IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT [DIVISION 3]

DANIEL L. BALSAM,

Appellant and Plaintiff,

v.

DSG DIRECT INC. *et al*,

Defendants,

TROPICINKS LLC,
DATASTREAM GROUP INC., and
LEIGH-ANN COLQUHOUN,

Respondents and Real Parties in Interest.

CASE NO. A126680
(Superior Court No. CGC-05-441630)

Appeal from the Superior Court of the State of California,
County of San Francisco, No. CGC-05-441630
The Honorable William Gargano, Commissioner

APPELLANT'S OPENING BRIEF

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QUESTIONS PRESENTED

1. Should Company *C* be held liable for a valid judgment against Companies *A* and *B* on a successor theory of liability when:

a) Company *C* operates the same business using the same websites from the same physical location under the same management as Companies *A* and *B*, and
b) The sole officer of Companies *A* and *B* caused *A* and *B* to dissolve shortly after a judgment creditor levied on a portion of the judgment, and the same person (co-)created Company C shortly thereafter, and
c) A creditor's rights are involved?

2. Should Company *D* be held liable for a valid judgment against Companies *A* and *B* on an alter ego theory of liability when:

a) Company *D* is the legal owner of the website actually reflecting the name of Company *A*, and
b) Company *D* was the legal owner of the website that processed payments for Company *A* and now processes payments for Company *C*, and
c) Company *D* is also located at the same physical address and under the same management as Companies *A*, *B*, and *C*, and
d) Company D has admitted its involvement in the same unlawful marketing practices for which judgment was entered against Companies *A* and *B*, and
e) A creditor's rights are involved?

3. Should Individual *E* be held liable for a valid judgment against Companies *A* and *B* on an alter ego theory of liability when:

a) Companies *A* and *B* (and *C* and *D*) are all closely held, and
b) Individual *E* is the sole, or one of a few, shareholders/owners of Companies *A* and *B*, and
c) Individual *E* has not demonstrated that her interests are divergent from those of Companies *A* and *B* (or *C* and *D*), and
d) Individual *E* participated in the underlying litigation by hiring an attorney and verifying an Answer, and
e) A creditor's rights are involved?

4. Should Individual *E* be held liable for a valid judgment against Companies *A* and *B* on a corporate officer theory of liability when:

a) Individual *E* was the sole corporate officer of Companies *A*, *B*, and *D*, and one of only two officers of Company *C*, and
b) Individual *E* participated in the underlying litigation by hiring an attorney and verifying an Answer, and
c) A creditor's rights are involved?

The answer to each of these questions is an unqualified "yes."

Here:

A is Defendant/Judgment Debtor DSG Direct Inc.

B is Defendant/Judgment Debtor Your-Info Inc.

C is Respondent TropicInks LLC

D is Respondent Datastream Group Inc.

E is Respondent Leigh-Ann Colquhoun

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

(California Rules of Court, Rule 8.208)

I am the Appellant and co-counsel for Appellant in this Action. I know of no entity or person under California Rules of Court, Rule 8.208 that has a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves under canon 3E of the Code of Judicial Ethics.

DATED: 1-23-2010

Daniel L. Balsam

Daniel L. Balsam

Attorney for Appellant

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LEIGH-ANN COLQUHOUN,	)
	)
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APPELLANT'S BRIEF ON THE MERITS

On Appeal from an Order of the Superior Court of the State of California,
County of San Francisco, No. CGC-05-441630
The Honorable William Gargano, Commissioner

STATEMENT OF THE CASE

A. Introduction

There are four interrelated questions now before this Court, all involving successor, alter ego, and corporate officer liability for a judgment:

1. Should TropicInks LLC ("TropicInks") be held liable for a valid judgment against DSG Direct Inc. ("DSG Direct") and Your-Info Inc. ("Your-Info") on a successor theory of liability when:

a) TropicInks operates the same business using the same websites from the same physical location under the same management as DSG Direct and Your-Info, and

b) The sole officer of DSG Direct and Your-Info caused DSG Direct and Your-Info to dissolve shortly after Balsam, the judgment creditor, levied on a portion of the judgment, and the same person (co-)created TropicInks shortly thereafter, and

c) A creditor's rights are involved?

2. Should Datastream Group Inc. ("Datastream") be held liable for a valid judgment against DSG Direct and Your-Info on an alter ego theory of liability when:

a) Datastream is the legal owner of the website actually reflecting the name of DSG Direct, and

b) Datastream was the legal owner of the website that processed payments for DSG Direct and now processes payments for TropicInks, and

c) Datastream is also located at the same physical address and under the same management as DSG Direct, Your-Info, and TropicInks, and

d) Datastream has admitted its involvement in the same unlawful marketing practices for which judgment was entered against DSG Direct and Your-Info, and

e) A creditor's rights are involved?

3. Should Leigh-Ann Colquhoun ("Colquhoun") be held liable for a valid judgment against DSG Direct and Your-Info on an alter ego theory of liability when:

a) DSG Direct and Your-Info (and TropicInks and Datastream) are all closely held, and

b) Colquhoun is the sole, or one of a few, shareholders/owners of DSG Direct and Your-Info (and TropicInks and Datastream), and

c) Colquhoun has not demonstrated that her interests are divergent from those of DSG Direct and Your-Info (or TropicInks and Datastream), and

d) Colquhoun participated in the underlying litigation by hiring an attorney and verifying an Answer, and

e) A creditor's rights are involved?

4. Should Colquhoun be held liable for a valid judgment against DSG Direct and Your-Info on a corporate officer theory of liability when:

a) Colquhoun was the sole corporate officer of DSG Direct, Your-Info, and Datastream, and one of only two officers of TropicInks, and

b) Colquhoun participated in the underlying litigation by hiring an attorney and verifying an Answer, and

c) A creditor's rights are involved?

The answer to each of these questions is an unqualified "yes." The evidence shows that Respondents TropicInks, Datastream, and Colquhoun should be added to the judgment against DSG Direct and Your-Info on successor, alter ego, and corporate officer theories of liability. There is no evidence, let alone substantial evidence, to the contrary.

If a court is ever to find successor, alter ego, or corporate officer liability, it should do so in the instant matter.

Appellant Daniel L. Balsam ("Balsam") obtained a valid judgment against DSG Direct and Your-Info. (Excerpts of Record "ER" 282-83.) Because DSG Direct and Your-Info did not voluntarily pay the judgment (ER 305), Balsam sought to enforce the judgment via Writ of Execution.

(ER 291-92.) Two months after Balsam seized $2,083.72 (just over 1% of the judgment) by levying on American Express payments (ER 293, 305), Respondent Colquhoun – the sole corporate officer of DSG Direct and Your-Info – caused both companies to dissolve. (ER 316, 320.) Less than two weeks later, Colquhoun (and her son) created TropicInks (ER 323), operating the same websites in the same business under the same management from the same physical address as DSG Direct and Your-Info. (ER 317, 320, 323, 347.) Datastream – also controlled by Colquhoun from the same physical address – was and is the legal owner of the *DSGDirect.com* website which processed payments for DSG Direct and TropicInks' websites. (ER 326, 347-48.)

"Section 187 of the Code of Civil Procedure grants to every court the power to use all necessary means to carry its jurisdiction into effect, even if those means are not specifically pointed out in the code." *Alexander v. Abbey of Chimes*, 104 Cal. App. 3d 39, 44 (1st Dist. 1980). Section 187 has specifically been used to amend judgments to add alter ego and successor entities. *Id*.

Balsam – unable to collect 99% of the judgment due to Respondents' corporate shenanigans – filed a Motion to Amend Judgment pursuant to Code of Civil Procedure § 187 to add Respondents TropicInks, Datastream, and Colquhoun to the judgment on successor, alter ego, and corporate officer theories of liability to "make the judgment speak the truth." (ER 294-353.)

Respondents submitted no evidence, let alone substantial evidence, suggesting that TropicInks, Datastream, and Colquhoun are not successors or alter egos of DSG Direct and Your-Info, nor any evidence or argument that rebuts the presumption that a judgment against a closely-held company is conclusive against the owner (Colquhoun). *Gottlieb v. Kest*, 141 Cal.

App. 4th 110, 151 (2d Dist. 2006). Nor did Respondents submit any evidence or argue that Colquhoun should not be held liable on the judgment as the sole *officer* of DSG Direct and Your-Info, independent from her status as the *owner*.

Nevertheless, without making any findings of fact, ruling on Balsam's Objections to Respondents' Opposition to Balsam's Motion to Amend Judgment and to Colquhoun's Declaration, or providing any basis or explanation for its reasoning, the trial court below incorrectly denied Balsam's Motion to Amend Judgment to add Respondents to the judgment as successors or alter egos of the Judgment Debtors, and impliedly held that Colquhoun also had no liability as the sole officer of the Judgment Debtors. (ER 476, Reporter's Transcript from September 1, 2009 hearing on Balsam's Motion to Amend Judgment ("RT2") 15-20.) The Court never issued a formal Order beyond the "Mini-Minutes." (ER 1, 476.)

B. Nature of Action and Relief Sought

Balsam seeks to hold Respondents TropicInks, Datastream, and Colquhoun liable on the judgment entered against DSG Direct and Your-Info under successor and alter ego theories, and to hold Colquhoun liable as the sole corporate officer of DSG Direct and Your-Info.

Balsam seeks a decision from this Court so holding and an order directing the court to amend the judgment accordingly.

C. Summary of Material Facts/Procedural History

1. Complaint Through Judgment

Balsam filed a Verified Complaint against DSG Direct and Your-Info[1] and other entities on May 26, 2005 for advertising in and sending

[1] Balsam would have also named Evoclix Inc. as a defendant in this Action – because Evoclix Inc. actually sent and advertised in some of the spams at issue – but on information and belief, Evoclix Inc. went inactive on October

unlawful spam[2] to Balsam, continuing to do so even after Balsam unsubscribed from defendants' spam lists multiple times (including via certified return-receipt mail) and received confirmation of the unsubscribe requests. The spams violated Business & Professions Code § 17529.5 and Civil Code § 1750 *et seq.* (Consumers Legal Remedies Act). (ER 19-31, 44-77, 282-83, Reporter's Transcript from February 25, 2008 prove-up hearing on Balsam's First Amended Complaint ("RT1") 2-4, 6-7.)

DSG Direct and Your-Info hired an attorney, and on August 8, 2005, Doron Ohel ("Ohel") filed an answer on behalf of DSG Direct and Your-Info, verified by Colquhoun as officer of both companies. (ER 32-35.)

On October 7, 2005, Ohel filed a Case Management Statement on behalf of DSG Direct and Your-Info. (The Case Management Statement is not included in the record, but it is referenced in the Register of Actions, ER 16.)

DSG Direct and Your-Info repeatedly failed to respond appropriately to Balsam's discovery,[3] and Balsam was forced to file several motions to compel, which the trial court granted. (ER 3-6.) On November 21, 2007, the trial court granted monetary sanctions to Balsam in the

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1, 2004 and was acquired by DSG Direct on or about that date. (ER 309-12.) The allegations in the Complaint and First Amended Complaint are herein incorporated by reference, but are not necessary for disposition of this case, except where noted.

[2] "Spam" is the commonly accepted term to describe "unsolicited commercial email." The California Legislature and courts have used the term. *See* B&P § 17529(a) and *Ferguson v. Friendfinders Inc.*, 94 Cal. App. 4th 1255, 1267 and n.5 (1st Dist. 2002). (ER 422.)

[3] At Defendants' request, Balsam even purchased a portable hard drive and sent it to Defendants to facilitate production of responsive documents, but Defendants never sent the hard drive back. (ER 109, RT1 4.)

amount of $740; the order was entered on December 19, 2007. (The Clerk did not include the order in the record, but see Register of Actions at ER 4.) These sanctions were never paid. Separately, the trial court sanctioned DSG Direct and Your-Info $300 for failure to appear at the mandatory settlement conference. (ER 284.) The Register of Actions does not indicate that these sanctions were ever paid to the court. (ER 1-18.)

On June 29, 2007, Ohel's motion to be relieved as counsel was granted. (ER 193-94.)

On February 25, 2008, Balsam appeared for trial. (RT1 1.) DSG Direct and Your-Info were properly noticed but failed to appear. (RT1 1.) DSG Direct and Your-Info never notified Balsam or the trial court that they would not appear, nor did they ever request a continuance. (ER 427.) On February 28, 2008, the trial court entered judgment against DSG Direct and Your-Info in the amount of $199,167.[4] (ER 282-83.)

DSG Direct and Your-Info never filed a motion to vacate the judgment or for reconsideration or challenged the judgment in any way. (ER 1-18.)

2. Levy on DSG Direct, and Dissolution of DSG Direct and Your-Info

Neither DSG Direct nor Your-Info voluntarily paid any part of the judgment. (ER 305.)

On June 26, 2008, Balsam sought and received a Writ of Execution, which he used to levy on American Express payments to DSG Direct on July 16, 2008. Balsam received $2,083.72 – just over 1% of the judgment. (ER 291-93, 305.)

[4] The trial court also entered judgment against Diabetic Plus Inc. in the amount of $1,000 (ER 282-83), but that judgment is not at issue in this appeal.

Two months later – on September 26, 2008 – Colquhoun, the sole officer of DSG Direct and Your-Info, caused both companies' corporate status with the State of Florida to dissolve by failing to file annual reports. (ER 317, 320.) In her undated Declaration in Support of Respondents' Opposition to Balsam's Motion to Amend Judgment, Colquhoun claimed that the reason DSG Direct went inactive was due to the untimely death[5] of her son Daniel Reinerston, allegedly "the key employee of DSG Direct," in 2006. (ER 361.)

However, Respondents' Opposition to Balsam's Motion to Amend Judgment and the Declaration of Leigh-Ann Colquhoun do not refer to any facts or attach any evidence tending to show that her son Daniel Reinerston was really the "key employee" or had any responsibility for any corporate functions and not Colquhoun herself. (ER 354-61.) There is no evidence showing that DSG Direct actually suffered from the loss of its purported "key employee," nor that it employed any other people. (ER 360-61.) Daniel Reinerston was never named as a corporate officer in DSG Direct's (or Your-Info's) filings with the Florida Department of State. (ER 457-62.) Colquhoun verified the Answer to the Complaint, not Daniel Reinerston. (ER 34.) Colquhoun was the incorporator and the only person ever identified as a corporate officer of DSG Direct officer and Your-Info (ER 317, 320, 457-62), showing that she, and not her son Daniel Reinerston, was the true brains behind the operation, like a "Ma Barker" of spamming.

3. TropicInks the Successor, and Datastream the Alter Ego

Less than two weeks after Colquhoun caused DSG Direct and Your-Info to dissolve (September 26, 2008), she was apparently ready to go back

[5] Balsam does not dispute the fact that Daniel Reinerston died in September 2006; Balsam found a September 27, 2008 article from *NaplesNews.com* referring to his death two years before. (ER 433.)

to work, and on October 8, 2008, instead of reviving DSG Direct and Your-Info, she and her other son Jonathan Reinertsen created a new company, TropicInks. (ER 323-24.) According to corporate filings with the Florida Department of State, TropicInks operated the same websites from the same physical location under substantially the same management as DSG Direct and Your-Info. (ER 317, 320, 323.)

In 2003, the *Evoclix.com* website's contact page identified Evoclix Inc. In 2005, the *Evoclix.com* website identified DSG Direct. In 2007, the *Evoclix.com* website still identified DSG Direct. In 2009, the *Evoclix.com* website identified Evoclix.com/TropicInks.com. (ER 329-32.)

In March 2008, the purchase/checkout process from the *Evoclix.com* website *and* the *TropicInks.com* website both led to a web page at the *DSGDirect.com* website that stated that "Your credit card will be billed by DSG Direct, Inc. Checks will be payable to DSG Direct, Inc." (ER 334-43.) In July 2009, the purchase/checkout process from the *Evoclix.com* website *and* the *TropicInks.com* website both led to an almost identical web page at *DSGDirect.com*, except now it said that "Your credit card will be billed by TropicInks, LLC. Checks will be payable to TropicInks, LLC." (ER 345.)

Interestingly, the domain name *DSGDirect.com* was and is registered to Datastream, not to DSG Direct or TropicInks. (ER 347-48.) Colquhoun is and has always been the sole corporate officer of Datastream too. (ER 326-27, 457-62.) Datastream has the same physical location as Your-Info and TropicInks. (ER 320, 323, 326.) Thus, the asset that is the *DSGDirect.com* website is apparently commingled between DSG Direct (the copyright holder) and Datastream (the domain name registrant and legal owner).

In March 2008 – before DSG Direct dissolved – the *TropicInks.com* website indicated "Copyright (C) 2006 – DSG Direct." In August 2009 – after DSG Direct dissolved – the *TropicInks.com* website indicated "Copyright (C) 2006 – Tropicinks.com." (ER 455.)

4. Motion to Amend Judgment

On July 27, 2009, Balsam filed a Motion to Amend Judgment pursuant to Code of Civil Procedure § 187 to add Respondents TropicInks, Datastream, and Colquhoun to the judgment on successor, alter ego, and corporate officer theories of liability. (ER 294-353.) On August 20, 2009, Respondents untimely[6] filed and served an Opposition (ER 354-59),

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[6] Code of Civil Procedure § 1005(b) requires that an Opposition be *filed* nine court days prior to the hearing. "There is no doctrine of substantial compliance with respect to documents required to be filed with the court . . . . The requirements of orderly administration of judicial business support the conclusion that *court filing requirements should be scrupulously observed.*" *Usher v. Soltz*, 123 Cal. App. 3d 692, 699 (4th Dist. 1981) (emphasis added). Here, since the hearing was September 1, 2009, that meant that the Opposition had to be filed by August 19, but the Opposition was actually filed on August 20. (ER 1, 354-420.)

Mailing a document from Santa Monica, as Respondents' attorney, Bennet Kelley ("Kelley") did, is not "filing" a document. "The filing of a document with a court clerk consists of (1) its *delivery to the clerk*, (2) for the purpose of filing it, (3) at the clerk's office, (4) during business hours, and (5) with payment of any required filing fee." *Thompson, Curtis, Lawson & Parrish v. Thorne*, 21 Cal. App. 3d 797, 801 (1st Dist. 1971) (citation omitted) (emphasis added). "No California case has held a filing to have occurred unless and until the document *came into the actual possession of the clerk*, a deputy clerk, or a judicial officer in a place at which the court's business was officially conducted such as a courtroom or clerk's office." *Usher*, 123 Cal. App. at 698-99. It is undisputed that the Respondents' Opposition was filed late – August 20 instead of August 19 – but the trial court nevertheless admitted the Opposition and considered its contents.

Service was untimely too. For service by Express Mail, service is complete when the envelope is deposited with the U.S. Postal Service.

supported by the improper Declaration of Leigh-Ann Colquhoun. (ER 360-61.)

On August 25, 2009, Balsam filed a Reply to the Opposition, pointing out everything that the Opposition *didn't* dispute, alleging transfer of assets from DSG Direct to TropicInks, explaining why Respondents' cited legal authorities are distinguishable and actually support Balsam's arguments, and suggesting that Respondents' attempts to relitigate the merits of the underlying judgment[7] confirmed the community of interest between Respondents and DSG Direct/Your-Info. (ER 421-62.)

Balsam concurrently filed an Objection to the Opposition based on the untimely filing and service, false case citations, distinguishable and non-binding case citations, the improper attempt to relitigate the judgment on the merits, and unfounded personal attacks on Balsam. (Balsam's Objection to Respondents' Opposition is not included in the Record but it is referenced on the Register of Actions, ER 1.) This Court is not asked to review the Objection, but merely to note that Balsam filed an Objection, and the trial court below improperly made its final ruling, based on

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Code Civ. Proc. § 1013(c). Kelley falsely implied on the proof of service that Balsam or his attorney had agreed to accept service by email. (ER 466, 472-73.) Kelley also falsely claimed on the proof of service, which he signed under penalty of perjury, that he served the Opposition via Express Mail – i.e., deposited it with the U.S. Postal Service – on August 19, which is belied by the Express Mail envelope itself that indicates that he did not even pay for the postage until August 20. (ER 466, 472-75.)

