiff's motion to strike arguments from Defendants' motion to dismiss is improper.

Similarly, Rule 12(e) of the Federal Rules of Civil Procedure allows a court to order a more definite statement in response to pleading deficiencies: "If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, the party may move for a more definite statement before interposing a responsive pleading." Rule 12(e) only contemplates a more definite statement with regard to pleadings, however, and it does not provide any mechanism through which a party may obtain a more definite statement as to a motion to dismiss. Accordingly, Plaintiff's motion for a more definite statement as to Defendants' motion to dismiss is also improper.

In short, Plaintiff's motion fails because neither a motion to strike nor a motion for more definite statement applies in the context of a motion to dismiss. Accordingly, the Court **DENIES** Plaintiff's motion to strike or for a more definite statement.

***2** Additionally, much of Plaintiff's motion attacks the sufficiency of Defendants' arguments raised in their motion to dismiss. The Court notes that Plaintiff may raise any perceived deficiencies in Defendants' motion in his

opposition to the motion to dismiss. As noted in a previous scheduling order, Plaintiff shall file any opposition to Defendants' motion to dismiss by August 13, 2007. Defendants may file any reply by August 20, 2007.

IT IS SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2007 WL 2262853

Exhibit L

SECRETARY FOR JUSTICE v GLOBAL MERCHANT FUNDING LTD

COURT OF FINAL APPEAL
FINAL APPEAL NO 4 OF 2015 (CRIMINAL)
MA CJ, RIBEIRO, TANG AND FOK PJJ AND LORD CLARKE NPJ
12 APRIL, 16 MAY 2016

Financial Services – Money lenders – Whether defendant carried on business as a money lender – Merchant cash advance contract – Whether relevant transactions loans or purchases of receivables – Money Lenders Ordinance (Cap 163) s 29(1)(a)

金融服務 — 放債人 — 被告人是否經營放債生意 — 商務金錢預支合約 — 是相關的借貸交易或購買的應收款項 — 《放債人條例》(第163章)第29(1)(a)條

The respondent, Global Merchant Funding Limited (GMF), was charged under s 29(1)(a) of the Money Lenders Ordinance (Cap 163) (MLO) which provided that any person who carried on business as a money lender without a licence committed an offence. The charge was dismissed by the Permanent Magistrate. It was held that the Merchant Cash Advance Contract (MCA Contract) entered into between GMF with other merchants did not constitute a loan within the meaning of s 2 of the MLO. The appeal was dismissed (see [2015] 2 HKLRD 843, [2015] HKCU 736). The prosecution appealed to the Court of Final Appeal.

The issue was whether GMF was carrying on business as a money lender. Since the MLO defined 'money lender' as 'every person whose business. . . is that of making loans. . .', the case turned on whether, by providing finance pursuant to the MCA Contract, GMF was 'making loans' to those merchants. In other words, whether the legal effect of the MCA Contract's provisions was such as to make it an agreement 'which was in substance or effect a loan of money'.

Held, dismissing the appeal:

The approach to categorising transactions

(1) The issue was one of categorisation: whether the relevant transactions should be categorised as loans or as purchases of receivables. The approach which the courts adopted in deciding between such rival contentions was well-established. The concepts employed in the Hong Kong legislation derived from the original English equivalents, and the English case law, dealing with very similar issues, was highly relevant (para 12).

(2) Perhaps because the legislation was penal and, if misapplied, might be commercially disruptive, the courts had consistently taken a restrictive view of what constituted money lending. As the court explained in *Olds Discount*: 'it is the nature of the agreement entered into, and not its object, at which the court has to look in order to decide whether in any particular case the agreement is a moneylending agreement or otherwise.' *Olds Discount Co Ltd v John Playfair Ltd* [1938] 3 All ER 275 considered (para 13).

(3) *Olds Discount* was approved by the Privy Council in *Chow Yoong Hong*, where Lord Devlin elucidated the court's approach in the following terms: 'It (the

court) must first look at the nature of the transaction which the parties have agreed. If in form it is not a loan, it is not to the point to say that its object was to raise money for one of them or that the parties could have produced the same result more conveniently by borrowing and lending money. But if the court comes to the conclusion that the form of the transaction is only a sham and that what the parties really agreed upon was a loan which they disguised, for example, as a discounting operation, then the court will call it by its real name and act accordingly.' *Chow Yoong Hong v Choong Fah Rubber Manufactory* [1962] AC 209, [1961] 3 All ER 1163, [1962] 2 WLR 43 considered. *Olds Discount Co Ltd v John Playfair Ltd* (above) referred to (para 14).

(4) The MLO's definition of a 'loan' to include 'every agreement (whatever its terms or form might be) which was in substance or effect a loan of money' must be understood to be referring to an agreement which had the legal substance or effect of a loan and not an agreement with such an economic or commercial substance or effect (para 21).

The parties' agreement analysed

(5) The MCA Contract was concerned only with contract between the credit card company (in this case, the Processor) and the merchant. The receivable that GMF was agreeing to buy was a percentage of the payment that the merchant had a right to receive from the Processor (para 35).

(6) The merchant's right against the Processor was a contractual right, enforceable by action, and was accordingly a chose in action. It was a right to be paid money at various future dates. Such right to payment gave rise from time to time to a debt payable by the Processor to the merchant so that what GMF was purchasing under the MCA Contract was an agreed percentage of each such debt until GMF received the full Purchased Amount (para 36).

(7) The rules of equity were undemanding as to the form the creation of an equitable assignment must take. There was accordingly no need for there to be any express words of assignment (paras 42, 44).

(8) It was enough if it was clear from the parties' agreement that they intended the right to be assigned. Such intention was sufficiently demonstrated where (i) the assignor entered into an agreement with the assignee for valuable consideration obliging the assignor irrevocably to authorise the debt to be paid to the assignee out of a particular fund belonging to or held to the assignor's order; (ii) the assignor irrevocably instructed his debtor or the holder of the fund to pay the assignee; and (iii) the agreement was one which equity would enforce by specific performance (para 46).

(9) The MCA Contract was what it purported to be, an agreement for the sale and purchase of receivables rather than a loan. The receivables consisting of credit card settlement payments to be made by the Processor, were assignable choses in action. In consideration of the Purchase Price received, the merchant bound itself irrevocably to instruct the Processor to pay to GMF directly the Split Settlement amounts upon processing each batch settlement until GMF had collected sums totalling the Purchased Amount. Such instruction was duly given by the merchant. This constituted an equitable assignment of the relevant sums which took effect as and when they came into existence. While the transaction plainly represented a form of finance indistinguishable in economic effect from a loan with interest, it was not a loan in legal substance and effect and therefore fell outside the MLO (para 49).

Cases referred to

Charge Card Services Ltd, Re [1989] Ch 497, [1988] 3 All ER 702, [1988] 3 WLR 764 (CA, Eng)

Chow Yoong Hong v Choong Fah Rubber Manufactory [1962] AC 209, [1961] 3 All ER 1163, [1962] 2 WLR 43 (PC)

Elders Pastoral Ltd v Bank of New Zealand (No 2) [1990] 1 WLR 1478; 134 Sol Jo 1336 (PC)

George Inglefield Ltd, Re [1933] Ch 1, [1932] All ER Rep 244, [1931] B & CR 220 (Ch D)

Holroyd v Marshall [1861-73] All ER Rep 414, (1862) 10 HL Cas 191 (HL)

James Talcott Ltd v John Lewis Ltd and North American Dress Co Ltd [1940] 3 All ER 592 (CA, Eng)

Kent & Sussex Sawmills Ltd, Re [1947] 1 Ch 177 (Ch D)

Lloyds & Scottish Finance v Cyril Lord Carpets [1992] BCLC 609 ; 129 NLJ 366 (HL)

Norman v Federal Commissioner of Taxation (1963) 109 CLR 9, [1964] ALR 131 (HC, Aust)

Olds Discount Co Ltd v John Playfair Ltd [1938] 3 All ER 275; 82 Sol Jo 648 (KBD)

Orion Finance Ltd v Crown Financial Management Ltd [1996] 2 BCLC 78 (CA, Eng)

Palmer v Carey [1926] AC 703 , [1926] B & CR 51 (PC)

Rekstin v Severo Sibirsko & Co and Bank for Russian Trade [1933] 1 KB 47, [1932] All ER Rep 534 (CA, Eng)

Swiss Bank v Lloyds Bank [1982] AC 584, [1980] 2 All ER 419, [1980] 3 WLR 457 (CA, Eng)

Tailby v The Official Receiver (1888) 13 App Cas 523, [1886-90] All ER Rep 486 (HL)

Welsh Development Agency v Export Finance Co [1992] BCLC 148, [1992] BCC 270 (CA, Eng)

William Brandt's Sons & Co v Dunlop Rubber Co [1905] AC 454, [1904-07] All ER Rep 345 (HL)

Williams v Ball [1917] 1 Ch 1, [1916-17] All ER Rep 354 (CA, Eng)

Whitting, Re, ex p Hall (1878) 10 Ch D 615; 48 LJ Bcy 46 (CA, Eng)

Legislation referred to

Companies Act 1985 [UK] s 395
Companies Ordinance (Cap 622) s 337(4)
Money Lenders Ordinance (Cap 163) ss 2(1), 29(1)(a)

[*Editorial note*: For discussion on money lenders, see *Halsbury's Laws of Hong Kong*, Title 40, Banking and Finance, [40.122].]

Final Appeal (Criminal)

The respondent was charged under s 29(1)(a) of the Money Lenders Ordinance, which provided that any person who carried on business as a money lender without a licence committed an offence. The magistrate and the Court of Appeal

held that the respondent's Merchant Cash Advance Contract did not constitute a loan. The prosecution appealed to the Court of Final Appeal. The facts appear sufficiently in the following judgment.

Clifford Smith SC and Anthony Chau SPP (Director of Public Prosecutions) for the HKSAR.

Simon Westbrook SC and Derek CL Chan and Michael Lok (Gall) for the respondent.

Ribeiro PJ:

1. At the hearing, this appeal was dismissed with costs. These are the court's reasons for so doing.

A. The charge, the issues and the decisions below

2. The respondent, Global Merchant Funding Limited (GMF), was charged under s 29(1)(a) of the Money Lenders Ordinance (MLO)[1] which provides that any person who carries on business as a money lender without a licence commits an offence.

3. The central issue is whether GMF was carrying on business as a money lender.[2] Since the MLO relevantly defines 'money lender' as 'every person whose business. . . is that of making loans. . .' the case turns on whether, by providing finance pursuant to a contract referred to as the Merchant Cash Advance Contract (MCA Contract) entered into with merchants operating small businesses, GMF was 'making loans' to those merchants.

4. Section 2(1) of the MLO defines 'loan' as follows:

> ''loan' includes advance, discount, money paid for or on account of or on behalf of or at the request of any person, or the forbearance to require payment of money owing on any account whatsoever, and every agreement (whatever its terms or form may be) which is in substance or effect a loan of money, and also an agreement to secure the repayment of any such loan, and 'lend' and 'lender' shall be construed accordingly'.

5. The Court of Appeal conveniently summarised the purport of the MCA Contract as follows:

> '. . . GMF purchased a fixed amount of the merchant's future credit card receivables, known as the 'Purchased Amount'. The price paid by GMF was in the form of a one-off upfront MCA, known as the 'Purchase Price', which was at a discount to the Purchased Amount. The merchant arranged for GMF to collect the Purchased Amount through the merchant's credit card processing

1. Cap 163.
2. It being accepted that GMF did not have a licence.

bank, whereby GMF received a fixed percentage of the merchant's credit card sales until the Purchased Amount was collected in full.'[3]

6. The crucial question is whether the legal effect of the MCA Contract's provisions is such as to make it an agreement 'which is in substance or effect a loan of money'.

7. The courts below answered that question in the negative. The charge was dismissed by Mr Li Kwok Wai, Permanent Magistrate.[4] The prosecution then brought an appeal to the Court of First Instance by way of case stated[5] and Line J acceded to an application for the appeal to be transferred to the Court of Appeal where the appeal was dismissed.[6] However, the Court of Appeal certified that a point of great and general importance arises in the following terms:

'Whether the reference to 'loan' in s 2 of the Money Lenders Ordinance (Cap 163) will apply to a transaction which:

(i) is not one of the traditional forms of discounting such as bill discounting, block discounting or the sale of book debts, and,

(ii) involves no discounting of any debt due from another person but in which, in consideration of a cash advance, the recipient of the cash advance (1) undertakes to pay a larger sum to the one making the advance and (2) makes provision by way of assignment for payments to be made out of anticipated future income accruing from credit card transactions whilst remaining liable as primary obligor for the amount so due to the extent that the income necessary to make the agreed payment does not materialize either at all or at the rate agreed, and,

(iii) where there are no receivables due from any third person or none having a face value corresponding to the amount due from the recipient of the cash advance?'

8. We should say at once that the question as certified is tendentiously framed, especially in postulating as a given that the transaction is one where the recipient of the payment remains liable as primary obligor and one where there are no receivables due from any third person. As appears from the discussion which follows, those propositions are very much in issue in analysing the effect of the MCA Contract. The court is of course not bound by the way questions are framed or certified but will address the issues properly arising where leave has been granted. But parties who put forward questions which are slanted or tendentiously framed should note

3. Per Kwan JA, with whom Lunn VP and Pang J agreed ([2015] HKCU 736, HCMA 716/2013, 2 April 2015) §9.
4. ESS 43438/2011 (13 July 2012).
5. HCMA 716/2013 (5 November 2013).
6. Lunn VP, Kwan JA and Pang J ([2015] 2 HKLRD 843, [2015] HKCU 736, HCMA 716/2013, 2 April 2015).

A that they run the risk of being refused leave to appeal for want of a properly formulated question.

9. The substantive issue is whether the Magistrate and the Court of Appeal were right to hold that the MCA Contract did not constitute a loan within the meaning of s 2 of the MLO.

B 10. GMF contends that the MCA Contract does not involve a loan. It says that the contract is what it purports to be, namely, an agreement whereby the merchant sells and GMF purchases the right to a percentage of the merchant's future payments by credit card companies, falling outside the MLO.

C 11. The Secretary for Justice, on the other hand, contends that the MCA Contract is in substance or effect an agreement for the loan of money by GMF to the merchant at an objectionably high rate of interest, secured by assignments of credit card receivables by way of security.

D *B. The approach to categorising transactions*

12. The issue is therefore one of categorisation: whether the relevant transactions should be categorised as loans or as purchases of receivables. The approach which the courts adopt in deciding between such rival E contentions is well-established. The concepts employed in the Hong Kong legislation derive from the original English equivalents[7] and the English case-law, dealing with very similar issues, is highly relevant.

