

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

CASE FINANCIAL, INC.,)
a Delaware corporation,)
)
Plaintiff,)
)
v.) Civil Action No. 1184-VCP
)
ERIC ALDEN,)
)
Defendant.)

OPINION

Submitted: January 26, 2011

Decided: May 11, 2011

Richard L. Horwitz, Esq., Kevin R. Shannon, Esq., Berton W. Ashman, Jr., Esq., POTTER ANDERSON & CORROON LLP, Wilmington, Delaware; Paul Mark Sandler, Esq., Roderick R. Barnes, Esq., John J. Leidig, Esq., Matthew Esworthy, Esq., John J. Lovejoy, Esq., SHAPIRO SHER GUINOT & SANDLER, Baltimore, Maryland; *Attorneys for Plaintiff*

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PARSONS, Vice Chancellor.

This action concerns a dispute that stems from the acquisition of a company engaged in financing litigation for plaintiffs and their attorneys. Plaintiff acquired most of the assets of a company that made advances or high interest loans to these attorneys. As part of the transaction, Defendant, who previously had been the Chief Executive Officer (“CEO”) of the selling company, became CEO of Plaintiff. He continued to serve as CEO and a director of the acquiring company for approximately two years. Eventually, certain investors in the acquiring organization had a falling out with Defendant, which led to his removal. The parties then entered into a settlement agreement, which included mutual releases that extinguished various legal claims each party had. The release in favor of Defendant had an exception, however, for any claims that arose from criminal actions by Defendant.

During Defendant’s tenure as CEO, the management and investors of Plaintiff began suspecting that Defendant committed fraud in connection with the sale of the old company’s assets and breached various fiduciary duties since the acquisition. Suspicions also arose that the CEO improperly diverted corporate funds, under the guise of lawsuit financing, to projects involving a Las Vegas casino and Bahamian hotel projects, and took stock and a bonus without permission.

In a previous opinion in this case, I ruled that the release only allowed Plaintiff to bring claims that arose directly out of criminal activity on the part of the CEO. Despite this hurdle, Plaintiff maintains that Defendant engaged in such illicit activity and has asserted numerous claims that were the subject of a four day trial in June 2010. Plaintiff alleges that: (1) Defendant intentionally misrepresented the value of a case advance

portfolio purchased by the new company; (2) while working for the new company, Defendant fraudulently induced Plaintiff to purchase \$835,000 in promissory notes from the old company that he knew were in default; (3) Defendant improperly diverted funds to bids for development projects; (4) Defendant stole money loaned to the company before he was terminated; and (5) Defendant improperly took company stock as well as an unauthorized bonus. For the reasons stated in this post-trial Opinion, I reject Plaintiff's claims in their entirety because, in each case, Plaintiff failed to prove that Defendant's alleged wrongdoing fell within the crime exception to the release.

I. BACKGROUND

A. The Parties

Plaintiff, Case Financial, Inc. ("Case Financial"), is a Delaware corporation with its principal place of business in California. By itself or through affiliates, Case Financial's primary business is financing litigation. Essentially, it participates in fronting money to attorneys for plaintiffs via high interest loans or case advances. The current iteration of Case Financial came into existence as a result of an asset purchase agreement (the "APA") between the original Case Financial, now referred to as "Old Case," and a company called Asia Web Holdings, Inc. ("Asia Web"). As discussed further *infra*, on May 24, 2002, Asia Web bought substantially all of the operational assets of Old Case and then changed the name of the purchasing company to Case Financial.

Defendant, Eric Alden, is the former President, CEO, and Co-Chairman of Case Financial. He resigned as a director and was terminated as CEO in February 2004. Alden is also a certified public accountant ("CPA") and a former Israeli naval officer.

B. Facts

Alden formed Old Case sometime in 1998 with two other individuals, and served as its CEO and a member of its Board of Directors.¹ Old Case's original business plan focused on funding actual plaintiffs in personal injury cases. As the business developed, Old Case started funding attorneys for plaintiffs instead of personal injury clients because the attorneys were more likely to provide repeat business.

1. The purchase of Old Case by Asia Web

Sometime in 2001, Old Case came into contact with Michael Schaffer, Asia Web's CEO.² At the time, Asia Web was a public shell company looking to effect a merger, asset purchase, or other business combination to deploy the capital it had raised. On March 12, 2002, Asia Web and Old Case executed the APA, under which Asia Web purchased Old Case's client list, management, and name. Asia Web also was to receive fifteen percent of the amount collected on the portfolio of Old Case loans. Before closing, Old Case provided Asia Web with Old Case's 1998-2000 audited financial statements and its 2001 unaudited financial statements, all of which had been prepared under the supervision of Gary Primes, the Chief Operating Officer ("COO") of Old

¹ Most of the stated facts are undisputed or have been decided in previous opinions. To the extent there is a dispute, exemplary, but not exhaustive citations to the record are provided. For additional background, see *Case Financial, Inc. v. Alden*, 2009 WL 2581873 (Del. Ch. Aug. 21, 2009).

² Trial Transcript ("T. Tr.") of June 22-25, 2010, 536-37 (Alden). Where the identity of the testifying witness is not clear from the text, it is indicated parenthetically. Defs.' Proposed Findings of Fact & Law ("DPFFL") ¶ 13.

Case.³ Alden provided Asia Web with access to Old Case's computers and files to verify the accuracy of the financial statements.⁴ While the Asia Web Board was invited to come to Old Case's office and review relevant information, no director ever did so.⁵ Moreover, there appears to have been some discussion of the "modification of purchased notes" and "intercompany loans."⁶ At the very least, these discussions indicate that Case Financial had notice of some of the defects about which they now complain.

Section 19.1 of the APA, entitled "Termination of Representations and Warranties," reads:

The respective representations and warranties of Seller and Buyer contained in this Agreement shall expire and terminate on the Closing Date. The obligations under all covenants and agreements which are to be performed after the Closing Date shall survive the Closing Date. All other covenants and agreements shall expire and terminate on the Closing Date.

On March 15, 2002, Michael Schaffer resigned as CEO of Asia Web and Alden became its President, CEO, and Chairman of the Board of Directors. The closing on the APA occurred on or about May 24, 2002. At that time, Asia Web changed its name to Case Financial.

In an effort to improve Case Financial's cash flow, Asia Web sought to purchase some outstanding promissory notes of Old Case from its noteholders in connection with

³ T. Tr. 559 (Alden); Joint Ex. ("JX") 78 F, I-J, M-R, T-U.

⁴ T. Tr. 545-56, 560, 572-90 (Alden).

⁵ *Id.* at 555.

