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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

STEVEN LAWSON, an individual;
and MICHAEL S. LERNER, both as
an individual and as Trustee of the
MICHAEL LERNER REVOCABLE
LIVING TRUST, a trust, COLD
TRAIN, LLC, a Washington limited
liability company,

Plaintiffs,

v.

BNSF RAILWAY COMPANY, a
Delaware corporation,

Defendant.

NO: 2:15-CV-0094-TOR

ORDER GRANTING DEFENDANT’S
MOTION TO DISMISS

BEFORE THE COURT is Defendant BNSF Railway Company’s motion to
dismiss for failure to state a claim (ECF No. 37). The motion was heard with oral
argument on April 13, 2016. Daniel J. Appel, Dale M. Foreman and R. Bruce
Johnston appeared on behalf of Plaintiffs. Markus W. Louvier and Daniel T.
Donovan appeared on behalf of Defendant. The Court has reviewed the briefing,
files, and record therein; heard from counsel, and is fully informed.

1 **PROCEDURAL HISTORY**

2 On April 7, 2015, Plaintiffs Steven Lawson and Michael S. Lerner initiated
3 this action against Defendant BNSF Railway Company (“BNSF”). ECF No. 1.
4 Their complaint asserted the following causes of action: (1) intentional interference
5 with business expectancy; (2) promissory estoppel; and (3) fraud/negligent
6 misrepresentation. *Id.*

7 On October 23, 2015, this Court dismissed Plaintiffs’ complaint after finding
8 Plaintiffs lacked standing and their claims failed to state a claim upon which relief
9 could be granted. ECF No. 31. The Court did, however, grant Plaintiffs leave to
10 file an amended complaint. *Id.*

11 On November 20, 2015, Plaintiffs filed their First Amended Complaint.
12 ECF No. 32. The amended complaint adds Cold Train, LLC and the Michael
13 Lerner Revocable Living Trust (the “Lerner Trust”) as plaintiffs, and alleges the
14 following causes of action: (1) promissory and/or equitable estoppel claim by
15 Lerner and Lawson, (2) intentional interference with business expectancy claim by
16 Lerner, Lawson, and Cold Train, LLC (3) Fraud, Promissory Fraud, and/or
17 Negligent Misrepresentation claim by Lerner and Lawson, (4) violation of the
18 Washington Consumer Protection Act claim by Lerner, Lawson, and Cold Train,
19 LLC and (5) Subrogation claims by Lerner. *Id.* at 35-40.
20

1 In the instant motion, BNSF moves to dismiss, arguing Plaintiffs still lack
2 standing and their claims again lack merit. ECF No. 37. Plaintiffs filed a response
3 in which they opposed dismissal of their first four causes of action (ECF No. 47)
4 and withdrew their fifth cause of action for subrogation (*id.* at 34).

5 **FACTS**

6 The following facts are drawn principally from Plaintiffs' First Amended
7 Complaint and documents attached thereto, and are accepted as true for the
8 purposes of the instant motion. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556
9 (2007).

10 Rail Logistics, LC ("Rail Logistics") and Cold Train, LLC operated the
11 "cold train" business,¹ an intermodal shipping service for fresh and frozen food
12 items. ECF No. 32 at ¶ 3. Mr. Lawson was the president and chief executive
13 officer of Rail Logistics and a manager of Cold Train, LLC. *Id.* at ¶ 3. Mr. Lerner
14 is a trustee of the Lerner Trust, the owner and managing member of Rail Logistics,
15 and the owner of Cold Train, LLC. *Id.* at ¶ 4.

16
17 ¹ Throughout the First Amended Complaint, Plaintiffs use the term Cold Train to
18 refer to the legal entity, Cold Train, LLC, and as a descriptive term for the
19 transporting business. To avoid confusion, hereinafter, the Court will refer to the
20 legal entity as Cold Train, LLC and the transporting business as cold train.

1 **1. The Contracts**

2 In 2009, Mr. Lawson met with representatives from BNSF to discuss the
3 possibility of shipping fresh produce from Quincy, Washington to points east by
4 rail. *Id.* at ¶ 9. Following these discussions, in March 2009, BNSF and Rail
5 Logistics entered into a shipping contract. *Id.* at ¶¶ 10; 16. The contract was
6 signed by Mr. Lerner in a representative capacity as the Managing Member of Rail
7 Logistics. ECF No. 16 at 2.