13. Perhaps because the legislation is penal and, if misapplied, may be commercially disruptive, the courts have consistently taken a restrictive F view of what constitutes money lending. Thus, in *Olds Discount Co Ltd v John Playfair Ltd*,[8] a case dealing with the MLA 1927,[9] it was held that an agreement for the purchase by a hire-purchase company of book debts owing by customers to a drapers company which had sold them goods on credit did not constitute a loan 'notwithstanding that the operative reason G in the minds of the defendants for entering into it was that they desired to raise money as a temporary matter in the same way as they would have raised it if they had merely entered into a transaction of loan'.[10] This was because, as Branson J explained:

H > '. . . it is the nature of the agreement entered into, and not its object, at which the court has to look in order to decide whether in any particular case the agreement is a moneylending agreement or otherwise.'[11]

I 7. The Moneylenders Acts 1900 to 1927 (since repealed and replaced, inter alia, by the Consumer Credit Act 1974). The Money-lenders Ordinance 1911 was closely based on the Moneylenders Act 1900. The MLO took its present form as a result of amendments made in 1980.
8. [1938] 3 All ER 275.
9. See also *Olds Discount Co Ltd v Cohen* [1938] All ER 281 (Note)]
10. At 277.
11. *Ibid.*

14. *Olds Discount* was approved by the Privy Council in *Chow Yoong Hong v Choong Fah Rubber Manufactory*, where Lord Devlin elucidated the court's approach in the following terms:[12]

> 'There are many ways of raising cash besides borrowing. One is by selling book-debts and another by selling unmatured bills, in each case for less than their face value. Another might be to buy goods on credit or against a post-dated cheque and immediately sell them in the market for cash. Their Lordships are, of course, aware, as was Branson J, that transactions of this sort can easily be used as a cloak for moneylending. The task of the court in such cases is clear. It must first look at the nature of the transaction which the parties have agreed. If in form it is not a loan, it is not to the point to say that its object was to raise money for one of them or that the parties could haveproduced the same result more conveniently by borrowing and lending money. But if the court comes to the conclusion that the form of the transaction is only a sham and that what the parties really agreed upon was a loan which they disguised, for example, as a discounting operation, then the court will call it by its real name and act accordingly.'

15. When the New Zealand Court of Appeal[13] considered the meaning of 'moneylending' under the applicable Act,[14] after citing *Chow Yoong Hong v Choong Fah Rubber Manufactory*, Richardson J stated:[15]

> '. . . the first step in determining whether the transactions under review were loans is to ascertain their true nature or substance. . .. It is well settled that, where documents have been drawn to define the relationship of persons involved in a business operation, the true nature of the transaction can only be ascertained by careful consideration of the legal arrangements actually entered into and carried out. . .. It is the legal character of the transaction which is decisive, not the overall economic consequences to the parties. . . That character is not determined conclusively by the nomenclature used by the parties. Consideration must be given to the whole of the contract in order to determine the true nature of the relationship.'

16. Another line of authority where the same approach to categorisation has been adopted is also relevant to the present appeal. Those cases involve companies which raise finance by assigning their assets to others where the question is whether such transactions should be categorised as outright sales or assignments on the one hand; or assignments by way of security, creating charges on those assets, on the other. If in the latter category, the charge must be registered and, if

12. [1962] AC 209 at 216-217.
13. *Re Securitibank Ltd (No 2)* [1978] 2 NZLR 136.
14. Section 2 of the Moneylenders Act 1908.
15. At 167-168 (authorities cited omitted).

unregistered, is void as against the liquidator.[16]

17. Some of those decisions will be considered in the context of the Secretary's submission that the receivables in the present case were assigned by way of security.[17] However, for now it is material to note that the same approach to categorisation has been adopted in that context. Thus, in *Welsh Development Agency v Export Finance Co*,[18] Dillon LJ commented that there is no one clear touchstone for such categorisation and that:

> 'It is necessary therefore to look at the provisions in the master agreement as a whole to decide whether in substance it amounts to an agreement for the sale of goods or only to a mortgage or charge on goods and their proceeds.'

18. *Lloyds & Scottish Finance v Cyril Lord Carpets*,[19] was a case involving a method of financing called 'block discounting' whereby a company assigned book debts arising from sales in blocks to a finance company in return for a lump sum payment calculated so as to provide a discounting charge to the finance house. Lord Wilberforce noted that such transactions had been held to be sales of the debts and not charges and elaborated as follows:

> '. . . it has to be appreciated that block discounting is essentially a method of providing finance. Commercially and in its economic result, it may not differ from lending money at interest: the 'discounting charge', which represents the finance house's profit, is stated in term[s] of so much per cent per annum, which percentage is no doubt based upon current interest rates. Legally, however, there is no doubt that discounting is not treated as the lending of money and that the asset discounted is not considered as the subject of a charge.'[20]

19. Because of the similarity in result between a loan and a sale, his Lordship held that the court could only decide between the rival contentions by paying close regard to the precise contractual arrangements between the parties.[21]

20. As Millett LJ (as Lord Millett then was) put it in *Orion Finance Ltd v Crown Financial Management Ltd*:[22]

> '. . .proper legal categorisation is a matter of construction of the documents. This does not mean that the terms which the parties have adopted are necessarily determinative. The substance of the parties' agreement must be

16. In the relevant authorities, by operation of s 395 of the Companies Act 1985 and its equivalents. In Hong Kong, s 337(4) of the Companies Ordinance (Cap 622) prescribes the same consequence.
17. Section E.2 below.
18. [1992] BCLC 148 at 161.
19. [1992] BCLC 609.
20. [1992] BCLC 609.
21. At 617.
22. [1996] 2 BCLC 78 at 84.

found in the language they have used; but the categorisation of a document is determined by the legal effect which it is intended to have, and if when properly construed the effect of the document as a whole is inconsistent with the terminology which the parties have used, then their ill-chosen language must yield to the substance.'

His Lordship added:

'The question is not what the transaction is but whether it is in truth what it purports to be. Unless the documents taken as a whole compel a different conclusion, the transaction which they embody should be categorised in conformity with the intention which the parties have expressed in them.'[23]

21. In our view, the abovementioned approach is applicable in the present case. The MLO's definition of a 'loan' to include 'every agreement (whatever its terms or form may be) which is in substance or effect a loan of money' must be understood to be referring to an agreement which has the ***legal*** substance or effect of a loan and not an agreement with such an economic or commercial substance or effect. Methods of financing which may be economically indistinguishable from a loan repayable with interest may well be differently categorised in law.

22. Assuming that the transaction is not merely a sham,[24] the court can only decide whether a transaction is or is not a loan by construing the relevant documents and analysing the legal effect of what the parties have actually agreed. The language used by the parties is relevant but if it is inconsistent with what, as a matter of law, they have mutually agreed, the court disregards the parties' terminology in categorising the transaction.

C. The principles applied

23. Applying those principles, on a proper legal analysis, what have the parties to the present transactions mutually agreed? Is their contract in truth what it purports to be, namely a contract for the sale and purchase of credit card receivables, or, despite the parties' terminology, is it in legal substance or effect a contract for a loan?

C.1 The main contractual terms

24. The terms of the MCA Contract are contained in two documents comprising the 'Merchant Cash Advance (MCA) Sale and Purchase Contract' (the Contract) and the GMF 'Standard Terms and Conditions' (the Standard Terms), designed to be read together. The material

23. At 85.

24. That is, a transaction in which the parties 'have a common intention that the acts or documents are not to create the legal rights and obligations which they give the appearance of creating': *Snook v London and West Riding Investments Ltd* [1967] 2 QB 786 at 802. The Secretary concedes that the present case does not involve a sham.

provisions are set out in the Annex to this judgment. In each case, the only parties to the contract were GMF and the merchant concerned.

25. The essential terms of the transaction are contained in the un-numbered clauses at the start of the Contract as follows:

> 'The Seller hereby agrees to sell to the Buyer a fixed amount of the Seller's future receivables (the *Future Receivables*), relating to the payment of monies by the Seller's customers, for the purchase of the Seller's goods or services, through the use of any of the following cards: Visa/Mastercard/CUP.
>
> The amount paid by the Buyer to the Seller in consideration for the Future Receivables shall be in the form of a one-off, upfront Merchant Cash Advance or 'MCA' (the *Purchase Price*).
>
> The total amount of the Future Receivables sold by the Seller to the Buyer shall be known as the '*Purchased Amount*'. The Purchased Amount will be collected by the Buyer through the deduction of a specified percentage of the Seller's periodic batch settlements from the Seller's card processor ('*the Processor*', as defined more fully in the Terms and Conditions[25]) until the Purchased Amount has been collected in full. The specified percentage shall be known as the '*Retrieved Percentage*'.
>
> The Seller shall give an irrevocable authorisation to the Processor to deduct or split a cash sum from each periodic batch settlement, equal to the periodic net batch settlement amount multiplied by the Retrieved Percentage (the *Split Settlement(s)*). This irrevocable authorisation will take the form of a letter (the *MCA Processing Instruction Letter*), and will be completed by the Seller and given to the Buyer, who will then send it to the Processor, on behalf of the Seller. The Processor will continue to pay the Split Settlement(s) to the Buyer until the Purchased Amount has been collected in full.'

We adopt the italicised contractual definitions in this judgment.

26. To underline the parties' professed intentions as to the nature of the contract, clause 7.8 of the Standard Terms states:

> 7.8 For the avoidance of doubt, each of the Seller and the Buyer acknowledges and agrees that the Purchase Price paid by the Buyer to the Seller is for the purchase by the Buyer of the Future Receivables as set out in the [MCA Contract] and is not a loan or a credit facility offered by the Buyer to the Seller. Accordingly, the Seller and the Buyer agree and acknowledge that the Contract and any transactions contemplated therein shall not be subject to the Money Lenders Ordinance **...**

C.2 The transactions

27. The charge alleges that GMF carried on business as a money lender without a licence between 9 May 2011 and 21 October 2011. The

25. Standard Terms §1.2(e): 'Processor'shall mean the card processor designated by the Buyer [GMF] in respect of the processing and settling of the Relevant Card Transactions".

prosecution relies on MCA Contracts entered into by GMF respectively with Lam Ching trading as Amy House (Amy House), Unionjoy Enterprise Limited (Unionjoy) and Big Food Yamagimachi Diet Limited (Big Food). Amy House was a fashion shop, Unionjoy sold clothing and Big Food ran a catering business.

28. Pursuant to each agreement, GMF paid to the merchant the Purchase Price for a specified Purchased Amount of future credit card receivables which would be collected in tranches directly from the Processor pursuant to the Processing Instruction Letter which irrevocably authorised such direct payments to GMF.

29. On 9 May 2011, Amy House was paid $80,000 as the Purchase Price for the Purchased Amount of $97,600 which GMF had fully recovered from the Processor by 22 October 2011. Unionjoy received the Purchase Price of $50,000 on 18 May 2011 and GMF had collected the Purchased Amount of $60,000 by September 2011. In Big Food's case, the Purchase Price of $300,000 was received on 3 June 2011 and the Purchased Amount of $375,000 was collected in full by GMF by 21 October 2011. It is evident that the Purchase Price was at a substantial discount from the Purchased Amount and that if the difference between the sums were to be treated as interest, it would represent a very high annual rate of interest.

C.3 The Processing Instruction Letter

30. Of central importance to the proper categorisation of this transaction are the MCA Contract's provisions concerning the Processing Instruction Letter and GMF's right to be paid the Purchased Amount.

31. Clause 1 of the Contract provides:

> 'The MCA Processing Instruction Letter will be sent by the Buyer to the Processor, and shall constitute an irrevocable authorisation by the Seller to the Processor to remit all of the Split Settlements into a designated bank account of the Buyer (the Designated Account) rather than to the Seller's existing bank account, until the Purchased Amount has been collected in full by the Buyer.'

32. It is supplemented by clauses in the Standard Terms (i) which make it a condition precedent to the payment of the Purchase Price that the merchant should provide GMF with the Processing Instruction Letter[26] as well as a copy of its agreement with the Processor regarding settlement of its credit card transactions;[27] (ii) by which the merchant irrevocably authorises the Processor to transfer the Split Settlement to the Designated Account from time to time until such time as the Purchased Amount has

26. Standard Terms §2.1(h).
27. Standard Terms §2.1(e).

been collected in full[28] and agrees that the Processor may rely upon Processing Instruction Letter, without reference to the merchant, in remitting the Split Settlement to GMF;[29] and (iii) which deem it a Termination Event for the merchant to revoke the Processing Instruction Letter.[30]

33. We will return to the MCA Contract to examine other provisions relied on by the Secretary in support of his rival contention favouring a loan. However, it is our view that the legal effect of the abovementioned terms is to establish that the transaction is not a loan but a contract for the sale and purchase of receivables falling outside the MLO.

D. The parties' agreement analysed

D.1 The legal nature of the receivable

34. The legal analysis of credit card transactions has authoritatively been provided by the English Court of Appeal in ***Re Charge Card Services Ltd***.[31] They involve three contracts: (i) the contract between the credit card company and the merchant whereby the merchant agrees to accept payment by use of the card from anyone holding the card and the credit card company agrees to pay to the merchant the price of goods or services supplied less a discount; (ii) the contract between the credit card company and the cardholder which enables him to pay the price by its use and with him in return agreeing to pay the credit card company the full amount of the price charged by the merchant; and (iii) the contract for the sale or supply of goods or services entered into between the merchant and the cardholder.

35. The MCA Contract is concerned only with contract (i), between the credit card company (in this case, the Processor) and the merchant. The receivable that GMF is agreeing to buy is a percentage[32] of the payment that the merchant has a right to receive from the Processor.

36. The merchant's right against the Processor is a contractual right, enforceable by action, and is accordingly a chose in action. It is a right to be paid money at various future dates. Such right to payment gives rise from time to time to a debt payable by the Processor to the merchant so that what GMF is purchasing under the MCA Contract is an agreed percentage of each such debt until GMF receives the full Purchased Amount.

D.2 The assignability of the receivable

28. Standard Terms §4.2(a).
29. Standard Terms §4.2(b).
30. Standard Terms §8.1(i).
31. [1989] Ch 497 at 509.
32. That percentage, referred to in the MCA Contract as the Retrieval Percentage, was for example 25% in the case of Amy House and 30% for Big Food.

37. It may be arguable whether the agreement is an agreement to assign an existing chose in action consisting of the legal right to payment in future or to assign a series of future choses in action, but we do not think that distinction material in the present case. Equity recognises that in either case, the purchased receivable is a chose in action capable of assignment. Equity also recognises that a chose in action consisting of part of a debt is assignable.

38. Thus, while property which does not presently exist but which is to be acquired at a future time is not assignable at law, equity has not been so inhibited. As Lord Westbury LC explained in *Holroyd v Marshall*:[33]

> '. . . if a vendor or mortgagor agrees to sell or mortgage property, real or personal, of which he is not possessed at the time, and he receives the consideration for the contract, and afterwards becomes possessed of property answering the description in the contract, there is no doubt that a Court of Equity would compel him to perform the contract, and that the contract would, in equity, transfer the beneficial interest to the mortgagee or purchaser immediately on the property being acquired. This, of course, assumes that the supposed contract is one of that class of which a Court of Equity would decree the specific performance. If it be so, then immediately on the acquisition of the property described the vendor or mortgagor would hold it in trust for the purchaser or mortgagee, according to the terms of the contract.'