⁶ *Id.* at 555-56, 559; JX 78, Ex. Z.

the APA. By purchasing these notes, Case Financial essentially substituted itself for various third parties as creditors of Old Case. Paragraph 6 of the APA provides that, “[Case] agrees to purchase up to \$2,500,000 of Promissory Notes owned by note holders of [Asia Web] and affiliates of [Asia Web] valued at \$.50 per share” Holders of \$810,000 in unsecured Old Case notes and \$25,000 in secured Old Case notes elected to convert their notes to stock in Case Financial, and Case Financial became the payee of those notes. As such, Case Financial became responsible for collecting from Old Case on these purchased notes. Holders who participated in the exchange were given two shares of restricted Asia Web common stock in exchange for every dollar in face value of notes they surrendered.⁷

Under the terms of the APA, Asia Web’s stock was valued at \$0.50 a share. Thus, by exchanging two shares for every dollar of face value in notes, Case Financial was agreeing to purchase the notes at par. While Michael Schaffer claims that Gordon Gregory, one of Old Case’s representatives, told him that the notes were performing, there is no indication that either Michael or Lawrence Schaffer, who was an officer and director of Asia Web, ever asked whether the notes were in good standing.⁸ Case Financial apparently collected about \$1,500,000 on the Old Case portfolio.⁹

⁷ T JX 45-54, 78 ¶ 6. This stock became stock of Case Financial after the closing.

⁸ T. Tr. 385 (M. Schaffer); Dep. of Lawrence Schaffer (“L. Schaffer Dep.”) 205.

⁹ T. Tr. 471-72 (M. Schaffer).

2. Alden's employment agreement

Pursuant to Alden's election as President and CEO of Asia Web, that company's board of directors ratified a three-year employment agreement on March 15, 2002, which included an award of 1,225,000 shares of stock that were to vest ratably over the term of the agreement.¹⁰ Between this time and the closing on May 24, 2002, Waddy Stephenson and Lawrence Schaffer remained directors of Asia Web and had access to all of Case Financial's records and information prepared by Primes.¹¹

On June 7, 2002, Case Financial's newly convened Board of Directors reelected Alden as CEO of the company and authorized a compensation package, including a grant of stock.¹² Under the package, Alden was to receive 700,000 shares of common stock as a "signing" bonus and a total of 525,000 more shares to be issued in three annual installments of 175,000 shares. The shares were to be restricted under the federal securities laws and, according to Alden, were subject to certain vesting requirements contingent on his continued employment at Case Financial.¹³ Alden never signed the employment agreement. Nevertheless, the parties apparently treated this requirement as a mere formality and generally acted in accordance with the agreement's terms. There is

¹⁰ JX 31, 78A, 123.

¹¹ T. Tr. 685, 690 (Alden).

¹² JX 32; Pretrial Stipulation and Order ("PTO") § III, ¶ 30.

¹³ JX 32; T. Tr. 651-52 (Alden); PTO § III, ¶ 30.

no evidence, for example, that anyone associated with Case Financial ever signed the agreement or pressed Alden to sign it.

On December 12, 2002, the Case Financial Compensation Committee resolved to issue Alden and other executives a bonus in the amount necessary to pay their taxes on the stock issuance.¹⁴ While there is no evidence that the full Board of Directors ever approved this bonus, Case Financial paid Alden a bonus of \$108,803 based on the estimated taxes that would be incurred in connection with the grant of 1,225,000 shares of common stock to him.¹⁵

On December 31, 2002, pursuant to the ratified but unexecuted employment agreement, Alden directed Case Financial's exchange agent, Computershare, to issue to him 1,225,000 shares of common stock in the company. Computershare complied on that same day.¹⁶ In his directive to Computershare, Alden asserted that the shares were in exchange for services already rendered to the company.¹⁷

3. Kardell allegations

At the time Case Financial and Old Case were negotiating the APA, Old Case owed money to one of its directors, Alan Kardell, and had secured that debt with all the

¹⁴ JX 36; T. Tr. 652 (Alden).

¹⁵ See JX 76 at Bates 1031; JX 33.

¹⁶ JX 33.

¹⁷ *Id.*

cash advances to Old Case's clients and the proceeds of those advances.¹⁸ On February 2, 2002, Kardell demanded that Old Case refrain from advancing any more funds until it repaid its debt to him. In addition, Kardell alleged that Old Case's financial statements were erroneous and misleading and demanded that Old Case immediately submit to a fraud audit by an independent CPA.¹⁹

Although it is unclear whether an "independent audit" of Old Case was ever performed, Alden did have an independent accounting firm, Good Swartz Brown & Berns, conduct a series of accounting procedures and prepare a report based on its findings.²⁰ The record does not indicate whether the report addressed Kardell's concerns or if he even examined it, but he never pursued his objections any further.²¹ There also is no evidence that Kardell's fraud claims were ever proven.

4. Improper use of Case Financial funds

In 2003, Case Financial formed a wholly-owned subsidiary called Case Capital, Inc. ("Case Capital"). Until that time, Case Financial had been making what Alden called "advances" to attorneys. Case Financial wanted to start making high interest loans instead, but to charge the interest rates it wanted to, it had to be licensed as a financing company. According to Alden, however, the State of California required licensed

¹⁸ JX 56; T. Tr. 698 (Alden).

¹⁹ JX 56; T. Tr. 698 (Alden).

²⁰ JX 57; T. Tr. 44 (Penczek).

²¹ T. Tr. 699-700 (Alden).

financing companies to have a balance sheet with “at least \$25,000 on it,” and Case Financial could not meet that requirement.

On April 8, 2003, the Case Financial Board resolved to make Case Financial a holding company and its subsidiary, Case Capital, the operating company. Thereafter, Case Capital raised the funds needed to be a financing company, operate its business, and make loans to plaintiffs’ attorneys. Case Capital eventually charged interest at rates ranging from 70% to 180% per year on funds loaned to attorneys.

a. The Radisson Hotel bid

Case Capital and one of Case Financial’s²² clients, Frederico Sayre, a class action attorney, signed a credit agreement on January 20, 2003, which gave him a \$500,000 line of credit, similar to a revolving credit agreement.²³ This agreement specified a credit limit for each case, called a “line limit,” and an overall limit of \$500,000 for all of Sayre’s cases.²⁴ Before Sayre could obtain funds for a case, he was required to pay Case Capital a consulting fee equal to 10% of the line limit set by Case Capital for that case. If Sayre prevailed in a specific case, he also was required to pay a success fee to Case Capital equal to 65% of the total he borrowed for the case, less the consulting fee already

²² Where it is not clear from the evidence which specific entity within the Case Financial family of companies was involved, I refer to that entity simply as Case Financial.

²³ JX 16. According to Alden, Sayre was Old Case’s and Case Financial’s largest client since 1999. T. Tr. 610 (Alden).

²⁴ Dep. of Eric Alden (“Alden Dep.”) 73-74.

paid.²⁵ In September 2003, through a series of two transactions, Sayre borrowed \$250,000 under this credit agreement, purportedly to finance litigation captioned *Tanguay v. Lerman, et al.* (the “Tanguay Litigation”).²⁶ Case Financial’s underwriting committee vetted and approved this case.