8 After signing the March 2009 Contract, the parties continued discussions
9 concerning the terms of the BNSF/Rail Logistics business relationship. ECF No.
10 32 at ¶¶ 13-22. For instance, in May 2009, Plaintiffs allege BNSF “confirmed”
11 that the service from Quincy to Chicago, Illinois would be 72 hours as part of its Z
12 train network. *Id.* at ¶¶ 17, 19. Further, Plaintiffs allege that BNSF imposed
13 certain conditions, including: (1) that Rail Logistics ship 95% of its traffic on
14 BNSF lines, *id.* at ¶ 22, a requirement Plaintiffs argue effectively prohibited the
15 cold train business from using other carriers, *id.* at ¶ 51, and (2) the use of 53’
16 refrigerated intermodal containers to ship produce out of Quincy, an
17 unconventional container size. *Id.* at ¶¶ 13,15.

18 Based on the second condition, in November 2009, Mr. Lerner personally
19 paid approximately \$55,000 for the construction of a 53’ container prototype, and
20 subsequently, caused 70 containers to be ordered. *Id.* at ¶¶ 30, 32. These

1 containers were purchased by a third-party and leased to Rail Logistics. *Id.* at ¶ 32.
2 Mr. Lerner personally guaranteed the lease. *Id.* Thereafter, Mr. Lerner continued
3 to personally guarantee the purchases and leases of such containers, and by
4 September 2013 there were 400 containers in operation. *Id.* at ¶¶ 43; 44; 47; 50,
5 56. Most often the leases were 7.5 years of a non-terminable duration. *Id.* at 45.
6 Notably, in December 2011, Mr. Lawson, in a representative capacity as President
7 of Rail Logistics, signed a contract governing the use of private containers on
8 BNSF's network. ECF No. 32-1, Ex. 10.

9 In early 2010, BNSF and Rail Logistics signed an amendment (“Quincy
10 Agreement”) to the March 2009 contract with specific terms relating to operations
11 in Quincy. ECF No. 17. The Quincy Agreement was signed by Mr. Lerner in a
12 representative capacity as the Managing Member of Rail Logistics. *Id.* It provided
13 for an initial term until August 31, 2014, followed by an option for an extension for
14 two additional years, if mutually agreed. *Id.* Plaintiffs allege the term to August
15 31, 2016 was known by the parties to be the “bare minimum required for a
16 reasonable recovery of the capital expenditures” for the 53’ containers. ECF No.
17 32 at ¶ 35.

18 2. Cold Train Operations

19 Sometime in early 2010, Cold Train, LLC was formed. *Id.* at ¶ 36.
20 Plaintiffs allege Cold Train, LLC leased the 53’ containers from Rail Logistics,

1 operated under the Quincy Agreement with BNSF's knowledge and consent, and
2 began the cold train operation with its first shipment in April 2010. *Id.* at ¶¶ 36,
3 47. Cold Train, LLC operated cold train until late 2011 when the entity's
4 operations were suspended due to unrelated litigation. *Id.* at ¶¶ 37-38. Thereafter,
5 Rail Logistics operated cold train. *Id.*

6 Initially, demand for cold train's service grew and the business added
7 approximately 200 loads per month for the last part of 2013 alone. *Id.* at ¶¶ 58, 60.
8 Because of this success, Plaintiffs sought out a capital partner to provide funds to
9 continue the expansion of the cold train business. *Id.* at ¶ 60. Plaintiffs also began
10 discussions with BNSF to extend the Quincy Agreement for an additional five
11 years. *Id.* at ¶ 61.

12 Starting in September of 2013, Plaintiffs allege that the 72-hour delivery on-
13 time percentage ("OTP") from Quincy to Chicago began to steadily decline, falling
14 to 81% in September, 54% in October, 44% in November, 35% in December, 28%
15 in January 2014, and 4% in February 2014. *Id.* at ¶¶ 62; 65-67; 69. Plaintiffs
16 allege they informed BNSF that these delays caused significant issues with clients
17 and that eastbound shipments were down 50%. *Id.* at ¶¶ 63, 67-68. In response,
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1 Plaintiffs allege BNSF repeatedly assured them that it was working to overcome
2 operational challenges and restore service.² *Id.* at ¶¶ 65-68.