39. It is important that an agreement to assign future property should be for value (as it was in the present case by GMF providing the Purchase Price). Windeyer J in the High Court of Australia emphasised this in *Norman v Federal Commissioner of Taxation*:[34]

> 'If we turn from attempted gifts of future property to purported dispositions of it for value, the picture changes completely. The common law objection remains. But in equity a would-be present assignment of something to be acquired in the future is, when made for value, construed as an agreement to assign the thing when it is acquired. A court of equity will ensure that the would-be assignor performs this agreement, his conscience being bound by the consideration. The purported assignee thus gets an equitable interest in the property immediately the legal ownership of it is acquired by the assignor, assuming it to have been sufficiently described to be then identifiable. The prospective interest of the assignee is in the meantime protected by equity. These principles, which now govern assignments for value of property to be acquired in the future, have been developed and established by a line of well-known cases[35]. . .'

40. His Honour also explained that part of a debt is assignable, but

33. (1862) 10 HL Cas 191 at 211.
34. (1963) 109 CLR 9 at 24.
35. Citing *Holroyd v Marshall* (1862) 10 HLC 191; *Collyer v Isaacs* (1881) 19 Ch D 342; *Tailby v Official Receiver* (1888) 13 App Cas 523; and *In re Lind; Industrials Finance Syndicate Ltd v Lind* (1915) 2 Ch 345.

necessarily by an equitable (as opposed to a statutory or legal) assignment:

> 'A creditor cannot recover a debt piecemeal in a court of law. Therefore, when part of a debt was assigned, proceedings to enforce the assignment had to be brought in a court of equity. And the assignee, not the assignor, would be the plaintiff in the suit. The assignor (the creditor) as legal owner, the debtor and any assignees of other parts of the debt were all necessary parties, so that all the obligations of the debtor and the rights of all persons interested in the fund might be established by the decree. This was the rule of the Chancery Court. It is still the law. . .'[36]

D.3 How was the assignment effected in the present case?

41. For GMF to have purchased the future credit card receivables, it had to have acquired the right, if necessary, to sue the Processor for the specified percentage of the Batch Settlement constituting the Split Settlement. As there are no express words of assignment in the MCA Contract, how – if at all – did GMF acquire that right? It is in this context that the irrevocable authorisation contained in the Processing Instruction Letter assumes crucial importance. It operates as an equitable assignment by the merchant to GMF of its right to payment by the Processor of the specified amount.

42. The rules of equity are undemanding as to the form the creation of an equitable assignment must take. As Lord Macnaghtan pointed out in *Tailby v The Official Receiver*:[37]

> 'It has long been settled that future property, possibilities and expectancies are assignable in equity for value. The mode or form of assignment is absolutely immaterial provided the intention of the parties is clear. To effectuate the intention an assignment for value, in terms present and immediate, has always been regarded in equity as a contract binding on the conscience of the assignor and so binding the subject-matter of the contract when it comes into existence, if it is of such a nature and so described as to be capable of being ascertained and identified.'

43. And as his Lordship reiterated in *William Brandt's Sons & Co v Dunlop Rubber Co*:[38]

> '. . . the document does not, on the face of it, purport to be an assignment nor use the language of an assignment. An equitable assignment does not always take that form. It may be addressed to the debtor. It may be couched in the language of command. It may be a courteous request. It may assume the form

36. *Norman v Federal Commissioner of Taxation* (1963) 109 CLR 9 at 29, citing *Performing Right Society Ltd v London Theatre of Varities Ltd* [1924] AC 1, at 14, 20, 30, 31.
37. (1888) 13 App Cas 523 at 543.
38. [1905] AC 454 at 462. This passage was applied by the Privy Council in *Elders Pastoral Ltd v Bank of New Zealand (No 2)* [1990] 1 WLR 1478 at 1480.

of mere permission. The language is immaterial if the meaning is plain. All that is necessary is that the debtor should be given to understand that the debt has been made over by the creditor to some third person. If the debtor ignores such a notice he does so at his peril. If the assignment be for valuable consideration and communicated to the third person, it cannot be revoked by the creditor or safely disregarded by the debtor.'

44. There is accordingly no need for there to be any express words of assignment. In the ***William Brandt's Sons*** case itself, Brandts' debtor (Kramrisch & Co, a rubber merchant) on-sold to Dunlop goods which it had purchased with finance provided by Brandts and undertook to Brandts that the price would be paid directly to Brandts by Dunlop, giving notice to Dunlop that it should do so. This was held to establish an equitable assignment of Kramrisch's debt to Brandt. Lord Macnaghten thought it 'difficult to conceive a plainer case of an equitable assignment, or a clearer case of notice to the debtor':

'There was an undertaking that the money should be paid direct to Brandts. There was besides a declaration of trust. There was an engagement to give Brandts 'a sole and absolute lien' - that is, sole and absolute control and dominion over the proceeds of the goods. Then Dunlops receive through Brandts a notice, which no man of business could mistake, telling them, on Kramrisch & Co's express authority, that they are to pay to Brandts the money which they owe their creditors, Kramrisch & Co. What more could be required? Dunlops disregard that notice, and pay the wrong people. They must pay the money over again, and pay it to the right person.'[39]

45. In ***Palmer v Carey***,[40] the question was whether an agreement had taken effect as an equitable assignment so as to keep a certain sum of money out of a bankrupt's estate. While it was held that on the facts that had not occurred, Lord Wrenbury[41] stated the principles as follows:

'The law as to equitable assignment, as stated by Lord Truro in ***Rodick v Gandell*** (1852) 1 De GM & G 763, 777, 778, is this: 'The extent of the principle to be deduced is that an agreement between a debtor and a creditor that the debt owing shall be paid out of a specific fund coming to the debtor, or an order given by a debtor to his creditor upon a person owing money or holding funds belonging to the giver of the order, directing such person to pay such funds to the creditor, will create a valid equitable charge upon such fund, in other words, will operate as an equitable assignment of the debts or fund to which the order refers.'. . . It is necessary to find, further, that an obligation has been imposed in favour of the creditor to pay the debt out of the fund. This is but an instance of a familiar doctrine of equity that a contract for valuable consideration to

39. At 460-461.
40. [1926] AC 703 (PC) at 706-707.
41. This passage was approved in ***Swiss Bank v Lloyds Bank*** [1982] AC 584 at 613, per Lord Wilberforce.

transfer or charge a subject matter passes a beneficial interest by way of property in that subject matter if the contract is one of which a Court of Equity will decree specific performance.'

46. These authorities show that it is enough if it is clear from the parties' agreement that they intend the right to be assigned. They have held that such intention is sufficiently demonstrated where (i) the assignor enters into an agreement with the assignee for valuable consideration obliging the assignor irrevocably to authorise the debt to be paid to the assignee out of a particular fund belonging to or held to the assignor's order; (ii) the assignor irrevocably instructs his debtor or the holder of the fund to pay the assignee; and (iii) the agreement is one which Equity will enforce by specific performance.

47. The importance of the assignor being contractually bound not to revoke the payment instruction is stressed. In ***Ex p Hall, In re Whitting,***[42] James LJ pointed out that, 'To prevent the possibility of revocation it is necessary to prove the prior agreement, which is the only thing which gives the bankers any equity.' A mandate which the assignor may revoke at will does not sufficiently demonstrate an intention to make over his right to payment to the assignee. A revocable mandate is also liable to be revoked, for instance, by the assignor's bankruptcy,[43] by service of a garnishee order on the person holding the fund to the assignor's order[44] or by the assignor's death,[45] a state of affairs inconsistent with an intention on the part of the assignor to assign his right to the assignee.

48. It may be noted in passing that one issue dealt with in these authorities concerns the question whether sufficient notice of the equitable assignment was given to the holder of the assigned property or funds to create a legal obligation on that person solely to pay the assignee, so that if payment was made to the wrong person, the holder of the funds would have to pay over again.[46] That is not an issue arising on this appeal.

D.4 Not a loan in substance and effect

49. The foregoing analysis justifies the conclusion that the MCA Contract is indeed what it purports to be, that is, an agreement for the sale and purchase of receivables rather than a loan. The receivables consisting of credit card settlement payments to be made by the Processor, are assignable choses in action. In consideration of the Purchase Price received, the merchant bound itself irrevocably to instruct the Processor to pay to GMF directly the Split Settlement amounts upon processing each

42. (1878) 10 Ch D 615 at 621.
43. *Ibid.*
44. *Rekstin v Severo Sibirsko & Co and Bank for Russian Trade* [1933] 1 KB 47.
45. *Williams v Ball* [1917] 1 Ch 1.
46. As in *William Brandt's Sons & Co v Dunlop Rubber Co* [1905] AC 454; and *James Talcott Ltd v John Lewis Ltd and North American Dress Co Ltd* [1940] 3 All ER 592.

batch settlement until GMF had collected sums totalling the Purchased Amount. Such instruction was duly given by the merchant. This constituted an equitable assignment of the relevant sums which took effect as and when they came into existence. While the transaction plainly represents a form of finance indistinguishable in economic effect from a loan with interest, it is not a loan in legal substance and effect and therefore falls outside the MLO.

E. The arguments on behalf of the Secretary for Justice

50. As we understood the submissions of Mr Clifford Smith SC,[47] he advanced three main arguments for holding that the MCA Contract was a loan agreement.

E.1 The 'Purchased Amount' argument

51. First, he contended that the contract involved no sale of any future receivable:

> '. . . the Merchant has not sold any right to claim the Purchased Amount. Indeed, the Merchant itself has no right to the Purchased Amount capable of being the subject of a sale. That is because there is no one who is under any obligation to pay the Purchased Amount to the Merchant.'[48]

52. By way of elaboration, it was submitted that:

> '. . . the Purchased Amount does not represent a debt due from any customer or other third party, including the credit card processor, but is an amount in respect of which the merchant is the only primary obligor and the guarantees given to GMF are guarantees of the merchant's own liability and not are guarantees for the performance of any debt or obligation that has been sold.'[49]

53. The Court of Appeal,[50] counsel submitted, fell into error in regarding the Purchased Amount as the 'face value' of the receivables.

54. We do not accept this argument. The MCA Contract is clear as to what the subject-matter of the sale is, namely, the 'Future Receivables' which relate to 'the payment of monies by the [merchant's] customers, for the purchase of the [merchant's] goods or services, through the use of [the specified credit cards]'. The expression 'Purchased Amount' is defined as 'The total amount of the Future Receivables sold by the [merchant] to [GMF]' to be 'collected by [GMF] through the deduction of a specified percentage of the [merchant's] periodic batch settlements from the [Processor]'.

47. Appearing for the Secretary for Justice with Mr Anthony Chau SPP.
48. Appellant's Case §7.
49. *Ibid* §43.
50. Court of Appeal §43.

55. Such an arrangement does not pose difficulties since, as stated in *Tailby v The Official Receiver*:[51] 'If future book debts be assigned, the subject-matter of assignment is capable of being identified as and when the book debts come into existence. . .'

56. It involves a method of financing which differs little from the 'block discounting' arrangement referred to by Lord Wilberforce in *Lloyds & Scottish Finance v Cyril Lord Carpets*,[52] as follows:

> 'The book debts in question arose out of credit sales by the appellant company to individual customers, in which payment was due to be made by the customers over periods of 6, 12, 24 or 30 months. In order to provide finance for expansion, the appellant company used a method called 'block discounting' which involved assignments of the book debts arising from these sales in blocks to a finance company in return for a lump sum payment calculated so as to provide a discounting charge to the finance house. This financing method is well known and widely adopted. It has received consideration in the courts in three reported cases: *Re George Inglefield Ltd* [1933] Ch 1, [1932] All ER Rep 244; *Olds Discount Co Ltd v John Playfair Ltd* [1938] 3 All ER 275; and *Olds Discount Co Ltd v Cohen* [1938] 3 All ER 281nin which, on documents not unlike those used in the present case, it was held that the transactions should be considered to be sales of the debts in question and not treated as charges.'

57. For the reasons given in Sections D.1 and D.2 of this judgment, it is clear that the Future Receivables are assignable in equity and, as explained in Section D.3 above, it is clear that such an equitable assignment was created in the present case. This is why we described the framed question of law as tendentious in so far as it postulated as a given that no receivables were due from any third person.

E.2 The argument that any assignment was by way of security

58. Secondly, Mr Smith SC sought to argue that the effect of the Processing Instruction was to create an assignment by way of security and did not involve the sale and purchase of choses in action as contended for by GMF. In the appellant's printed case,[53] the point is put as follows:

> 'If GMF is to be regarded as an equitable assignee of a future chose in action, which the Court of Appeal took to be the case (at para 27 of the Judgment) this would necessarily mean that the future chose in action had been assigned by way of security for a debt, as in *Tailby*.[54] For that reason, the fact that an agreement to assign a future chose in action may be effective in equity does not indicate that the MCA Contract is one of sale and purchase. On the contrary, it is entirely consistent with it being a loan agreement.'

51. (1888) 13 App Cas 523 at 544 per Lord Macnaghten.
52. [1992] BCLC 609 at 611.
53. At §25.
54. *Tailby v The Official Receiver* (1888) 13 App Cas 523.

59. We are quite unable to understand the contention that such an assignment 'would *necessarily* mean that the future chose in action had been assigned by way of security for a debt'. Clearly, such an assignment might alternatively be by way of sale, which is what the debate in the present case is all about.

60. Where a person borrows money, it is of course possible that he may assign certain property to or on trust for his creditor by way of security for the debt.[55] That obviously presupposes that there is a debt to be secured. Whether that is the nature of the transaction depends on the construction of the parties' agreement. The parties expressly agreed to such a transaction in *Tailby* (referred to by Mr Smith), as stated in the bill of sale with which that case was concerned.[56] The question in issue, as indicated by Lord Herschell, was 'whether an assignment by way of security of certain book debts not existing at the time of the assignment was valid, so as to give the assignee a good title to them when they came into existence.'[57] *Tailby* therefore offers no support for Mr Smith's proposition.

61. An important feature distinguishing a sale on the one hand from a mortgage or charge on the other is the existence of an equity of redemption. This was pointed out by Romer LJ in *Re George Inglefield Ltd*:[58]

> 'In a transaction of sale the vendor is not entitled to get back the subject-matter of the sale by returning to the purchaser the money that has passed between them. In the case of a mortgage or charge, the mortgagor is entitled, until he has been foreclosed, to get back the subject-matter of the mortgage or charge by returning to the mortgagee the money that has passed between them.'[59]

62. The importance of this distinguishing feature was also recognised by Millett LJ in *Orion Finance Limited v Crown Financial Management Limited*.[60] Having cited *Re George Inglefield Ltd*, his Lordship noted that '[the] absence of any right in the transferor to recover the property transferred is inconsistent with the transaction being by way of security. . .'