Sayre, however, did not use the advancement proceeds to finance the Tanguay Litigation. Rather, Sayre reached an agreement with one of his clients, Sailor Kennedy, and Alden to use the money to pay for expenses in conjunction with making a bid for the Radisson Hotel in the Bahamas. Alden and Sayre incorporated E&F, Inc. (“E&F”) to hold their combined 25% equity interest in that venture in equal shares. Thus, Alden was to receive a 12.5% equity stake in the Radisson venture.²⁷

Alden later personally invested \$125,000 in E&F, which was used to finance additional expenses incurred by Sayre and Kennedy. Subsequently, Alden disclosed to the Case Financial Board that he had co-invested with a client of the firm in a foreign real estate project.²⁸ It is not clear, however, whether Alden also disclosed that the funds advanced to Sayre to finance the Tanguay Litigation were used to finance at least Sayre’s contribution to the same real estate venture.

²⁵ JX 16 at 5-6 ¶¶ 2.2(c), 3.2.

²⁶ T. Tr. 191-93 (Stephenson); JX 17-19.

²⁷ JX 21-22.

²⁸ JX 120-21.

Sayre and Alden's bid for the Radisson failed, and the Tanguay Litigation ultimately settled.²⁹ In April of 2004, after Alden had been terminated, Sayre asked Case Financial to reassign \$100,000 of the money he had borrowed for the Tanguay Litigation to another case, Barcnas v. Firestone ("the Barcnas Litigation").³⁰ Case Financial agreed to make the transfer. The Barcnas Litigation also settled, but Sayre refused to perform on his obligations to make the payments required as to either the Tanguay or Barcnas Litigation.³¹ Case Capital and Sayre later reached a wide-ranging settlement that resolved Case Capital's claims against Sayre.³²

b. The Aladdin Hotel bid

Sometime in early 2003, Kennedy approached Sayre about helping Kennedy buy the Aladdin Hotel in Las Vegas out of bankruptcy.³³ In connection with preparing his bid proposal, Kennedy asked Sayre for a loan of one million dollars for planning, architects, and related pre-purchase expenses.³⁴ In exchange for this loan, Sayre was to receive a 7% interest in the transaction. To finance the loan to Kennedy, Sayre met with Alden about obtaining a loan from Case Financial backed by a case in which Sayre represented

²⁹ PTO § III, ¶ 27; T. Tr. 28 (Penczek).

³⁰ T. Tr. 194 (Stephenson); JX 23.

³¹ T. Tr. 194-95 (Stephenson).

³² *Id.* at 437-38 (M. Schaffer); JX 119.

³³ Dep. of Federico Sayre ("Sayre Dep.") 62-65.

³⁴ *Id.*

a class of approximately 3,000 individuals, known as Chiang v. Veneman (“the Chiang Litigation”). Sayre eventually offered to make the loan to Kennedy, but mentioned that Alden had requested a 2.5% interest in the transaction. Although Kennedy’s bid materials listed Alden as owning a 2.5% interest, the interest apparently was earmarked for investors with whom Alden had arranged to finance the bid. Case Financial later entered into split funding agreements with those same investors.³⁵ In exchange for the potential 2.5% ownership interest, Sayre and Alden, on behalf of Case Capital, agreed that the monthly interest rate on Sayre’s loan from Case Capital would be reduced from 6.25% to 5.25% if the bid was successful.³⁶

Because the loan sought by Sayre was for substantially more than Sayre was authorized to borrow under the January credit agreement, Sayre and Case Capital entered into a separate credit agreement for the Chiang Litigation on May 22, 2003. Under this agreement, Sayre borrowed \$1,000,000, the stated purpose of which was for working capital for the Chiang Litigation.³⁷ Although Case Financial’s underwriting and loan committees approved the loan, Alden did not believe it was a prudent business decision to tie up so much of the company’s capital in a case that was risky and likely to take a

³⁵ A split funding agreement is a term used by Case Financial to denote an agreement under which individual investors provided the capital to finance a particular case, as opposed to having it financed out of the general funds of Case Financial. Because Case Financial originated these opportunities, it and the investor “split” the upside of the transaction.

³⁶ Dep. of Sailor Kennedy (“Kennedy Dep.”) 17.

³⁷ PTO § III, ¶¶ 19, 23; JX 10.

long time to litigate. To fund \$960,000 of its credit commitment, therefore, Case Capital entered into four split funding agreements. The agreements were arranged with the Canadian Commercial Workers Industry Pension Plan (“CCWIPP”) for \$750,000, Harvey Bibicoff for \$100,000, Alden’s mother, Aliza Kitay, for \$50,000, and Red Sands, an entity controlled by Cliff Evans, chairman of CCWIPP’s investment committee, for \$60,000.³⁸ While seeking this funding, Alden told these investors that Sayre had offered additional compensation in “the form of a ½% interest in a real estate investment.”³⁹ He did not disclose explicitly, however, either the nature of the real estate investment or that the money would be used to prepare a bid for the Aladdin Hotel. The record shows that Sayre spent a considerable amount of his own money on the Chiang Litigation, but there is no evidence that any of the money advanced by Case Capital was used directly to fund that case. Ultimately, Sayre lost the Chiang Litigation and was unsuccessful in his bid for the Aladdin Hotel.⁴⁰

c. Diversion of funds from David Shalom loan

On January 8, 2004, David Shalom, Alden’s uncle, loaned \$100,000 to Case Capital for the purpose of lending it to Sayre for the Barcenas Litigation. On January 12,

³⁸ PTO § III, ¶¶ 19-22; JX 9, 11, 106, 107. CCWIPP has been described as Case Financial’s “largest . . . and controlling shareholder, in a sense”; so, it is reasonable to assume that it was familiar with these types of funding arrangements. T. Tr. 358 (M. Schaffer).

³⁹ JX 4.

⁴⁰ JX 12; Kennedy Dep. 55; Sayre Dep. 142, 260; T. Tr. 20 (Penczek).

2004, Case Capital executed a promissory note to Shalom reflecting this arrangement and its receipt of the \$100,000.⁴¹

Roughly contemporaneously, Shalom also loaned a total of \$100,000 to Case Capital in two separate installments of \$25,000 and \$75,000 to fund cases under the supervision of Stuart Fest and the law firm of Hackard & Holt.⁴² Funding agreements for these two transactions were executed on December 5, 2003 and January 10, 2004, respectively.⁴³

Shortly after Shalom made these loans, Alden informed him that CCWIPP was trying to remove him as both CEO and a director of Case Financial. Shalom told Alden that he wanted his money back. Case Capital apparently had not yet sent the money for the Chiang Litigation to Sayre. On January 15, 2004, Alden signed a check on behalf of Case Capital that purported to refund \$100,000 to Shalom, but the check never was cashed. Indeed, it is not clear whether it ever was sent to Shalom.⁴⁴

On January 16, Alden evidently caused Case Capital to wire the \$100,000 advanced by Shalom for the Barcenas Litigation to Sayre. The wire transfer memo states that the funds were wired as a repayment to Shalom “per EA [Eric Alden].”⁴⁵ Alden

⁴¹ T. Tr. 31 (Penczek), 202 (Stephenson), 675 (Alden); JX 26.