[7] In their Opposition to Balsam's Motion to Amend Judgment, Respondents incorrectly claimed that Balsam's only theory of liability was that the spams were sent from multiple domain names. (ER 357-58.) Balsam also testified at the prove-up hearing that some of the spams had subject lines advertising goods and services as "free" without disclosing required purchase conditions. (RT1 3.)

argument but no real evidence put forth by Respondents, without ever ruling on Balsam's Objection.

Balsam also concurrently filed an evidentiary Objection to Colquhoun's Declaration (ER 463-75), because the Declaration did not conform with Code of Civil Procedure § 2015.5(b) in that it was undated and it was not signed under penalty of perjury under the laws of the State of California. (ER 467-68, 360-61.) Colquhoun's Declaration also included conclusions of law masquerading as facts, and – unlike Balsam's Declarations (ER 304-53, 432-62) – it attached no independent evidence in support of the self-serving "facts" and conclusions put forth therein. (ER 467, 360-61.)

Trial courts have a duty to rule on evidentiary objections, including objections to declarations. *Hollywood Screentest of America, Inc. v. NBC Universal, Inc.*, 151 Cal. App. 4th 631, 642 (2d Dist. 2007), citing *Sambrano v. City of San Diego*, 94 Cal. App. 4th 225, 235 (4th Dist. 2001). Here, the trial court below appears to have considered Colquhoun's Declaration in making its final ruling, even though it never ruled on Balsam's Objections to Respondents' Opposition and to Colquhoun's Declaration (RT2 15-20). This failure to rule on the Objections, in conjunction with the failure to issue a written Order on Balsam's Motion to Amend Judgment or even notify the parties of the Mini-Minutes (ER 476), and the failure to expressly address the question of Colquhoun's liability as DSG Direct and Your-Info's sole corporate *officer*, further suggests that the trial court glossed over the evidence in reaching its conclusion that Respondents were not successors or alter egos of the Judgment Debtors. (RT2 20.)

D. Order/Ruling of Superior Court and Statement of Appealability

On September 1, 2009, Balsam and Respondents appeared before Commissioner Gargano on Balsam's Motion to Amend Judgment. Balsam was represented by Timothy Walton (ER 476, RT2 16) and Respondents were represented by Bennet Kelley (RT2 16).

Without making any findings of fact, ruling on Balsam's Objections, or providing any basis or explanation for its reasoning, the trial court below incorrectly denied Balsam's Motion to Amend Judgment to add Respondents to the judgment. (ER 476, RT2 15-20.) The Court never issued a formal Order beyond the "Mini-Minutes." (ER 1, 476.)

Under California Code of Civil Procedure § 904.1(a)(2), a party may file an appeal to an order after judgment. Balsam timely filed an appeal. (ER 477-78.)

STANDARD OF REVIEW

The standard of review on appeal for the question of alter ego or successor liability is "substantial evidence." *NEC Electronics v. Hurt*, 208 Cal. App. 3d 772, 777 (6th Dist. 1989), *CenterPoint Energy, Inc. v. Superior Court*, 157 Cal. App. 4th 1101, 1119 (4th Dist. 2007).

Therefore, this Court will need to determine whether the trial court below had substantial evidence to support its conclusion. As discussed below, the trial court below made *no* findings of fact that would tend to suggest that TropicInks, Datastream, and Colquhoun should not be held liable on the judgment against DSG Direct and Your-Info as successors, alter egos, and corporate officers. Nor *could* the trial court make any findings of fact, except to accept Balsam's evidence as truth, for Respondents submitted *no* evidence to support their position that they are *not* successors to or alter egos of Judgment Debtors DSG Direct and Your-

Info… only a self-serving declaration that did not conform to California law, that was untimely filed and served, that attached no independent evidence, and that contradicts Respondents' own admissions in a Consent Judgment when Datastream was sued by the Michigan Attorney General for unlawful spamming, *infra*. (*See* Declaration of Daniel L. Balsam in Support of Request for Judicial Notice "RJN Balsam Decl." at ¶¶ 3-4 and Attach. 1-2, concurrently filed.)

In contrast, Balsam submitted numerous documents – including Respondents' admissions from their own websites, corporate filings, and the Michigan Consent Judgment – tending to show that Respondents *are* successors and alter egos to the Judgment Debtors, Colquhoun is the owner of closely-held Judgment Debtors, and Colquhoun is the sole officer of Judgment Debtors, and on those grounds, should have been added to the judgment against DSG Direct and Your-Info.

ARGUMENT

I. RESPONDENTS SUBMITTED NO EVIDENCE TENDING TO SHOW THAT THEY SHOULD NOT HAVE SUCCESSOR, ALTER EGO, AND CORPORATE OFFICER LIABILITY FOR THE JUDGMENT

This appeal arises from Respondents' wrongful use of the corporate form to avoid liability on a valid judgment. Based on substantial evidence, the trial court below should have amended the judgment to add TropicInks, Datastream, and Colquhoun as judgment debtors under successor, alter ego, and corporate officer theories of liability.

> When a corporation is used by an individual or individuals, or by another corporation, to perpetrate a fraud, circumvent a statute, or accomplish some other wrongful or inequitable purpose, a court my disregard the corporate entity and treat

> the acts as if they were done by the individuals or by the controlling corporation.

9 WITKIN, SUMMARY OF CAL. LAW: CORPORATIONS § 9, p. 785 (Thomson West 10th ed. 2005).

A trial court has the power pursuant to Code of Civil Procedure § 187 to modify a judgment to add judgment debtors. *McClellan v. Northridge Park Townhome Owners Association Inc.*, 89 Cal. App. 4th 746, 752 (2d Dist. 2001); *Alexander*, 104 Cal. App. 3d at 44. The trial court below should have exercised such power and amended the judgment.

> When a request to amend has been denied, an appellate court is confronted by two conflicting policies. On the one hand, the trial court's discretion should not be disturbed unless it has been clearly abused; on the other, there is a strong policy in favor of liberal allowance of amendments. This conflict "is often resolved in favor of the privilege of amending, and reversals are common where the appellant makes a reasonable showing of prejudice from the ruling." (3 Witkin, Cal. Procedure (2d ed. 1971) Pleading, § 1042, pp. 2620-2621.)

Mesler v. Bragg Management Co., 39 Cal. 3d. 290, 296-7 (1985).

This Court should now order the trial court below to amend the judgment because Balsam was unfairly prejudiced by the trial court's order. The trial court made no findings of fact; it should have made findings of fact in Balsam's favor, for Respondents submitted *no* evidence to support their position that they are not successors to or alter egos of Judgment Debtors DSG Direct and Your-Info.[8] (ER 354-61.) Nor did Respondents submit any evidence, or make any argument, that Colquhoun should have

[8] The Florida Department of State's website does not allow Balsam to determine the true owners of the four companies, but in closely held corporations such as these, this Court should infer that the sole officer is the sole owner, especially where Colquhoun has provided no evidence to rebut the presumption.

no liability as the sole officer of DSG Direct and Your-Info.[9] (ER 354-61.) The trial court did not rule on Balsam's Objection to Respondents' "evidence," and gave no basis or explanation whatsoever for its decision. (RT2 15-20.)

Colquhoun's self-serving Declaration attached no independent evidence tending to show that her son Daniel Reinerston was really the "key employee" or had any responsibility for any corporate functions and not Colquhoun herself. (ER 360-61.) There is no evidence showing that DSG Direct actually suffered from the loss of its purported "key employee," nor that it employed any other people. (ER 360-61.) Daniel Reinerston was never named as a corporate officer in DSG Direct's (or Your-Info's) filings with the Florida Department of State. (ER 457-62.) Colquhoun verified the Answer to the Complaint, not Daniel Reinerston. (ER 34.) Colquhoun was the incorporator and the only person ever identified as a corporate officer of DSG Direct and Your-Info (ER 317, 320, 457-62), showing that she, and not her son Daniel Reinerston, was the mastermind of the spamming scheme. The declaration improperly includes legal *conclusions*, not facts, that "Datastream and Tropic are separate and distinct entities and are not successor nor alter ego entities of the Florida Defendants." (ER 360-61.)

Colquhoun's declaration also claims that "Datastream is not an e-commerce company such as DSG Direct or Tropic[Inks] but rather is an

[9] Respondents' Opposition stated "Plaintiff makes much of the fact that Ms. Colquhoun is a common *officer* of the Florida Defendants and [Respondents], but this is insufficient to claim alter ego status" (emphasis added). (ER 356.) Respondents fail to recognize that alter ego liability is based on *ownership* and not status as an *officer*. In fact, Respondents immediately follow the "officer" quote with a citation to federal authority and the Fletcher Cyclopedia referring to "ownership" and "shareholder."

internet services company." (ER 361.) Again, Colquhoun attached no such evidence in support of this claim. Nor *could* she attach any such evidence, because the claim is demonstrably false, as shown by Datastream's admissions in a Consent Judgment (RJN Balsam Decl. at ¶ 4 and Attach. 2) after being sued by the Michigan Attorney General for unlawful spamming (RJN Balsam Decl. at ¶ 3 and Attach. 1), *infra*.

Furthermore, Colquhoun's declaration was undated and was not signed under penalty of perjury under the laws of the State of California, and thus does not conform to Code of Civil Procedure § 2015.5(b). (ER 360-361, 467.) Nor was it timely filed and served pursuant to Code of Civil Procedure §§ 1005(b), 1013(c). (ER 464-66.)

In sum: The trial court's conclusion was not based on substantial evidence, or indeed, any evidence at all tending to show that Respondents were not successors or alter egos of the Judgment Debtors DSG Direct and Your-Info. The trial court never made any factual findings and never ruled on Balsam's Objections to Respondents' "evidence." The trial court ignored substantial evidence submitted by Balsam, including Judgment Debtors' and Respondents' corporate filings with the Florida Department of State, their domain name registrations, and their websites, all of which demonstrate that Respondents *are* successors and alter egos of Judgment Debtors DSG Direct and Your-Info, and Colquhoun is the owner and sole corporate officer of the closely-held Judgment Debtors.

The trial court's order essentially condoned Defendants' and Respondents' fraudulent activities and abuse of the corporate form to avoid liability on a valid judgment and deny Balsam his rights as a creditor, leaving Balsam with no means of recovery, even as Respondents continue to operate in the same business, using the same websites, from the same location, and under the same management as did the Judgment Debtors.

If there were ever a case for a court to find successor, alter ego, and officer liability, this Court should find successor, alter ego, and corporate officer liability here.

II. TROPICINKS HAS SUCCESSOR LIABILITY FOR THE JUDGMENT

A. In Certain Circumstances, a Successor Company is Liable for the Debts of the Predecessor

In general, when one corporation sells or transfers all of its assets to another corporation, the latter is not liable for the debts and liabilities of the former unless

> (1) there is an express or implied agreement of assumption, (2) the transaction amounts to a consolidation or merger of the two corporations, *(3) the purchasing corporation is a mere continuation of the seller*, or *(4) the transfer of assets to the purchaser is for the fraudulent purpose of escaping liability for the seller's debts.*

Ray v. Alad, 19 Cal. 3d 22, 28 (1977) (emphasis added) (citations omitted).

Ninety years ago, *Stanford Hotel Company v. M. Schwind Company* elaborated on factors 3 and 4 in a manner presciently foreshadowing the fact pattern now before this Court.

> [I]t is well established in this state that under circumstances such as these where a corporation reorganizes under a new name but with practically the same stockholders and directors and continues to carry on the same business, a court of equity will regard the new corporation as a continuation of the former corporation, and will hold it liable for the debts of the former corporation.

180 Cal. 348, 354 (1919).

B. TropicInks' Website, Address, Management, Corporate Filings, and Transfer of Assets Demonstrate that It is the Successor to DSG Direct and Your-Info

1. Admissions on Websites and Checkout Processes

In March 2008, a consumer shopping on the *Evoclix.com* or *TropicInks.com* website was directed to a web page at the *DSGDirect.com* website – showing logos for both *EvoClix.com* and *TropicInks.com* – as part of the checkout process. (ER 334-343.) In March 2008, this web page said "Your credit card payment will be billed by DSG Direct, Inc./Checks will be payable to DSG Direct, Inc." (ER 333-343.) In July 2009, a consumer shopping on the *Evoclix.com* or *TropicInks.com* website was directed to a web page at the *DSGDirect.com* website that was identical to the March 2008 page, except that it substituted "TropicInks LLC" in place of "DSG Direct Inc." (ER 345.) Thus, the tortfeasors' own website constitutes a *de facto* admission that TropicInks is the successor to DSG Direct.

Additionally, the copyright notice on the *TropicInks.com* website changed from "Copyright (C) 2006 – DSG Direct" in 2008 to "Copyright (C) 2006 – TropicInks.com" in 2009. (ER 454-55.) Respondents did not even bother to change the date; they literally substituted the name of one of the Respondents for the name of one of the Judgment Debtors, thereby constituting an admission that TropicInks succeeded DSG Direct as the copyright holder of the *TropicInks.com* website.

2. Same Physical Addresses and Telephone Numbers

One of the factors used by courts to determine whether to pierce the corporate veil is the use of the same office or business location. *Associated Vendors Inc. v. Oakland Meat Co. Inc.*, 210 Cal. App. 2d 825, 839 (1st Dist. 1962).

Respondents claim that Datastream is based in Bonita Springs, DSG Direct was founded in Sarasota, and TropicInks operates in Gainesville. (ER 355, 360-61.) However, corporate filings on file with the Florida Department of State show that Your-Info, TropicInks, and Datastream are *all* located at the same address in Bonita Springs. (ER 320, 323, 326.) There is no valid rebuttal evidence that these companies are or were not acting as a single business.

Moreover, the domain name registration information for *TropicInks.com* has only reflected a Gainesville address since February 7, 2009. For more than four years before that, *TropicInks.com* was registered to the same address in Sarasota where *Evoclix.com* – i.e., DSG Direct – had been registered since 2002. (ER 436-452.)

The *Evoclix.com* website displayed the same telephone number from 2005-2009, even as the website's identified owner changed from "DSG Direct Inc." in 2005 and 2007 to "Evoclix.com/TropicInks.com" in 2009. This same telephone number appeared on a web page at *DSGDirect.com* that included the Evoclix and TropicInks logos in 2009. (ER 329-43.) These businesses are all really the same – iterations of the same spamming operation, with a common address and common operators.

3. Common Officers and Stockholders

The California Supreme Court held that a corporation is a mere continuation of another and liable for its debts upon a showing that "one or more persons were *officers, directors, or stockholders of both corporations*." *Ray*, 19 Cal. 3d at 29 (emphasis added).

Here, Colquhoun was always the sole officer of DSG Direct, Your-Info, and Datastream (ER 317, 320, 326-27, 457-62), and is one of only two officers of TropicInks (the other officer being her son Jonathan Reinertsen) (ER 323-24.)

Colquhoun admitted to being a "shareholder or interest holder of . . . DSG Direct, Inc. and Your-Info-Inc. *[sic]* . . . as well as TropicInks, LLC and Datastream Group, Inc." (ER 360.)

4. Transfer of Assets/No Adequate Consideration Made Available

The California Supreme Court held that a corporation is a mere continuation of another and liable for its debts upon a showing that "no adequate consideration was given for the predecessor corporation's assets *and made available for meeting the claims of its unsecured creditors*." *Ray*, 19 Cal. 3d at 29 (emphasis added).

In *Thomson v. L.C. Roney & Co.*, the court found liability because

> When the assets of L. C. Roney, Inc., were sold to Southwestern Development Company the former corporation received no consideration other than the recited cancellation of debts allegedly owed to the parent corporation and the agreement to assume one particular obligation, and was left without assets and without the means of paying its debt to plaintiff. Following the shift of assets, the business of L. C. Roney, Inc., was carried on in identical fashion, with the same controlling personnel, using its former name as a fictitious firm style as a part of the operations of the Southwestern Development Company. These facts and circumstances furnish ample support for the finding of the trial court that defendant was but the *alter ego* of [Southwestern Development Company].

112 Cal. App. 2d 420, 428-9 (2d Dist. 1952).

In March 2008 – before DSG Direct dissolved – the *TropicInks.com* website indicated "Copyright (C) 2006 – DSG Direct." (ER 454.) In August *2009*, the *TropicInks.com* website indicated "Copyright (C) *2006* – Tropicinks.com." (ER 455.) Aside from the retroactive changing of the copyright holder, this evidences the transfer of assets (the website itself) from DSG Direct to TropicInks.

Balsam is unaware how much, if anything, TropicInks paid (now defunct) DSG Direct for its assets (the website, customer database, and physical inventory of products) or (now defunct) Your-Info for any assets it might have, but if any consideration were paid to DSG Direct or Your-Info, neither company ever made any of the consideration available to meet Balsam's claim as a creditor. (ER 305.) Thus, the instant dispute is remarkably similar to *Thomson* – TropicInks continues to operate in the same business as did DSG Direct and Your-Info and with practically the same management, but DSG Direct and Your-Info never paid, or offered to pay, their debt to Balsam (ER 305) pursuant to the judgment (ER 282-83) or the sanctions ordered by the trial court (ER 3-4).

A dissolving company must pay its debts before distributing assets. *Ray, Thomson, supra.* So, if consideration were not paid to DSG Direct and Your-Info for their assets, then to the extent that DSG Direct and/or Your-Info distributed any assets to Colquhoun, TropicInks, Datastream, or anyone else "for free" as the companies dissolved, [10] then Balsam's judgment against DSG Direct and/or Your-Info may be enforced against the recipients of the assets up to the amounts distributed. Corp. Code § 2011(a)(1)(B). Of course, if DSG Direct and Your-Info still have any assets, those assets must be distributed, or sold and distributed, to Balsam too. Corp. Code § 2011(a)(1)(A).

In fact, if DSG Direct and/or Your-Info distributed any assets to any shareholder (including Colquhoun), without first satisfying their debt to Balsam, Balsam could even bring suit in DSG Direct and Your-Info's

[10] And if consideration were not paid, the absence of such consideration, even as assets were transferred from one company to another, further demonstrates that Colquhoun used DSG Direct and TropicInks as mere shells.

names as a creditor, against those shareholders who received any distributions, up to the amount of those distributions. Corp. Code § 2009.

C. The Creation of TropicInks was Fraudulently Intended to Escape Liability for the Judgment Against DSG Direct and Your-Info

In *McClellan*, the court found that Peppertree North Condominium Association Inc. failed to pay McClellan for earthquake repair work he performed. 89 Cal. App. 4th at 749. Peppertree filed for bankruptcy to avoid its debts, but McClellan filed a motion to dismiss the bankruptcy, arguing that the filing had been in bad faith because just one month prior, the Peppertree board of directors formed Northridge Park Townhome Owners Association Inc. to collect dues, manage the property, and otherwise act as the same homeowners association, just with a different name. *Id*. at 750. The bankruptcy court granted McClellan's motion to dismiss, and McClellan then filed a motion in the superior court to amend the judgment to add Northridge Park as a judgment debtor

> on the grounds that Northridge Park was merely a continuation of Peppertree and was created to hinder, delay and defraud Peppertree's creditors. McClellan presented evidence to show that "aside from the name, there is no difference whatsoever [between] [Peppertree] and Northridge Park. Northridge Park conducts the same business, collects the same revenues, operates through the same Board of Directors, has the same management company and presides over the same Condominiums, as did [Peppertree]."

Id.

The trial court granted the motion to amend the judgment, and Northridge Park appealed. *Id*. at 751. The court of appeal cited *Blank v. Olcovich Shoe Corp.*, 20 Cal. App. 2d 456, 461 (2d Dist. 1937) with approval:

> Citing the evidence of similarity of names, identity of directorate, purchase of assets and offer of stock to the old shareholders at a nominal value, [*Blank v. Olcovich Shoe Corp.*] held: "Corporations cannot escape liability by a mere change of name or a shift of assets when and where *it is shown that the new corporation is, in reality, but a continuation of the old*. Especially is this well settled when actual fraud or the rights of creditors are involved, under which circumstances the courts uniformly hold the new corporation liable for the debts of the former corporation." [Citations.]