63. In the present case, there is no basis for regarding the assignment of the credit card receivables to GMF as an assignment by way of security. There is no question here of the merchant getting back the subject-matter of the property assigned by returning to GMF the money that has passed between them. Payment of each Split Settlement by the Processor

55. As occurred for instance in *Holroyd v Marshall* (1862) 10 HL Cas 191.
56. *Tailby v The Official Receiver* (1888) 13 App Cas 523 at 523.
57. *Ibid* at 527-528.
58. [1933] Ch 1 at 27.
59. His Lordship also pointed out (at 27-28) that on realisation of the mortgaged property at a surplus, the mortgagee has to account for the excess; and that if realisation leaves an unpaid balance on the loan, the mortgagee may sue for that balance; whereas the profit or loss realised on the sale of property purchased rests entirely with the purchaser.
60. [1996] 2 BCLC 78 at 84.

represents the Processor's performance of the assigned payment obligations. When GMF receives the Purchased Amount in full, its assigned rights are satisfied. There is no question of the merchant paying off a loan and then getting back some property assigned by way of security. The parties have simply not agreed anything to that effect.

64. Mr Smith SC endeavoured to rely on *In re Kent & Sussex Sawmills Ltd*,[61] in support of his submission that the MCA Contract arrangement *does* confer on the merchant an equity of redemption. We do not consider that decision of any help to the Secretary's case. The issue there was whether certain letters of authority created an unregistered charge on the book debts of a company which was void against the liquidator.

65. It arose in the context of the sawmill company borrowing money on overdraft from a bank for the purpose of financing a sale of cut logs to a government Ministry and agreeing to provide a letter to the Ministry authorising it to remit the purchase price to the bank, stating in the letter that its instructions were 'to be regarded as irrevocable unless the said bank should consent to their cancellation in writing'. The starting-point was therefore that the bank had loaned money to the company by way of overdraft. That was the crucial basis of Wynn-Parry J's construction of the letter of authorisation with a view to determining whether it was an assignment at all, and if so, whether it was an outright assignment or an assignment by way of security. Thus, his Lordship stated:

> '. . . in my judgment the proper way of construing this letter, looking at it as a whole, is to bear in mind and never to lose sight of the circumstance that the relationship of the two parties in question, the company and the bank, was that of borrower and lender and that this letter was brought into existence in connexion with a proposed transaction of borrowing by the company and lending by the bank.'[62]

66. Having concluded that it was an assignment, Wynn-Parry J continued:

> 'That, however, does not conclude the matter because I have then to investigate the question whether that assignment on its true construction is an out-and-out assignment of the whole of the benefit accruing or to accrue to the company under the contract or whether it is no more than an assignment by way of security. Here, again, I think the truth is to be found by bearing in mind the relationship between the parties. Prima facie, at any rate when one has to look at a document brought into existence between a borrower and a lender in connexion with a transaction of borrowing and lending, one must approach the consideration of that document with the expectation of discovering that the

61. [1947] 1 Ch 177.
62. *Ibid* at 180.

document is intended to be given by the borrower to the lender in order to secure repayment of a proposed indebtedness of the borrower to the lender.'[63]

67. Given this orientation, it is hardly surprising that his Lordship construed the letter as intending to create an equity of redemption rather than an outright assignment to the bank of the right to payment by the Ministry:

'As I say, I approach this matter more in the expectation of finding that the parties have brought into existence a document consistent with their relations of borrower and lender rather than finding that notwithstanding those relations they brought into existence a document in which their relationship changed to that of vendor and purchaser.'[64]

68. Needless to say, we do not, in the present case, start from the premise that the relationship between the merchant and GMF is that of borrower and lender, so that the ***Sawmills*** case of no assistance to the Secretary's case.

E.3 The effect of clauses imposing liability on the merchant

69. The third argument advanced by Mr Smith SC rested on certain terms of the MCA Contract which impose a liability on the merchant upon the GMF failing to collect the full Purchased Amount either at all or at a specified minimum rate per week. Such terms are relied on as indicating that there was in truth a loan repayable by the merchant and not a sale and purchase of credit card receivables.

70. The relevant provisions are set out in full in the Annex to this judgment. First, Mr Smith relied on clause 10 of the Contract which provides that if there is no payment at all by the merchant – not even the first Split Settlement – GMF can call the whole deal off and the merchant must return the Purchase Price. This places a potential liability on the merchant but it is wholly consistent with the contract being one of purchase and sale. It deals with the situation where the transaction simply fails to get off the ground.

71. Mr Smith relies next on clauses 6, 7 and 11 of the Contract and clauses 8.1(l), 8.2 and 8.4 of the Standard Terms, whose combined effect may be summarised as follows. In entering into the MCA Contract, GMF and the merchant negotiated the percentage (the Retrieval Percentage) of the merchant's credit card takings which would be devoted to paying off progressively the Purchased Amount. As we have seen, the agreed percentages were 25% in the case of Amy House and 30% for Big Food. There was necessarily some uncertainty as to what the actual rate of the merchant's future credit card takings would be. So the parties negotiated

63. *Ibid* at 181.
64. *Ibid.*

a minimum benchmark for such takings calculated on the basis of the merchant's track record over the preceding 12 months. Thus, for instance, in Amy House's case, the historical benchmark was taken to be $73,461 per month and so a weekly 'historical collection rate' of $4,238 reflecting the agreed Retrieval Percentage. The benchmark was therefore set at $4,238 per week and, by clause 11, if the actual weekly collection rate were to fall by more than 20% below that weekly benchmark, GMF reserved the right to require the merchant to top up the deficiency; or to terminate the MCA Contract making the balance of the Purchased Amount immediately payable; or to terminate and treat the outstanding balance as due under any other outstanding transactions between GMF and the merchant. As the Contract states, these are options which GMF has but is not obliged to exercise.

72. The abovementioned provisions address the position where the essential contractual arrangement has failed. The vital feature of the deal involves the sale and purchase of the merchant's credit card receivables effected by the equitable assignment to GMF of a percentage of future debts, to be paid off in tranches by the Processor until the Purchased Amount is collected by GMF in full. It is to the Processor that GMF looks as the primary obligor in respect of the payment of Split Settlements. This is how GMF actually recovered the Purchased Amount in full in all three of the transactions relied on by the prosecution.[65] These are the core characteristics of the contract upon which categorisation of the transaction must be based. It is only if the central mechanism fails that GMF may need to have recourse to the provisions regarding claims against the merchant. To categorise the MCA Contract on the basis of such contingent, fall-back provisions while ignoring the vital features of the contract would present the spectacle of the tail wagging the dog.

73. As Sir Nicholas Browne-Wilkinson VC pointed out in *Welsh Development Agency v Export Finance Co*:[66]

> 'The fact that the 'purchaser' of, for example, book debts has a right of recourse against the 'seller' of the debts in the event of the debtor's nonpayment is not in itself inconsistent with the transaction being one of sale. In many cases (see, for example, *Olds Discount Co Ltd v John Playfair Ltd* [1938] 3 All ER 275) a transaction has been upheld as a sale notwithstanding a personal obligation on the vendor of book debts to make good to the purchaser any default in payment by the debtors.'

65. As indicated in Section C.2 of this judgment.

66. [1991] BCLC 936 at 949. The English Court of Appeal agreed on this point: 'It is now well-established that factoring or block discounting amounts to a sale of book debts, rather than a charge on book debts, even though under the relevant agreement the purchaser of the debts is given recourse against the vendor in the event of default in payment of the debt by the debtor.' *Welsh Development Agency v Export Finance Co* [1992] BCLC 148 at 154, per Dillon LJ. See also Millett LJ in *Orion Finance Ltd v Crown Financial Management Ltd* [1996] 2 BCLC 78 at 84.

74. It is true that many such contracts will provide for such recourse where the debtor of the assigned debt defaults in making payment whereas in the present case, clause 11 operates where the Processor is not in default but where (by virtue of low credit card takings) payment received by GMF does not achieve the contractually agreed threshold. In our view, this is a distinction which does not make a difference for categorisation purposes. Recourse to the merchant under clause 11 is triggered by non-receipt of a contractually agreed amount. It provides a contingent fall-back mechanism which is not inconsistent with the essential contract being one for the sale and purchase of receivables rather than a loan.

75. Finally, Mr Smith SC relied on clause 9 of the Contract making the merchant and the guarantor jointly and severally liable to pay the Purchased Amount to GMF in full. That must be construed in context as a joint and several liability under a guarantee which is self-evidently a contract of suretyship whereby (in this case) the merchant and the guarantor accept a secondary contractual liability to see that the principal debtor – the Processor – duly performs its payment obligations. The existence of such potential secondary liability does not affect the categorisation of the MCA Contract discussed.

F. Conclusion

76. For the foregoing reasons, the Secretary's appeal was dismissed.

Annex

A. The Contract

'The Seller hereby agrees to sell to the Buyer a fixed amount of the Seller's future receivables (the Future Receivables), relating to the payment of monies by the Seller's customers, for the purchase of the Seller's goods or services, through the use of any of the following cards: Visa/Mastercard/CUP.

The amount paid by the Buyer to the Seller in consideration for the Future Receivables shall be in the form of a one-off, upfront Merchant Cash Advance or 'MCA' (the Purchase Price).

The total amount of the Future Receivables sold by the Seller to the Buyer shall be known as the 'Purchased Amount'. The Purchased Amount will be collected by the Buyer through the deduction of a specified percentage of the Seller's periodic batch settlements from the Seller's card processor (the Processor, as defined more fully in the Terms and Conditions) until the Purchased Amount has been collected in full. The specified percentage shall be known as the 'Retrieved Percentage'.

The Seller shall give an irrevocable authorisation to the Processor to deduct or split a cash sum from each periodic batch settlement, equal to the periodic net batch settlement amount multiplied by the

A Retrieval Percentage (the Split Settlement(s)). This irrevocable authorisation will take the form of a letter (the MCA Processing Instruction Letter), and will be completed by the Seller and given to the Buyer, who will then send it to the Processor, on behalf of the Seller. The Processor will continue to pay the Split Settlement(s) to
B the Buyer until the Purchased Amount has been collected in full.

In consideration of the mutual obligations of the parties in relation to the Transaction, each of the Buyer and the Seller agrees that:

1. The MCA Processing Instruction Letter will be sent by the Buyer
C to the Processor, and shall constitute an irrevocable authorisation by the Seller to the Processor to remit all of the Split Settlements into a designated bank account of the Buyer (the Designated Account) rather than to the Seller's existing bank account, until the Purchased Amount has been collected in full by the Buyer.

D ...

5. The period for the collection of the Purchased Amount by the Buyer is not fixed, and is dependent on the actual level of the Seller's Relevant Card Transactions (as defined in the Terms and Conditions).

E 6. According to the information provided by the Seller to the Buyer during the Seller's application for the Transaction, the Seller and the Buyer agree that, for the purposes of this Contract, the average monthly volume of the Seller's card transactions during a period of 12 months prior to the date of this Contract shall be deemed to be
F HK$73,4611 per month. This implies a theoretical historical weekly collection rate (the 'Historical Weekly Collection Rate') of HK$4,238 per week (ie HK$73,461 multiplied by 12, divided by 52 and then multiplied by the Retrieval Percentage).

7. The 'Actual Weekly Collection Rate' shall be defined on any
G given date as the total amount collected by the Buyer since the start of the Transaction, being the date on which the Purchase Price is paid to the Seller, up to such date, divided by the number of weeks taken by the Buyer to collect such amount.

H ...

9. The Seller and the Guarantor(s) shall be jointly and severally liable to pay the Purchased Amount to the Buyer in full.

10. The first Split Settlement shall be collected by the Buyer within seven (7) days of the date on which the Purchase Price is paid by the
I Buyer to the Seller. If no such Split Settlement is received by the Buyer, then the Buyer shall be entitled to modify or terminate the Contract and/or the Transaction, and the Seller shall immediately thereafter return the Purchase Price to the Buyer.

11. If, by the end of each 14-day period since the start of the

Transaction, the Actual Weekly Collection Rate is less than the Historical Weekly Collection Rate by 20% or more, then the Buyer shall, without prejudice to receiving the Split Settlement(s), be entitled but not obliged to take any of the following measures against the Seller at its sole discretion:

a. Demand the payment of a sum of money equivalent to the deficit equals to the Actual Weekly Collection Rate minus the Historical Weekly Collection Rate, multiplied by the number of weeks that have passed since the start of the Transaction. The Seller shall pay such sum to the Buyer within seven (7) days of such demand. For the avoidance of doubt, such sum shall be applied to reduce the then remaining balance of the Purchased Amount; or

b. Terminate the Contract, whereupon the entire then remaining balance of the Purchased Amount shall become immediately payable by the Seller to the Buyer; or

c. Terminate the Contract, whereupon the entire outstanding balance of the Purchased Amount shall be applied to any or all of any other transactions outstanding as of that date with the Buyer. **...**

For the avoidance of doubt, the remedies contemplated under this Clause 11 are intended for the benefit of the Buyer in the event the Seller fails to comply with its obligations to ensure accurate processing of all future Relevant Card Transactions, in addition to its obligations as set out herein. The entitlement of the Buyer to receive any sums pursuant to this clause 11 shall not in any way be deemed as being equivalent to a minimum monthly collection amount.'

B. The Standard Terms

'**1.Definitions and Interpretations**

...

1.2 In these Terms and Conditions, the following words and expressions shall have the following meanings:

...

(e) 'Processor' shall mean the card processor designated by the Buyer in respect of the processing and settling of the Relevant Card Transactions;

...

2.Conditions Precedent

2.1 Prior to the payment of the Purchase Price by the Buyer to the Seller pursuant to the Contract, the Buyer must receive and be

A satisfied with the following documents, provided that the Buyer may waive any of such requirements at its sole discretion:-

...

(e) a copy of the Seller's agreement with the Processor in respect of the processing and settling of the Relevant Card Transactions (the Processing Contract);

B

...

(h) the MCA Processing Instruction Letter;

3.Representations and Warranties

C

...

3.2 In respect of each of the Seller's Future Receivables and the Processor, the Seller represents and warrants that:

(a) the Processor has no right to prohibit the Seller's assignment of any part of such Future Receivables nor any set-off right in respect of it;

D

4.Processing Covenants

...

E

4.2 By entering into the Contract, the Seller:-

(a) irrevocably authorises the Processor to transfer the Split Settlement to the Designated Account from time to time until such time as the Purchased Amount has been collected in full;

F

(b) agrees that the Processor may rely upon the Seller's instructions in the form of the MCA Processing Instruction Letter, without reference to the Seller, in remitting the Split Settlement to the Buyer;

(c) agrees that the Processor will act on the Buyer's behalf, and as instructed by the Buyer, with respect to the receipt of the Split Settlement;

G

...

7. Sale and Purchase

H

7.1 The Seller acknowledges that it is selling to the Buyer, and the Buyer is buying from the Seller, a sum of the Batch Settlement Payments equal to the Purchased Amount, subject to the terms of the Contract.

I

...