⁴² T. Tr. 644-45 (Alden); JX 108.

⁴³ JX 108.

⁴⁴ T. Tr. 646 (Alden).

⁴⁵ *Id.* at. 32 (Penczek).

recorded the transfer on Case Capital's books as a repayment of Shalom's loan. Sayre received the money and recorded it on his books as a loan from C&R Resources, a company controlled by Alden's family and managed by him. The alleged "repayment" is not documented any further in Case Capital's books. Sometime after Alden had left, Shalom called Case Capital to inquire about his \$100,000.

5. Souring relations between Alden and Case Financial's shareholders

At some point, relations soured between Alden and CCWIPP. In February 2004, Alden was fired as CEO and resigned as a director of Case Financial. Between then and June 2004, Alden and Case Financial negotiated a mutual settlement of their differences. Initially, Alden negotiated with Bibicoff, who succeeded him as CEO of Case Financial.

Bibicoff and Alden reached an impasse concerning the value of Alden's shares in Case Financial. John Irvine, who was affiliated with CCWIPP, eventually took over the negotiations on Case Financial's behalf. On June 7, 2004, the company entered into an Agreement and Mutual Release (the "Release") with Alden. The Release provided, among other things, for the "release and discharge" by Case Financial of Alden from:

Any and all debts, claims, demands, liabilities, obligations, contracts, agreements, guarantees, causes of action, known and unknown, against any of them which any of them now owns, holds or has at any time heretofore owned or held by reason of any act, matter, cause or thing whatsoever done prior to the execution of this Agreement.⁴⁶

⁴⁶ JX 126, the Release, ¶ 4.

The Release did not, however, “release or discharge Alden from any act or conduct that constitutes a crime under California and/or federal law” (the “Crime Exception”).⁴⁷ Alden signed the Release on his own behalf, and Primes signed on behalf of Case Financial as President and Chief Investment Officer.

The Release was part of a broader settlement agreement between Alden and Case Financial that, among other things, dealt with the Case Financial stock and options Alden had received. Pursuant to the settlement, Alden agreed to sell 770,833 shares of stock to a third party or parties and the company acknowledged that Alden remained the owner of record of an additional 250,000 shares.⁴⁸

This general recitation of the facts provides a backdrop for the plethora of allegations and arguments Case Financial makes against Alden. Additional details regarding the specific transactions underlying Case Financial’s claims are included in the discussions of those aspects of Plaintiff’s case in the analysis *infra*.

I also note that the parties submitted extensive evidence as to damages with respect to each of the allegedly criminal actions by Alden. Because Case Financial failed to prove that any of its claims fall within the Crime Exception to the Release, it has not demonstrated any liability on Alden’s part. Accordingly, I need not address Case Financial’s damages proofs or argument.

⁴⁷ *Id.*

⁴⁸ Release.

C. Procedural History

On March 14, 2005, Case Financial authorized CCWIPP to proceed with a derivative suit on its behalf against Alden, Gregory, Lorne Pollock, and Bibicoff.⁴⁹ On March 16, 2005, this suit was filed against those individuals in their capacities as officers and directors of Case Financial. On October 5, 2005, Gregory settled and returned to Case Financial 750,000 shares of its common stock and \$100,000 worth of its promissory notes. Pollock also settled on the same date and returned 100,000 shares of Case Financial common stock, and paid the company \$15,160 in cash.⁵⁰

In a Memorandum Opinion entered on February 22, 2006, I denied a motion by Alden to dismiss Count I of the Complaint for breach of fiduciary duty and Count III for fraud.⁵¹

On September 1, 2006, Case Financial reached a settlement with Bibicoff in which he canceled promissory notes from Case Financial having a face amount of \$640,000 and for which the amount due, including accrued interest, totaled approximately \$875,000. In November 2007, CCWIPP withdrew as Plaintiff and Case Financial intervened to pursue directly its claims against Alden, the only remaining Defendant.

⁴⁹ Gregory served as Co-Chairman of Case Financial's Board until February 23, 2004 and as a director thereafter. Pollock was a member of Case Financial's Board and also served as its Secretary and Vice President Underwriting.

⁵⁰ JX 117 at Bates 1941; JX 154; T. Tr. 449 (M. Schaffer), 481 (Pollock).

⁵¹ *See Canadian Commercial Workers Indus. Pension Plan v. Alden*, 2006 WL 456786, at *1 (Del. Ch. Feb. 22, 2006).

On July 11, 2008, Case Financial moved for partial summary judgment on the issue of Alden’s liability for fourteen acts of alleged misconduct. On October 31, 2008, Alden responded and cross moved for partial summary judgment. On December 2, 2008, I denied both motions and ordered a bifurcated trial.⁵² The first phase of the trial, held in March 2009, focused on three threshold issues. I addressed those issues in an August 21, 2009 Memorandum Opinion, holding that: (1) Case Financial had standing to sue Alden for breach of fiduciary duty or fraud arising out of transactions entered into by its wholly-owned subsidiary, Case Capital; (2) the Crime Exception to the Release granted to Alden by Case Financial did not release Alden from civil liability for any conduct that constitutes a crime under California or federal law, provided that the elements of the crime include a requirement that Alden acted with criminal intent or scienter rather than simply recklessly, or some other factor beyond those necessary for a civil claim; and (3) the Expiration of Warranties clause in section 19.1 of the APA did not bar a claim for fraud brought after the closing of the APA based on misrepresentations made by Alden before the closing.⁵³

⁵² Summ. J. Hr’g Tr., Docket Item (“D.I.”) 154, 121.

⁵³ *Case Fin., Inc. v. Alden*, 2009 WL 2581873, at *13 (Del. Ch. Aug. 21, 2009) (“If the Release is to have any teeth, Case Financial should be barred from pursuing claims based on charges that Alden committed overly picayune or technical crimes. Therefore, I conclude the correct reading of the Release is that when the underlying conduct satisfied the elements of a crime and the crime has an analog in a civil claim, Case Financial may pursue the civil claim, provided that the elements of the crime include that Alden acted with criminal intent or scienter rather than simply recklessness, or some other comparable factor in addition to those necessary for a civil claim.”).

The parties tried the remaining issues in June 2010. After extensive post-trial briefing, I heard post-trial arguments in January 2011. This Post-Trial Opinion reflects my findings of fact and conclusions of law on the issues that remain outstanding.

D. Parties' Contentions

Case Financial has presented a number of claims against Alden. In each case, it argues that the asserted claim arose from Alden's criminal activity and thus falls within the Crime Exception to the Release he obtained and, therefore, may be pursued here. According to Case Financial, certain of Alden's actions constituted securities fraud, theft, embezzlement, and wire fraud, among other crimes.