Id. at 754 (emphasis in original). The court of appeal found that

> Peppertree purported simply to abandon its CC&R's [covenants, conditions, and restrictions] and its very existence by forming a new incorporated homeowners association governed by a new set of CC&R's. That it cannot do.

Id. at 756. The court of appeal affirmed the judgment of the trial court, holding Northridge Park liable as Peppertree's successor for Peppertree's debt to McClellan. *Id*. at 757.

Here, just as in *McClellan*, Colquhoun created TropicInks to evade the judgment against DSG Direct and Your-Info. Balsam is sympathetic as to Colquhoun's son Daniel's untimely death, but it is curious that when Colquhoun went back to work, she decided to start a new company – TropicInks – instead of reviving DSG Direct, which had gone inactive less than two weeks before. (ER 317-24.) Respondents have provided no explanation for this decision. (ER 360-61.) Starting the new company must have taken additional effort, because the *Evoclix.com*, *TropicInks.com*, and *DSGDirect.com* websites had to be modified to reflect the new company TropicInks, even though the websites otherwise remained identical. Respondents may have spent time and money printing new business cards, letterhead, and envelopes, and obtaining new listings in their local Yellow Pages. Of course, dissolving the old companies and

starting the new company allowed Colquhoun and her new company to avoid paying 99% of the judgment, at least to date.

"The successor, to be liable, must have 'played some role in curtailing or destroying the [plaintiff's] remedies.'" *Lundell v. Sidney Machine Tool Company et al*, 190 Cal. App. 3d 1546, 1553 (2d Dist. 1987).

Here, Balsam is a creditor of the now-defunct DSG Direct and Your-Info. Balsam's rights were destroyed (*see Ray*, 19 Cal. 3d at 31) by the very creation of TropicInks, which took over the *TropicInks.com* website, owned by DSG Direct, when Colquhoun caused DSG Direct to dissolve.

D. Conclusion

Even aside from the fact that Colquhoun's Declaration in Support of Respondent's Opposition (ER 360-61) is facially invalid because it was undated and not signed under penalty of perjury of the laws of the States of California, the Declaration failed to attach any supporting evidence whatsoever to show that TropicInks was not the successor/alter-ego of Florida Defendants. Colquhoun claimed that "Datastream and Tropic[Inks] are separate and distinct entities and are not successor nor alter ego entities of the Florida Defendants" (ER 361), but this is not a statement of *fact* as is required in a declaration; it is a legal conclusion – and not even a conclusion with any support.

TropicInks is but a continuation of DSG Direct, and therefore "is liable regardless of any distinction as to the character of the creditors or the nature of the debt." *Olcovich Shoe Corp.*, 20 Cal. App. 2d at 462.

III. DATASTREAM HAS ALTER EGO LIABILITY FOR THE JUDGMENT

A. Rules for Alter Ego Liability

"[T]he separate personality of the corporation is a statutory privilege, it must be used for legitimate business purposes and must not be

perverted. When it is abused it will be disregarded and the corporation looked at as a collection or association of individuals." *Mesler*, 39 Cal. 3d at 300 (citing Comment, Corporations: Disregarding Corporate Entity: One Man Company, 13 CAL. L. REV. 235, 237 (1925)). "The essence of the alter ego doctrine is that justice be done." *Id.* at 301.

When a trial court amends a judgment to add an alter ego, it is not really adding a *new* defendant; rather, it is inserting the name of the real defendant.

> Such a procedure is an appropriate and complete method to bind new . . . defendants where it can be demonstrated that in their capacity as alter ego of the corporation they in fact had control of the previous litigation, and thus were virtually represented in the lawsuit.

Carr v. Barnabey's Hotel Corp., 23 Cal. App. 4th 14, 21-22 (2d Dist. 1994) (quoting *NEC Electronics*, 208 Cal. App. 3d at 778).

There are two general requirements before piercing a corporate veil to hold individuals liable:

> (1) that there be such unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist and (2) that, if the acts are treated as those of the corporation alone, an inequitable result will follow."

Automotriz del Golfo v. Resnick, 47 Cal. 2d 792, 796 (1957).

While alter ego theory is generally used to hold an individual liable for the actions of a corporation, it can also be used to hold a corporation liable for the actions of another corporation under certain circumstances, e.g., if "the use of a corporation [is] as a mere shell, instrumentality, or conduit for a single venture or the business of an individual *or another corporation*" or if there is a "diversion of assets from a corporation by or to a stockholder or other person *or entity*, to the detriment of creditors." *Associated Vendors*, 210 Cal. App. 2d at 839 (citations omitted) (emphasis

added). *See also Troyk v. Farmers Group Inc.*, 171 Cal. App. 4th 1305, 1341 (4th Dist. 2009) ("Alter ego liability is not limited to the parent-subsidiary corporate relationship; rather, 'under the single-enterprise rule, liability can [also] be found between sister [or affiliated] companies'" (citation omitted)).

> It is well settled that when a corporation "is used by an individual or individuals, or by another corporation, to perpetrate a fraud, circumvent a statute, or accomplish some other wrongful or inequitable purpose, a court may *disregard the corporate entity* and treat the acts as if they were done by the individuals themselves or by the controlling corporation . . . the court will disregard the 'fiction' of corporate entity[.]"

McClellan, 89 Cal. App. 4th at 752-53 (quoting 9 WITKIN, SUMMARY OF CAL. LAW: CORPORATIONS § 12, p. 524 (Thomson West 9th ed. 1989).

B. <u>DSG Direct was Just a Shell for Datastream</u>

"Commingling of funds and other assets, failure to segregate funds of the separate entities, and the unauthorized diversion of corporate funds or assets to other than corporate uses" and "the use of a corporation as a mere shell, instrumentality or conduit for a single venture or the business of an individual or another corporation" are factors courts use when determining whether to find alter-ego liability. *Associated Vendors*, 210 Cal. App. 2d at 838-39.

Troyk also referred to "identical directors and officers" as a criterion. 171 Cal. App. 4th at 1342. In *Troyk*, the court found that

> there is substantial evidence to support the trial court's finding that FGI, FIE, and Prematic acted as a single enterprise and therefore FGI and FIE may be liable for UCL restitution. Prematic is a wholly owned subsidiary of FGI and all of its directors are officers or employees of FGI. Prematic performs most of its billing and forwarding activities by using FGI's equipment and personnel and pays FGI for such use. . .

Id. at 1342-3.

As described above, Colquhoun was/is the sole officer of DSG Direct, Your-Info, and Datastream (ER 317, 320, 326-27, 457-62), and she is one of only two officers of TropicInks; the other is her son Jonathan Reinertsen (ER 323-24). Therefore, this Court should find that DSG Direct was just a shell for Datastream.

> Likewise, there is substantial evidence to support a finding that Prematic was an alter ego of, or acted as part of a single enterprise with, FIE. Although FIE did not control or own any shares of stock of Prematic, the trial court could reasonably infer that FGI's managerial and administrative control over FIE's activities as FIE's attorney-in-fact allowed FGI to control the activities of both FIE and Prematic, effectively making FIE and Prematic sister, or at least affiliated, entities for the purpose of applying the single enterprise doctrine. . . . FGI did not need to own FIE for application of the alter ego or single enterprise doctrine.

Id. at 1342-3.

In 2008 and 2009, consumers shopping at *EvoClix.com* or *TropicInks.com* ended up at the same billing page at the *DSGDirect.com* website. (ER 334-45.) And even though the *DSGDirect.com* website shows a copyright notice in the name of DSG Direct (ER 337, 343, 345); the *DSGDirect.com* website is *not* owned by DSG Direct. Rather, it is owned by Datastream. (ER 347-48.) In July 2009 the *DSGDirect.com* website also stated that credit cards would be billed by/checks should be written to TropicInks. (ER 345.) Thus, three different entities have a claim on the *DSGDirect.com* website: Datastream, DSG Direct, and TropicInks. DSG Direct and TropicInks were/are mere shells for Datastream to conduct its business.

Four companies and one individual – DSG Direct, Your-Info, TropicInks, Datastream, and Colquhoun – conspired together in their e-commerce ventures, using the websites *EvoClix.com*, *TropicInks.com*, and

DSGDirect.com, as part of a single enterprise. Common knowledge and concerted action is demonstrated by the simple fact that Colquhuon is the sole officer of DSG Direct, Your-Info, and Datastream, and one of only two corporate officers of TropicInks.

Associated Vendors also cites a common address as one of the factors courts consider when deciding whether to pierce the corporate veil. 210 Cal. App. 2d at 839. Here, Datastream has the same Bonita Springs address as does Judgment Debtor Your-Info and TropicInks. (ER 320-27.)

C. Respondents Made False and Misleading Statements to the Trial Court Below

Respondents' statement that "Datastream . . . has never commingled any assets with DSG Direct" (ER 361) is demonstrably false. The intellectual property and asset that is the *DSGDirect.com* website is commingled between DSG Direct (the copyright holder) and Datastream (the domain name registrant and legal owner).

Furthermore, Respondents claimed in their Opposition to the Motion to Amend Judgment that "Datastream is not an e-commerce company such as DSG Direct or Tropic but rather is an internet services company. Datastream has provided services to DSG Direct, such as domain name management…" (ER 361.) Datastream thus *suggests* its innocence as to the underlying unlawful spams.

This statement was demonstrably false and misleading too.

Respondents successfully deceived the trial court into believing that Colquhoun's company Datastream is just an "internet services company" (a term so broad and vague as to be essentially meaningless) that provides certain services to Colquhoun's other companies such as domain name management but (allegedly) is *not* an e-commerce company; i.e., it (allegedly) does not advertise or sell anything.

However, Datastream's own Articles of Incorporation states at ¶ 3 that "The purpose for which the corporation is organized is to offer services in Internet *Marketing*" (emphasis added). (RJN Balsam Decl. at ¶ 5 and Attach. 3.) "Internet marketing" is a broad term, indicating the advertising and selling of products/services, and *not* limited merely to domain name management.

Additionally, *after* the hearing on the Motion to Amend Judgment (RJN Balsam Decl. at ¶ 6), Balsam learned that in 2006, the Michigan Attorney General filed civil and criminal actions against *Datastream – not* DSG Direct or Your-Info – for sending unlawful spam advertising alcohol to an email address on Michigan's Children's Protection Registry. *Cox v. Data Stream Group Inc.*, No. 06-1007-CP (Mich. Circ. Ct. Cty. of Ingham Aug. 10, 2006) (complaint filed). (RJN Balsam Decl. at ¶ 3 and Attach. 1.)

Datastream subsequently entered into a Consent Judgment. *Cox v. Data Stream Group Inc.*, No. 06-1007-CP (Mich. Circ. Ct. Cty. of Ingham Feb. 6, 2008) (consent judgment). (RJN Balsam Decl. at ¶ 4 and Attach. 2.) Datastream admitted to violating the Michigan's Children's Protection Registry Act by "causing an e-mail message soliciting the purchase of alcoholic beverages to an e-mail address registered with the state's children's protection registry as a contact point used by a minor" but stated that "upon learning of the violation, it undertook immediate, affirmative steps to come into compliance with the Act." Datastream did *not* deny the Attorney General's allegations, and the Consent Judgment does *not* include any "no admission of liability" language or any language limiting Datastream's admissions to that particular Michigan action. (RJN Balsam Decl. at ¶ 4 and Attach. 2.)

A court of appeal can take judicial notice of evidence that was not included in the record of the trial court below. And it should do so, *in any way*, to find the truth.

> *Unreported Matters.* The augmentation procedure is not confined to bringing up matters reported; it may be used *in any way* that will make the record conform to the truth.

9 WITKIN CALIFORNIA PROCEDURE: APPEALS § 683(2) (Thomson West 5th ed. 2009) (emphasis added). Accordingly, in *South Shore Land Company v. Peterson*,

> Respondent assert[ed] that in determining the question before us we are not restricted to the four corners of the pleadings, but that we must read into them matters of which we may take judicial notice . . . . [A] reviewing court "can properly take judicial notice of any matter of which the court of original jurisdiction may properly take notice." Accordingly, we have heretofore granted respondent's motion to augment the record before us to include documents which, it asserts, we should judicially notice.

226 Cal. App. 2d 725, 742 (1st Dist. 1964) (citation omitted). Therefore, Balsam concurrently files with this Opening Brief a Motion/Request for Judicial Notice to Supplement Record as to the Michigan Complaint and Michigan Consent Judgment, and Datastream's Articles of Incorporation, pursuant to Evidence Code §§ 459(a) and 452(d), (h).

The Michigan Documents and Datastream's own Articles of Incorporation are highly relevant to Balsam's Motion to Amend Judgment and this Appeal, because they demonstrate the falsity of Respondents' claim to the trial court below, intended to evade liability on the judgment, that Datastream is *not* an "e-commerce company." (ER 361.)

Whether or not the email advertisements at issue in the Michigan Complaint actually violated Michigan law is not relevant to this appeal. But what *is* highly relevant in the Michigan Documents is the fact that

Datastream – not DSG Direct or Your-Info, which were not even defendants in the Michigan action – admitted that *it* sent or caused e-mail advertisements to be sent, and admitted that *it* had the ability to control the email advertisements in order to comply with Michigan law. (RJN Balsam Decl. at ¶ 4 and Attach. 2.)

Ultimately, the Michigan Documents and Datastream's Articles of Incorporation undermine and discredit Respondents' false and misleading claims in their Opposition to Balsam's Motion to Amend Judgment that Datastream is *just* an "internet service company" that provides certain services but does *not* advertise or sell anything because it is *not* an e-commerce company. Datastream's own statements show otherwise. Thus, the Michigan Documents and Datastream's Articles of Incorporation support Balsam's argument that Datastream has alter ego liability for the judgment. By Datastream's own admissions, it is an Internet marketing company, it sent or caused email advertisements to be sent, and it had control over email advertisements.

D. Conclusion

As shown, there is a strong unity of interest between Datastream and DSG Direct (as well as between Datastream and TropicInks). There are no true "separate personalities" between them. Datastream admitted in the Michigan Consent Judgment that it caused spams to be sent and that it had the power to control its spamming (RJN Balsam Decl. at ¶ 4 and Attach. 2), undermining its assertions to the trial court below that it was *only* an "internet services company" providing domain registration services to DSG Direct and *not* an e-commerce company. Datastream's own Articles of Incorporation state that it is in the Internet marketing business. (RJN Balsam Decl. at ¶ 5 and Attach. 3.) Under these circumstances, adherence to the fiction of separate existences of Datastream and DSG Direct/Your-

Info would lead directly to the inequitable result that Balsam would be denied his remedy even as the tortfeasors engage in fraud by continuing to operate just as before – albeit under different names – to evade liability on the judgment.

IV. COLQUHOUN HAS ALTER EGO LIABILITY FOR THE JUDGMENT AS THE OWNER/SHAREHOLDER OF DSG DIRECT, YOUR-INFO, TROPICINKS, AND DATASTREAM

This Court should hold Colquhoun liable for the judgment as the owner/shareholder of DSG Direct and Your-Info (ER 360), conducting her own activities through the corporate shells. And if this Court finds that TropicInks and/or Datastream is liable on the judgment on a successor or alter ego theory, then this Court should also hold that Colquhoun is liable as the owner/shareholder of TropicInks and Datastream too.

If this Court were to find TropicInks and Datastream liable on the judgment but not Colquhoun, history suggests that Colquhoun would likely dissolve TropicInks and Datastream and start new e-commerce companies in their place. Therefore, in the interest of justice and judicial economy, this Court should find Colquhoun personally on the judgment at this time.

A. Rules for Alter Ego Liability

See Section IV, A, *supra*.

B. Alter Ego Liability and Closely-Held Companies

In their Opposition to Balsam's Motion to Amend Judgment, Respondents cited to a federal case, *Katzir's Floor & Home Design Inc. v. M-MLS.com*, for the premise that

> "Allegations that the defendant was the sole or primary shareholder are inadequate as a matter of law to pierce the corporate veil. Even if the sole shareholder is entitled to all of the corporation's profits, and dominated and controlled the corporation, that fact is insufficient by itself to make the shareholder personally liable." 1 William Meade Fletcher et

> al., Fletcher Cyclopedia of the Law of Private Corporations § 41.35, at 671 (perm. ed., rev. vol. 1999).

394 F.3d 1143, 1149 (9th Cir. 2006). In *Katzir's*, the Ninth Circuit stated that the alter ego doctrine is only invoked "only where recognition of the corporate form would work an *injustice* to a third person," and found that the district court failed to make factual findings as to the individual Peter Sommer's (alleged) misuse of the corporate form, failed to demonstrate any injustice, and failed to find that Sommer's interests were protected in the underlying litigation. *Id*. (emphasis in original).

But the instant facts are distinguishable from those in *Katzir's*. Here, a failure to treat the actions of DSG Direct and Your-Info as those of Colquhoun *would* create an injustice, because Balsam has been deprived of the right to recover his judgment even as Colquhoun started TropicInks less than two weeks after causing DSG Direct and Your-Info to dissolve (ER 317-24), and transferred assets (ER 454-55) while ignoring Balsam's rights as a creditor (ER 305). It is true that the trial court below did not make factual findings as to Colquhoun's (mis)use of the corporate form; the trial court made no factual findings at *all* (RT2 15-20), despite substantial evidence submitted by Balsam (ER 304-48, 432-62) and without ruling on Balsam's Objections to Respondents' evidence (ER 463-75).

The instant dispute is far more akin to *Resilient Floor Covering Pension Fund v. M&M Installation Inc.*, in which the District Court for the Northern District of California did not follow the logic of *Katzir's*. The court found that M&M Installation Inc. and Simas Floor Co. had substantially identical ownership and management (indeed, the companies were owned by three members of the same family and controlled by those three and their fathers); M&M had no source of business other than from Simas Floor; Simas Floor handled all of M&M's office, administrative, and

billing functions; M&M employees worked out of Simas Floor's location but M&M did not pay Simas Floor for use of the office space; and M&M had no phone line, fax line, or website of its own. No. C08-5561 BZ, 2009 U.S. Dist. LEXIS 72793 at *4, 11-12 (N.D. Cal. Aug. 18, 2009) (order granting summary judgment). The court found that Simas Floor and M&M were alter egos, and held that Simas Floor was liable for M&M's pension obligations. *Id*. at *18.

Here, as in *Resilient Floor Covering Pension Fund*, the companies are owned and controlled by one person, the companies have less than arms-length associations, the companies claim the same physical address and telephone numbers, and Datastream owns the *DSGDirect.com* website. Moreover, in the instant Action, the businesses all pursue the same line of business: spamming.

However, neither of these federal cases is binding on this California court.[11] And, as shown below, a different section of *Fletcher* cited by a California court states precisely the opposite rule from the section cited in *Katzir's*.

The California case *Gottlieb v. Kest*, 141 Cal. App. 4th 110 (2d Dist. 2006) – a case Respondents also brought to the attention of the trial court below – contradicts *Katzir's* and explains that the owner of a closely held corporation *is* liable for the corporation's debts when the individual's

[11] *See, e.g., People v. Crittenden*, 9 Cal. 4th 83, 120 (1994) ("Defendant asserts we should follow several United States Court of Appeals decisions holding, according to defendant, that under *Batson* a prima facie showing is made whenever a prosecutor has exercised one or more peremptory challenges against all members of a defendant's race. These decisions do not persuade us to alter the conclusion we have reached above, and, as we have observed on prior occasions, we [the California Supreme Court] are not bound by decisions of the lower federal courts, even on federal questions.") (citations omitted).

interests were the same as those of the corporation, which is presumed to be the case unless the individual demonstrates otherwise.

Gottlieb noted that generally corporations are distinct legal entities and issues determined against corporations are not conclusive against directors, officers, and stockholders, and vice-versa… *as to corporations whose ownership is widely held*. *Id*. at 150-51.