7.8 For the avoidance of doubt, each of the Seller and the Buyer acknowledges and agrees that the Purchase Price paid by the Buyer to the Seller is for the purchase by the Buyer of the Future Receivables as set out in the [MCA Contract] and is not a loan or

a credit facility offered by the Buyer to the Seller. Accordingly, the Seller and the Buyer agree and acknowledge that the Contract and any transactions contemplated therein shall not be subject to the Money Lenders Ordinance **...**

7.10 The Buyer shall be entitled at any time to request the Seller to complete, sign and deliver to the Buyer, in the form as required by the Buyer, a written assignment of the Future Receivables at the Seller's expense.

...

8. Termination Events

8.1 For the purposes of these Terms and Conditions, each of the events or circumstances as described in this clause 8.1 shall be regarded as a Termination Event:

...

(i) the Seller shall revoke the MCA Processing Instruction Letter;

...

(l) the Actual Weekly Collection Rate is less than the Historical Weekly Collection Rate by 20% or more by the end of each 14-day period since the start of the Transaction;

8.2 At any time after a Termination Event the Buyer shall have the right, without prejudice to any other rights, power or remedy the Buyer may have pursuant to the Contract, these Terms and Conditions and in law, to terminate all or any obligations the Buyer may have to the Seller under the Contract by written notice to the Seller.

...

8.4 Without prejudice to the generality of clause 8.3 of these Terms and Conditions, the Seller shall immediately after the termination of the Contract by the Buyer pursuant to clause 8.2 pay the then remaining balance of the Purchased Amount to the Buyer.

8.5 As security for the performance by the Seller of its obligations under the Contract, by signing the Contract, the Seller appoints the Buyer **...** to be the Seller's attorney for any of the following: **...** (d) to do any other acts or things the Buyer considers to be necessary in order to collect, realise or perfect the Buyer's ownership of the Future Receivables or to secure the performance by the Seller of any of its obligations under the Contract.'

Reported by Ma Chun Man Amos

Exhibit M

CACV 105/2010 AND CACV 106/2010

CACV 105/2010

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF APPEAL

CIVIL APPEAL NO. 105 OF 2010

(ON APPEAL FROM HCA NO. 595 OF 2008)

BETWEEN

PEARLDELTA GROUP LIMITED	Plaintiff
and	
HUGE WINNERS INTERNATIONAL LIMITED	1st Defendant
LEE MAN BUN (李文彬)	2nd Defendant
NG SIO KOK (吳小菊)	3rd Defendant
YANG SHAO-CHEN (楊少辰)	4th Defendant
HAN JIN-LONG (韓金龍)	5th Defendant
LUO HUI-CAI (羅會才)	6th Defendant

AND

CACV 106/2010

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF APPEAL

CIVIL APPEAL NO. 106 OF 2010

(ON APPEAL FROM HCA NO. 818 OF 2008)

BETWEEN

PEARLDELTA GROUP LIMITED	Plaintiff
and	
HUGE WINNERS INTERNATIONAL LIMITED	1st Defendant
LEE MAN BUN (李文彬)	2nd Defendant
YANG SHAO-CHEN (楊少辰)	3rd Defendant
HUGE WINNERS CNC (SHENZHEN) LTD.	4th Defendant

(Head together)

Before: Hon Rogers VP, Le Pichon JA and Stone J in Court

Date of Hearing: 24 August 2010

Date of Handing Down Judgment: 3 September 2010

J U D G M E N T

Hon Rogers VP:

1. This was an appeal from a judgment, in two actions, of Saunders J dated 22 April 2010. In the first action judgment was given for the sum of $86,321,292.66 with interest calculated at $17,689,424.63 up until judgment with interest at judgment rate thereafter. In respect of the second action the judge made a declaration that the appointment of Mr Mo Yu Bin as a director of Huge Winners CNC (Shenzhen) Ltd was in breach of the Subscription and Investment Agreement dated 23 August 2005 (the "SIA") and was void and of no effect and a further declaration that the resolutions purported to be passed by the Board of Directors of Huge Winners CNC (Shenzhen) Ltd at the meeting held on 11 April 2008 was in breach of the SIA and invalid.

2. The plaintiff is an investment company, seemingly under the control of a Mr Shaw. The first defendant is a BVI company and is the holding company of the group companies concerned with the manufacture of printed circuit boards and light-emitting diodes. The second to sixth defendants in the first action are the shareholders in the first defendant.

3. On 23 August 2005 the plaintiff entered the SIA with the first defendant. The purpose of the SIA was that the plaintiff would subscribe $20,000,000 for zero-coupon convertible bonds of HK$1 each to be issued by the first defendant. In the letter of intent issued prior to the SIA, it was said that the bonds were to be convertible at any time within 3 years after their issue at a valuation representing 28% of the first defendant. Clause 21.1 of the SIA records the fact that the defendants acknowledged that the plaintiff had entered into the SIA with a view to making a capital gain through the disposal of shares to be obtained by the conversion of bonds that were to be issued. The capital gain was to be made either through a qualifying IPO or a trade sale. The defendants agreed to use their best endeavours to implement a qualifying IPO or a trade sale within 36 months of the issue of the bonds. The second to sixth defendants guaranteed the obligations of the first defendant.

4. The SIA referred to a number of matters including corporate governance and, in particular, to the establishment of an audit committee. The audit committee was to be comprised of at least the CEO of the first defendant and a director who had been designated by the plaintiff. For all material purposes that director has been Mr Shaw. Under clause 16.3 of the SIA:

> "All material questions concerning auditing, the acceptance and recommendation for approval of audit reports to the Board, accounting policy matters, and internal financial and risk controls of the Group shall be dealt with and approved by the audit committee."

5. The terms of the bonds are important. They were set out in Schedule 5 of the SIA. Under the Bond Conditions, it is made clear, in a number of places, that the bonds could be converted or redeemed in whole or in part. The SIA provided that the Bond Conditions were to have the same effect as if they were set out in the SIA itself.

6. Clause 1 of the Bond Conditions sets out the interpretation which is to be given in respect of a number of the expressions used in the Bond Conditions. For example the expression Conversion Right meant the right of the plaintiff, subject to the provisions of condition 6, to convert, during the relevant conversion period, any of the bonds which were held by it into the conversion number of ordinary shares. Ordinary shares had a par value of US$1. Conversion was to be at the Conversion Price which was HK$685.70 subject to adjustment from time to time in accordance with condition 7.

7. The definition of Redemption Amount is important and was defined as follows:

> "**Redemption Amount**
>
> means, in relation to any Bonds as at any date of determination, an amount that would provide to the holder of such Bonds the higher of:
>
> (i) the amount that provides an internal rate of return of 12% *per annum* based on the number of days elapsed from the Issue Date through the date on which such Bonds are actually redeemed as determined by the following formula:
>
> $$[I \times (1.120)^{N/365}] - D$$
>
> where:
>
> I = the Issue Amount of the Bonds;
>
> N = the number of days from and including the Issue Date of the Bonds to but excluding the actual date of redemption of the Bonds; and
>
> D = the aggregate amount (if any) paid to the holder pursuant to condition 5.2;

(ii) the amount determined by the following formula:

$$\frac{1.2 \times V}{S}$$

where:

V = total assets less total liabilities (excluding the Bonds) of the Company and its subsidiaries on a consolidated basis, as reflected in the most recent Accounts; and

S = the total number of Ordinary Shares outstanding as if the Bonds had been converted into Ordinary Shares at the then current Conversion Price as provided in Conditions 6 and 7;

provided, that in no event will the Redemption Amount of any Bonds be less than the Issue Amount thereof."

8. Under clause 6.1 it is provided that:

"The Bonds held by each Bondholder may be converted in whole or in part into Ordinary Shares, at any time at the option of the Bondholder, by delivery of a Conversion Notice."

9. Clause 6.2 provided that the bonds should be converted into ordinary shares at the Conversion Price. Clause 6.3 provided that the bondholder had to complete a conversion notice and deliver it together with the certificates in respect of the relevant bonds. It also provided that the conversion notice once given could not be withdrawn. Under clause 6.4 upon conversion the first defendant was required to allot and issue the relevant number of ordinary shares. The Conversion Price was further referred to under clause 7. Clause 7.2 provided that subject to the provisions of that Condition, the Conversion Price would from time to time be further adjusted in accordance with the provisions of that sub-clause. For the purposes of this case it is subcondition (f) which is relevant:

"(f) If and whenever the NPAT for any Financial Period are less than the targets established by the Company and the Initial Bondholder, then the Conversion Price shall be adjusted as follows:

(i) If upon the determination of the NPAT for the financial year ending 31 December, 2005 ("**FY05 NPAT**") the FY05 NPAT are less than RMB 20,000,000, then the Conversion Price shall be multiplied by a fraction (1) the numerator of which is equal to FY05 NPAT, and (2) the denominator of which is RMB 20,000,000. Such adjustment will be effective from the date on which the FY05 NPAT is certified in accordance with Condition 7.6 (*7.4*)

(ii) If upon determination of the NPAT for the financial year ending 31 December, 2006 ("**FY06 NPAT**") the FY06 NPAT is less than RMB 40,000,000, then if (1) the ratio of FY06 NPAT divided by RMB40,000,000 is less than (2) the ratio of the FY05 NPAT divided by RMB 20,000,000, the Conversion Price shall be multiplied by the product of:

X x Y

where:

$$X = \frac{\text{RMB } 20{,}000{,}000}{\text{FY05 NPAT}}$$

and

$$Y = \frac{\text{FY06 NPAT}}{\text{RMB } 40{,}000{,}000}$$

Such adjustment will be effective from the date on which the FY06 NPAT is certified in accordance with condition 7.6 (*7.4*)."

10. NPAT was defined in the interpretation clause as meaning:

"the net profit after tax (expressed in RMB) of the Company and its subsidiaries on a consolidated basis determined in accordance with AAS"

11. AAS was defined to mean the applicable accounting standards and the definition was further elaborated. Clause 7.4 provided:

"7.4 Any adjustment to the Conversion Price will be rounded upwards to the nearest HK$0.01, and subject as hereafter provided in this Condition 7, in no event shall any adjustment (otherwise than as provided in this Condition 7 or upon the consolidation of Ordinary Shares into shares of a larger par value) involve an increase in the Conversion Price. No adjustment to the Conversion Price shall be made unless it has been certified in accordance with this Condition 7

> by the Auditor. No adjustment will be made to the Conversion Price in any case in which the amount by which the same would be reduced would be less than HK$0.01. and any adjustment which would otherwise then be required will be carried forwards and taken into account appropriately in any subsequent adjustment."

12. Clause 7.6 provided that:

> "Notwithstanding the provisions of this Condition 7, in any circumstances where the Directors and the Bondholders consider that adjustments to the Conversion Price provided under the said provisions should not be made or should be calculated on a different basis or date or should take effect on a different date or that an adjustment to the Conversion Price should be made notwithstanding that no such adjustment is required under the said provisions, the Company and the Bondholders may appoint an Approved Bank to consider whether for any reason whatever the adjustment to be made (or the absence of such adjustment) or the adjustment to be made in accordance with the provisions of this Condition 7 is appropriate or inappropriate, as the case may be, and, if such Approved Bank shall consider the adjustment to be inappropriate, the adjustment shall be modified or nullified or an adjustment made instead of no adjustment in such manner as shall be considered by such Approved Bank to be in its opinion appropriate."

13. An Approved Bank was defined in the interpretation clause to mean:

> "a reputable bank or merchant bank as may be selected by the Company and the Bondholders or, failing agreement, by the Chairman of the Hong Kong Bankers' Association (or any successor entity thereto) for the time being"

14. Redemption was dealt with under clause 8.2. If there was an event of default the bondholder was entitled to give notice to redeem all or a portion of his Bonds. The redemption was to be at the Redemption Amount, which was to be calculated according to the provisions set out above.

15. The SIA was executed on 23 August 2005 and on 31 August 2005 certificates of the convertible bonds were issued. There was a draft report on the financial statements of the first defendant for the year ended 31 December 2005 which was prepared by one firm of accountants. In view of what was considered to have been the unsatisfactory nature of that, another firm of

accountants, RSM Nelson Wheeler, was engaged. That firm produced a draft report on the financial statements of the first defendant for the years ending 31 December 2005 and 31 December 2006. That was in part based, or perhaps prepared in conjunction with, a valuation report prepared by Castiores Magi Asia Ltd. Mr Deret Au, who was a director of that company, gave evidence on behalf the plaintiff at trial. The only basis upon which he could have given evidence was as an expert witness, but there had been no directions for the calling of an expert witness at trial.

16. The judge was satisfied that those responsible from the defendants had deliberately not attended an audit committee meeting in respect of those accounts and that that draft report of the financial statements for those years was never adopted as the company's accounts.

17. On 14 March 2008 the plaintiff served 2 notices under the SIA. The first was a notice of conversion in which the plaintiff claimed to exercise the conversion rights in respect of 0.5% of the convertible bonds which it held. The notice requested the issue of a certificate of 10 million ordinary shares on the basis that it was entitled to conversion at the rate of $0.01 per share. The other notice was a notice to redeem $19,900,000 of the convertible bonds. The amount claimed under that redemption was $86,755,068. That was said to be based upon the financial statements prepared by RSM Nelson Wheeler and the Castiores Magi Asia Ltd valuation report. Those demands were swiftly followed by claims against the second to sixth defendants under their guarantees. On 10 April 2008 the writ in the first action was issued. That was followed in the following month by the writ in the second action.

The trial

18. At the trial a number of defences were raised which are no longer relevant. Those included defences on the basis of misrepresentation, *non est factum* and unilateral mistake. The judge dismissed those defences and in paragraph 243 of his judgment held that the plaintiff was entitled to judgment on its claim against all the defendants jointly and severally. Basing himself on the calculation of the amounts said to have been due as at 1 December 2009 which had been put to him he went on to say at paragraph 243 of the judgment:

> "As I understand his position he (Mr Carolan, the Counsel who appeared for the plaintiff at trial) seeks judgment in the sum of HK$86,321,292.66, or alternatively a declaration that Pearldelta is entitled to the conversion shares and an order to specific performance of the obligation to allot and issue the conversion number of Ordinary Shares."

19. The judgment entered in the first action was for the sum of HK$86,321,292.66 together with interest of HK$17,689,424.63. The interest was to run at judgment rate on the total sum of HK$104,010,717.29. In respect of the second action, which was issued on 9 May 2008, the plaintiff raised claims against the first and second defendants, a Dr Yang as well as against Huge Winners CNC System (Shenzhen) Ltd. It claimed a declaration that Mr Mo Yu Bin had been appointed as a director in breach of the SIA and a declaration that resolutions passed by the board of directors at the meeting on 11 April 2008 were in breach of the SIA and consequential relief. The issues in that action do not appear to have been uppermost during the course of the trial, other than the fact that an interlocutory injunction had been granted: see paragraphs 74 to 78 of the judgment. The order made at the conclusion of the trial followed the relief which was claimed in the statement claim in that action.

20. Following a further application the defendants have paid the plaintiff the sum of $41,783,117 as a condition of stay of the judgment pending the appeal to this court.