Count I of the Complaint alleges that Alden breached his fiduciary duty to Case Financial in a number of ways. First, it claims that he improperly took company property in that he took all of the stock allotted to him under a draft employment agreement even though he never signed that agreement and did not work a full three years for Case Financial as that agreement contemplated. Second, it alleges that he improperly received a bonus to allow him to pay withholding taxes on the Case Financial stock he received. Third, Plaintiff accuses Alden of improperly diverting company funds that should have been used to finance cases. Allegedly, these funds were used instead to fund bids for certain real estate ventures with a client of the firm and another third party, Kennedy. Plaintiff further claims that Alden personally stood to gain an interest in these real estate ventures at Case Financial's expense. Finally, Count I alleges that Alden breached his fiduciary duty by usurping Case Financial's opportunity to fund the Barcenas Litigation and funding it through C&R Resources instead.

Count III asserts that Alden committed fraud. In particular, Case Financial alleges that Alden defrauded the company by causing it to purchase \$810,000 in unsecured, and \$25,000 in secured, promissory notes, all of which had been issued by Old Case to fund its business. Case Financial claims that Alden knew Old Case already had defaulted on these notes, but either concealed or failed to disclose this fact. Furthermore, Case Financial contends that Alden defrauded the company by preparing and providing to Asia Web materially misleading reports detailing certain case advances made by Case Financial LLC (“Case LLC”)⁵⁴ and the expected returns from them. It alleges that Alden knew of material impairments to a series of these advances, yet failed to incorporate that information in the report and updates he provided to Case Financial. In total, including prejudgment interest, Case Financial seeks damages totaling \$5,947,104.

By way of defense, Alden denies any wrongdoing. He contends that he did not breach his fiduciary duty or commit any fraud. In addition, Alden maintains that none of his actions were criminal.

As to Case Financial’s fiduciary duty claims, Alden first asserts that the stock and bonus he received were authorized by the company’s Board of Directors. Second, he argues that under Case Financial’s Litigation Expense (“LEG”) Program the company made case advances to reimburse attorneys for funds already expended on the identified

⁵⁴ Case LLC is a California corporation formed by Bibicoff and Ruben Kitay in 2000 to invest in cases they selected. Old Case managed the Case LLC portfolio, paid Bibicoff and Kitay 18% interest on their investments, and retained the rest of any profits. T. Tr. 562 (Alden).

case, and did not require the attorneys to use the newly advanced funds on case expenditures. Therefore, according to Alden, so long as Sayre had spent at least the amount of the advance on the cases which backed the loans, he was free to use the funds advanced for other purposes, including to finance hotel bids. Furthermore, Alden maintains that Case Financial suffered no damages on these transactions, even if his actions were improper. And third, Alden denies breaching any fiduciary duty by wiring the funds Shalom loaned to Case Financial to Sayre on behalf of another company affiliated with Alden in lieu of repaying Shalom directly, because Shalom did not want his money invested through Case Financial.

Finally, Alden disputes Case Financial's allegations that he fraudulently misrepresented the value of Old Case's portfolio of case advances. He argues that representatives of Asia Web were provided with full financial disclosures from Old Case before the closing and, therefore, Case Financial was on notice of the issues about which it now complains. Similarly, Alden denies any liability for alleged mistakes in the financial statements regarding the Case LLC case advance portfolio because he was not responsible for preparing them and had no obligation to verify their accuracy before submitting them to Case Financial.

II. ANALYSIS

In effect, through Counts I and III of the Complaint, Plaintiff asserts seven sets of claims against Alden. Pursuant to the Release between Alden and Case Financial and in accordance with my August 21, 2009 ruling, for each set of its claims, Case Financial

first must show by a preponderance of the evidence that Alden’s conduct was criminal and, therefore, not barred by the Release. Moreover, to establish a claim for criminal conduct sufficient to fall within the Crime Exception to the Release, Case Financial must prove that “Alden acted with criminal intent or scienter rather than simply recklessness, or some other comparable factor in addition to those necessary for a civil claim.”⁵⁵

A. Case Financial’s Purchase of \$835,000 of Promissory Notes

1. Relevant facts

In the course of funding its business, Old Case issued a number of promissory notes to its investors. Because Old Case was the obligor on the notes, the investors had the burden of collecting from Old Case on them.⁵⁶ In negotiating the APA, Asia Web sought to convert many of these notes into Asia Web stock to improve Case Financial’s cash flow.⁵⁷ Under the APA, Asia Web offered to use its stock to purchase up to \$2,500,000 in Old Case promissory notes.⁵⁸ In exchange for each dollar of a tendered note, the holder would receive two shares of Asia Web stock, to which the APA attached

⁵⁵ *Case Fin., Inc. v. Alden*, 2009 WL 2581873, at *12 (construing the Release, as limited by the Crime Exception, as still barring Case Financial “from pursuing claims based on charges that Alden committed overly picayune or technical crimes”). I further note that Case Financial has not alleged the existence of any “comparable factor” other than scienter that would be necessary to establish any of the myriad crimes it has asserted. Therefore, my analysis as to whether Alden’s actions fall under the Crime Exception focuses on whether he acted with fraudulent intent or scienter.

⁵⁶ T. Tr. 176 (Stephenson).

⁵⁷ T. Tr. 171-72 (Stephenson).

⁵⁸ JX 78 ¶ 6.

a value of \$0.50 per share. The APA also made it a condition for closing that the holders of at least \$825,000 in Old Case notes had to agree to exchange them for Asia Web stock.⁵⁹

On December 12, 2001, before the negotiations with Asia Web began, Old Case failed to meet the demands of certain noteholders for repayment, putting the notes in default. Case Financial avers that Alden, as CEO of Old Case when that occurred, must have known the notes were in default. It further asserts that Alden falsely represented that the notes were in good standing.

After carefully reviewing the record, including the inconclusive testimony of Asia Web's representatives and the recollection of Alden, I find that Case Financial has not proven that Alden, in fact, made such a representation. For example, when questioned about whether he had asked anyone if the notes were in good standing, Lawrence Schaffer replied, "I don't recall who I asked or who I discussed it with."⁶⁰ When asked if anyone at Asia Web inquired as to whether the notes were in good standing, he replied "No, not that I can recall. Not that I know."⁶¹ Likewise, another Asia Web director, Stephenson, acknowledged that he did not do any due diligence to determine whether the notes were in good standing.⁶² In fact, Alden claims that he was present when the default

⁵⁹ *Id.*, Ex. A at 3.

⁶⁰ L. Schaffer Dep. 204.

⁶¹ *Id.* at 205.

⁶² T. Tr. 238 (Stephenson).

on the notes was discussed during negotiations between Gregory of Old Case and Michael Schaffer of Asia Web.