3 In January of 2014, Plaintiffs allege Mr. Lawson, “on behalf of himself and
4 Mr. Lerner, and not on behalf of Rail Logistics,” met with BNSF representatives to
5 inform them they received an offer to sell Rail Logistics and its cold train business
6 to Federated Railways, Inc. (“Federated”). *Id.* at ¶¶ 79, 86. Pursuant to the
7 pending offer, Mr. Lawson informed BNSF he would continue to oversee
8 operations as president of the purchased entity. *Id.* Plaintiffs claim BNSF
9 responded “enthusiastically,” encouraged Mr. Lawson and Mr. Lerner to move
10 forward with the sale, and agreed to meet with Federated. *Id.* at ¶ 80.

11 Based on these representations and the “promises of improved service,”
12 Plaintiffs claim Mr. Lawson executed a Letter of Intent with Federated. *Id.* at ¶ 81.
13 Plaintiffs allege the sale would provide a “significant payment” to Mr. Lerner and
14 relieve him of liabilities, and additionally, that the sale was worth an estimated \$21
15 million to Mr. Lawson. *Id.* at ¶¶ 84-85.

16 On March 4, 2014, Mr. Lawson, “on behalf of himself and Mr. Lerner,” met
17 with representatives from Federated and BNSF. *Id.* at ¶ 86. At the meeting,

18
19 ² At least some of the service delays were due to extreme weather-related
20 problems. *See* ECF No. 32-1, Ex. 11.

1 Plaintiffs allege BNSF “promised continued and improved service to *Rail*
2 *Logistics, or its successor*, and made these representations and promises directly to
3 Mr. Lawson and [Federated’s representative].” *Id.* at ¶¶ 86-87 (emphasis added).
4 Plaintiffs further allege BNSF “confirmed that it would offer a new five-year
5 contract for Quincy” and “promised to do whatever was necessary to ensure a
6 smooth transition from Rail Logistics to Federated Cold Train.” *Id.* at ¶ 88.
7 Plaintiffs claim that, based on BNSF’s representations and promises at this
8 meeting, Federated infused capital of \$1.25 million into Rail Logistics. *Id.* at ¶¶
9 89-90. Mr. Lerner personally guaranteed these funds. *Id.* at ¶ 90.

10 However, on April 24, 2014, BNSF informed Mr. Lawson and Mr. Lerner
11 that it cancelled the 72-hour Z train service, effective the following day, and
12 substituted it with a new 125-hour Q train service. *Id.* at ¶ 92. Plaintiffs allege
13 BSNF planned to make this change prior to the March 4, 2014 meeting with
14 Federated, and prepared other major customers for this change but “concealed its
15 plan” from Plaintiffs and Federated. *Id.* at ¶ 95.

16 On April 28, 2014, Mr. Lerner and Mr. Lawson met with BNSF
17 representatives to request restoration of the 72-hour Z train service. *Id.* at ¶ 101.
18 However, BNSF declined to restore the service. *Id.* at ¶ 102. Plaintiffs claim that
19 at the time of the service termination, BNSF was aware that the 72-hour service
20 and a high OTP were “vital to the Cold Train’s economic viability” and that Mr.

1 Lerner had not yet recovered his capital expenditures. *Id.* at ¶¶ 98-99. Plaintiffs
2 assert that BNSF’s termination of the 72-hour service “effectively destroyed” the
3 cold train business. *Id.* at ¶ 46.

4 Additionally, Plaintiffs allege that “[a]s a direct result of the service
5 termination,” Federated terminated its approximately \$31.7 million offer to
6 purchase Rail Logistics and submitted a new, reduced offer of \$2 million. *Id.* at ¶
7 106. The new offer was contingent upon a new five-year contract with BNSF
8 absent the requirement that 95% of the containers be carried on BNSF lines. *Id.* at
9 ¶ 107. Plaintiffs allege BNSF initially agreed to waive the 95% requirement but
10 ultimately refused to exclude the term from the new contract. *Id.* at ¶¶ 107-08.
11 Thereafter, Federated withdrew its \$2 million offer. *Id.* at ¶ 109.