> But the Restatement notes an exception for corporations that are closely held: "If the corporation is closely held, in that *one or a few persons hold substantially the entire ownership in it*, the judgment in an action ... against the corporation or the holder of ownership in it is conclusive upon the other of them as to issues determined therein as follows: [¶] ... The judgment in an action ... against the corporation is conclusive upon the holder of its ownership if he actively participated in the action on behalf of the corporation, *unless his interests and those of the corporation are so different that he should have* [*an*] *opportunity to relitigate the issue*." (*Rest.2d Judgments, § 59(3)(a),* p. 94, italics added; accord, 9A Fletcher Cyclopedia of the Law of Private Corporations (2000 rev.) § 4705, p. 484.)

Id. at 151 (emphasis in original). Thus, when a company is closely held, the *presumption* is that the judgment against the company is conclusive upon the actively participating owner, *unless* the owner's interests are markedly different from the company's interests.

> As explained in the commentary to the Restatement: "When the corporation is closely held, ... [the] *interests* of the corporation's management and stockholders and the corporation itself *generally fully coincide*. By definition, the stockholders are few in number and either themselves constitute the management or have direct personal control over it. In many respects, the enterprise is a proprietorship or partnership conducted in corporate form. If the corporate form ... is adequately adhered to, the fact that interests of a closely held corporation and its proprietors are usually identical does not efface the separate legal identity of the corporation for such purposes as taxation, regulation, and the

> limitation of stockholders' liability to their investment in the corporation. For the purpose of affording opportunity for a day in court on issues contested in litigation, however, there is no good reason why a closely held corporation and its owners should be ordinarily regarded as legally distinct. On the contrary, it may be *presumed that their interests coincide* and that one opportunity to litigate issues that concern them in common should sufficiently protect both.

Id. (emphasis in original).

Here, DSG Direct and Your-Info were, and TropicInks and Datastream are, closely-held companies. Balsam believes that Colquhoun was the sole – or one of very few – shareholders. (ER 360-61.) These are not widely held corporations. *Cf. Gottlieb, supra*, 141 Cal. App. at 150-51.

Following *Gottlieb*, even though the closely-held companies DSG Direct and Your-Info may have been separate from Colquhoun for, e.g., taxation purposes,[12] as far as litigation is concerned, it should be *presumed* that Colquhoun's interests and her companies' interests are the same and she should not be treated as legally distinct from her companies.

Gottlieb requires that the judgment against DSG Direct and Your-Info be conclusive upon their owners – i.e., Colquhoun – *unless* she can prove that her interests diverge from the companies' interests. I.e., the burden of proof is on *Colquhoun* to prove that her interests are divergent, not on Balsam to prove that her interests are the same. And Colquhoun made no such showing in the Opposition to Balsam's Motion to Amend Judgment and her Declaration in Support (ER 354-61), or at the hearing on the Motion (RT2 15-20) to demonstrate that her interests are divergent. Indeed, she did not even try. Even if all of Balsam's Objections were

[12] Balsam does not know whether or how DSG Direct and Your-Info paid their taxes.

overruled – which they were not – Colquhoun has not provided even a self-serving statement that her interests diverge from those of her companies.

Similarly, in *Jack Farenbaugh & Son v. Belmont Construction Inc.*, the court of appeal affirmed the trial court's amendment of the judgment to hold another company, not party to the original action, liable on an alter ego theory. 194 Cal. App. 3d 1023, 1027, 1034 (2d Dist. 1987). The court found – in a fact pattern strikingly similar to the instant dispute – that

> By Appellant's causing Belmont to go out of business and disbursing all of its monies and other assets to pay others, not including respondent, Belmont was left as a hollow shell without means to satisfy its existing and potential creditors; when viewed with the other evidence presented, the evidence was more than sufficient for the trier of fact to find both unity of interest and ownership as well as an inequitable result if the alter ego doctrine were not applied.

Id. at 1034. Here, just as in *Jack Farenbaugh*, Colquhoun caused DSG Direct and Your-Info to dissolve and did not use their assets to pay Balsam as their creditor. This Court should similarly find that an inequitable result would result if Colquhoun were not held liable on an alter ego theory.

C. <u>Colquhoun Had Control of the Litigation</u>

"It is now settled that '. . . the authority of the court will be exercised to impose liability under a judgment upon the *alter ego* who has had control of the litigation.'" *Jack Farenbaugh*, 194 Cal. App. 3d at 1029 (citation omitted).

But it is *not* necessary that persons sought to be added as judgment debtors must have actually participated in the trial, only that they had the *opportunity* to do so. *Dow Jones Company Inc. v. Avenel*, 151 Cal. App. 3d 144, 150-51 (1st Dist. 1984).

Here, Colquhoun had control of the litigation and hired an attorney to represent her companies. (ER 33.) She verified the Answer to the

Complaint. (ER 34.) Respondents could have appeared at trial in February 2008 (RT1 1-13); it is not Balsam's fault that no one from DSG and Your-Info chose to appear, without ever contacting Balsam, his attorney, or the trial court. Indeed, the trial court below noted that the judgment entered against DSG Direct and Your-Info (ER 282-83) was *not* a default; it was a judgment entered at a prove-up hearing when the defendants did not appear, after they *did* answer the Complaint. (RT2 19-20.)

D. Conclusion

There is no evidence whatsoever that DSG Direct, Your-Info, TropicInks, and Datastream are *not* alter egos of Colquhoun. Colquhoun's self-serving Declaration, unsupported by any external evidence (ER 360-61), does not pass muster. Balsam has substantial evidence – including Defendants' and Respondents' own corporate documents filed with the Florida Department of State, and the Michigan Consent Judgment – indicating that Colquhoun engaged in a single enterprise, using her various companies as a shield from liability, to commit unlawful acts. (ER 304-53, 432-62.)

If the unlawful acts that were the basis of the underlying judgment were treated as those of DSG Direct and Your-Info alone, an inequitable result would follow. (ER 293, 305). New companies could – and here *did* – resume their unlawful activities, but under different names. Colquhoun caused DSG Direct and Your-Info to dissolve (ER 317-21) and disbursed their assets (including the websites) (ER 454-55) while ignoring Balsam's valid claims as a creditor (ER 305), and created TropicInks less than two weeks later (ER 323-24), operating in the same business, using the same websites, from the same physical location, and under substantially the same management (ER 334-45), for the wrongful purpose of evading the judgment.

These companies are just shells for Colquhoun, so this Court should disregard the corporate form, pierce the corporate veil, and treat the actions of DSG Direct, Your-Info, TropicInks, and Datastream, and the liability of DSG Direct, Your-Info, TropicInks, and Datastream, as that of Colquhoun personally, the "Ma Barker" mastermind behind the unlawful spamming racket and money-making enterprise.

V. COLQUHOUN IS ALSO LIABLE FOR THE JUDGMENT AS THE SOLE CORPORATE OFFICER OF DSG DIRECT AND YOUR-INFO

A. Corporate Officers are Liable for their Own Tortious Conduct

Officers of corporations and members of limited liability companies can be held liable for their own tortious conduct. Corporations Code §§ 17101(a) and (c), 17158(a).

> Directors and officers of a corporation are not rendered personally liable for its torts merely because of their official positions, but may become liable if they directly ordered, authorized or participated in the tortious conduct. . . . Personal liability, if otherwise justified, may rest upon a "conspiracy" among the officers and directors to injure third parties through the corporation.

Wyatt v. Union Mortgage Co. et al, 24 Cal. 3d 773, 785 (1979) (citations omitted).

See also Frances T. v. Village Green Owners Assn., 42 Cal. 3d 490, 503 (1986) (holding that corporate directors can be held liable for their own tortious conduct), *People v. Pacific Landmark LLC,* 129 Cal. App. 4th 1203, 1215 (2d Dist. 2005) (holding that a limited liability company's manager is not insulated from liability for participation in tortious conduct merely because the conduct occurs within the scope and role as a manager), *People v. Conway,* 42 Cal. App. 3d 875, 886 (2d Dist. 1974) (finding that

the president "was in a position to control the activities of the [corporation] and thus could be held criminally liable for false advertising").

B. Colquhoun is the Mastermind Behind and Controlled/ Controls all Four Companies at Issue

Colquhuon's managerial involvement has been a constant factor throughout years of corporate shenanigans, dating back to at least 2000. Colquhuon has used at least four different companies to shield her own involvement in unlawful activities.

Colquhuon always was the sole officer of DSG Direct, now inactive. (ER 317-18, 457-62.) Colquhuon was the sole officer of Your-Info, now inactive. (ER 320-21.) Colquhuon is the sole officer of Datastream. (ER 326-27.) Colquhuon is one of only two members/managers of TropicInks; the other is her son Jonathan Reinertsen. (ER 306, 323-24.) In their Opposition to Balsam's Motion to Amend Judgment, Respondents did not dispute any of these allegations. (ER 354-61.)

It is difficult to conceive how the four companies could have engaged in *any* activities, legal or not, without Colquhuon's knowledge and involvement. Colquhoun points to no other person responsible for the unlawful acts. (ER 360-61.)

This Court should not allow Colquhoun's corporate shenanigans to enable her to evade liability for the actions of the companies under *her* managerial control. Respondents' Opposition to Balsam's Motion to Amend Judgment and Colquhoun's Declaration do not refer to any facts or attach any evidence tending to show that her son Daniel Reinerston was really the "key employee" or had any responsibility for any corporate functions and not Colquhoun herself. (ER 354-61.) There is no evidence showing that DSG Direct actually suffered from the loss of its purported "key employee," nor that it employed any other people. (ER 360-61.)

Daniel Reinerston was never named as a corporate officer in DSG Direct's (or Your-Info's) filings with the Florida Department of State. (ER 457-62.) Colquhoun verified the Answer to the Complaint, not Daniel Reinerston. (ER 34.) Colquhoun was the incorporator and the only person ever identified as a corporate officer of DSG Direct officer and Your-Info (ER 317-21, 457-62), showing that she, and not her son Daniel Reinerston, was truly in charge of these corrupt organizations and unlawful business practices.

Furthermore, Colquhoun's Declaration (ER 360-61) was undated and was not signed under penalty of perjury under the laws of the State of California as required by Code of Civil Procedure § 2015.5(b) and untimely filed and served. Balsam objected to the Declaration on these grounds (ER 463-75) but the trial court did not rule on Balsam's Objections (RT2 15-20).

Therefore, independently of the successor and alter ego theories of liability, the trial court also erred when it impliedly held that Colquhoun was not liable on the judgment as the sole officer of DSG Direct and Your-Info.

VI. HOLDING TROPICINKS, DATASTREAM, AND COLQUHOUN LIABLE UNDER SUCCESSOR, ALTER EGO, AND OFFICER THEORIES DOES NOT VIOLATE DUE PROCESS

In their Opposition to Balsam's Motion to Amend Judgment, Respondents cited *NEC Electronics* for the premise that if a judgment is entered by default and the alter ego's interests were not represented in the underlying action, then adding them as judgment debtors would violate due process. (ER 357.)

Respondents are incorrect as a matter of law *and* misrepresent facts clearly established by the record.

First, as the trial court below noted, the judgment entered against DSG Direct and Your-Info (ER 282-83) was *not* a default; it was a judgment entered at a prove-up hearing when the defendants did not appear at trial, after they answered the complaint. (RT2 19-20.)

Moreover, amending a judgment on an alter ego theory does not violate due process because alter ego liability is premised on the fact that the named judgment debtor, and the entity against whom the plaintiff seeks to amend the judgment, were one and the same, so amending the judgment pursuant to Code of Civil Procedure § 187 is merely inserting the correct name of the real defendant. *Katzir's*, 394 F.3d at 1148.

It is *not* necessary that persons sought to be added as judgment debtors must have actually participated in the trial, only that they had the *opportunity* to do so. *Dow Jones*, 151 Cal. App. 3d at 150-51. Under such circumstances, there are no due process violations. *Jack Farenbaugh*, 194 Cal. App. 3d at 1031.

Citing to two California cases (*Jack Farenbaugh* and *Alexander*), the Ninth Circuit held that the District Court

> did not clearly err in finding that this requirement [of "controlling" the litigation for amendment under Code of Civil Procedure § 187] was met in the instant case. The Partnership in essence controlled the litigation because the same group of individuals comprised the Partnership and the Corporation, they were present during the litigation, and one of the partners even contributed deposition testimony. *Thus, adding the Partnership as a judgment-debtor raises no due process concerns.*

Levander v. Prober (In re Levander), 180 F.3d 1114, 1123 (9th Cir. 1999) (emphasis added) (citations omitted).

Here, Colquhoun was the sole officer of DSG Direct and Your-Info (ER 317-24, 457-62), Colquhoun controlled the litigation and verified the

Answer (ER 34), and Colquhoun is the sole officer of Datastream (ER 326-27) and one of but two officers of TropicInks (ER 323-24).

NEC Electronics is also distinguishable because defendant Ph Components made *no* attempt to defend the NEC lawsuit, 208 Cal. App. 3d at 780, and *NEC Electronics* also pointed out that in *Dow Jones*, the appellants were able to present a defense to the trial court through Communimark, so the court found alter ego liability, *id*. *NEC Electronics* specifically contrasted *Dow Jones* and *Motores De Mexicali v. Superior Court*, 51 Cal. 2d 172 (1958), also cited by Respondents in their Opposition (ER 357), because in *Motores*, the individuals sought to be added as alter egos had "*in no way* participated in the defense of the action" *Id*. at 779.

In contrast, DSG Direct, Your-Info, and Colquhoun *did* participate in the defense of the action – they hired an attorney, filed a Verified Answer (signed by Colquhoun) to the Verified Complaint (ER 32-34), filed an Answer (never actually verified) to the First Amended Complaint (ER 88-93), partially responded to the first round of discovery, filed an Opposition to Balsam's Motion to Compel Responses and to Have Matters Deemed Admitted (ER 171-81), and filed a Case Management Statement (not included in the record, but referenced in the Register of Actions, ER 16).

Furthermore, in *NEC Electronics* the court found that Ph Components and Hurt's interests were divergent. *Id.* at 780. As above, in a closely-held company, the presumption is that the interests of the owner and the company do coincide. *Gottlieb*, 141 Cal. App. 4th at 151. Here, Respondents have not proven or even alleged that their interests are divergent from the interests of the Judgment Debtors. (ER 354-61.)

Balsam is sympathetic to the loss of Colquhoun's son; nevertheless, Judgment Debtors DSG Direct and Your-Info had almost a year and a half

after Daniel Reinerston's death in September 2006 (ER 433) to notify Balsam and/or the trial court, before trial in February 2008 (RT1 1). Nothing stopped DSG Direct and Your-Info from appearing at trial, and they never even requested a continuance of trial, which Balsam would have granted under the circumstances. Colquhoun participated in pre-trial litigation and had the opportunity to participate at trial. That DSG Direct and Your-Info did not appear at trial, or even challenge the judgment after it was entered, is hardly Balsam's fault.

Respondents also claimed in their Opposition to Balsam's Motion to Amend Judgment that "Plaintiff does not cite a single case where a judgment has been amended in a comparable situation." (ER 357.) Respondents are incorrect. *Gottlieb* supports Balsam's Motion to Amend Judgment, as does *Dow Jones*, which has a very similar fact pattern.

Dow Jones Co. v. Avenel	***Instant Action***
Dow Jones Company Inc. sued Communimark Inc. and obtained a judgment of $208,000.	Balsam sued DSG Direct and Your-Info and obtained a judgment of $199,167.
Dow Jones then filed a motion to amend the judgment to include Gerard Avenal, an individual, and Avenal Imports Ltd., a corporation ("appellants") as judgment debtors. They were not parties to the original action. The basis of the motion was that appellants were the alter egos of Communimark.	Balsam then filed a motion to amend the judgment to include TropicInks, DataStream, and Colquhoun, not named defendants in the original action. The basis of the motion was that Respondents were successors, alter egos, and officers of DSG Direct and Your-Info.
Gerard Avenel was the 100 percent shareholder, president, and chief executive officer of Communimark and the 100 percent shareholder, chief executive officer, and only director of Avenel Imports.	Colquhoun is/was the sole officer of DSG Direct, Your-Info, and Datastream Group, and one of only two officers of TropicInks.

In *Dow Jones*, the trial court found that appellants had acted as the alter egos of Communimark and so amended the judgment. 151 Cal. App. 3d at 149. The court of appeals affirmed, finding that appellants *were* the real defendants, notwithstanding their arguments that they were denied due process because they did not defend themselves in the original action since they were not technically named parties in the original action. *Id.* The court held that

> While appellants, themselves, technically were not given the opportunity to convince the trial court that material issues of fact did exist because they were not then named parties, they were able to do so through the vehicle of Communimark . . . . Appellants' real point seems to be that *they* should be allowed to "litigate factual issues" concerning *their* liability to Dow Jones, else they cannot properly be added as judgment debtors. We conclude otherwise.

Id. at 150 (emphasis in original). The facts in the instant matter are remarkably similar to *Dow Jones*; the trial court should have amended the judgment.

Gottlieb addressed alter ego parties' liability for a default judgment by focusing on privity; specifically, whether it would be fair to bind a new party to a judgment in prior proceedings in which it did not participate. "Due process requires that the nonparty have had an *identity or community of interest* with, and adequate representation by, the … party in the first action." 141 Cal. App. 4th at 150 (emphasis in original). And,

> [D]ue process requires that "the circumstances must have been such that the party to be estopped should reasonably have expected to be bound by the prior adjudication" . . . . "The 'reasonable expectation' requirement is satisfied if the party to be estopped had a proprietary [or financial] interest in and control of the prior action, or if the unsuccessful party in the first action might fairly be treated as acting in a representative capacity for the party to be estopped."

Id. at 156 (citations omitted).

Here, Respondents have a strong identity and community of interest with the Judgment Debtors, and a financial interest in the prior action. Datastream owns the *DSGDirect.com* website that handled/handles billing for DSG Direct and TropicInks, and provides various services for both companies. (ER 334-48, 361.) Colquhoun had control of the prior action. (ER 34.) DSG Direct "represented" TropicInks in the prior action in that TropicInks now operates and holds the copyright to the *TropicInks.com* website that DSG Direct used to operate. (ER 334-45, 454-55.) And Colquhoun controls all.

CONCLUSION

As described herein, Colquhoun is the mastermind of the conspiracy and the controlling force behind all of the companies – Judgment Debtors DSG Direct and Your-Info, and Respondents TropicInks and Datastream Group. Colquhoun caused DSG Direct and Your-Info to dissolve just two months after Balsam levied on American Express for 1% of the judgment, and less than two weeks later, instead of reviving DSG Direct, Colquhoun created a new company, TropicInks, to avoid the valid judgment. TropicInks operates the same websites *Evoclix.com* and *TropicInks.com* that used to be operated by DSG Direct. Datastream provided/provides billing and other services to DSG Direct and TropicInks, and owns the *DSGDirect.com* website. Colquhoun is/was the sole officer of three of the companies at issue, and one of only two officers of the fourth company. Colquhoun participated in the litigation by verifying the Answer to the Verified Complaint. The companies claim the same addresses and telephone numbers.

Colquhoun had a financial interest in the litigation because her companies were at risk of a judgment. Colquhoun has not proved or even alleged that her interests diverged from any of the companies' interests. Colquhoun should have expected that her new companies, operating the same websites, would be bound by the judgment against her old companies. Respondents have not been deprived of any due process, because DSG Direct and Your-Info had the opportunity to participate in the trial, Datastream and Colquhoun were always the true defendants, and TropicInks received DSG Direct and Your-Info's assets without any provision being made to Balsam as a judgment creditor. Under the circumstances, it would be unjust to *not* hold Respondents liable on the judgment because TropicInks, Datastream, and Colquhoun continue to operate just as DSG Direct, Datastream, and Coluqhoun did prior to entry of the underlying judgment, which was *not* a default.