Old Case also provided to Asia Web its audited 1998-2000 and unaudited 2001 financial statements. These documents provided enough information to put Asia Web on notice that the notes were in default.⁶³ For example, Note 4 to the financial statements for the years ended December 31 of 1999 and 2000 and the initial period of November 19, 1998 to December 31, 1998 lists the maturity dates of the different tranches of Old Case's notes, all of which were before 2002.⁶⁴ The record, however, contains no evidence that representatives of Asia Web performed any due diligence regarding the promissory notes before the APA was executed on March 12, 2002. Rather, Case Financial seems to rely on its decision to hire Alden, the CEO of the seller, Old Case, to be the CEO of the buyer, Asia Web, before the APA even closed as satisfying any need for due diligence. I consider this position untenable in view of Alden's dual roles as an executive of both the buying and selling entities. Between the time the APA was executed and its closing, Alden likely would have possessed at least some confidential information of Old Case that he could not have disclosed or used for the benefit of Asia Web without Old Case's consent. Nevertheless, Case Financial, which bears the burden of proof here, appears to be trying to use the hopelessly conflicted position of Alden, which Case Financial created by hiring him even before the APA closed, to its own

⁶³ JX 78, Ex. I-J.

⁶⁴ *Id.*, Ex. I.

advantage. That is, Plaintiff essentially seeks to saddle Alden with a duty to disclose everything he knew as CEO for Old Case to Case Financial. For the reasons stated, this argument is unconvincing. Therefore, the fact that the notes were in default was not material based on the total mix of information available to Asia Web independently of Alden.

On May 1, 2002, Alden, as CEO of Asia Web, agreed on its behalf to purchase \$810,000 of unsecured Old Case notes and \$25,000 of secured Old Case notes.⁶⁵ In exchange for the notes, Asia Web issued 1,670,000 shares of its stock to the tendering noteholders. The parties dispute the value of this stock. According to Case Financial, it had a value of \$835,000 based on the \$0.50 per share value assigned to the stock in the APA. Alden argues for a much lower value, \$0.17 per share, based on the price at which the stock traded at some point during the negotiation of the APA.

When the APA closed on May 24, 2002, Asia Web's stock was trading at \$0.45 per share, close to the value assigned in the APA. Therefore, Alden, as the party urging the Court to apply something other than the plain language of the APA, bears the burden of proof on this issue. Alden has shown only that Asia Web's stock traded at different prices from that stated in the APA during the period before the closing. He has not shown, for example, that any of the parties to the APA valued Asia Web's stock at anything other than \$0.50 per share for purposes of the exchange made for the Old Case notes. To use another value would render that provision of the APA essentially

⁶⁵ T. Tr. 42 (Penczek), 175-76 (Stephenson); JX 45-53.

meaningless. Therefore, I find that the value of the Asia Web stock exchanged for the notes was \$835,000.

2. Did Alden commit a crime in connection with the purchase of the notes?

Case Financial contends that Alden violated federal and California securities laws and committed theft in connection with the purchase of the Old Case notes. Specifically, Plaintiff alleges that he violated § 78j(b) of the Securities Exchange Act and 17 C.F.R. § 240.10b-5. Section 78j(b) makes it illegal to use “any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [Securities and Exchange] Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.”⁶⁶ Moreover, Rule 10b-5 makes it illegal:

(a) To employ any device, scheme or artifice to defraud, (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.⁶⁷

Under the federal securities laws, scienter is a required element to prove criminal liability; thus, there must be evidence of intent to deceive, manipulate, or defraud, or at least knowing misconduct.⁶⁸

⁶⁶ 15 U.S.C. § 78j(b).

⁶⁷ 17 C.F.R. § 240.10b-5.

⁶⁸ *Aaron v. S.E.C.*, 446 U.S. 680, 680-81, 686 (1980); *S.E.C. v. First Jersey Secs., Inc.*, 101 F.3d 1450, 1467 (2d Cir. 1996).

Case Financial does not clearly delineate how Alden violated the statute or Rule 10b-5. Instead, it claims that he either affirmatively misrepresented a material fact by attesting that the notes purchased were in good standing or made a material omission by failing to disclose that the notes were in default.⁶⁹ Case Financial has failed to meet its evidentiary burden as to either of these claims. Based on the equivocal and vague testimony presented by representatives of Asia Web, I am not persuaded that Alden affirmatively represented to Asia Web that the notes were in good standing. In addition, the financial disclosures provided to Asia Web's representatives put them on at least constructive notice that the notes were in default. Had Asia Web made even a cursory review of the available documents, it easily could have discovered the defaulted status of the notes at issue, regardless of any misrepresentations or omissions made by Alden. Thus, Case Financial has not shown that Alden either made a material omission or concealed the fact that the notes were in default from Asia Web.

Case Financial also alleges that Alden violated CAL. CORPS. CODE § 25401, which provides that:

It is unlawful for any person to offer or sell a security in this state or buy or offer to buy a security in this state by means of any written or oral communication which includes an untrue statement of a material fact or omits to make a material fact necessary in order to make the statements made, in the light

⁶⁹ As previously noted, based on my construction of the Crime Exception to the Release, all of Case Financial's allegations of criminality, whether under state or federal law, require proof of scienter or its equivalent. I therefore focus my analysis first on that element.

of the circumstances under which they were made, not misleading.

The California Supreme Court has further stated “that knowledge of the falsity or misleading nature of a statement or of the materiality of an omission, or criminal negligence in failing to investigate and discover them, are elements of the criminal defense described in section 25401.”⁷⁰ For similar reasons to those discussed *supra* regarding the alleged federal crimes, I conclude that Case Financial has not shown that Alden either affirmatively misrepresented that the notes were in good standing or intentionally omitted or concealed their defaulted status. Furthermore, based on the information available to Asia Web when the APA closed, I find that Alden’s failure to advise Asia Web that the notes were in default was not material.

Lastly, Case Financial alleges that Alden committed theft as proscribed by CAL. PENAL CODE § 484, which makes it illegal to “fraudulently appropriate property which has been entrusted to him or her, or who shall knowingly and designedly, by any false or fraudulent representation or pretense, defraud any other person of money, labor or real or personal property” Proof of theft under California law also “requires the intent to permanently deprive the owner of possession of the property.”⁷¹ Case Financial alleges that Alden violated this statute because he intentionally concealed the defaulted status of the Old Case promissory notes, and thereby permanently deprived Case Financial of its

⁷⁰ *People v. Simon*, 9 Cal. 4th 493, 522 (Cal. 1995).

⁷¹ *People v. Avery*, 27 Cal. 4th 49, 54 (Cal. 2002).

stock. Because such intentional concealment is an essential premise to this argument, my previous finding that Case Financial failed to prove that Alden concealed a material fact defeats this claim, as well. In addition, Case Financial also has not produced any evidence that Alden intended to permanently deprive Asia Web of its property. The evidence suggests that Alden did not stand to benefit directly from the sale of the notes and that his incentives were aligned with Case Financial's because he expected to continue in a managerial role with the company. These circumstances undermine Plaintiff's argument that Alden intended to defraud it. Therefore, both because I am not convinced that Alden concealed that the notes were in default and because Case Financial has not proven that he had any intent to defraud Asia Web, I conclude that Plaintiff has not shown that Alden committed theft in connection with the purchase of the notes.