12 The cold train ceased operations on August 6, 2014. *Id.* Plaintiffs claim that
13 due to BNSF’s actions Mr. Lerner lost the value of his cold train business and now
14 faces significant liabilities.³ *Id.* at ¶ 111. Similarly, Mr. Lawson claims he lost the

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16 ³ On September 8, 2014, Plaintiffs allege Mr. Lawson contacted Marc Allen of
17 BNSF regarding mitigation of losses about the potential redeployment of the 53’
18 containers, and Mr. Allen responded “Sell them and buy trailers,” indicating BNSF
19 had changed its requirements from the 53’ containers back to trailers. ECF No. 32
20 at ¶ 46.

1 value of Federated’s offer to him and claims to have declined “lucrative job
2 opportunities” that he would have taken if not for BNSF’s promises and
3 representations. *Id.* at ¶ 112.

4 **STANDARD OF REVIEW**

5 This Court has previously set forth in detail the standards by which a
6 complaint is evaluated on a motion to dismiss for failure to state a claim. *See* ECF
7 No. 31 at 8-10. Those same standards apply to the instant motion. In brief, a
8 motion to dismiss for failure to state a claim tests the legal sufficiency of the
9 plaintiff’s claims. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001).

10 “Threadbare recitals of the elements of a cause of action, supported by mere
11 conclusory statements, do not suffice.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)
12 (citations omitted). Even when a complaint fails to state a claim for relief,
13 however, the Ninth Circuit has repeatedly instructed district courts to “grant leave
14 to amend even if no request to amend the pleading was made, unless . . . the
15 pleading could not possibly be cured by the allegation of other facts.” *Lopez v.*
16 *Smith*, 203 F.3d 1122, 1130 (9th Cir. 2000) (quotations omitted). The court
17 considers five factors in assessing the propriety of leave to amend—bad faith,
18 undue delay, prejudice to the opposing party, futility of amendment, and whether
19 the plaintiff has previously amended the complaint. *United States v. Corinthian*
20 *Colleges*, 655 F.3d 984, 995 (9th Cir. 2011).

1 **DISCUSSION**

2 **1. Standing**

3 As the Court previously set forth, *see* ECF No. 31 at 12-13, standing consists
4 of two related components: the constitutional requirements of Article III and
5 nonconstitutional prudential considerations. *See Franchise Tax Bd. Of California*
6 *v. Alcan Aluminium Ltd.*, 493 U.S. 331, 335 (1990). Art. III requires a plaintiff to
7 allege: (1) “that he personally has suffered some actual or threatened injury as a
8 result of the putatively illegal conduct of the defendant;” (2) “that the injury fairly
9 can be traced to the challenged action;” and (3) that the injury “is likely to be
10 redressed by a favorable decision.” *Id.* (internal quotations and citations omitted).
11 Among the prudential considerations related to standing is the Ninth Circuit’s
12 “shareholder standing rule.” *See id.* at 336 (rule recognized and left intact). That
13 rule provides that “a shareholder must assert more than personal economic injury
14 resulting from a wrong to the corporation. A shareholder must be injured directly
15 and independently of the corporation.” *Shell Petroleum, N.V. v. Graves*, 709 F.2d
16 593, 595 (9th Cir. 1983) (internal citations omitted); *see also United States v.*
17 *Stonehill*, 83 F.3d 1156, 1160 (9th Cir. 1996) (“Well-established principles of
18 corporate law prevent a shareholder from bringing an individual direct cause of
19 action for an injury done to the corporation or its property by a third party.”).
20 Washington state law also recognizes the shareholder standing rule. *See Sabey v.*

1 *Howard Johnson & Co.*, 101 Wash. App. 575, 584 (2000) (“Ordinarily, a
2 shareholder cannot sue for wrongs done to a corporation, because the corporation
3 is a separate entity[.]”).

4 In general, plaintiffs are excepted from the shareholder standing rule if they
5 can (1) allege an injury distinct from other shareholders or members of the
6 corporation or (2) allege that there was a special duty, such as a contractual duty,
7 between the plaintiff and the defendant. *See Sparling v. Hoffman Constr. Co. Inc.*,
8 864 F.2d 635, 640-41 (9th Cir. 1988).