This appeal

21. On this appeal the plaintiff has filed a respondents' notice in which it claims a declaration that it is entitled to 10 million ordinary shares in satisfaction of the conversion of the convertible bonds of the value of HK$100,000. The plaintiff also seeks that it should have its costs on a full indemnity basis, although that does not seem to have been the subject of a request to the judge below when judgment was given.

22. The first, second and third defendants on this appeal claim that the plaintiff's only entitlement is to redemption of the bonds. It is the defendants' contention that the appropriate sum has already been paid, namely the sum of $41,783,117. I would mention, at this stage, that it is not entirely clear how that sum was calculated, but since the calculation of the sum is agreed on the basis of formula (i) under Redemption Amount in clause 1 of the Bond Conditions, I do not propose to consider that matter any further.

23. It is not contested that the plaintiff would have been entitled to conversion of any quantity of the bonds at the rate of $685.70 per share. However, as the plaintiff sought to be entitled to conversion at a rate other than that it had to rely upon the provisions in condition 7.

24. The judge held that there was nothing in the evidence to indicate that it would not be proper to him to rely on the audit report that had been prepared by the second firm of accountants, RSM Nelson Wheeler. He said that the defendants had elected not to put a contrary report to the court and went on to say that they put nothing to the auditors in cross-examination that would

lead the judge to conclude that he could not accept the audit report as being accurate.

25. In my view there was no necessity for the defendants to challenge the audit report because of the contents of that report itself. Page 1 of the report commences with the following paragraph:

> "**Disagreement about accounting treatment**
>
> Included in the intangible assets is a technical know-how with cost of RMB9,315,000, which is assessed to be having indefinite life and no amortisation has been charged up to 31 December 2006. No evidence shows that the Group has assessed the intangible asset impairment by comparing its recoverable amount with its carrying amount annually in accordance with Hong Kong Accounting Standard 38 "Intangible Assets" ("HKAS 38"). We have not been provided with sufficient information to determine whether any impairment of the intangible asset should be made in the financial statements."

26. The following two pages are headed "Basis for disclaimer of opinion". There are four paragraphs under that which relate to separate aspects which in themselves would undermine the validity of the accounts. On the next page the heading is:

> "**Disclaimer of opinion: disclaimer on view given by financial statements**.
>
> Because of the significance of the matters described in the basis for disclaimer of opinion paragraphs, we do not express an opinion on the financial statements as to whether they give a true and fair view of the state of the Group's affairs as at 31 December 2005 and 2006 and of its results are cash flows for the years ended 31 December 2005 and 2006 in accordance with Hong Kong Financial Reporting Standards."

27. As already pointed out, clause 16.3 of the SIA provided that all material questions concerning auditing and the acceptance of recommendation for approval of the audit report to the board had to be dealt with and approved by the audit committee. Again, as indicated above, the judge was satisfied that those responsible on behalf of the defendants had deliberately not attended an audit committee meeting in respect of those accounts and that the financial

statements for the years 2005 and 2006 were never adopted. Nevertheless the judge said that he considered that he could proceed on the basis of the draft report, because he did not consider that there had been any challenge to it. In my view, the judge was not entitled to proceed upon the basis of the financial statements that have been put forward. On the face of the document they could not be said to be accurate. They were not in a state that the company directors could have adopted the accounts. The document itself states that they are inaccurate. Furthermore, the judge's own findings about the misstatements in the accounts would themselves undermine the validity of those accounts.

28. In the light of the absence of any audit report which had been approved by the audit committee and the clear dispute as to whether there should be any adjustment to the Conversion Price it was, it seems to me, open to the plaintiff to seek to have an Approved Bank appointed. In that case the provisions of clause 7.6 of the Bond Conditions would apply and there would seem, at any rate on the face of the matter, no reason why the plaintiff could not have obtained an order to compel the submission to the Chairman of the Hong Kong Bankers' Association for the appointment of an Approved Bank.

29. For condition 7.2(f) to apply it was, of course, necessary for the net profit after tax of the first defendant and its subsidiaries for both the years 2005 and 2006 to have been determined in accordance with the applicable accounting standards.

30. There is another and further point which, also, in my view, prevents the application of any adjustment under condition 7. The financial statements produced by RSM Nelson Wheeler shows, on the fourth page, that the profit in the year 2005 was RMB8,178,212 and in the year 2006 there was a loss of RMB33,664,628. In paragraph 166, the judge accepted that it was impossible to apply a negative value for the share price for the purpose of

conversion. Indeed, if the judge was saying that it was impossible to apply the formula in condition 7.2(f)(ii) where a loss was made in the year 2006, I would respectfully agree. In the formula, Y would be a negative figure and the product of X and Y would therefore be negative; the Conversion Price would thus have to be multiplied by a negative figure. This is only compounded by the fact that a negative figure is conceptually very different from a positive figure. It represents something which does not exist rather than something which does exist. It is unnecessary, however, to delve deeper into number theory. The definition of NPAT itself refers to the net profit after tax. It does not refer to the net profit or loss after tax.

31. In those circumstances it would appear clear that there can be no adjustment to the Conversion Price under the provisions of condition 7.2(f). The judge appeared to obviate the difficulty of being unable to calculate an adjustment to the Conversion Price by resort to condition 7.4. In my view condition 7.4 cannot be applied if there is not a fixed adjustment to the Conversion Price.

32. Furthermore, the interpretation given by the judge to condition 7.4 was that it provided a minimum Conversion Price of HK$0.01. Quite simply, as argued by Mr Yuen SC, who appeared on behalf of the first to third defendants in this court but not in the court below, the reference to the figure of $0.01 is a reference to the adjustment figure not to the Conversion Price. Hence if it were possible for a multiplicand to be applied to the Conversion Price that was a negative figure, the resultant negative Conversion Price would simply be reduced by $0.01; but it is wrong to take the $0.01 as the minimum Conversion Price. In that respect I am conscious of the fact that the matter was conceded in the court below but, in my view, it was wrongly conceded.

Redemption

33. As already mentioned, Mr Au gave evidence as an expert witness although there had been no directions for expert evidence. It would appear that in accepting the figure of $86,321,292.66 as the appropriate Redemption Amount for the bonds the judge had simply taken a figure which Mr Au had given. The judgment does not appear to include an analysis of formula (ii) in the definition of the Redemption Amount. The judge appears simply to have taken it that, in his own words, the plaintiff was entitled to redeem on the basis of the calculation of the notional increase in the capital value of the company, without considering how that should be calculated according to the provisions of formula (ii).

34. There are places in the judgment where the term redemption has been used to mean conversion. But in respect of convertible bonds there is a clear distinction between equity represented by shares that have been issued as a result of conversion of bonds and loan which is represented by the bonds. Loans represented by the bonds can be converted into equity, but a share is a very different thing from a loan. A share cannot be redeemed except in special circumstances which do not exist here. The question of redemption is one of redeeming the loan represented by the bonds. Granted that there may be different ways of calculating the Redemption Amount, but it is the bonds which are to be redeemed and not the equity.

35. The major obstacle in accepting Mr Au's calculation is that in one instance he has changed the formula by omitting an essential part and in the other he has added a material ingredient to the formula (ii) which was not there.

36. The definition of Redemption Amount commences, as one might expect, with the words "…in relation to any Bonds..", because it is the bonds

which are being redeemed in whatever quantity the bondholder chooses. The two formulae give the calculation of the amount that will be paid in respect of a bond or the bonds.

37. Mr Au reaches his conclusion on the first occasion, i.e. in the report, by ignoring one part of the formula and, on the second occasion, in his witness statement, by multiplying the figure achieved by application of the formula in (ii) by a hypothetical number, namely the number of shares which would be obtained if the bonds that were being redeemed had been converted into shares.

38. In paragraph (3) of his report dated 26 November 2007 Mr Au has a heading "Redemption Value" (not "Redemption Amount"). The calculation ignores the figure "S" in formula (ii). In his witness statement he seeks to multiply the result of the application of formula (ii) by a hypothetical number of shares that would have been obtained had the bonds been converted into shares at the figure he gave. Quite apart from the fact that his calculation of the number of shares that would have been obtained was based on the premise that the Conversion Price would be $0.01, which in my view is wrong, both approaches appear to me to be illegitimate.

39. I would add that Mr Au's witness statement is a little curious because in paragraph 11 he states that the value "V" of RMB72,659,187 used in the report "was derived from the audit report of HWIL for the financial year ended 31 December 2006 prepared by RSM". The document to which, apparently, he is referring as the audit report contains, in paragraph 23 (b), reference to Mr Au's determination of the redemption value. One can only speculate from that that the 2 documents must have been prepared at the same time.

40. As already indicated, it would appear that the judge did not purport to interpret the definition; he simply accepted Mr Au's calculation without any analysis.

41. It was said by Mr Sakhrani, who appeared on behalf of the plaintiff in this court but not in the court below, that the interpretation of the formula (ii) advocated by Mr Au was valid because it was legitimate to add words such as "multiplied by the number of ordinary shares that would be obtained upon conversion of all bonds" as a means of correcting a mistake in the document as a matter of construction. In so saying he relied upon the proposition stated by Brightman LJ in the case of *East v Pantiles (Plant Hire) Ltd* (1981) 263 E.G. 61 which is quoted by Lord Hoffman in the case of *Chartbrook Ltd v Persimmon Homes Ltd* [2009] 1 AC 1101 at page 11014:

> "Two conditions must be satisfied: first, there must be a clear mistake on the face of the instrument; secondly, it must be clear what correction ought to be made in order to cure the mistake. If those conditions are satisfied, then the correction is made as a matter of construction."

42. In this instance, even if it is assumed that there is a clear mistake on the face of the instrument, it is by no means clear what correction ought to be made. The formulae provided under the definition Redemption Amount are clearly intended to produce different results. The judge made reference to the Letter of Intent and the subsequent correspondence and said in paragraph 27 of the judgment:

> "…that redemption at 1.2 x net assets, (if that were higher than 12% IRR), was envisaged during the negotiations."

43. That may be true, but even if it were legitimate to have regard to the pre-contract negotiations for the purpose of clarifying an ambiguity, I do not consider that that exchange of communications referred to by the judge establishes that Mr Au's approach is correct. Specifically, even on the

assumption that something is missing from formula (ii) and that it was intended that that formula would give the bondholder a Redemption Amount for the bonds that would reflect a change in value of the assets of the first defendant and its group, there are clearly other and more appropriate ways of reflecting the changing proportion of the value of the total assets from the initial time, when the bonds represented 28% of the total value.

44. Finally, I would add that it is not for Mr Au, as an expert witness, to interpret the document. It is the court that must interpret a document.

45. In my view, therefore, the plaintiff has only established an entitlement to a Redemption Amount calculated in accordance with formula (i). The parties are in agreement that the sum already paid to the plaintiff reflects that. I would mention, however, that that sum appears to have been based on the order dated 10 February 2009. The figure there of $30,722,038 would appear to be considerably higher than the figure which was given to the judge when he asked for the calculation during the relevant hearing.

46. I would, therefore, make an order in appeal CACV 105 of 2010 that the judgment below be set aside and judgment be entered for the plaintiff in the sum of $41,528,212.09; it being recorded that that sum has already been paid to the plaintiff.

47. In respect of appeal number CACV 106 of 2010, the appellants in that appeal ask that the injunctions that have been granted should be discharged and the appeal allowed accordingly on the basis that the plaintiff no longer has any interest in the first defendant. In that respect, I observe that the Notice of Conversion relied upon by the plaintiff claims 10 million shares. There is no claim in the alternative based on a Conversion Price of $685.70. The conversion of 100,000 bonds at the rate of $685.70 would only entitle the

bondholder to 145 shares. That, presumably, would be of no interest to the plaintiff. Since the final Redemption Date of the bonds was 36 months from the Issue Date, those bonds which are not already redeemed should be redeemed. The plaintiff would no longer have any interest in either bonds or shares of the first defendant. As has been submitted on behalf of the appellants, the basis for the orders which were in place has now gone. Those injunctions should therefore be discharged.

Costs

48. Apart from the fact that the plaintiff was entitled to obtain a final order it would appear that the remainder of the trial was taken up in respect of issues on which the plaintiff has failed in this court. On that basis I consider that the first to third defendants should be entitled to 90% of the costs in the court below and the costs in this court in respect of HCA 595 of 2008 and CACV 105 of 2010. In respect of the second action namely HCA 818 of 2008, the judge observed that as at the date of trial the defendants were in breach of the orders that were made. In those circumstances I consider that there should be no order of costs in action HCA 818 of 2008 and but that the appellants should be entitled to the costs of appeal CACV 106 of 2010. I therefore propose that orders of costs *nisi* should be made accordingly.

Hon Le Pichon JA:

49. I agree with the judgment of Rogers VP and the orders he proposes.

Hon Stone J:

50. I agree with the judgment of the Vice President.

(Anthony Rogers)	(Doreen Le Pichon)	(William Stone)
Vice-President	Justice of Appeal	Judge of the Court of First Instance

Mr Sanjay A Sakhrani, instructed by Messrs Blank Rome, for the Plaintiff/Respondent

Mr Rimsky Yuen SC & Mr Keith Lam, instructed by Messrs Tung, Ng, Tse & Heung, for the 1st to 3rd Defendants in CACV 105/2010 and the 1st, 2nd & 4th Defendants in CACV 106/2010/Appellants

Exhibit N

HCCW 329/98

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

Companies (Winding -Up) Proceedings No.329 of 1998

IN THE MATTER OF SINO-AMERICAN TELECOM INC.

AND

IN THE MATTER of the Companies Ordinance (cap. 32)

Before: Hon Yuen J in Court

Dates of hearing: 19 - 22, 25-26 October 1999

Date of Judgment: 9 June 2000

JUDGMENT

This is a creditor's petition presented by Dragon Investment Company II LLC ("Dragon"), a Cayman Islands company, for the winding-up of Sino-American Telecom Inc ("the Company"), a BVI company. It is not disputed that the Hong Kong courts have jurisdiction

to deal with this petition. The Company is registered under Part XI of the Companies Ordinance, chapter 32 of the Laws of Hong Kong and it has substantial connections with this jurisdiction.

The petition is presented on the ground that the Company is indebted to Dragon in the sum of US$2,644,194. It is not disputed that this sum is owing and that it has not been repaid. Further, it is *now* no longer disputed that the Company is insolvent.

The petition has, however, been resisted by a contributory Allan Yuen Shek Sang ("Yuen"). He had previously sought to resist the petition on the ground, amongst others, that the Company was not insolvent, but he has now abandoned that position. He is now resisting the petition on the ground only that it has been presented, he says, for an improper purpose and as such, it is an abuse of the process of the Court.

That purpose is said to be Dragon's designs on 1 asset of the Company, viz. its interest, through a subsidiary called Remoco (HK) Ltd ("Remoco"), in a joint venture known as Shenzhen Ligao Telecom Technology Co. Ltd ("Ligao"). Mr Yuen alleges that Dragon's purpose in presenting the petition was not to bring about a rateable distribution of the Company's assets on a winding-up. Rather, it was to acquire Ligao by taking the Company out of the hands of its board of directors and putting it into the hands of (in the words of counsel for Mr Yuen) "friendly" provisional liquidators who would effect the re-structuring of the Company by hiving off Ligao for Dragon so as to secure an advantage for it over other unsecured creditors.