Independent of her status as the *owner* of the Judgment Debtors, Colquhoun is also liable for the judgment as the sole *officer* of the Judgment Debtors; corporate officers cannot evade liability for their own wrongful acts merely because they happen to be corporate officers.

Finally, Respondents made demonstrably false statements to the trial court below by claiming that Datastream was *just* an "internet services company" and not an e-commerce company, even though Datastream admitted in the Michigan Consent Judgment that it caused spams to be sent and had the ability to control the spams, and Datastream's own Articles of Incorporation state that its purpose is "Internet marketing." In fact, *all* of Colquhoun's companies are involved in the same unlawful business enterprise.

If the concepts of successor, alter ego, and corporate officer liability are *ever* going to apply, they must apply to a situation such as this one.

To avoid sanctioning a fraud, promoting injustice, and allowing the true tortfeasors to escape their liability, this Court should reverse the trial court's decision and order the trial court to hold Respondents TropicInks, Datastream, and Colquhoun liable on the judgment and discovery sanctions, interest since entry of judgment, and costs and attorney's fees[13] associated with the Motion to Amend Judgment and this Appeal.

THE LAW OFFICES OF DANIEL BALSAM

Dated: 1-23-2010

By: Daniel L Balsam

Daniel L. Balsam
Attorney for Appellant

[13] Business & Professions Code § 17529.5(b)(1)(C) states that "the recipient [of unlawful spam] may also recover reasonable attorney's fees," and Civil Code § 1780(e) (the Consumers Legal Remedies Act) states that "the court shall award court costs and attorney's fees to a prevailing plaintiff." The judgment indicates that Plaintiff Balsam prevailed on both causes of action. (ER 282-83.)

CERTIFICATE OF WORD COUNT

(California Rules of Court, Rule 8.204(c)(1)

The text of this brief consists of 13, 961 words, excluding tables, this certificate, and the Index of Non-California Authorities, as counted by the Microsoft Word 2003 word processing program used to generate the brief.

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COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT [DIVISION 3]

DANIEL L. BALSAM, Appellant and Plaintiff, v. DSG DIRECT INC. *et al*, Defendants, TROPICINKS LLC, DATASTREAM GROUP INC., and LEIGH-ANN COLQUHOUN, Respondents and Real Parties in Interest.	Case No.: A126680 **APPELLANT'S INDEX OF NON-CALIFORNIA AUTHORITIES IN SUPPORT OF OPENING BRIEF**

Appellant Daniel L. Balsam hereby lodges the following non-California authorities cited in his Opening Brief:

1. *Katzir's Floor & Home Design Inc. v. M-MLS.com*, 394 F.3d 1143 (9th Cir. 2006).

2. *Levander v. Prober (In re Levander)*, 180 F.3d 1114 (9th Cir. 1999).

3. *Resilient Floor Covering Pension Fund v. M&M Installation Inc.*, No. C08-5561 BZ, 2009 U.S. Dist. LEXIS 72793 (N.D. Cal. Aug. 18, 2009) (order granting summary judgment).

THE LAW OFFICES OF DANIEL BALSAM

Dated: 1-23-2010

By: Daniel L Balsam

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KATZIR'S FLOOR AND HOME DESIGN, INC., d/b/a National Hardwood Flooring, Plaintiff-Appellee, v. M-MLS.COM; PETER SOMMER, Defendants-Appellants. KATZIR'S FLOOR AND HOME DESIGN, INC., d/b/a National Hardwood Flooring, Plaintiff-Appellee, v. M-MLS.COM; PETER SOMMER, Defendants-Appellants.

No. 03-55084, No. 03-55674

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

394 F.3d 1143*; *2004 U.S. App. LEXIS 26739

August 3, 2004, Argued and Submitted, Pasadena, California
December 22, 2004, Filed

PRIOR HISTORY: [**1] Appeals from the United States District Court for the Central District of California. D.C. No. CV-99-08755-FMC. Florence Marie Cooper, District Judge, Presiding.

DISPOSITION: Judgment in 03-55674 is VACATED. Judgment in 03-55084 is REVERSED.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellants, an individual and a brokerage company, challenged the decision entered by the United States District Court for the Central District of California that added them as judgment debtors to a default judgment previously entered against a wholly owned corporation. Appellants also appealed from the district court's denial of their *Fed. R. Civ. P. 60(b)* motion challenging the underlying default judgment as it applied to them.

OVERVIEW: Plaintiff in the initial action filed a motion to modify the federal court default judgment to reflect the true names of the debtor by adding appellants.

The district court granted the motion on the bases that the individual was the alter ego of the corporation, and the brokerage was the successor to the corporation. Both appellants filed a notice of appeal, as well as *Fed. R. Civ. P. 60(b)* and *55(c)* motions that challenged the underlying default judgment as it applied to them. Appellants argued that the district court abused its discretion when it denied the *Fed. R. Civ. P. 60(b)* motion. The court found that the individual was not named individually, knew the corporation was on the verge of dissolution through Canadian bankruptcy law, and had no personal duty to defend the underlying suit. The court also found that the district court clearly erred in finding that the brokerage was the mere continuation of the corporation where there was no evidence that the brokerage acquired assets for inadequate consideration.

OUTCOME: The court vacated for lack of jurisdiction the district court's order that denied appellants' motion, and the court reversed the district court's order adding appellants to the judgment.

COUNSEL: Jonathan B. Cole and Karen K. Coffin, Sherman Oaks, California, for the defendants-appellants. With them on the briefs was Leslie G. Landau, San Francisco, California.

Martin L. Horwitz, Beverly Hills, California, for the plaintiff-appellee.

JUDGES: Before: William C. Canby, Jr., David R. Hansen, * and Johnnie B. Rawlinson, Circuit Judges. Opinion by Judge Hansen.

* The Honorable David R. Hansen, Senior United States Circuit Judge for the Eighth Circuit, sitting by designation.

OPINION BY: David R. Hansen

OPINION

[*1146] HANSEN, Circuit Judge:

Peter Sommer and M-MLS.com appeal from the district court's amended judgment adding them as judgment debtors to a default judgment previously entered against M-MLS, Inc., Sommer's wholly-owned corporation. They also appeal from the district court's denial of their *Federal Rule of Civil Procedure 60(b)* motion challenging the underlying default judgment as it applied to [**2] them. We vacate the order denying the *Rule 60(b)* motion, and we reverse the amended judgment adding appellants as judgment debtors to the default judgment against M-MLS, Inc.

I.

M-MLS, Inc., a Canadian corporation wholly owned by Peter Sommer, sold an end matcher machine (a woodworking machine) to Katzir's Floor for $ 87,200 in an "as is" condition. According to Katzir's Floor, the machine never worked properly. Katzir's Floor sued M-MLS, Inc. in California state court on July 29, 1999, seeking special damages of not less than $ 87,200, as well as general, incidental, consequential, and punitive damages. The action was removed to federal court on the basis of diversity.

M-MLS, Inc. initially answered and defended the lawsuit. Faced with financial [*1147] difficulties, M-MLS, Inc. borrowed $ 50,000 from its former accountant, Elliott Fromstein, on August 28, 2000, giving Fromstein a secured interest in all of M-MLS, Inc.'s assets. M-MLS, Inc. discharged its attorneys in December 2000 and ceased defending the lawsuit. Default was entered against M-MLS, Inc. on March 9, 2001, for failing to secure new counsel, and a default judgment of $ 1,638,884 was entered on June 18, 2001, based on an [**3] affidavit submitted by Katzir's Floor's owner relating the lost sales Katzir's Floor suffered from its inability to meet orders requiring use of the machine.

Meanwhile, M-MLS, Inc. failed to make payments to Fromstein, and Fromstein initiated private involuntary receivership proceedings under Canadian law in June 2001. As provided under Canadian law, Fromstein appointed Sklar Receivers and Consultants, Inc. (Sklar) as the receiver. Sklar received three appraisals on M-MLS, Inc.'s assets that ranged between $ 11,000 and $ 14,000. The appraised assets included office furniture, machine brochures, and computers, but did not value any intangible assets, including a website used by M-MLS, Inc.

On July 9, 2001, Sklar sold all of the assets of M-MLS, Inc. to Scamper Enterprises, Inc., a separate corporation wholly owned by Sommer's wife, for $ 25,000. The proceeds, less a $ 5,000 receivership fee retained by Sklar, were paid to Fromstein as the secured creditor. The receiver's bill of sale to Scamper included the right to use the name "M-MLS" and all company software, telephone numbers, and intellectual property associated with the name M-MLS. Katzir's Floor was given notice and was aware [**4] of the receivership proceedings in Canada but did not challenge the valuation or the sale to Scamper of all of M-MLS, Inc.'s assets.

Around the time that M-MLS, Inc. discharged its attorneys in December 2000, Sommer formed another Canadian corporation called M-MLS.com, an online brokerage company for new and used woodworking machinery.

After Scamper bought the assets of M-MLS, Inc., Scamper allowed M-MLS.com to use the M-MLS website that Scamper had acquired as part of the receiver's sale.

In May 2002, Katzir's Floor moved to modify the federal court default judgment to reflect the true names of the debtor by adding Sommer as an individual and M-MLS.com. The district court granted the motion on the bases that Sommer was the alter ego of M-MLS, Inc. and M-MLS.com was the successor corporation of M-MLS, Inc. Accordingly, the court entered an amended judgment on December 19, 2002. Sommer and M-MLS.com filed a notice of appeal from the December 19, 2002, order on January 10, 2003. They also filed a *Rule 60(b)* motion and a *Federal Rule of Civil Procedure 55(c)* motion on March 10, 2003, challenging the underlying default judgment as it applied to [**5] them. The district court denied the motions, and Sommer and M-MLS.com appealed that order on April 21, 2003. We have consolidated the appeals.

II.

A. Denial of *Rule 60(b)* and *Rule 55(c)* Motions

Appellants argue on appeal that the district court abused its discretion, *see Floyd v. Laws, 929 F.2d 1390, 1400 (9th Cir. 1991)* (standard of review), when it denied their *Rule 60(b)* motion. [1] According [*1148] to appellants, adding them to the default judgment violates *Federal Rule of Civil Procedure 54(c)* and the due process rights it protects because the $ 1.6 million award greatly exceeded the $ 87,200 sought in the complaint. *See Fed. R. Civ. P. 54(c)* ("A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment."). We cannot reach this issue. The district court lacked jurisdiction to entertain the *Rule 60(b)* motion, which was filed after the notice of appeal had been filed, thereby stripping the district court of its jurisdiction. *See Williams v. Woodford, 384 F.3d 567, 586 (9th Cir. 2004)* (vacating, for lack of jurisdiction, [**6] order denying *Rule 60(b)* motion where the motion was filed after the notice of appeal and movant did not follow the procedure for seeking a remand of the case back to district court); *Carriger v. Lewis, 971 F.2d 329, 332 (9th Cir. 1992)* (en banc) (same). We therefore vacate the district court's order denying appellants' *Rule 60(b)* motion.

1 Appellants also filed a *Rule 55(c)* motion, which allows a court to set aside a default for good cause shown. Once a default *judgment* has been entered, however, the aggrieved party must proceed under *Rule 60(b)* to have the judgment set aside. *See Fed.*

R. Civ. P. 55(c). Thus, our analysis applies to both motions.

B. Order Amending Judgment and Adding Sommer and M-MLS.com as Additional Judgment Debtors

We reject Katzir's Floor's frivolous argument that the appellants' notice of appeal from the amended judgment adding them as judgment debtors was untimely because it was not filed within 30 days of the original [**7] judgment (which would have required them to file the notice of appeal nearly 18 months before they were added as judgment debtors). [HN1] A notice of appeal must be filed "within 30 days after the judgment or order appealed from is entered." *Fed. R. App. P. 4(a)(1)(A)*. To the extent appellants seek review of the order adding them as judgment debtors, their notice of appeal was timely. We do agree, however, that the notice of appeal does not allow appellants to raise issues outside of the order adding them as judgment debtors, and we limit our discussion accordingly.

[HN2] *California Code of Civil Procedure § 187* has been interpreted to grant courts "'the authority to amend a judgment to add additional judgment debtors.'" *In re Levander, 180 F.3d 1114, 1121 (9th Cir. 1999)* (quoting *Issa v. Alzammar*, 38 Cal. App. 4th Supp. 1, 44 Cal. Rptr. 2d 617, 618 (Cal. Ct. App. 1995) (parallel citation omitted)). This circuit has approved the use of the state procedure in federal court pursuant to *Federal Rule of Civil Procedure 69(a). See id. at 1120-21* (noting that *Rule 69(a)* "permits judgment [**8] creditors to use any execution method consistent with the practice and procedure of the state in which the district court sits" (quoted source and internal marks omitted)). *Section 187* is premised on the notion that the amendment "is merely inserting the correct name of the real defendant," *id. at 1122* (quoted source and internal marks omitted), such that adding a party to a judgment after the fact does not present due process concerns. [HN3] We review for clear error the district court's findings that a party is properly added to a previous judgment. *Id. at 1123*. We address the district court's application of *§ 187* to each appellant in turn.

1. Peter Sommer

[HN4] A *§ 187* amendment requires "(1) that the new party be the alter ego of the old party *and* (2) that the new party had controlled the litigation, thereby having had the opportunity to litigate, in order to satisfy due process concerns." *Id. at 1121* (quoted source and internal marks omitted). The district court found that Sommer was the alter ego of M-MLS, Inc. because "he was the sole director, president, treasurer,

and secretary of the corporation, and all the evidence reflects that Peter Sommer was in complete control [**9] of M-MLS." The district court also found [*1149] that M-MLS, Inc.'s corporate veil should be pierced to reach Sommer because "Sommer, perhaps single-handedly, controlled M-MLS, and now controls M-MLS.COM," and "Sommer formed the 'new' corporation . . . to continue conducting the same business he had with MMLS, and to escape the judgment." (*Id.* at 917-18.)

The district court clearly erred in finding that Sommer was the alter ego of M-MLS, Inc. solely because of the fact of control. [HN5] "Alter ego is a limited doctrine, invoked only where recognition of the corporate form would work an *injustice* to a third person." *Tomaselli v. Transamerica Ins. Co., 25 Cal. App. 4th 1269, 31 Cal.Rptr.2d 433, 443 (Cal. Ct. App. 1994)* (citation omitted) (emphasis in the original). The injustice that allows a corporate veil to be pierced is not a general notion of injustice; rather, it is the injustice that results only when corporate separateness is illusory. *See id.* (listing examples of the "critical facts" needed to establish that it would be inequitable to respect separate corporate identities "as inadequate capitalization, commingling of assets, [or] disregard of corporate formalities"). [**10] The district court made none of these critical findings before determining that Sommer was the alter ego of M-MLS, Inc. and that the corporate veil should be pierced. Had the district court considered these factors, the only evidence in the record would have supported a finding that the corporation was indeed a separate entity. M-MLS, Inc. maintained separate bank accounts from Sommer, and Sommer never commingled funds with M-MLS, Inc. or used its assets as his own. The mere fact of sole ownership and control does not eviscerate the separate corporate identity that is the foundation of corporate law. *See Dole Food Co. v. Patrickson, 538 U.S. 468, 475, 155 L. Ed. 2d 643, 123 S. Ct. 1655 (2003)* ("The doctrine of piercing the corporate veil, however, is the rare exception, applied in the case of fraud or certain other exceptional circumstances."); 1 William Meade Fletcher et al., Fletcher Cyclopedia of the Law of Private Corporations § 41.35, at 671 (perm. ed., rev. vol. 1999) ("Allegations that the defendant was the sole or primary shareholder are inadequate as a matter of law to pierce the corporate veil. Even if the sole shareholder is entitled to all of the corporation's profits, [**11] and dominated and controlled the corporation, that fact is insufficient by itself to make the shareholder personally liable." (footnotes omitted)).

The district court also erred in adding Sommer to the judgment without finding that Sommer's interests were protected in the underlying action. [HN6] *Section 187* "is an equitable procedure . . . [that] 'bind[s] new individual defendants where it can be demonstrated that in their capacity as alter ego of the corporation they in fact had control of the previous litigation, and thus were virtually represented in the lawsuit.'" *NEC Elecs. Inc. v. Hurt, 208 Cal. App. 3d 772, 256 Cal.Rptr. 441, 444 (Cal. Ct. App. 1989)* (quoting 1A Ballantine & Sterling, Cal. Corp. Laws (4th ed.) § 299.04, p. 14-45). The district court noted the second *§ 187* requirement that the new party had to have controlled the litigation such that it was "virtually represented," but failed to address it in its discussion as it applied to Sommer. Katzir's Floor suggests that Sommer controlled the litigation because he hired the attorneys for M-MLS, Inc., appeared at settlement conferences, financed the litigation, and discharged [**12] the attorneys. (Appellee's Br. at 42-43.)

[HN7] The purpose of the requirement that the party to be added to the judgment had to have controlled the litigation is to protect that party's due process rights. Due process "guarantees that any person against whom a claim is asserted in a judicial proceeding shall have the opportunity to be heard and to present his defenses." [*1150] *Motores De Mexicali v. Superior Court, 51 Cal. 2d 172, 331 P.2d 1, 3 (Cal. 1958)* (citations omitted). A prior judgment against a corporation "'can be made individually binding on a person associated with the corporation only if the individual to be charged . . . had control of the litigation and occasion to conduct it with a diligence corresponding to the risk of personal liability that was involved.'" *NEC, 256 Cal.Rptr. at 444* (quoting *RESTATEMENT (SECOND) OF JUDGMENTS § 59*, at 102 (1982)).

We believe that *NEC* represents the law that the California Supreme Court would apply if faced with this issue, and we therefore follow it. *See Glendale Assocs., Ltd. v. N.L.R.B., 347 F.3d 1145, 1154 (9th Cir. 2003)* (noting duty to determine [**13] how the highest court of the state would decide an issue of state law). In *NEC*, the Court of Appeals of California reversed the Santa Clara County Superior Court's judgment adding a shareholder to a judgment against his wholly-owned corporation where the shareholder's individual interests were not represented in the lawsuit. The corporation did not appear at trial or defend itself, despite a colorable defense, because it was on the verge of bankruptcy. The court reasoned that the sole shareholder, who was not a named party to the suit and

had no personal liability, had no duty to intervene. *NEC, 256 Cal.Rptr. at 442, 445* (relying on *Motores*). It further found that the shareholder's interests were not represented during the lawsuit where the corporation had no incentive to, and in fact did not, defend given its pending bankruptcy. *Id.*

Similarly, Sommer was not named individually, knew M-MLS, Inc. was on the verge of dissolution through Canadian bankruptcy law, and had no personal duty to defend the underlying lawsuit. [HN8] "To summarily add [corporate shareholders] to [a] judgment heretofore running only against [the corporation], without allowing them [**14] to litigate any questions beyond their relation to the allegedly alter ego corporation would patently violate [due process]." *Motores, 331 P.2d at 3*. The district court clearly erred in adding Sommer to the judgment against M-MLS, Inc.