9 The Court previously ruled that Mr. Lerner and Mr. Lawson lacked standing
10 to assert claims that belong to Rail Logistics. *See* ECF No. 31 at 13-15. The Court
11 explained that “[t]he gravamen of Plaintiffs’ claims are that BNSF caused injury to
12 cold train through low OTPS and cancelled the 72-hour service. This alleged
13 injury reduced the value of Rail Logistics’ cold train. Plaintiffs now seek to
14 recover damages for losses that are merely incidental to the alleged harm inflicted
15 upon Rail Logistics’ business.” *Id.* at 13. Consequently, the Court ruled that Mr.
16 Lerner and Mr. Lawson, as the sole shareholder and an employee of Rail Logistics
17 respectively, were barred by the shareholder standing rule. The Court further ruled
18 that because Plaintiffs did not sufficiently allege a distinct injury or that a special
19 relationship or duty existed between them and BNSF, neither of the two exceptions
20 to the shareholder standing rule applied. *Id.* at 13-14.

1 Plaintiffs' First Amended Complaint does not remedy the deficiencies
2 identified in the Court's prior order. The alleged facts demonstrate that BNSF was
3 in a contractual relationship with Rail Logistics since March 2009, and that at all
4 relevant times it was Rail Logistics operating the cold train business pursuant to its
5 contracts with BNSF. Plaintiffs' arguments that the contracts were "nominally
6 between BNSF and Rail Logistics" and Rail Logistics was a mere "placeholder,"
7 *see* ECF No. 32 at ¶¶ 10, 25, 42, are unpersuasive.⁴ *See Sears, Roebuck & Co. v.*
8 *Nicholas*, 2 Wash.2d 128, 132-33 (1939) (holding that, generally, a formal written
9 contract embraces all agreements between the parties in connection with the
10 subject-matter of the contract, and all parol testimony of prior or contemporaneous
11 conversations tending to substitute a new contract is incompetent).

12 Importantly, despite the new allegations, Plaintiffs are still pursuing claims
13 that properly belong to Rail Logistics, because the gravamen of Plaintiffs' claims
14 remain that BNSF caused injury to Rail Logistics' cold train business through low
15 OTPs and a discontinued 72-hour service. All of Plaintiffs' alleged injuries and

16 ⁴ Likewise, Plaintiffs' argument that their "prior business relationship" with BNSF
17 establishes individual standing, *see* ECF No. 47 at 2, is without merit, because all
18 their alleged prior relationships and misconduct occurred after Rail Logistics
19 signed the contract in March 2009.

1 damages flow from this injury and from the BNSF/Rail Logistics relationship.

2 Decisively, in the absence of the alleged injury to Rail Logistics, Plaintiffs would
3 not have suffered harm.

4 Nonetheless, Plaintiffs claim to have standing and argue the First Amended
5 Complaint includes new factual allegations that demonstrate the exceptions to the
6 shareholder standing rule apply. ECF No. 47 at 13-20. This Court disagrees, as
7 explained below.

8 **a. Mr. Lawson**

9 With respect to Mr. Lawson, the First Amended Complaint includes the new
10 allegation that he was a party, in his personal capacity, to the letter of intent with
11 Federated. *See* ECF No. 32 at ¶ 81. Plaintiffs argue this demonstrates Mr. Lawson
12 suffered a distinct injury because he lost millions and an offer of employment
13 when Federated withdrew its offer due to the cancelled 72-hour service. *See* ECF
14 No. 47 at 15. In support, Plaintiffs cite to a Supreme Court of Delaware case
15 holding that a party to a commercial contract may sue to enforce its contractual
16 rights directly, without proceeding by way of a derivative action. *Id.* (citing *NAF*
17 *Holdings, LLC v. Li & Fung (Trading) Ltd.*, 118 A.3d 175, 179-80 (Del. 2015)
18 (where plaintiff was in a direct contractual relationship with the defendant)).

19 The Court finds Plaintiffs still fail to demonstrate how Mr. Lawson was
20 injured independent of Rail Logistics. When Federated withdrew its offer Mr.