In opposing this petition, Mr Yuen is joined by an opposing creditor Andrew Chan who also claims to represent another creditor. The values of their claims are comparatively small. Mr Chan only attended part of the hearing and did not seek to present a case separately from that advanced on behalf of Mr Yuen. There are also other small creditors who have neither supported nor opposed the petition. As far as the value of claims are concerned, Dragon is by far the largest creditor.

Before I deal with the facts and issues in this case, I should record my understanding of the position taken by Mr Benjamin Chain, counsel for Mr Yuen, concerning the allegation of abuse of process. Mr Chain's position is *not* that the petitioner's alleged abuse of process would warrant a dismissal of the petition automatically; he accepts that even if an improper purpose is proved, that is only one of the factors to be considered by the court in the exercise of its discretion whether to order the company to be wound up.

I should also record that it has been agreed between counsel that there is no higher burden on Mr Yuen to show that it is plain and obvious that the petition is an abuse of process.

The issues in this case must be considered against the background of the following facts.

The Company

The Company is held as to about 85% by Mr Yuen and his associates including his wife and his brother. The Company has 2 wholly-owned subsidiaries, Remoco and Goldremart (Holdings) Ltd., both Hong Kong companies.

The Ligao joint venture

Remoco has a manufacturing arm which appears to be loss-making, but it is one of the two parties in the Ligao joint venture which is involved in developing a telecommunications business on the Mainland. The Chinese partner in the joint venture is a PRC corporation called Shenzhen Wanlitong Industrial Development Co. Ltd ("Wanlitong"). The joint venture has licences to operate a paging system on the Mainland.

The terms of the joint venture were that investment capital would be provided by Remoco. It would not be until the equipment were in place and the network in operation that Ligao would be expected to generate revenue.

For the purpose of raising funds for the joint venture which was entered into in late 1995, the Company had in 1996 issued certain convertible loan notes. This was in anticipation of an initial public offering (IPO) in the United States in 1997. Dragon is a noteholder, and Rose Marie Fox, a person connected with Dragon and some other noteholders, was placed on the board of the Company, the other directors being Mr Yuen and his wife. (Miss Fox was not however appointed to the board of Remoco - the directors of Remoco were Mr Yuen, his wife and his brother).

The Company's financial situation

In April - May 1997, however, the planned IPO failed, apparently because of problems with underwriting. After the failure of the IPO, the Company was unable to repay the loans. The noteholders' position appears to be that the loans were not capable of being converted into equity because the formula that had been used in the loan notes was rendered inapplicable as a result of the failure of the IPO. (This is apparently not disputed as there was no cross-examination on this point).

Certain bridging loans, arranged by the noteholders, were then entered into by the Company but its financial situation remained difficult. It was heavily indebted to the noteholders but was required under the joint venture agreement to provide funding for Ligao.

Between September and November 1997, there were unsuccessful attempts to interest banks in providing funds. In the meantime, it became apparent that there was discord between Mr Yuen and the representatives of the noteholders. The noteholders had also started investigations into the Company's accounts and were querying the purposes to which some of the funds had been put.

In November 1997, a proposal was made by the noteholders to separate the Ligao joint venture from the manufacturing arm of Remoco, with Mr Yuen taking the latter and the noteholders acquiring the former. This proposal was aborted and led to a further deterioration of the relationship between Mr Yuen of the one part and the noteholders of the other.

Events leading to petition

In February 1998, the Company's finances had reached such a state that Mr Yuen admitted that it was insolvent. Meanwhile, a creditor had sought a garnishee order to garnishee funds in Remoco's bank account. Mr Yuen then caused payments intended for Remoco to be deposited into Goldremart's bank account.

In March 1998, further negotiations between Mr Yuen of the one part and the noteholders of the other part failed.

On 15 April 1998, the noteholders sent a letter before action to the Company in respect of its failure to repay the loans threatening to commence proceedings to recover the amounts outstanding.

Mr Yuen responded by causing Remoco to resolve at a board meeting on 7 May 1998 that Ligao, which was in effect the Company's only valuable asset, "must be liquidated" together with Remoco. A meeting to discuss the winding-up was called for 16 May 1998. This would have serious consequences as discussed later.

On 8 May 1998, in a fax letter Miss Fox called upon Mr Yuen to retract his actions. That was not done. On the contrary, a letter dated 8 May 1998 was faxed by Remoco to Ligao and Wanlitong reiterating the intention to put Ligao into liquidation.

The noteholders' response, 2 days before the scheduled meeting, was to present this petition and to make an urgent application to the Court for the appointment of provisional liquidators. That order was granted.

Events after presentation of petition

On 16 May 1998, the provisional liquidators of the Company presented a petition to wind up Remoco and Goldremart on the grounds of insolvency and the just and equitable ground. On the same day, the same persons were appointed provisional liquidators of Remoco. The scheduled meeting for the winding up of Ligao was called off.

On the application of Remoco, the order appointing provisional liquidators was discharged by the Companies Judge on 21 May 1998. On 25 May 1998, leave was given for the provisional liquidators to withdraw the petitions to wind up Remoco and Goldremart but by the same order, Mr Yuen was required to act in accordance with the directions of the provisional liquidators.

Events leading to validation application for sale of Remoco's interests

On 4 June 1998, a letter was received from Chu Qing Hai ("Chu"), a director of Wanlitong, alleging that Remoco has been in breach of the joint venture agreement, that funds were urgently needed and threatening to terminate the agreement.

On 5 June 1998, the provisional liquidators made an urgent application for an order, amongst other things, that (i) they may cause Remoco to acquire a new wholly-owned subsidiary to be called Remoco (China) Ltd. which would take over Remoco's interest in Ligao and (ii) that they be at liberty to invite offers by way of private treaty from the shareholders and noteholders of the Company and another company called Star Telecom, for the Company's interest in and loans to Remoco

and Goldremart and the Company's loans to a company called Rightone Telecom (HK) Ltd. That order was granted by the Duty Judge.

Dragon and the noteholders banded together to form a new BVI company called Phoenix Telecommunications Ltd. Its bid made on 23 June 1998 was the only bid received by the provisional liquidators in response to the invitation for offers.

On 30 June 1998, the provisional liquidators made an application to the Companies Judge for an order under s.182 (commonly called a validation order) that they be at liberty to dispose of the Company's interest in Remoco, amongst other assets, to Phoenix.

The Companies Judge took the view that the application for the validation order was in effect a scheme of arrangement, whereby the Yuen group and those creditors who did not participate in the Phoenix scheme would be deprived of the opportunity to benefit from the Ligao asset on liquidation. This would be in breach of the principle that on a winding-up, the free assets of a company should be rateably distributed amongst all unsecured creditors. The judge dismissed the application for the validation order.

The provisional liquidators appealed. On 7 July 1998 the appeal was dismissed on the ground, amongst other things, that the provisional liquidators had failed to obtain a valuation of the Ligao asset, which was the only valuable asset of the Company. There was at least a risk that that asset might be disposed of at an undervalue, given the limited scope of the entities invited to bid.

Events leading to validation order for loan from Phoenix

Thereafter on 16 July 1998, there was a meeting between Dragon's representatives and Mr Chu of Wanlitong in which Mr Chu confirmed the need for `emergency funding' and threatened to take steps to terminate the joint venture should US$200,000 not be received by Ligao by 31 July 1998 and US$300,000 the week after.

On 3 August 1998, the provisional liquidators applied to the Court for a new validation order, this time to accept a loan of up to US$6m (but with a committed amount of only US$500,000) proposed to be made by Dragon and others (through Phoenix) to the Company (through Remoco) to enable Remoco to fulfil its funding obligations to Ligao and to finance Rightone and Remoco (China).

Barnett J granted the order. Thereafter Mr Yuen opposed the petition on the grounds that the Company was not insolvent and that the petition was presented for an improper purpose and was thus an abuse of the process of the Court.

The Law

In *re a Company* [1983] BCLC 492, Harman J held that in considering the issue whether a petition was being presented for an improper purpose, the question was not whether the petitioner genuinely wished to wind up the company; the true question was *for what purpose* did the petitioner wish to wind up the company. The court had to decide whether the petition was for the benefit of the class of which the

petitioner formed a part, or was for *some purpose of his own*. If the latter, the petition was not properly brought.

In that case, the petitioner brought the petition because there was an arrangement with the company's landlord whereby the company's lease would be taken over by the petitioner if a petition had been brought before a certain date. It was clear from the facts in that case that the only purpose of presenting the petition was so that the petitioner could take over the lease.

So also in *Re Wallace Smith & Co Ltd* [1992] BCLC 970, the petition was presented so that the company's directors would no longer be able to mount a defence against the petitioner in other proceedings started in another jurisdiction. Again, it was clear that the petitioner's purpose in presenting the petition was solely to eliminate the opposition in another action.

But what about a situation when the petitioner had more than one purpose in mind? In *Goldsmith v Sperrings Ltd* [1977] 1 WLR 478, Bridge LJ considered Lord Evershed's dictum in *re Majory* [1955] Ch 600 which dictum was as follows:-

> "The so-called `rule' in bankruptcy is, in truth, no more than an application of a more general rule that court proceedings may not be used or threatened for the purpose of obtaining for the person so using or threatening them some collateral advantage to himself, and not for the purpose for which such proceedings are properly designed and exist; and a party so using or threatening proceedings will be liable to be held guilty of abusing the process of the

> court and therefore disqualified from invoking the powers of the court by proceedings he has abused."

Bridge LJ considered the application of this dictum as follows (at 503):-

> "For the purpose of Lord Evershed's general rule, what is meant by a `collateral advantage? The phrase manifestly cannot embrace every advantage sought or obtained by a litigant which it is beyond the court's power to grant him. ... In my judgment, one can certainly go so far as to say that when a litigant sues to redress a grievance no object which he may seek to obtain can be condemned as a collateral advantage if it is reasonably related to the provision of some form of redress for that grievance. On the other hand, if it can be shown that a litigant is pursuing an ulterior purpose unrelated to the subject matter of the litigation and that, but for that his ulterior purpose, he would not have commenced proceedings at all, that would be an abuse of process. These two cases are plain; but there is, I think, a difficult area in between. *What if a litigant with a genuine cause of action, which he would wish to pursue in any event, can be shown also to have an ulterior purpose in view as a desired byproduct of the litigation? Can he on that ground be debarred from proceeding? I very much doubt it.* But on the view I take of the facts in this case, the question does not arise and it is neither necessary nor desirable to try to lay down a precise criterion in the abstract." (emphasis added).

Allegations of collateral purpose

Although Bridge LJ's statement above was expressly obiter, it helps to guide the court's deliberations when considering the facts in this case, in which Mr Yuen claims that Dragon had its designs on Ligao,

and that it was not interested in a rateable distribution of all the assets of the Company amongst all creditors.

Mr Yuen's case is that the "sequence of events" showed that Dragon wanted the noteholders' position vis-a-vis the Ligao joint venture `secured' first before allowing the Company to be wound up, and that the acquisition of the joint venture was the petitioner's only agenda.

Notwithstanding that, it would appear clear from Mr Yuen's cross-examination that he has no objection to the Company being wound-up, so long as its assets could be distributed fairly by independent liquidators.

Allegations of evidence of improper purpose

The "sequence of events" Mr Yuen relies upon are as follows:-

(1) Dragon's attempts to acquire Ligao;
(2) The acts of the provisional liquidators whom Mr Yuen considers "friendly" with Dragon;
(3) Dragon's solicitors' failure to advertise the petition on the first occasion when it was due to be heard;
(4) The failure of negotiations which Mr Yuen considers Dragon did not conduct bona fide.

(1) Dragon's attempts to acquire Ligao

Previous negotiations

First of all, it is clear that there had been previous negotiations in which the noteholders led by Dragon had attempted to acquire Ligao for themselves. They were prepared to pay Mr Yuen off, and for him to retain the manufacturing part of Remoco's business. That arrangement was however aborted.

That piece of evidence cannot be conclusive. It does not necessarily follow from that that Dragon presented the petition as part of a design to get for the noteholders through the liquidation process what they had failed to get through commercial negotiation. It is only part of the circumstances to be taken into account in the court's deliberations as to what was the predominant purpose of the petitioner when it brought the petition.

Cause for presenting petition

I find that the noteholders (and indeed all creditors) had cause to present the petition when on 7 May 1998 Mr Yuen and his associates caused Remoco to resolve to wind-up Ligao.

A winding-up of Ligao would have had drastic consequences. Under clause 44 of the joint venture contract, all assets after dissolution "shall belong to Party A" i.e. Wanlitong. Thus, if Remoco had proceeded with the proposal to wind-up Ligao, as Mr Yuen and his associates resolved to do on 7 May 1998, this would have been tantamount, as it were, to giving the goose away before it had laid any eggs.

In Mr Yuen's oral evidence, he attempted to explain the resolution of 7 May 1998 by saying that he was intending to offer Remoco's interest in the Ligao joint venture for *sale, not* to wind-up the joint venture. However, the minutes of the Remoco board meeting signed by Mr Yuen, his wife and brother as directors of Remoco, and signed by Mr Yuen as chairman, expressly states that "it is now decided that its subsidiaries ... Ligao ... must be liquidated together with Remoco. ... In order to protect the interest of creditors, the management has resolved to inform both subsidiaries to start the winding-up proceeding". A sale was not mentioned, nor would there have been a sale on dissolution under Clause 44 of the joint venture contract.

It may or may not be that Mr Yuen's threat to wind up Ligao was only a ploy to hit back at the noteholders who had been demanding repayment. But from 7 May up until the presentation of this petition on 14 May, this bluff (if it was that) had not been withdrawn by Mr Yuen. Indeed, he had even given notice of the meeting to the Chinese party Wanlitong. At that stage his relationship with the noteholders was poor and it could well have been that he was adopting a "scorched earth" policy; if they were no longer willing to give their financial support, then he would ensure that there would be nothing of value left in the Company.

If Mr Yuen had carried out that threat, the joint venture would have been lost to the Company, its creditors and contributories. The Company was in danger of losing its only valuable asset. In these circumstances Dragon had cause to present this petition and to apply for the appointment of provisional liquidators to avert that threat.

Fox's letters dated 30 May 1998 and 30 June 1998

Mr Yuen relied on 2 letters, one dated 30 May 1998 and the other undated but probably sent on 30 June 1998, from Miss Fox in support of his contention that it was not Dragon's intention to have a rateable distribution of the Company's assets, but to acquire Ligao for itself.

I find that Dragon did want to acquire Ligao for itself (and the noteholders), but as a byproduct of the petition process which it was entitled to bring by reason of Mr Yuen's threat to wind-up Ligao.

The May letter was a circular letter sent to "investors" slightly more than 2 weeks after the presentation of the petition and the appointment of provisional liquidators. The purpose of this circular letter was to ask co-investors to sign counter-indemnities for Dragon, which had had to provide an indemnity for the provisional liquidators' costs, liabilities and disbursements.