2. M-MLS.com

The district court added M-MLS.com to the judgment against M-MLS, Inc. on the basis that M-MLS.com was the successor corporation of M-MLS, Inc. *See McClellan v. Northridge Park Townhome Owners Ass'n, 89 Cal. App. 4th 746, 107 Cal. Rptr. 2d 702, 706-08 (Cal. Ct. App. 2001)* (utilizing *§ 187* to add successor homeowners' association to prior judgment against predecessor association). [HN9] The general rule of successor liability is that a corporation that purchases all of the assets of another corporation is not liable for the former corporation's liabilities unless, among other theories, the purchasing corporation is a mere continuation of the selling corporation. *See Ray v. Alad Corp., 19 Cal. 3d 22, 560 P.2d 3, 7, 136 Cal. Rptr. 574 (Cal. 1977)*. To be a mere continuation, California courts require evidence of one or both of the following factual elements: (1) a lack of adequate consideration [**15] for acquisition of the former corporation's assets to be made available to creditors, or (2) one or more persons were officers, directors, or shareholders of both corporations. *Id.*; *see also Franklin v. USX Corp., 87 Cal. App. 4th 615, 105 Cal.Rptr.2d 11, 18-19 (Cal. Ct. App. 2001)* (rejecting reliance solely on the second factor and noting that although the California Supreme Court in *Ray* listed the two additional factors in the disjunctive, all of the cases cited by the Supreme Court involved inadequate consideration). Inadequate consideration is an "essential ingredient" to a finding that one entity is a mere continuation of another. *See Maloney v. Am. Pharm. Co., 207 Cal. App. 3d 282,* [*1151] *255 Cal.Rptr. 1, 4 (Cal. Ct. App. 1988)* (refusing to find one corporation liable for the debts of another as a successor corporation, even though

the second corporation held itself out as a continuation of the first and shared common shareholders, where the second corporation paid adequate consideration for the assets of the first corporation). The district court relied on the transfer of the website and intellectual property to Scamper to support its finding [**16] of inadequate consideration. This finding is erroneous for several reasons. First, the transfer was to Scamper, an intervening corporation, not to M-MLS.com. *See Maloney, 255 Cal.Rptr. at 4* ("*[A] mere continuation contemplates a direct sale of assets* from the predecessor corporation to the successor corporation." (emphasis added)). Second, even if Scamper's subsequent grant of permissive use of the website to M-MLS.com could somehow make M-MLS.com the successor corporation of M-MLS, Inc. (a proposition of highly dubious merit), Katzir's Floor has failed to establish that the transfer to Scamper involved inadequate consideration. *See id. at 3 n.3* (holding that the party asserting the theory of successor liability bears the burden of establishing inadequate consideration). The district court noted that Scamper paid more than the appraised value of the remaining assets, and the court refused to admit evidence offered by Katzir's Floor to establish the value of the website. Thus, while the website was not included in the appraisal, no evidence as to its value was introduced, and there are no facts in the record to support the district court's conclusion that [**17] MMLS, Inc.'s transfer of its website and intellectual property to Scamper satisfied the requirement that the transfer involved inadequate consideration.

Contrary to the successor homeowners' association in *McClellan*, there is no indication that M-MLS.com was formed improperly, or that M-MLS, Inc.'s receivership proceeding under Canadian law was unlawful or even tainted. *See 107 Cal.Rptr.2d at 709* ("The effect of [the former association's] failure to disband properly is that notwithstanding the purported establishment of [the new association] as a separate new entity, [the new association] is essentially nothing more than the continuation of [the former association] under a different name."). Katzir's Floor had notice of the receivership proceedings and participated to some extent, but did not contest the valuation of the assets or the sale of the property to Scamper, as the district court recognized it had the right to do.

[HN10] The requirement of inadequate consideration in a successor liability case is premised on the notion that when a successor corporation acquires the predecessor's assets without paying adequate consideration, the successor deprives the [**18]

predecessor's creditors of their remedy. Where the predecessor files bankruptcy and its debts are discharged, however, it is the discharge and the lack of sufficient assets that deprive the predecessor's creditors of their remedy, not the acquisition of the predecessor's assets by another entity, in this case for more than their appraised value. *See Monarch Bay II v. Prof'l Serv. Indus., Inc., 75 Cal. App. 4th 1213, 89 Cal.Rptr.2d 778, 780 (Cal. Ct. App. 1999)* (indicating that there must be a causal relationship between a successor's acquisition of assets (i.e., inadequate consideration), and the predecessor's creditors' inability to get paid). The district court clearly erred in finding that M-MLS.com was the mere continuation of M-MLS, Inc. where there is no evidence that M-MLS.com acquired M-MLS, Inc.'s assets for inadequate consideration.

[*1152] III.

For the foregoing reasons, we vacate for lack of jurisdiction the district court's order denying Sommer and M-MLS.com's *Rule 60(b)* motion, and we reverse the district court's order adding Sommer and M-MLS.com to the judgment against MMLS, Inc.

Judgment in 03-55674 is VACATED. Judgment in [**19] 03-55084 is REVERSED.

180 F.3d 1114, *; 1999 U.S. App. LEXIS 14995, **;
99 Cal. Daily Op. Service 5402; 99 Daily Journal DAR 6921

LEXSEE 180 F.3D 1114

In re: ROGER LEVANDER; JOSIE LEVANDER, Debtors. ROGER LEVANDER; JOSIE LEVANDER, Appellants, v. EDWIN PROBER; ELIAS MILLER; PETER MILLER, Estate of; ALL CARR COMMUNICATIONS COMPANY; CALGRIND HOMES INC.; DALBY HOMES INC.; DENORMANDIA LAND CO.; DREAMLAND HOMES INC.; EFFINGTON HOMES INC.; ELDRIDGE CORPORATION; FLORADAY PARK INC.; GRANTON HOMES INC.; GREGORY KNOLLS INC.; LADDS HOMES INC.; LAUREL APARTMENTS; MILLER MORTGAGE CO.; MILLGEE INVESTMENT CO. INC.; PHALANX HOMES INC.; PRICHARD HOMES INC.; ROWENA HOMES INC.; SHEPARD HOMES INC.; SUFFOLK HOMES INC.; THRIFTY ESTATES INC., Appellees.

No. 97-56525

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

180 F.3d 1114; 1999 U.S. App. LEXIS 14995; 99 Cal. Daily Op. Service 5402; 99 Daily Journal DAR 6921

April 27, 1999, Argued and Submitted, Santa Ana, California
July 7, 1999, Filed

SUBSEQUENT HISTORY: [**1] As Amended July 20, 1999.

PRIOR HISTORY: Appeal from the United States District Court for the Central District of

California. D.C. No. CV 96-08544 KMW. Kim McLane Wardlaw, District Judge, Presiding.

DISPOSITION: REVERSED the decision of the district court and REMANDED with directions that the bankruptcy court's order be affirmed.

CASE SUMMARY:

PROCEDURAL POSTURE: Debtors appealed from the United States District Court for the Central District of California, which reversed for lack of jurisdiction, a bankruptcy court's order amending its judgment that awarded debtors attorney's fees to add an additional judgment debtor. The bankruptcy court had relied upon its inherent equitable power to amend its judgment three years after it was originally issued.

OVERVIEW: Debtors obtained an order awarding them attorney's fees against a corporation. The corporation transferred all of its assets to a partnership controlled by the same individuals that controlled the corporation. An officer of corporation testified under oath that no transfer of corporate assets had been made. Three years after the original order was entered, debtors learned of the asset transfer and requested the bankruptcy court to amend its judgment to include the partnership as a judgment debtor. The bankruptcy court did so, but the district court reversed on appeal, saying that the bankruptcy court lacked jurisdiction to amend its order because the 10-day time limit of *Fed. R. Civ. Pro. 59(e)* had expired. Debtors appealed and the court reversed the district court, holding that the bankruptcy court, like all federal courts, had the inherent power to amend its judgment to prevent a fraud on the court. The corporation had committed a fraud on the court, not just the debtors, because the bankruptcy court relied on the corporation's representation in its deposition when it imposed attorney's fees on the corporation rather than the real party in interest, the partnership.

OUTCOME: The court reversed the order of the court below and remanded with instructions to affirm the order of the bankruptcy court because the bankruptcy court had jurisdiction to amend its earlier order awarding attorney's fees to debtors because it was necessary to add another judgment debtor to that order to prevent a fraud on the court.

COUNSEL: Daniel J. McCarthy, Hill, Farrer, & Burrill, Los Angeles, California, for the appellants.

Irving M. Gross, Robinson, Diamant, Brill, & Klausner, Los

Angeles, California, for the appellees.

JUDGES: Before: Warren J. Ferguson, Diarmuid F. O'Scannlain, and A. Wallace Tashima, Circuit Judges. Opinion by Judge Tashima; Concurrence by Judge Ferguson; Concurrence by Judge O'Scannlain.

OPINION BY: A. WALLACE TASHIMA

OPINION

[*1116] OPINION

TASHIMA, Circuit Judge:

In December, 1993, the bankruptcy court awarded attorneys' fees to Chapter 11 debtors Roger and Josie Levander against All-Carr Communications Company, Inc. ("Corporation"). In November, 1996, the bankruptcy court entered two orders that amended the December, 1993, order to add All-Carr Communications Company, a general partnership ("Partnership"), as an additional judgment-debtor. On appeal, the district court reversed the November, 1996, order for lack of jurisdiction. The Levanders appeal, [**2] contending that jurisdiction existed to amend the original order under the bankruptcy court's inherent equitable powers, *Rule 60(a)* and *(b) of the Federal Rules of Civil Procedure*, and *§ 187* of the California Code of Civil Procedure. We have jurisdiction under *28 U.S.C. § 158(d)*, and we reverse. We hold that the bankruptcy court had jurisdiction to amend its order under *§ 187* and its inherent power based on the fraud perpetrated upon it by the Corporation and the Partnership.

I.

The Levanders owned a cellular telephone service company. In 1991 and 1992, they filed separate bankruptcy petitions, which were consolidated in April, 1992, and thereafter jointly administered. On July 29, 1992, the Corporation filed a proof of claim against the Levanders' bankruptcy estate alleging a nonpriority general unsecured claim for $ 714,742.21 that the Levanders owed the Corporation on three promissory notes. At a hearing on July 30, 1993, the bankruptcy court disallowed this claim on the ground that the Corporation had previously accepted stock in satisfaction of the obligation. The bankruptcy court confirmed the Levanders' plan of reorganization on August 11, 1993.

[*1117] On August 20, 1993, the [**3] Corporation appealed the confirmation order and the order disallowing its claim. The bankruptcy court, the bankruptcy appellate panel (BAP), and this court all refused to grant the Corporation's motion for a stay of the confirmation pending appeal. The Corporation subsequently

abandoned its appeal and the BAP dismissed the Corporation's appeal with prejudice on September 30, 1994.

Meanwhile, on December 13, 1993, the bankruptcy court granted the Levanders' motion for attorneys' fees and costs totaling $ 44,170.00 against the Corporation for the time period of May 17, 1993, through August 31, 1993. The court did not know of the existence of the Partnership or that the Corporation had transferred its assets, so it awarded the attorneys' fees and costs only against the Corporation. The reason the court so believed was that when one of the Corporation's officers was asked during a May, 1993, deposition whether the Corporation's assets had been sold, he answered: "No. The assets haven't been sold." To the question of "as far as you know, All-Carr Communications [Corporation] is still an active company?" the same officer answered: "Yes. They still have the [cellular telephone] numbers [**4] and is active." The court ordered the Corporation to pay the awarded amount, but reserved final judgment on the total amount of fees and costs to be awarded until the Corporation's appeal was completed.

On July 20, 1995, after unsuccessfully seeking voluntary payment from the Corporation, the Levanders had the marshal levy a writ of execution against the Corporation's bank accounts. That same day, a former employee of the Corporation responded to the writ, stating that she owned what had been the Corporation's assets in the bank and produced a bill of sale to that effect. This bill of sale, dated December 7, 1993, [1] showed that the Partnership had transferred to her the ownership of what had formerly been the Corporation's assets, including the store, inventory, and all of the equipment, for one dollar.

1 The Partnership sold everything one day after this court denied the Corporation's motion for a stay pending appeal, and only five days after the bankruptcy court ruled that the Levanders were entitled to recover their fees and costs from the Corporation.

[**5] On September 29, 1995, the Levanders requested documents and depositions from the Corporation's officers regarding the sale or transfer of the Corporation's assets. On the day that production was to commence, the Corporation filed a voluntary bankruptcy petition, which stayed discovery. The Corporation's bankruptcy filing also prevented the Levanders from proceeding with a motion they had filed for additional attorneys' fees against the Corporation. The Levanders then filed a motion under *Rule 2004 of the Federal*

Rules of Bankruptcy Procedure, which was granted on November 14, 1995, for the same documents and depositions.

These documents and depositions revealed that the assets traveled in a circle. Beginning on February 4, 1993, months before the officer testified that the Corporation still had its assets, the Corporation transferred its assets to 19 corporate entities. These corporate entities later conveyed the Corporation's assets to the Partnership, which had been formed on February 25, 1993. Finally, in December, 1993, the Partnership sold the assets to the former employee for one dollar.

On June 14, 1996, the Levanders filed a motion to amend the attorneys' fees order to [**6] designate the Partnership as an additional judgment-debtor. [2] On November 6, 1996, the bankruptcy court granted the motion to amend the order, stating that "equity screams for some remediation" [3] [*1118] because the Partnership was the real party in interest in the Corporation's litigation against the Levanders' estate. [4] The Partnership appealed the order to the BAP on November 15, 1996, and, on December 30, 1996, the appeal was transferred to the district court.

2 The Levanders also included Edwin Prober, Elias Miller, the Estate of Paul Miller, and the 19 corporations in their motion to amend the judgment. The bankruptcy court denied this part of the Levanders' motion, a decision the Levanders do not appeal.

3 During its October, 1996, hearing to determine whether to add the Partnership as a judgment-debtor, the bankruptcy court characterized the Corporation's earlier deposition testimony as "plain not true."

4 The bankruptcy court actually filed two separate orders on November 6, 1996, both of which granted the Levanders' motion to amend the judgment to add the Partnership as an additional judgment-debtor. In addition to granting the motion to amend, the first order awarded the Levanders an additional $ 37,051.85 in fees and costs against the Partnership for the time period September 1, 1993, through March 31, 1996. The second order specifically amended paragraphs 1-4 of the original order so that it included both the Partnership and Corporation as judgment-debtors. To facilitate discussion, we refer to the two orders as the "order."

[**7] On September 25, 1997, the district court entered an order

reversing the decision of the bankruptcy court to add the Partnership as a judgment-debtor for lack of jurisdiction. Specifically, the district court concluded that the ten-day time limit of *Federal Rule of Civil Procedure 59(e)* had expired. The district court also held that *§ 187* of the California Code of Civil Procedure did not govern because the federal - not state - rules of procedure control in bankruptcy court.

II.

"We stand in the same position as did the district court in reviewing the bankruptcy court's order." *United States v. Wyle (In re Pacific Far E. Lines, Inc.), 889 F.2d 242, 244 (9th Cir. 1989)*. [HN1] We therefore review the bankruptcy court's findings of fact for clear error and its conclusions of law de novo. *See Diamant v. Kasparian (In re Southern Cal. Plastics, Inc.), 165 F.3d 1243, 1245 (9th Cir. 1999)*.

III.

A.

"[HN2] The inherent powers of federal courts are those that 'are necessary to the exercise of all others.'" *Primus Automotive Fin. Servs., Inc. v. Batarse, 115 F.3d 644, 648 (9th Cir. 1997)* (quoting *Roadway Express, Inc. v. Piper, 447 U.S. 752, 764, 65 L. Ed. 2d 488, 100 S. Ct. 2455 (1980)* [**8] (quoting *United States v. Hudson, 11 U.S. 32, 34, 3 L. Ed. 259 (1812))*. This inherent power, which is based on equity, *see Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 244, 88 L. Ed. 1250, 64 S. Ct. 997 (1944)*, not only springs forth from courts' traditional power "to manage their own affairs so as to achieve the orderly and expeditious disposition of cases," *Chambers v. NASCO, Inc., 501 U.S. 32, 43, 115 L. Ed. 2d 27, 111 S. Ct. 2123 (1991)* (quoting *Link v. Wabash R.R. Co., 370 U.S. 626, 630-31, 8 L. Ed. 2d 734, 82 S. Ct. 1386 (1962))*, but also "furthers the pursuit of achieving complete justice by enabling the court to suspend those judgments whose enforcement leads to inequitable results." *Hadix v. Johnson, 144 F.3d 925, 937 (6th Cir. 1998)*. In *Chambers*, the Supreme Court observed that the inherent power of federal courts includes, *inter alia*, the power to vacate judgments on proof that a fraud upon the court has been committed. *See Chambers, 501 U.S. at 44*.

The Court justified the "historic power of equity to set aside fraudulently begotten judgments" on the basis that "tampering with the administration of justice in this manner involves [**9] far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public." *Id.* (internal quotation marks and alterations omitted)

(citation omitted); *see also Hazel-Atlas Glass Co., 322 U.S. at 246* ("The public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims of deception and fraud."); *Universal Oil Prod. Co. v. Root Ref. Co., 328 U.S. 575, 90 L. Ed. 1447, 66 S. Ct. 1176 (1946)* (bribery of judge).

[*1119] [HN3] Just as a court may use its inherent power to protect its integrity by vacating a judgment obtained by fraud, it also may amend a judgment for the same purpose. When a court vacates a judgment obtained by fraud, it not only rids itself of the defilement caused by the fraud, but also restores balance and fairness between the parties by removing the benefit gained by the party that committed the fraud. Amending a judgment serves these same goals by removing the benefit - for example, the avoidance of a judgment against itself - that the party gained by committing fraud on the court.

We therefore hold that [HN4] a federal court may amend a judgment or order [**10] under its inherent power when the original judgment or order was obtained through fraud on the court. [5] *Cf. Pumphrey v. K.W. Thompson Tool Co., 62 F.3d 1128, 1133 (9th Cir. 1995)* (non-disclosure of existence of videotape containing unfavorable results amounted to fraud on the court, thereby justifying new trial).

5 [HN5] Although motions for relief from judgment may also be brought pursuant to *Rule 60(b) of the Federal Rules of Civil Procedure, Rule 60(b)*'s savings clause specifically provides that the rule "does not limit the power of a court . . . to set aside a judgment for fraud upon the court." *Fed. R. Civ. P. 60(b)*; *see also id.* at advisory committee notes, 1946 amendment ("The rule expressly does not limit the power of the court, when fraud has been perpetrated upon it, to give relief under the saving clause.").

Thus, the bankruptcy court had the inherent power to amend its judgment to add the Partnership as an additional judgment-debtor based on the fraud committed upon it. [6] We now turn to the question [**11] of whether the Corporation and the Partnership committed fraud upon the bankruptcy court.

6 [HN6] The inherent power of Article III courts to amend a judgment extends to bankruptcy courts. *Cf. Caldwell v. Unified Capital Corp. (In re Rainbow Magazine, Inc.), 77 F.3d 278, 284 (9th Cir. 1996)* (noting that *11 U.S.C. § 105(a)*

> provides bankruptcy courts with the authority to issue orders necessary "to prevent an abuse of process," including the power to sanction) (quoting *11 U.S.C. § 105(a)*).

B.

A court must exercise its inherent powers with restraint and discretion in light of their potency. *See Chambers, 501 U.S. at 44*. Although the term "fraud on the court" remains a "nebulous concept," *Broyhill Furniture Indus., Inc. v. Craftmaster Furniture Corp., 12 F.3d 1080, 1085 (Fed. Cir. 1993)*, that phrase "should be read narrowly, in the interest of preserving the finality of judgments." *Toscano v. Commissioner, 441 F.2d 930, 934 (9th Cir. 1971)*.

Simply put, [HN7] not all fraud is fraud on the court. To constitute [**12] fraud on the court, the alleged misconduct must "harm[] the integrity of the judicial process." *Alexander v. Robertson, 882 F.2d 421, 424 (9th Cir. 1989)*. To determine whether there has been fraud on the court, this circuit and others apply Professor Moore's definition:

> "Fraud upon the court" should, we believe, embrace only that species of fraud which does or attempts to, defile the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery can not perform in the usual manner its impartial task of adjudging cases that are presented for adjudication.

Gumport v. China Int'l Trust and Inv. Corp. (In re Intermagnetics Am., Inc.), 926 F.2d 912, 916 (9th Cir. 1991) (quoting 7 James Wm. Moore et al., Moore's Federal Practice Par. 60.33, at 515 (2d ed. 1978)).