1 Lawson suffered personal economic loss, but this loss derives from Mr. Lawson's
2 employment at Rail Logistics and stems from the alleged injury incurred by Rail
3 Logistics. Thus, as the Court explained in its prior order, *see* ECF No. 31 at 13-14,
4 this loss is insufficient to establish an independent, distinct injury. *See Shell*
5 *Petroleum*, 709 F.2d at 595; *see also Stein v. United Artists Corp.*, 691 F.2d 885,
6 896 (9th Cir. 1982) (collecting cases denying corporate officers and employees
7 standing).

8 Moreover, Plaintiffs still fail to allege facts which demonstrate there was a
9 contractual relationship or special duty between BNSF and Mr. Lawson. Whether
10 or not Mr. Lawson has a contractual relationship with Federated, by way of the
11 letter of intent, and can enforce his rights pursuant to such a contract, is not at
12 issue. Significantly, a contract between Mr. Lawson and Federated does not
13 provide him standing to bring an action against BNSF to assert claims that belong
14 to Rail Logistics. The Court concludes Mr. Lawson lacks standing.

15 **b. Mr. Lerner**

16 With respect to Mr. Lerner, Plaintiffs argue the First Amended Complaint
17 contains new allegations demonstrating Mr. Lerner was "induced" to incur
18 individual liability by BNSF's promises and misrepresentations. *See* ECF No. 47
19 at 7 (citing ECF No. 32 at ¶¶ 79-90); 15-16. Plaintiffs argue this demonstrates Mr.
20 Lerner suffered a distinct injury. *Id.* at 15-16. In support, Plaintiffs reference the

1 March 4, 2014 meeting, where Mr. Lawson met with representatives of BNSF and
2 Federated to discuss the possible acquisition of Rail Logistics by Federated, and
3 argue “If BNSF had simply told the truth at the [] meeting, Federated would not
4 have put up the \$1.25 million and Mr. Lerner would not have guaranteed it.” *Id.* at
5 16.

6 Plaintiffs further argue the First Amended Complaint demonstrates BNSF
7 owed Mr. Lerner special duties, because BNSF “required the special design and
8 purchase of the special [53’] containers.” ECF No. 47 at 18. Specifically,
9 Plaintiffs argue BNSF owed Mr. Lerner a “duty to be candid, a duty to act in good
10 faith, and a further duty to allow a reasonable time of operation for recovery of the
11 huge, single use, capital expenditures required by it.” ECF No. 47 at 19.

12 First, the First Amended Complaint fails to plead that any alleged
13 misrepresentations or promises were made to Mr. Lerner in his personal capacity.
14 For instance, at the March 4, 2014 meeting, the alleged promises were made to
15 Rail Logistics and Federated, not any of the named Plaintiffs. *See* ECF No. 32 at
16 ¶ 88 (“[O]n March 4, 2014, BNSF promised continued and improved service to
17 Rail Logistics, or its successor ... BNSF further promised to do whatever was
18 necessary to ensure a smooth transition from Rail Logistics to Federated Cold
19 Train.”); *id.* (“BNSF confirmed that it would offer a new five-year contract for
20 Quincy that would provide incentives for investment in new refrigerated

1 containers.”). Likewise, other alleged promises and misrepresentations included in
2 the amended complaint were made to agents of Rail Logistics, not Plaintiffs in
3 their personal capacity, as shown by the emails attached to the amended complaint.
4 *See, e.g.*, ECF No. 32-1, Ex. 1 (where BNSF emails Mr. Lawson, as Rail Logistics
5 then Director of Business Development, and allegedly promises 72 hour rail
6 service); *id.*, Exs. 11; 12 (where BNSF emails April Withers, as Rail Logistics
7 Vice President of Operations, and Mr. Lawson, as Rail Logistics President, and
8 allegedly misrepresents that OTPs would improve). Consequently, the First
9 Amended Complaint fails to show any independent interest Mr. Lerner may have
10 in the alleged promises.

11 Moreover, Mr. Lerner’s status as a personal guarantor for Rail Logistics’
12 liabilities fails to establish a distinct injury. *See Sparling*, 864 F.2d at 641 (“Any
13 harm to the [plaintiffs] due to their status as guarantors of the bonds given by the
14 corporation is also derivative of the harm to the corporation.”); *see also Sherman v.*
15 *British Leyland Motors, Ltd.*, 601 F.2d 429, 439-440 (9th Cir. 1979) (denying
16 standing in circumstances where sole stockholder of a corporation personally
17 guaranteed certain obligations of corporation to third parties). The cases cited by
18 Plaintiffs do not hold otherwise.