For all of these reasons, I will dismiss Case Financial's claims against Alden for breach of his fiduciary duty to it in connection with the purchase of the Old Case notes.

B. Asia Web's Purchase of the Case LLC Case Advance Portfolio

1. Relevant facts

Under the APA, one of the assets purchased by Asia Web was a portfolio of case advances and loans held by Case LLC. As part of a diligence report dated March 5, 2002, Old Case provided Michael Schaffer and the other directors of Asia Web with a set of documents entitled, "Case Advances with Accrued Fees Reports" ("Case Advances Reports") for Old Case and Case LLC.⁷² Each of these Case Advances Reports listed: (a)

⁷² T. Tr. 145, 147 (Stephenson), 488 (Pollock), 579 (Alden); JX 78, Ex. O.

the date of the advance; (b) the client; (c) the amount advanced; (d) the payback amount; (e) the status of the underlying case; and (f) the expected time it would take for the advance to be paid off.

When the APA closed, Case LLC's portfolio consisted of loans with a total principal of about \$811,000, on which it estimated a payback of almost \$1.7 million.⁷³ After accounting for a 15% estimated reserve for bad debt and a 15% management fee for Asia Web, the Case Advances Report listed the net value of the portfolio as \$1.22 million.⁷⁴ Primes of Old Case updated the Case Advances Reports monthly and the updates were provided to Stephenson and Lawrence Schaffer until closing.⁷⁵

After Alden was terminated in February 2004, Stephenson reviewed the Case Advances Reports and updates and found several impairments to the underlying advances. These impairments existed as of May 24, 2002, the end of the diligence period, but were not accounted for in the Reports or otherwise disclosed to Case Financial.⁷⁶ For example, in one instance, Case LLC had loaned \$100,000 for a case in which it expected to recover approximately \$316,000. It later emerged that either the plaintiff or his attorneys in that case had materially misrepresented to Case LLC the strength of their legal position. This led to an agreement between Case LLC and the

⁷³ JX 78, Ex. P.

⁷⁴ *Id.*

⁷⁵ T. Tr. 594-96, 682-83 (Alden).

⁷⁶ *Id.* at 148-50 (Stephenson).

plaintiff's creditors in which Case LLC agreed to subordinate its position and recovery.⁷⁷ Yet, the relevant Case Advances Report did not reflect this impairment.⁷⁸ In another example, Case reportedly advanced \$87,250 on a case and expected a payback of \$292,562. But, the Case Advances Report failed to indicate that the case was dismissed with prejudice in January of 2002.⁷⁹ In addition to these two, Case Financial has identified nine other cases that allegedly became impaired at some point before closing, but were not accurately disclosed by Alden or representatives of Case LLC.⁸⁰ In total, Case Financial avers that \$850,548 of the approximately \$1.7 million in the expected recovery from the Case LLC portfolio was impaired.⁸¹

On May 21, 2002, Asia Web agreed to purchase Case LLC from Bibicoff and Kitay, including its portfolio of case advances. Alden was not an employee, director, or officer of Case LLC and held no interest in it. Alden negotiated the agreement for Case Financial and, in exchange for selling their interests in Case LLC, Bibicoff and Kitay, respectively, received from Asia Web \$600,000 and \$100,000 in unsecured promissory

⁷⁷ *Id.* at 154-56 (Stephenson); JX 41, 86.

⁷⁸ JX 39.

⁷⁹ T. Tr. 156-57(Stephenson); JX 39, 42, 84.

⁸⁰ JX 39, 81-83, 85, 87-88, 90-92.

⁸¹ Pl.'s Post Trial Br. ("PPTB") 13.

notes, bearing interest at 8%, as well as 120,000 shares and 30,000 shares of Asia Web stock.⁸²

2. Did Alden commit any crime in connection with the sale of the Case LLC case advance portfolio?

As to the Case LLC transaction, Case Financial again alleges that Alden violated federal and California state securities laws and committed theft. It claims that Alden intentionally misrepresented the value of the Case LLC case advance portfolio by failing to disclose the existence of several impairments. Case Financial also accuses Alden of theft based on the Asia Web stock that was given to Bibicoff and Kitay as part of the transaction. In response, Alden denies making any misrepresentations or having any role in the preparation of the challenged reports; instead, he claims he relied on the work of his subordinates, such as Primes. Moreover, Alden asserts that Michael Schaffer either knew of the impairments to the Case LLC portfolio or was negligent in not conducting reasonable due diligence.

As discussed *supra* Part II.A.2, federal securities law, under 15 U.S.C. § 78j and 17 C.F.R. § 240.10b-5, makes it illegal:

(a) To employ any device, scheme or artifice to defraud, (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

⁸² T. Tr. 179, 181-84 (Stephenson), 332 (M. Schaffer); JX 78, Ex. GG.

Moreover, to prove such a crime, a claimant must establish scienter, meaning an intent to deceive, manipulate, or defraud—or at least knowing misconduct.⁸³

Case Financial has failed to prove either that Alden had any significant role in preparing the documents or updates provided to Asia Web or that he intended to defraud it in connection with its purchase of the Case LLC portfolio. All Case Financial has proven is that Old Case provided it with summaries of the cases in which Case LLC had a funded interest and what it expected to earn on those cases. Case Financial has not proven that Alden participated in the preparation of those documents. Rather, the record indicates that Primes was principally responsible for preparing them. In addition, even if Alden was involved in preparing the summaries, Case Financial has failed to prove that he made any representations as to the accuracy of the data. Indeed, the documents clearly were labeled as an *estimate* of what Old Case thought the cases might produce. In such circumstances, it is reasonable to expect that Case Financial would have conducted its own analysis of the Case LLC portfolio, which it apparently did not do until after the APA closed.

Case Financial also has not shown by a preponderance of the evidence that Alden attempted to conceal the case impairments. If, in advance of the closing, representatives of Asia Web had reviewed the disclosure list (as Stephenson later did), they, too, likely would have discovered the impaired status of a number of the cases. Therefore, Case Financial has shown, at most, that Alden was negligent or grossly negligent in failing to

⁸³ See *supra* note 69.

track more diligently and report impairments to the Case LLC portfolio. It has not proven that Alden willfully defrauded it in connection with the purchase of Case LLC.