[HN8] Generally, non-disclosure by itself does not constitute fraud on the court. *See England v. Doyle, 281 F.2d 304, 310 (9th Cir. 1960)* (failure to produce evidence, without more, does not constitute fraud on the court). Similarly, perjury by a party or witness, by itself, is not normally fraud on the court. *See, e.g., Gleason v. Jandrucko, 860 F.2d 556, 559-60* [**13] *(2d Cir. 1988)*; [*1120] 12 James Wm. Moore & Joseph T. McLaughlin, *Moore's Federal Practice § 60.21[4][c]*, at 60-56-57 (3d ed. 1998). The *Gleason* court reasoned that since perjury is an evil that could and should be exposed at trial, it should not qualify as fraud upon the court. *See Gleason, 860 F.2d at 560*.

The reason why the courts in these cases did not treat perjury or

non-disclosure alone as fraud on the court was that the plaintiff had the opportunity to challenge the alleged perjured testimony or non-disclosure because the issue was already before the court. For example, in *Gleason*, Gleason could have deposed eyewitnesses and introduced evidence at trial to impeach the police officers' testimony, which he claimed was perjured, because the issues of lack of probable cause and bad faith on the part of the officers, and therefore their credibility, were already before the court. *See id. at 559*. The court concluded that Gleason could not, after the fact, claim fraud on the court based only on this alleged perjury, which he could have challenged during the trial. *See id. at 559-60*.

In contrast, the perjury and non-disclosure in the instant case (that the Corporation [**14] had transferred its assets to shell entities months before the Corporation testified in depositions that the Corporation's "assets haven't been sold") was not - and could not have been - an issue at the attorneys' fees hearing, as neither the court nor the Levanders knew that the Partnership existed. Therefore, neither the Levanders nor the court had any reason to question the veracity of the Corporation with respect to whether the Corporation still possessed its assets. Further, not only did the Corporation and the Partnership deceive the Levanders, but they also deceived the court, because the court relied on the Corporation's depositions to impose attorneys' fees on the Corporation, rather than on the party with the assets - the Partnership. *See, e.g., Broyhill Furniture Indus., Inc., 12 F.3d at 1086-87* (although party knowingly withheld material and thereafter sought enforcement of a fraudulently obtained patent, there was no fraud on the court because fraudulent evidence used to obtain patent from patent office was not submitted to court, so court itself was not victim of fraud); *In re Intermagnetics Am., Inc., 926 F.2d at 917* ("[HN9] The inquiry as to whether a judgment [**15] should be set aside for fraud upon the court . . . focuses not so much in terms of whether the alleged fraud prejudiced the opposing party but more in terms of whether the alleged fraud harms the integrity of the judicial process."). Therefore, since the bankruptcy court itself was defiled by the perjury, the fraud was a fraud on the court.

IV.

In ruling that the bankruptcy court did not have jurisdiction to amend its order, the district court rejected the Levanders' argument that *§ 187* of the California Code of Civil Procedure [7] applied, concluding that "the federal, not state, rules of procedure . . . govern in bankruptcy court." We disagree.

7 *Section 187* provides:

> [HN10] When jurisdiction is, by the constitution or this code, or by any other statute, conferred on a court or judicial officer, all the means necessary to carry it into effect are also given; and in the exercise of this jurisdiction, if the course of proceeding be not specifically pointed out by this code or the statute, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of this code.

Cal. Civ. Proc. Code § 187.

[**16] A.

We have held that *Federal Rule of Civil Procedure 69(a)* [8] empowers federal [*1121] courts to rely on state law to add judgment-debtors under *Rule 69(a)*, which "permits judgment creditors to use any execution method consistent with the practice and procedure of the state in which the district court sits." *Cigna Property & Cas. Ins. Co. v. Polaris Pictures Corp., 159 F.3d 412, 421 (9th Cir. 1998)* (quoting *Peacock v. Thomas, 516 U.S. 349, 359 n.7, 133 L. Ed. 2d 817, 116 S. Ct. 862 (1996))* (internal quotation marks omitted). [9] In *Cigna*, the appellant, much like the appellees in the instant case, argued that the motion to amend the judgment to add a judgment-debtor was untimely under *Rule 59(e)*, and that the court therefore had no jurisdiction. *See id.* We rejected this argument, holding that *Rule 69(a)* allows judgment-creditors to use state law to collect on their debts. *See id.* Because California law allows amendment of a judgment to add a judgment-debtor, we held that the district court did not abuse its discretion in so doing. *See 159 F.3d at 421-22*.

8 *Rule 69(a)* provides:

> Process to enforce a judgment for the payment of money shall be a writ of execution, unless the court directs otherwise. The procedure on execution, in proceedings supplementary to and in aid of a

> judgment, and in proceedings on and in aid of execution shall be in accordance with the practice and procedure of the state in which the district court is held, existing at the time the remedy is sought, except that any statute of the United States governs to the extent that it is applicable. In aid of the judgment or execution, the judgment creditor or a successor in interest when that interest appears of record, may obtain discovery from any person, including the judgment-debtor, in the manner provided in these rules or in the manner provided by the practice of the state in which the district court is held.
>
> *Fed. R. Civ. P. 69(a).*

[**17]

9 The district court did not have the benefit of *Cigna* at the time it made its ruling.

The instant case is analogous since the Levanders also were judgment-creditors attempting to collect on a debt. As such, *Rule 69(a)* authorized the use of California law to collect on their debt, and the district court erred by holding that the bankruptcy court did not have the jurisdiction to allow them to do so.

Finally, we must determine whether the requirements of California law were met in order to add the Partnership as a judgment-debtor.

B.

[HN11] Under California Code of Civil Procedure *§ 187*, a court "has the authority to amend a judgment to add additional judgment debtors." *Issa v. Alzammar, 38 Cal. App. 4th Supp. 1, 4 (1995)*; *see also Hall, Goodhue, Haisley & Barker, Inc. v. Marconi Conference Ctr. Bd., 41 Cal. App. 4th 1551, 1554-55 (1996)*. To amend a judgment under *§ 187*, two requirements must usually be met: "(1) that the new party be the alter ego of the old party *and* (2) that the new party had controlled the litigation, thereby having had the opportunity to litigate, in order to satisfy [**18] due process concerns." *Tripplet v. Farmers Ins. Exch., 24 Cal. App. 4th 1415, 1421 (1994)*. [10]

10 A motion to amend a judgment under *§ 187* must also be made within a reasonable time. *See, e.g., Cigna, 159 F.3d at 421*; *Alexander v. Abbey of the Chimes, 104 Cal. App. 3d 39, 48-49, 163 Cal. Rptr. 377 (1980)* (court abused its discretion in granting motion to amend judgment after an almost seven-year delay because movants had no reasonable explanation). The Levanders discovered the fraudulent conduct of the Corporation and Partnership in late 1995 and filed the motion to amend in June, 1996. We find this period of time to be reasonable. *See Cigna, 159 F.3d at 421* (seven and one-half month delay was reasonable).

1.

When the bankruptcy court evaluated whether it had authority under California law to amend its order to add the Partnership as a judgment-debtor, it relied primarily on *Carr v. Barnabey's Hotel Corp., 23 Cal. App. 4th 14 (1994). Carr* involved a situation analogous to the instant [**19] case. Carr had sued and obtained a judgment against Barnabey's Hotel Corporation (the original judgment-debtor) for sex and pregnancy discrimination, wrongful termination, and fraud. *See id. at 16-17*. Barnabey's Hotel Corporation answered the complaint and defended the case at trial, *see id. at 20,* [*1122] as did the Corporation in the instant case. But, Barnabey's Hotel Corporation had ceased doing business before the trial, had no assets or source of income, and never held title to the hotel, *see id.*, just as the Corporation in the instant case had transferred all of its assets prior to appearing before the bankruptcy court. Peppercorn (the added judgment-debtor in *Carr*) was a limited partnership with the same president and partners as the officers of Barnabey's Hotel Corporation, *see id.*, just as the Partnership and Corporation in the instant case have many of the same officer/partners. Furthermore, Peppercorn had been doing business as Barnabey's Hotel and Restaurant. *See id.* The appellate court in *Carr* upheld the trial court's amendment of the judgment to add Peppercorn as a judgment-debtor and stated:

> Under Code of Civil Procedure 187, the court had [**20] the authority to amend the judgment to add a judgment debtor. Carr's error essentially amounted to no more than a variance between pleading and proof. The decision to grant an amendment in such

> circumstances lies in the sound discretion of the trial court. "The greatest liberality is to be encouraged in the allowance of such amendments in order to see than justice is done." Justice was obviously served by the amendment.
>
> It is not too much to say that Peppercorn's conduct approached a fraud on the court. Carr sued the right party under the wrong name, a fact which must have been clear to the defense from the inception of the litigation. Yet, nothing was said about the mistake in any deposition, motion, or other proceeding.

Id. at 20-21 (citations omitted).

The instant case is indistinguishable. The Levanders pursued the Corporation for attorneys' fees because they thought, as a result of the Corporation's officer's testimony and the fact that the Corporation continued to argue its claim against the Levanders' estate, that the Corporation was the proper party with the assets, when all along, the Corporation knew and did not disclose to the court, that the Partnership had [**21] control of the assets. Therefore, just as in *Carr*, the instant case involved conduct that amounted to fraud on the court.

The amended judgment-debtors in *Carr* argued, as the appellees do in this case, that they were not the alter egos of the original judgment-debtor and therefore could not be added as judgment-debtors pursuant to *§ 187*. *See id. at 21*. The *Carr* court rejected this argument and affirmed the trial court's amendment of the judgment explicitly without a finding of alter ego, stating that "the equities overwhelmingly favor" it. *Id. at 22-23*.

The *Carr* court looked to the "equitable principles regarding alter ego" and concluded that although the added judgment-debtor did not meet the formal requirements for alter ego liability, it nevertheless fit within the theory underlying amendment of a judgment based on alter ego liability. That is, "the court is not amending the judgment to add a new defendant but is merely inserting the correct name of the real defendant." *Id. at 21*. The court then reasoned that by not allowing amendment due to the absence of a finding of alter ego would "work an injustice." *Id. at 23*.

Therefore, under the authority [**22] of *Carr*, a finding that the Partnership was the alter ego of the

Corporation was not required to add the Partnership as a judgment-debtor. [11]

> 11 We recognize that there is California case authority to the contrary. *See Triplett, 24 Cal. App. 4th 1415 at 1420-21* (not allowing amendment without finding of alter ego). We believe, however, that *Carr* is the better reasoned case and the path that the California Supreme Court would follow. *See Elliott v. City of Union City, 25 F.3d 800, 802 n.3 (9th Cir. 1994).*

[*1123] 2.

The second requirement for amendment under *§ 187* is that the added party "'controlled' the litigation." *Triplett, 24 Cal. App. 4th at 1421*. The bankruptcy court did not clearly err in finding that this requirement was met in the instant case. The Partnership in essence controlled the litigation because the same group of individuals comprised the Partnership and the Corporation, they were present during the litigation, and one of the partners even contributed deposition testimony. Thus, adding [**23] the Partnership as a judgment-debtor raises no due process concerns. *See, e.g., Farenbaugh & Son v. Belmont Constr., Inc., 194 Cal. App. 3d 1023, 1031, 240 Cal. Rptr. 78 (Ct. App. 1987)* (allowing amendment of judgment to add judgment-debtor when new debtor "was not a passive participant by any manner of means in that original trial."); *Alexander, 104 Cal. App. 3d at 45-46* (approving amendment of judgment to add name of corporate judgment-debtor's sole stockholder).

In sum, since *Rule 69(a)* authorizes judgment-creditors to use state law to collect on their debts and *§ 187* applies in the instant case, the bankruptcy court had jurisdiction to amend its order to add the Partnership as a judgment-debtor.

V.

The district court erred when it reversed the bankruptcy court's order, because the bankruptcy court had jurisdiction to add the Partnership as a judgment-debtor under both its inherent power and *§ 187* of the California Code of Civil Procedure. Accordingly, we *REVERSE the decision of the district court and REMAND with directions that the bankruptcy court's order be affirmed.*

CONCUR BY: WARREN J. FERGUSON; DIARMUID F. O'SCANNLAIN

CONCUR

FERGUSON, Circuit Judge, concurring:

When an appellate court has alternative bases for its holding, it

cannot be claimed that all but one of the bases is unnecessary dicta. Part III of the Court's opinion here is not irrelevant to our disposition of the matter, as the special concurrence claims; rather, it is an alternative holding providing one of two independent bases for supporting our disposition. *Cf. United States Steel Corp. v. United States Envtl. Protection Agency, 444 U.S. 1035, 1038, 100 S. Ct. 710, 62 L. Ed. 2d 672 (1980)* (Rehnquist, J., dissenting from denial of certiorari) (recognizing that alternative holdings are not dicta).

O'SCANNLAIN, Circuit Judge, specially concurring:

[**24] As the opinion makes plain, we have previously recognized that *Federal Rule of Civil Procedure 69(a)* allows recourse to state procedures for the execution of a federal judgment. See *Cigna Property & Cas. Ins. Co. v. Polaris Pictures Corp., 159 F.3d 412, 421 (9th Cir. 1998)*. Because California law permits the amendment of the judgment to add judgment debtors like the partnership here, *see Carr v. Barnabey's Hotel Corp., 23 Cal. App. 4th 14, 20-21 (1994)*, we need not reach nor resolve the novel question of whether a federal court's inherent equity powers permit such amendment. Rather than make new law unnecessarily, and in dicta, no less, I would leave the resolution of this question for another day.

While I concur in the result and in parts I, II, and IV, I cannot join part III of the opinion or that portion of part V which relies on the alternative "inherent powers" ground.

LexisNexis

RESILIENT FLOOR COVERING PENSION FUND, et al., Plaintiff(s), v. M & M INSTALLATION, INC., et al, Defendant(s).

No. C08-5561 BZ

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

2009 U.S. Dist. LEXIS 72793

August 17, 2009, Decided
August 18, 2009, Filed

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiffs, the trustees of a multiemployer pension fund, filed a motion for summary judgment in their action seeking to collect withdrawal liability pursuant to *29 U.S.C.S. § 1381* of the Multiemployer Pension Plan Amendments Act of 1980 against defendants, a non-union flooring contractor and the union contractor that it formed. Defendants filed a motion for summary judgment as to liability and as to default under *29 U.S.C.S. § 1399(c)(5)*.

OVERVIEW: The union company was created to serve as a union signatory flooring contractor to allow the non-union company to bid on union jobs by subcontracting the work to the union company. The union company entered into collective bargaining agreements that required it to make contributions to the pension fund on behalf of its floor installers. Plaintiffs filed the instant action after the union company notified the pension fund that it was going to stop making withdrawal liability payments because it had ceased operations. Although the non-union company argued that it could not be held responsible for the union company's withdrawal liability because it was not an "employer" within the meaning of *§ 1381*, the court held that plaintiffs established that defendants were alter ego employers for purposes of

imposing pension fund withdrawal liability. Defendants, however, were entitled to a declaratory judgment that they were not in default under *29 U.S.C.S. § 1399(c)(5)(A)* or *(B)*. Installment payments were made, and there was no evidence that the non-union company was insolvent, delinquent on its current bills, or otherwise defunct in its daily operations.

OUTCOME: The court granted plaintiffs summary judgment against the non-union company on the grounds that defendants were alter ego employers. The court denied defendants summary judgment on their claim that the non-union company was not an employer within the meaning of *§ 1381*, but it granted defendants' motion for a declaratory judgment that they were not in default.

COUNSEL: [*1] For Resilient Floor Covering Pension Fund, Board of Trustees of the Resilient Floor Covering Pension Fund, Plaintiffs: Katherine Ann McDonough, LEAD ATTORNEY, Lisa Marie Schwantz, Michael James Korda, Kraw & Kraw, Mountain View, CA.

For M&M Installation, Inc., a California Corporation, Simas Floor Co., Inc., a California Corporation, Simas Floor Co., Inc., a California Corporation, Defendants: Stephen Thomas Davenport, Jr., LEAD ATTORNEY, Jeffrey Gordon McClure, Davenport Gerstner & McClure, Walnut Creek, CA.

For Resilient Floor Covering Pension Fund, Board of Trustees of the Resilient Floor Covering Pension Fund, Counter-defendants: Katherine Ann McDonough, LEAD ATTORNEY, Kraw & Kraw, Mountain View, CA.

JUDGES: Bernard Zimmerman, United States Magistrate Judge.

OPINION BY: Bernard Zimmerman

OPINION

ORDER GRANTING SUMMARY JUDGMENT

On December 12, 2008, plaintiffs Resilient Floor Covering Pension Fund and Board of Trustees of the Resilient Floor Covering Pension Fund ("plaintiffs") filed suit against defendants M & M Installation, Inc. ("M & M") and Simas Floor Co., Inc. ("Simas Floor") (collectively "defendants") to collect withdrawal liability in the amount of $ 2,414,228.00, pursuant to the Employee Retirement Income [*2] Security Act ("ERISA"), *29 U.S.C. §§ 1001 et seq.*, as amended by the Multiemployer Pension Plan Amendments Act of 1980

("MPPAA"). [1] Before the Court are the parties' cross motions for summary judgment.

> 1 All parties have consented to my jurisdiction, including entry of final judgment, pursuant to *28 U.S.C. § 636(c)* for all proceedings. On June 29, 2009, by agreement of the parties, plaintiffs filed a first amended complaint, which added one additional theory of withdrawal liability based on "successor liability."

Plaintiffs seek summary judgment on three grounds, asserting that Simas Floor is liable for M & M's withdrawal liability because Simas Floor and M & M were "alter ego" employers; because M & M wound up its operations and transferred its business to Simas Floor with a principal purpose of avoiding paying its withdrawal liability in violation of *29 U.S.C. § 1392(c)*; and because Simas Floor is the successor employer to M & M. Defendants seek summary judgment, arguing that Simas Floor is not liable for M & M's withdrawal liability because Simas Floor is not an "employer" within the meaning of the MPPAA, since it is neither under "common control" with M & M, as defined under ERISA *section 1301(b)(1)*, [*3] nor the "alter ego" or "successor" of M & M. Simas Floor also seeks a declaratory judgment that a default has not occurred within the meaning of *29 U.S.C. § 1399(c)(5)(A)-(B)* because it timely cured M & M's failure to pay the June 2008 withdrawal liability payment and timely requested review and arbitration of the Pension Fund's determination that Simas Floor is liable for M & M's withdrawal liability. Finally, Simas Floor seeks a refund of all withdrawal liability payments it made under protest, a total of $ 219,726.32.

FACTUAL BACKGROUND [2]

> 2 To the extent that the Court relies on any facts objected to by either party, those objections are **OVERRULED**. Plaintiffs' unopposed request for judicial notice is **GRANTED**, to the extent of taking judicial notice of the fact that appellate briefs have been filed by the parties in Case No. 057688; not of the truth of the facts contained within those briefs.

It is undisputed that plaintiff Resilient Floor Covering Pension Fund ("Pension Fund") is a trust fund established and maintained pursuant to Section 302(c)(5) of the Labor Management Relations Act of 1947, as amended, *29 U.S.C. § 186(c)(5)*. The Pension Fund is an employee benefit plan within the

[*4] meaning of *Sections 3(2)* and *3(3) of ERISA, 29 U.S.C. § 1002(2)* and *(3)*, and is maintained for the purpose of providing retirement and related benefits to eligible participants. The Pension Fund is also a multiemployer pension plan within the meaning of Section 2(37) of ERISA, *29 U.S.C. § 1002(37)*. Plaintiff Members of the Board of Trustees of the Resilient Floor Covering Pension Fund ("Plaintiff Trustees") are fiduciaries within the meaning of *Section 3(21)(A) of ERISA, 29 U.S.C. § 1002(21)(A)*.

Defendant Simas Floor is a non-union residential and commercial flooring contractor, and a retailer of flooring products, with offices in Sacramento, Stockton, and Visalia. It was founded by Robert Simas in the 1950's. In the early 1990's, Robert Simas left the company and sold his shares to his three brothers, Ken, Jack and Dave Simas, leaving each of them with an equal 33.33% interest. Effective January 1, 2004, Ken, Jack and Dave Simas each transferred by gift and sale their shares to their respective children, Mark Simas, Michelle Simas Carli, and Craig Simas, who now each own 33.33% of Simas Floor. Mark Simas is Simas Floor's president and Michele Simas Carli and Craig Simas are vice-presidents. [*5] Along with their three fathers, the children also serve as Simas Floor's directors.