19 Second, as for the purported duties BNSF owes Mr. Lerner because of his
20 investment in the 53’ containers, the First Amended Complaint demonstrates that

1 Rail Logistics leased the 53' containers, not Mr. Lerner. *See* ECF No. 32 at ¶¶ 32,
2 43-44. Thus, any purported special duty attached to the procurement of these
3 containers would be owed to Rail Logistics. While Mr. Lerner personally
4 guaranteed these leases, as discussed, his status as guarantor does not confer him
5 standing. *See Sparling*, 864 F.2d at 641.

6 Because the First Amended Complaint fails to demonstrate Mr. Lerner
7 suffered a distinct injury or had a relationship with BNSF independent of Rail
8 Logistics, the Court concludes that Mr. Lerner lacks standing to assert claims that
9 properly belong to Rail Logistics.

10 **c. The Lerner Trust and Cold Train, LLC**

11 With respect to the new plaintiffs included in the First Amended Complaint,
12 the Lerner Trust and Cold Train, LLC, the Court finds neither party allegedly
13 suffered a direct injury as a result of BNSF's alleged misconduct, and
14 consequently, both parties lack Art. III standing. *See Franchise Tax Bd.*, 493 U.S.
15 at 335. Significantly, the First Amended Complaint is devoid of any specific facts
16 concerning the Lerner Trust; beyond listing it as a party, the amended complaint
17 does not mention or discuss this entity. Therefore, the First Amended Complaint
18 fails to allege a direct injury against the Lerner Trust, and accordingly, the Lerner
19 Trust lacks Art. III standing to assert claims against BNSF.

1 As for Cold Train, LLC, the First Amended Complaint alleges facts
2 purporting it was in a contractual relationship with Rail Logistics, not BNSF, *see*
3 ECF No. 32 at ¶ 36, and that it suspended its operations in 2011, *see id.* at ¶¶ 37-
4 38, well before BNSF’s alleged misconduct concerning OTP issues began to occur
5 in 2013 and the cancelled 72-hour service in 2014. Thus, like the Lerner Trust
6 above, the amended complaint fails to allege a direct injury against Cold Train,
7 LLC, and accordingly, Cold Train, LLC lacks Art. III standing to assert claims
8 against BNSF.

9 In summation, because Mr. Lerner and Mr. Lawson lack standing pursuant
10 to the shareholder standing rule, and Lerner Trust and Cold Train, LLC lack Art.
11 III standing, this Court dismisses Plaintiffs’ First Amended Complaint with
12 prejudice in its entirety.

13 Plaintiffs have not sought leave to amend. The standard for granting leave
14 to amend, however, is generous. *See* Fed. R. Civ. P. 15(a)(2) (“The court should
15 freely give leave when justice so requires.”). The court considers five factors in
16 assessing the propriety of leave to amend—bad faith, undue delay, prejudice to the
17 opposing party, futility of amendment, and whether the plaintiff has previously
18 amended the complaint. *United States v. Corinthian Colleges*, 655 F.3d 984, 995
19 (9th Cir. 2011).

1 This Court finds that granting further leave to amend the First Amended
2 Complaint would be nothing less than futile. *See Corinthian Colleges*, 655 F.3d at
3 995. Plaintiffs have had two full and fair opportunities to plead their case and
4 nothing indicates that additional time or any restructuring of the facts would
5 change the outcome.

6 **ACCORDINGLY, IT IS HEREBY ORDERED:**

- 7 1. Defendant's Motion to Dismiss for Failure to State a Claim (ECF No.
8 37) is **GRANTED**.
- 9 2. Plaintiffs' First Amended Complaint (ECF No. 32) is **DISMISSED**
10 **with prejudice**.

11 The District Court Executive is directed to enter this Order, enter Judgment
12 for Defendant, provide copies to counsel, and **CLOSE** this case.

13 **DATED** May 16, 2016.



15 *Thomas O. Rice*
THOMAS O. RICE
16 Chief United States District Judge

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