In this letter, Miss Fox said:-

> "The deadlock that has affected Sino over the last months has now been broken with the appointment of provisional liquidator, Mr John Lees. Under Hong Kong law, this does not mean that Sino has to proceed to a full liquidation, but the provisional liquidator takes control of the board of the company and will consider any restructuring proposal that is in the interests of the company and the creditors. I see this as a positive step forward for Sino. I am currently working on a restructuring proposal to be put to him and then sanctioned by the Hong Kong courts early next week. I will send a copy of this to you shortly. I believe that Sino is now in a position to move forward rapidly, however the most critical factor affecting Sino is the timing of additional funding for the Sino/Ligao joint venture."

It is true that a company against which a petition is presented does *not have to* proceed invariably to liquidation. Sometimes, restructuring proposals are accepted which would lead to an outcome other than liquidation.

This letter shows that Dragon preferred restructuring to liquidation, but by itself, it is not evidence of its predominant intention in bringing the petition.

The undated letter was more revealing. In this letter, again sent to "investors", Miss Fox, signing as a director of the Company, wrote:-

> "In April [1998], Dragon notified Mr Yuen of their demand for repayment of their investment in convertible notes and bridge loans and the intention to commence formal proceedings if repayment was not made within seven days. After seven days, Dragon commenced legal proceedings through the Hong Kong court system. *The purpose of Dragon's action was to initiate a process whereby they and the other investors in Sino would have the potential to realize the value of their investment. In essence, the intention was to have the reorganization proceed through the courts* and thereby have greater assurance of an outcome within a reasonable period of time. ...
>
> In addition, the court has approved that Remoco(HK) Ltd's interest in the joint venture Ligao will be transferred to a newly incorporated Hong Kong company Remoco (China) Ltd thus removing it from being associated with the trading business. Initially Remoco (China) Ltd will need to be structured as a wholly-owned subsidiary of Remoco (HK) Ltd. However the intention is ultimately to

> accomplish a direct ownership of Remoco (China) and Ligao by Phoenix" (emphasis added).

It is noticeable that there was no mention of what unsecured creditors would expect to get at liquidation through a pari passu distribution. The expressed intention was to have *reorganization* proceed through the petition process with Phoenix's sights on acquiring Ligao in the reorganization.

In my view this was the situation described by Bridge LJ in *Goldsmith* - a situation where Dragon had genuine cause for a petition to be presented against the Company, but also had an ulterior purpose in view as a desired byproduct of the petition process.

Where there was a genuine cause (to prevent Mr Yuen carrying out his threat of winding up Ligao), it cannot, in my judgment, be said that the ulterior purpose was the sole or even the predominant purpose of the petition. Any independent creditor, without reorganization in mind, would still have had to take the step of presenting a petition to thwart Mr Yuen's threats. Otherwise the joint venture would have been lost to Wanlitong at the expense of the Company, its creditors and its contributories.

Validation application for sale of Remoco's interests

As part of his `sequence of events' argument, Mr Yuen also relied upon the provisional liquidators' application for validation of a proposed sale of Remoco's interests to Phoenix.

The order obtained from the Duty Judge on 5 June 1998 has been described as unusual by the Court of Appeal. By reason of the matters following, however, I accept that the provisional liquidators' application to the Duty Judge was caused, not by any machination on the part of Dragon, but by the urgency of the situation.

On 4 June 1998, Wanlitong had sent a letter to, amongst others, the provisional liquidators listing Remoco's alleged breaches and threatening that if Remoco failed to provide funds, the next tranche of which was to be available on 30 June 1998, Wanlitong would terminate the agreement.

There is *no* evidence that Wanlitong was part of any conspiracy with Dragon or the other noteholders or the provisional liquidators to issue that threat. As such, it must follow that this was a genuine threat and it was accepted by Mr Chain counsel for Mr Yuen that a further injection of funds was necessary.

It may be that the provisional liquidators' application to the Duty Judge, made the next day, was not well thought out, but absent any conspiracy with Wanlitong, this cannot in my view amount to evidence of a scheme on the part of Dragon with the assistance of the provisional liquidators to deliberately engineer a situation so that it could acquire Ligao on terms favourable to itself and unfair to other creditors and the contributories.

Mr Chain pointed to Phoenix's correspondence with Maurice Vallat in May-June 1998 as an indication of Phoenix's confidence in acquiring Ligao. It would appear from a letter dated 5 May

1998 that Mr Vallat had already been contacted by the noteholders for a position in the joint venture. However it is not clear from that letter when this contact first began.

It is common ground that in late 1997, the noteholders had been negotiating to acquire Ligao from Remoco, with Mr Yuen to receive a payment and the manufacturing arm. Since Mr Yuen would no longer be involved with the joint venture, the noteholders would have needed someone to replace him. Therefore it is entirely possible that Mr Vallat had been approached then.

When an order was obtained from the Court on 5 June 1998 for bids to be made within less than a month, someone with expertise in the field would have had to step immediately into action should Phoenix succeed in its bid. Hence, the noteholders' desire not "to lose" Mr Vallat, as indicated by Miss Fox in her letter to the representatives of the noteholders in June 1998. I find that the retainer of Mr Vallat did not prove that Dragon knew that its acquisition of Ligao was a certainty.

I then come to Phoenix's bid of 23 June 1998 and the provisional liquidators' application to validate the sale to Phoenix.

Phoenix's bid was not a generous one. As was shown in Miss Fox's letter to the provisional liquidators dated 9 June 1998, Phoenix was anxious to secure the Ligao joint venture for itself at the least possible cost. It was acting in the capacity as a potential purchaser, and it is not unnatural that it was driving a hard bargain.

It was up to the provisional liquidators to stand firm in the interests of the Company and other unsecured creditors and to enable themselves to make an informed decision whether, in all the circumstances, Phoenix's bid should be accepted or rejected.

Mr Lees said in evidence that alternative sources for the funds that Wanlitong was demanding were not available. He had approached 3 banks, none of whom was interested in providing funds. Mr Yuen was unable to raise any funds and Star Telecom was apparently not interested enough to put in a bid. Phoenix's bid was the only bid received and on that basis the provisional liquidators made the validation application on 30 June 1998.

The Companies Judge refused to validate the sale and the Court of Appeal dismissed the appeal from that refusal because the provisional liquidators had failed to obtain a valuation of what Ligao was or would be worth so as to enable themselves to make a proper assessment of the bid. In his evidence Mr Lees said that there were no funds for a valuation. (Although Mr Lees also said that there was not enough time for a valuation, it has to be noted that there were some 6 weeks between the appointment of provisional liquidators and 30 June 1998 when the application for validation was made).

The provisional liquidators should have insisted on being put in funds for a valuation. They failed to do so. Dragon was obviously attempting to pursue the best deal for Phoenix by taking advantage of the provisional liquidators' lack of funds and resolve. However, in my view, that episode stops short of being evidence that the petition was presented by Dragon for an improper purpose when the petition was necessary to

thwart Mr Yuen's threat to wind up Ligao, to the detriment of everyone involved with the Company.

Validation application for loan

On 16 July 1998, there was another demand for funds from Wanlitong. This led ultimately to a loan being sought by the provisional liquidators from Phoenix, which loan was sanctioned by Barnett J on 3 August 1998.

Mr Yuen was served with the application and appeared (at least for part of the hearing) before Barnett J. Although Mr Yuen has alleged that the order was wrongly made, there has been no appeal and I must take it that the order was made by the judge in the proper exercise of his discretion, when the exigencies of the situation were that further funds were required to keep the joint venture alive for Remoco, and the provisional liquidators could not marshal funds from any other quarter except Phoenix. This application therefore does not support Mr Yuen's contention of an abuse of process in bringing the petition.

Finally I should note that Mr Chain had at one stage made a submission based on s.265(5B) of the Companies Ordinance. He submitted that Dragon was attempting to "sidestep" this provision and this was a further abuse of the process of the Court. However it would appear that this subsection is not applicable prior to liquidation, so there is no question of Dragon attempting to "sidestep" it.

(2) Provisional liquidators' actions

Mr Yuen's case was that the provisional liquidators were not impartial. He did not allege any special relationship between Dragon and the provisional liquidators before their appointment, but he had taken the view that because the provisional liquidators were funded by Dragon, that was evidence of an abuse as he had not realized that petitioners would generally be required to indemnify provisional liquidators.

Mr Yuen has however referred to other instances where the provisional liquidators were not seen to be treating the parties (i.e. himself of the one part and the noteholders of the other) equally.

On 8 July 1998, after the Court of Appeal had dismissed the appeal from the Companies Judge's refusal to validate the sale, the provisional liquidators wrote to James Collins-Taylor, the noteholders' representative, asking him "to clarify what strategy you wish to take in terms of potentially acquiring the assets of Sino and also entering into the proposed loan documentation. I am now in the process of assessing the options available to me and, as such, I need a clear indication as to what your proposed strategy is and how you propose to implement that strategy".

Mr Yuen has construed that as a request by the provisional liquidators for, as it were, further instructions from the noteholders. I do not agree that the letter is capable of only that construction. The provisional liquidators knew that Ligao was the only asset of any value for the Company. They also knew that the noteholders were interested in

Ligao as Phoenix had been the only bidder. It was therefore natural and sensible for the provisional liquidators to keep abreast of the plans of the only people who were in the market for the Company's only asset. Having said that, it would have been better had the provisional liquidators copied such correspondence to Mr Yuen to avoid any suspicions of manoeuvres behind his back.

Mr Yuen had also pointed to another document which, if true, would have substantiated his fears of bias of the provisional liquidators. This was a purported minute of a meeting at the provisional liquidators' office on 20 November 1998 attended by Mr Lees, a member of his staff, Mr Vallat and William Brown who had used to work for Remoco and who was then assisting Phoenix. If the contents of this minute were accurate, then the provisional liquidators would have been behaving in a biased and most improper way towards Mr Yuen.

Mr Lees has denied the contents of the purported minute. It is not known who was the author and Mr Chain did not pursue this matter further in cross-examination of Mr Lees.

In conclusion, therefore, I am not satisfied that Mr Yuen has made out a case of bias on the part of the provisional liquidators, although the evidence shows that they may not have been as firm with Phoenix and not as sensitive to Mr Yuen's perceptions as they should have been.

(3) Failure to advertise

Mr Yuen also referred to an episode in which the petition was not advertised in time, leading to a postponement of the hearing scheduled for 20 July 1998. He says that that showed that Dragon was not anxious to proceed to a liquidation.

However Mr Collins-Taylor has given evidence that he had never given instructions to Dragon's solicitors to delay advertising, and he was not challenged on this part of his evidence.

Further, there is evidence from the solicitors that the Gazette was full. This was supported by a letter from the Government Printer's Office showing that attempts had been made by the solicitors to place the advertisement.

Mr Chain submits that Dragon's solicitors should have tried to place the advertisement earlier. However, there is no evidence as to when the Gazette became full and certainly there is no evidence that the solicitors were or should have been aware of this. I find therefore that there is nothing in this point.

(4) Lack of bona fides in negotiations

Finally Mr Yuen's case was that further evidence of abuse can be found in Dragon's lack of bona fides in negotiations after the presentation of the petition.

The parties had entered into negotiations which failed. That was not surprising given the lack of trust between them. The noteholders

had begun to lose trust in Mr Yuen ever since investigations had been made into his use of funds, which revealed some irregularities which were later rectified. It is common ground that he had also attempted to stultify a garnishee order by paying Remoco's funds into Goldremart's account. There was also his threat to wind up Ligao even though the Company would have thereby lost its only valuable asset.

Given this history, it is not surprising that the goodwill and trust that is essential in conducting negotiations would be lacking. I do not therefore find that the failure of the parties to arrive at a negotiated settlement can be regarded as any party's fault, much less as evidence of an abuse of process by Dragon.

Conclusion

In conclusion therefore, I find that Dragon had genuine cause for a petition to be presented against the Company by reason of Mr Yuen's actions in threatening to windup Ligao. Any independent creditor would have done the same to stop Mr Yuen from in effect depleting the Company of its only asset.

Although Dragon wished to acquire Ligao for itself as a byproduct of the petition process, I find this latter purpose was not the predominant purpose of the petition, the predominant purpose being to stop the depletion of Ligao. Accordingly I would not dismiss the petition on that ground.

Further, even if I am wrong in finding that the petitioner's predominant purpose was not an improper one, in the exercise of the

court's discretion in the circumstances of this case, I would still have ordered the petition to proceed to liquidation. It is apparent from the evidence that Mr Yuen had been running the Company in such a way, and his relationship with the Company's main financial backers was so poor, that the Company could not carry on normal operations.

The interests of the Company as a whole, including other unsecured creditors and contributories, would be best served by an independent liquidator being put in place to dispose of the Company's assets fairly and properly, free from the recriminations and distrust between the main creditors of the one part and the board and main contributories of the other that had so beset and paralysed the proper conduct of this Company's business.

Accordingly I would make the usual winding-up order. I will hear the parties as to costs, the identity of the liquidator to be appointed and any ancillary orders.

(MARIA YUEN)
Judge of the Court of First Instance

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Mr Robert Whitehead instructed by Herbert Smith for the Petitioner
Mr Benjamin Chain instructed by Ivan Tang & Co for Opposing Contributory Mr Allan Yuen
Chan Chi Yun Andrew, Opposing Creditor, in person

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:

Arnold & Porter Kaye Scholer, LLP
777 South Figueroa Street, Forty-Fourth Floor
Los Angeles, CA 90017-5844

A true and correct copy of the foregoing document entitled (*specify*): **APPENDIX OF UNPUBLISHED OPINIONS CITED IN LI QI'S AND UL DEFENDANTS' RESPONSE TO OBJECTION AND MOTION TO STRIKE DECLARATION OF PETER FERRER IN SUPPORT OF LI QI'S MOTION TO DISMISS AND DECLARATION OF HARPRABDEEP SINGH IN SUPPORT OF UL DEFENDANTS' MOTION TO DISMISS and EXHIBITS A-N** 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 (*date*) June 27, 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:

☒ Service information continued on attached page

2. SERVED BY UNITED STATES MAIL:
On (*date*) June 27, 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.

Honorable Sandra R. Klein
United States Bankruptcy Court
for the Central District of California
255 East Temple Street, Suite 1582
Los Angeles, CA 90012

☐ 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 (*date*) June 27, 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.

☐ 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.

06/27/2021	Rebecca McNew	/s/ Rebecca McNew
Date	*Printed Name*	*Signature*

SERVICE LIST

SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING (NEF)

United States Trustee	ustpregion16.la.ecf@usdoj.gov
Minsheng Business Aviation Limited; Minsheng Financial Leasing Co., Ltd.; Wells Fargo Bank Northwest, N.A., in its Capacity as trustee to Yuntian 3 Trust dated September 20, 2016; Yuntian 3 Leasing Company Designated Activity Company; Yuntian 4 Leasing Company Designated Activity Company	jmester@jonesday.com; dtmoss@jonesday.com; dstorborg@jonesday.com
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