Defendant M & M was formed on June 1, 1994 by Mark Simas, as a residential flooring and tile contractor, which operated out of Simas Floor's Sacramento facility. According to Mark Simas, M & M was created to serve as a union signatory flooring contractor to allow non-union Simas Floor to bid on union jobs by subcontracting the work to M & M. M & M entered into collective bargaining agreements with Carpet, Resilient Flooring and Sign Workers Local Union No. 1237 ("Local 1237"), which covered M & M's flooring installers. [3] These agreements required M & M to make contributions to the Pension Fund on behalf of M & M's flooring installers.

> 3 M & M also employed tile setters, who were covered by a different collective bargaining agreement than its flooring installers.

When M & M's collective bargaining agreement came up for renegotiation in mid-2004, Painters District Council No. 16 ("District Council") had assumed control of Local 1237. During the ensuing negotiations, the District Council insisted that it would only sign a new collective bargaining agreement if M & M agreed that the new agreement would also [*6] cover Simas Floor's Sacramento flooring installers. Since Simas Floor did not want to become a

union shop, M & M refused to agree to the District Council's demands, which led to an impasse in the negotiations and a strike by Local 1237 in July 2004.

After the strike, Mark Simas sent Local 1237 a letter dated July 8, 2004 stating that M & M was withdrawing recognition from the Union, effectively repudiating its collective bargaining agreement. M & M thereafter stopped making contributions to the Pension Fund.

After withdrawing recognition from the Union, M & M and the union agreed to allow M & M to complete some outstanding jobs. M & M finished those jobs with the approximately twenty employees who returned to work after the strike, after they had resigned from the union. At the end of 2005, M & M laid off its remaining flooring installers, two of whom were hired by Simas Floor.

Around October 29, 2004, after it ceased to contribute to the Pension Fund, M & M received notice from the Pension Fund that M & M had been assessed a $ 2,414,228.00 withdrawal liability, with quarterly payments of $ 43,945.20 due every March, June, September, and December for a period of twenty years. Beginning [*7] in December of 2004 and through early 2008, M & M made quarterly installment payments, using at least in part Simas Floor's funds. After operating solely as a union tile setting contractor for approximately three years, M & M shut down its operations and wound up its business on April 30, 2008, selling its only assets (three used work trucks) to Simas Floor. By letter dated June 27, 2008, M & M notified the Pension Fund that it was going to stop making withdrawal liability payments because it had "ceased operations" and "wound up its affairs."

In a letter dated August 19, 2008, the Pension Fund notified M & M that its June 2008 payment was delinquent and demanded payment, contending that M & M was "still doing business under the name of either M & M Installations or Simas Floor Company" and that it "continues to be liable for withdrawal liability." M & M received the Pension Plan's August 19, 2008 letter on September 8, 2008. After some negotiation, by letter dated November 6, 2008, Simas Floor sent the Pension Fund the June 2008 quarterly withdrawal liability payment, plus an additional amount representing interest, under protest.

At the end of November 2008, Simas Floor, through its [*8] attorney, wrote the Pension Fund requesting review in accordance with MPPAA Section 4219(b)(2), *29 U.S.C. Section 1399(b)(2)*, in order to preserve Simas Floor's right to a refund of the withdrawal liability amounts it had paid on behalf of M & M. On May 13, 2009, Simas Floor, again through

its attorney, requested arbitration of the Pension Fund's determination that Simas Floor is liable for M & M's withdrawal liability.

Simas Floor has now paid, under protest, M & M's withdrawal liability payments for June 2008, September 2008, December 2008, March 2009 and June 2009, a total of $ 219,726.32. Simas Floor now claims that it is entitled to reimbursement of all payments made, and that it is not liable for the balance of M & M's withdrawal liability. The parties' central dispute concerns whether Simas Floor is responsible for the withdrawal liability incurred by M & M.

THE ALTER EGO DOCTRINE

As a threshold issue, Simas Floor argues that it cannot be held responsible for M & M's withdrawal liability because it is not an "employer" within the meaning of the MPPAA, *29 U.S.C. § 1381*. [4] Both parties agree that [HN1] whether Simas Floor is an "employer" within the meaning of the MPPAA is a legal issue [*9] to be resolved by the Court. *See, e.g.*, Bowers on behalf of *NYSA-ILA Pension Trust Fund v. Transportacion Maritima Mexicana, 901 F.2d 258 (2d Cir. 1990)* (citing *Korea Shipping Corp. v. New York Shipping Ass'n-Int'l Longshoremen's Ass'n Pension Trust Fund, 880 F.2d 1531, 1536 (2d Cir. 1989))*.

4 *Section 1381* states, in relevant part: [HN2] "(a) If an employer withdraws from a multiemployer plan in a complete withdrawal or a partial withdrawal, then the employer is liable to the plan in the amount determined under this part [*29 USCS §§ 1381 et seq.*] to be the withdrawal liability." *29 U.S.C. § 1381(a)*.

Plaintiffs contend that Simas Floor is an "employer" upon whom withdrawal liability should be imposed because Simas Floor and M & M are "alter egos". [5] [HN3] A court may impose pension fund liability upon a nonsignatory to a collective bargaining agreement that is the "alter ego" of the signatory. *See Massachusetts Carpenters Cent. Collection Agency v. Belmont Concrete Corp., 139 F.3d 304, 307-08 (1st Cir. 1998)*. The party asserting the alter ego doctrine has the burden of establishing it. *See U.A. Local 373 v. Nor-Cal Plumbing, Inc., 48 F.3d 1465, 1471 (9th Cir. 1994)*.

5 The Ninth Circuit has noted that [*10] "it may be perfectly legal for a contractor to conduct business through a 'double breasted' operation, one in which the same contractor owns both union and non-union companies for legitimate business purposes.

> In such cases, the collective bargaining agreement of the union firm does not ordinarily apply to the non-union firm. Out of concern, however, that some contractors would use double-breasted operations to avoid their collective bargaining obligations, the courts and the NLRB have developed two conceptually related, but distinct theories - 'single employer' and 'alter ego' - to guard against such abuse." *UA Local 343 of the United Ass'n of Journeymen & Apprentices of the United States and Canada, AFL-CIO, 48 F.3d 1465, 1469 (9th Cir. 1994)* (citing *Carpenters' Local Union No. 1478 v. Stevens, 743 F.2d 1271, 1275-77 (9th Cir. 1984),* cert. denied, *471 U.S. 1015, 105 S. Ct. 2018, 85 L. Ed. 2d 300 (1985)).* Plaintiffs do not argue that Simas Floor and M & M are a "single employer" operating under "common control."

Defendants do not dispute that an employer found to be the alter ego of another employer who has incurred withdrawal liabilities may be responsible for the latter's withdrawal liability. Nor do defendants dispute [*11] the first half of the alter ego doctrine - that there is sufficient common ownership, common management, interrelation of operations, and centralized control of labor relations between M & M and Simas Floor to satisfy the commonality requirement of the alter ego doctrine. (Def.'s Opp. p. 16:19-23.) This is not surprising, since it is undisputed that Simas Floor and M & M had substantially identical ownership and management and that Simas Floor formed M & M to allow Simas Floor to bid on union jobs. In fact, M & M had no source of business other than from Simas Floor and no office staff. The human resource operations of M & M, including the hiring, disciplining, and terminating of employees, were handled by Michelle Carli Simas, who was paid by Simas Floor, not M & M. [6] M & M employees worked out of the Simas Floor location in Sacramento and M & M did not pay Simas Floor for use of Simas Floor's Sacramento office space. [7] M & M had no phone line, fax line, or website of its own. All of the daily administrative work of M & M was performed by Simas Floor employees and staff, using Simas Floor's office and equipment. Simas Floor submitted all of M & M's bids and billed customers for work [*12] performed by M & M. M & M had no written subcontracts with Simas Floor. All the officers of M & M received salaries from Simas Floor; not from M & M. Simas Floor paid M & M only enough to cover M & M's overhead and expenses, so M & M's net income was close to

zero. M & M never distributed any profits to its shareholders.

6 Defendants' objections that this evidence is not supported by the cited references provided by plaintiffs and was taken out of context are **OVERRULED**.

7 Defendants' objection that this evidence is not supported by the cited references provided by plaintiffs is **OVERRULED**.

Instead of arguing that the commonality requirement of the alter ego test has not been satisfied, defendants insist that for Simas Floor to be found liable, plaintiff must prove that M & M "was created by the union employer for the purpose of evading the union employer's existing collective bargaining obligations." (Def.'s Opp. p. 14:1-4.) To support this proposition, defendants cite to *Nor-Cal, 48 F.3d at 1470-1471*, as well as a recent Ninth Circuit case, *Southern California Painters & Allied Trades, District Council No. 36 v. Rodin & Co, Inc., 558 F.3d 1028 (9th Cir. 2009)*, upon which defendants relied [*13] heavily during oral argument. Neither of these cases, however, involved pension fund liability. [8] What the Ninth Circuit said in Nor-Cal was that the second half of the alter ego doctrine required the union to show that the non-union employer "was being used in a sham effort to avoid collective bargaining obligations." *Nor-Cal, 48 F.3d at 1470* (citing *Brick Masons Pension Trust v. Industrial Fence & Supply, Inc., 839 F.2d 1333, 1336 (9th Cir. 1988))*. The court then stated that to bind a non-union employer to a collective bargaining agreement signed by an affiliated union employer, the union would have to show that the non-union employer was "created in 'an attempt to avoid the obligations of [the union employer's] collective bargaining agreement through a sham transaction or a technical change in operations.'" *Id. at 1472* (quoting *A. Dariano & Sons, Inc. v. District Council of Painters No. 33, 869 F.2d 514, 518 (9th Cir. 1989))*. In Rodin, the Ninth Circuit refused to use the alter ego doctrine to impose a collective bargaining agreement on a non-union employer that had allegedly created a separate union employer, stating that "[t]he alter ego doctrine was never intended to coerce [*14] a non-union company into becoming a union company by requiring compliance with a collective bargaining agreement it never signed, with a union its employees never authorized to represent them." *Rodin, 558 F.3d at 1033*.

8 Defendants also rely on *CMSH Co. v. Carpenters Trust Fund, 963 F.2d 238 (9th Cir. 1992)*. In 1978, CMSH Framing "took over"

> CMSH's obligation under a collective bargaining agreement and CMSH ceased all union operations. In 1980, Congress passed the MPPAA which imposed liability on employers who withdrew from established pension plans. In 1982, CMSH framing did not renew its collective bargaining agreement and later dissolved itself and incurred withdrawal liability. The Ninth Circuit ruled that CMSH was not liable for CMSH Framing's withdrawal liability because CMSH had withdrawn from the pension fund before the passage of the MPPAA at a time when there was no withdrawal liability. The issue of retroactively imposing withdrawal liability on firms which had withdrawn from pension funds prior to the enactment of the MPPAA is not present here.

Here, plaintiffs are not a union; they are pension fund trustees. Plaintiffs are not trying to turn Simas Floor into a union shop; [*15] they are simply trying to collect the pension fund liability which M & M incurred during its 10 years of operation. In such a situation, the second half of the alter ego doctrine focuses not on the intent in creating the alter ego employer but on whether recognizing the separateness of the two employers undermines the purposes of ERISA and the MPPAA. [9] As the First Circuit explained in Belmont:

> [HN4] The alter ego doctrine is meant to prevent employers from evading their obligations under labor laws and collective bargaining agreements through the device of making '"a mere technical change in the structure or identity of the employing entity . . . without any substantial change in its ownership or management.'"
>
> Although developed in the labor law context, alter ego or successor liability analysis has been applied to claims involving employee benefit funds brought under ERISA and the LMRA. The rationale is that "an employer who evades his pension responsibilities gains an unearned advantage in his labor activities. Moreover, underlying congressional policy behind ERISA clearly favors the disregard of the corporate entity in cases where employees

are denied their pension benefits."

[HN5] In determining [*16] whether a nonsignatory employer is an alter ego of a signatory, we consider a variety of factors, including continuity of ownership, similarity of the two companies in relation to management, business purpose, operation, equipment, customers, supervision, and anti-union animus-i.e., "whether the alleged alter ego entity was created and maintained in order to avoid labor obligations." No single factor is controlling, and all need not be present to support a finding of alter ego status. In particular, there is no rule that wrongful motive is an essential element of a finding of alter ego status.

139 F.3d at 307-308 (citations omitted). More recently, [HN6] the First Circuit stated that the alter ego doctrine

> is not a formalistic mechanism for reflexively regarding distinct jural entities' as legally interchangeable whenever the entities' relationship is marked by a sufficient number of the doctrine's characteristic criteria . . . . Rather, the doctrine is a *tool* to be employed when the corporate shield, if respected would inequitably prevent a party from receiving what is otherwise due and owing from the person or persons who have created the shield.

Massachusetts Carpenters Central Collection Agency v. A.A. Building Erectors, Inc., 343 F.3d 18, 21-22 (1st Cir. 2003). [*17] Other circuits generally agree. "[A]lter-ego liability does not arise from any particular statutory provision at all, but rather from a general federal policy of piercing the corporate veil when necessary to protect employee benefits." *See* New York State Teamsters Conference Pension & Retirement Fund v. Express Services, Inc., 426 F.3d 640, 647 (2d Cir. 2005) (citing *Bd. of Trs. v. Foodtown, Inc., 296 F.3d 164, 169 (3d Cir. 2002)*; *Lumpkin v. Envirodyne Indus., Inc., 933 F.2d 449, 460-61 (7th Cir. 1991))*. In a pension fund liability case, the focus is less whether a

union or non-union employer was created for an improper purpose, and more whether disregarding their separate entities is necessary to protect employees' rights under ERISA and the MPPAA.

> 9 Unlike this case, in Rodin there was no evidence that the union employer used the non-union employer to avoid its union obligations or that the non-union employer benefitted from any arrangement it had with the union employer's labor force. *Rodin, 558 F.3d at 1033-34*.

After reviewing the substantial undisputed evidence presented by the parties about the manner in which Simas Floor and M & M operated, I conclude that for purposes of imposing [*18] pension fund withdrawal liability, plaintiffs have established that Simas Floor and M & M were alter egos. To find otherwise would defeat the purpose of the alter ego doctrine in the ERISA and MPPAA context. It would permit M & M to evade its obligations under ERISA and the collective bargaining agreement. It would result in M & M's former employees being deprived of contributions towards their pension benefits that they earned under the collective bargaining agreement M & M signed. It would also permit Simas Floor to have gained an unearned advantage, allowing it to keep the benefits of the profits it made from M & M's union workforce without requiring it to bear the pension responsibilities that work entailed.

The evidence that most troubles the Court is the way Simas Floor controlled the cash that flowed through to M & M. Simas Floor did not deal with M & M as an arms length subcontractor; it merely provided M & M with sufficient funds to pay operating expenses and overhead. This meant that Simas Floor controlled M & M's profits, and that consequently, M & M would never have had sufficient funds to pay the withdrawal liability unless those funds were provided to it by Simas Floor. [*19] The import of this ruling is to require Simas Floor to do just that. Having benefitted for 10 years from work performed by employees protected by union collective bargaining agreements, Simas Floor should bear the burden of completing the funding of their pension entitlements.

For all the foregoing reasons, plaintiffs are **GRANTED** summary judgment against Simas Floor on the grounds that Simas Floor and M & M were alter ego employers. [10]

> 10 In view of this disposition I need not reach plaintiffs' alternative grounds for liability: a violation of *29 U.S.C. § 1392(c)* and successor liability.

DEFENDANTS' MOTION

For the reasons plaintiffs are granted summary judgment, defendants are **DENIED** summary judgment on their claim that Simas Floor is not an employer within the meaning of the MPPAA. [11] This leaves defendants' motion for a declaratory judgment that it is not in default under *29 U.S.C. § 1399(c)(5)(A)* or *(B)*.

> 11 Defendants also sought a ruling that it and M & M are not under "common control" within the meaning of *29 U.S.C. § 1301(b)(1)*. This request is **DENIED** as moot, in view of the Court's ruling and the fact that plaintiffs did not seek relief on this theory.

Plaintiffs argue that defendants [*20] are in default under both sub-sections of *section 1399* because defendants did not timely submit M & M's September 2008 withdrawal liability payment and because M & M's liabilities exceed its assets.

Section 1399(c)(5)(A) states that:

> [HN7] [i]n the event of a default, a plan sponsor may require immediate payment of the outstanding amount of an employer's withdrawal liability, plus accrued interest on the total outstanding liability from the due date of the first payment which was not timely made . . . the term "default" means . . . the failure of an employer to make, when due, any payment under this section, if the failure is not cured within 60 days after the employer receives written notification from the plan sponsor of such failure . . . ."

29 U.S.C. § 1399(c)(5)(A). [HN8] The Supreme Court has stated that:

> [a] withdrawing employer's basic responsibility under the MPPAA is to make each withdrawal liability payment when due. The Act thus establishes an installment obligation. Just as a pension plan cannot sue to recover *any* withdrawal liability until the employer misses a scheduled payment, so too must the plan generally wait until the employer misses a particular payment before suing to collect [*21] that payment.

Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp., 522 U.S. 192, 208, 118 S. Ct. 542, 139 L. Ed. 2d 553 (1997).

Here, plaintiffs did not send written notice to defendants, as required by *section 1399*, of defendants' failure to pay the September 2008 quarterly liability payment. Plaintiffs' August 18, 2008 letter demanding the June 2008 payment was sent before defendants' September installment payment was even due. It did not provide defendants with written notification of the default as to the September payment. Because defendants timely cured their default of the June 2008 payment, plaintiffs' invocation of the statutory acceleration provision was staved off. Defendants never reinvoked it by making a written demand for the September quarterly payment.

Plaintiffs assertion that defendants are in default under *section 1399(c)(5)(B)* is equally unavailing. [HN9] Like *section 1399(c)(5)(A)*, *section 1399(c)(5)(B)* permits a plan sponsor to accelerate payments upon "any other event defined in rules adopted by the plan which indicates a substantial likelihood that an employer will be unable to pay its withdrawal liability." Plaintiffs argue that under *section 1399(c)(5)(B)*, defendants are in default because [*22] M & M's liabilities exceed its assets. Having found that defendant Simas Floor is responsible for M & M's withdrawal liability, I find that defendants' liabilities do not exceed their assets, as plaintiffs have submitted no evidence that Simas Floor is insolvent, delinquent on its current bills, or otherwise defunct in its daily operations.

Defendants' motion for summary adjudication is not in default under *section 1399(c)(5)(A)-(B)* is therefore **GRANTED**.

Judgment shall be entered accordingly.

Dated: August 17, 2009

/s/ Bernard Zimmerman

Bernard Zimmerman

United States Magistrate Judge

PROOF OF SERVICE AND DELIVERY

I, Timothy J. Walton, declare that:

I am at least 18 years of age and not a party to the above-entitled action. My business address is Law Offices of Timothy Walton, 801 Woodside Road, Suite 11, Redwood City, CA 94061.

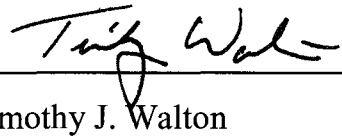
I served the foregoing APPELLANT'S OPENING BRIEF, including an Index of Non-California Authorities, on January 27, 2010 by depositing a copy thereof in the United States mail in Redwood City, California, enclosed in a sealed envelope, with postage fully prepaid, addressed to the persons listed below:

Bennet Kelley
Internet Law Center
100 Wilshire Blvd., Suite 950
Santa Monica, CA 90401

I served a copy of the brief on the clerk of the Superior Court of California, County of San Francisco by U.S. mail on January 27, 2010.

I served a text-searchable PDF copy of such brief on the California Supreme Court by uploading the brief to the Supreme Court's website on January 27, 2010.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 27th day of January, 2010 at Redwood City, California.



Timothy J. Walton