Plaintiffs also have not proven that Alden had any intent to defraud Case Financial. Conceptually, Alden had no apparent motive to defraud the company as to Case LLC. By the time Asia Web decided to purchase the Case LLC portfolio, Alden was already CEO of Asia Web. Because he had no financial stake in the Case LLC case advance portfolio, Alden presumably stood to benefit most if Case Financial performed strongly, the odds of which would have increased if the Case LLC portfolio performed well. Nor has Case Financial adduced any evidence that Alden had any motivation other than to serve his new employer, Case Financial, faithfully. Therefore, Plaintiff has failed to prove that Alden committed federal securities fraud in connection with Case Financial's purchase of the Case LLC portfolio.

As previously discussed, California's securities laws include a similar requirement that a criminal violation be willful—meaning a defendant must know of the misleading nature of his representation or omission. Thus, for the same reasons I concluded that Case Financial failed to show that Alden made any misrepresentations or misleading omissions or otherwise intended to defraud it, I also reject the claim that he violated state securities law.

Similarly, Case Financial has not shown that Alden committed theft. To succeed on such a claim under CALIFORNIA PENAL CODE § 484, Plaintiff must prove that Alden intended to either “fraudulently appropriate property which has been entrusted to him” or “knowingly and designedly, by any false or fraudulent representation or pretense, defraud

any other person of money, labor or real or personal property” As before, Case Financial’s failure to prove that Alden made any fraudulent representation or otherwise deceived the company defeats this aspect of its claim. The fact that Alden personally did not receive any consideration for the portfolio further undercuts the argument that he intended to defraud Case Financial.

For all of these reasons, Case Financial has failed to prove that Alden committed a federal or state crime with respect to its purchase of Case LLC’s case advance portfolio. Therefore, even if Alden breached his fiduciary duty to Case Financial in connection with that purchase, any claim for such a breach is barred by the Release.

C. Alden’s Receipt of Stock and Bonus

1. Relevant facts underlying the transaction

The Asia Web Board of Directors elected Alden CEO and Board Chairman at a meeting on March 15, 2002, with the understanding that he would become CEO of Case Financial upon closing of the APA and execution of an employment agreement.⁸⁴ The Asia Web Board minutes also indicate that they approved the terms of an employment agreement for Alden.⁸⁵ An unsigned copy of a sixteen-page document entitled “Employment Agreement” and dated December 13, 2002 (the “Employment Agreement”), contains detailed terms regarding Alden’s duties, compensation, and benefits as CEO and Chairman. Specifically, the compensation portion of the document

⁸⁴ JX 31.

⁸⁵ *Id.* (“[t]he terms of an employment agreement have been agreed upon between Eric Alden and the Corporation.”).

states: “Upon the execution of this Employment Agreement, and subject to the following conditions set forth herein below, Company shall grant and issue to Executive One Million Two Hundred Twenty Five Thousand (1,225,000) shares of common stock of the Company”⁸⁶ This section then addresses how the grant of stock would vest over time. Specifically, the Employment Agreement states that 868,746 shares were to vest immediately, and the remaining 356,254 shares were to vest over the following twenty-seven months.⁸⁷ Although Alden never signed the Employment Agreement, he nonetheless became interim CEO of Asia Web at the March 15, 2002 meeting and continued as the CEO of Case Financial from the time of the closing in May 2002 until February 2004.⁸⁸

On June 7, 2002, after the closing, the Case Financial Board of Directors approved and ratified a compensation package for Alden as outlined in a one-page document entitled, “Eric Alden Compensation Package Memorandum of [U]nderstanding” (the “MOU”).⁸⁹ In reference to the Case Financial stock Alden would be entitled to as CEO, the MOU states in relevant part:

Stock and option compensation:

- a. Signing Bonus: 700,000 shares
- b. Three year package 525,000 shares and 525,000 options total allocated as follows:

⁸⁶ JX 123, the Employment Agreement, § 3(j).

⁸⁷ *Id.*

⁸⁸ *See* PTO § III, ¶ 4.

⁸⁹ JX 32.

- i. 175,000 shares yearly and in addition
- ii. 175,000 yearly options (price currently open)⁹⁰

The MOU is in the nature of a term sheet and is generally consistent with the more detailed description of Alden’s compensation plan contained in the Employment Agreement.⁹¹ On December 12, 2002, the Compensation Committee—of which Alden was a member—resolved to issue bonuses to cover the federal and state withholding taxes that would be due on the stock granted to management, and resolved to “issue the share grants as soon as practicable”⁹² Alden abstained from this vote.

On December 31, 2002, Alden directed Computershare, the company responsible for holding and issuing Case Financial stock, to issue him 1,225,000 shares, the entire amount he was entitled to receive over the duration of the Employment Agreement.⁹³ In doing so, Alden certified to Computershare that “1. The issuance [was] pursuant to Board approval and [was] for services rendered to the company. 2. The said common stock [had] been properly allotted, that the Company [had] received the full consideration therefore, and that the shares [were] therefore fully paid and non-assessable. . . .”⁹⁴

⁹⁰ *Id.*

⁹¹ In addition to § 3(j) quoted above, § 3(c) of the Employment Agreement discusses Alden’s stock options. In pertinent part, it states: “Executive shall also be granted options to purchase 175,000 shares of common stock for each of the first three years of this Employment Agreement” This comports with the options referred to in the MOU.

⁹² JX 36; PTO § III, ¶ 32.

⁹³ JX 33.

⁹⁴ *Id.*

Because the stock was unregistered and subject to Rule 144, however it was restricted.⁹⁵ In addition to the stock grant, on or about December 31, 2002, Case Financial also paid Alden \$108,803 to cover his withholding taxes on the 1,225,000 shares issued.⁹⁶

Although Alden never signed the Employment Agreement, both parties proceeded as if such an agreement had been reached, and Case Financial has not shown that Alden failed to perform in substantial conformity with that agreement. After the stock issuance, Alden continued in his role as CEO and Chairman of the Board of Directors until Case Financial terminated him on February 23, 2004.⁹⁷ As of then, Alden had not sold any of the shares issued to him.⁹⁸

By the time of his termination, certain disputes had arisen between Alden and Case Financial. One such dispute related to Alden's ownership of Case Financial stock. As described *supra* Part I.B.5, Case Financial and Alden later entered into the Release on June 7, 2004, by which they released any claims that either party might have against the other. The Release indicates that, at or around the time of its entry, Alden was the record

⁹⁵ In his correspondence with Computershare, Alden directed that a restrictive legend be placed on the shares noting that they were unregistered and could not be sold in the absence of registration. The purpose of this restriction was to comply with SEC Rule 144. Pursuant to this rule, Alden would have had to hold the shares for at least one year, and during the second year his ability to sell shares would have been subject to a volume restriction. 17 C.F.R. § 230.144 (2009). *See also* T. Tr. 652-53 (Alden).

⁹⁶ PTO § III, ¶ 33.

⁹⁷ PTO § III, ¶ 5.

⁹⁸ T. Tr. 652 (Alden).

holder of 1,020,833 of the 1,225,000 shares that had been issued to him.⁹⁹ As part of the Release, Alden turned in his stock certificate for 1,225,000 shares, and the parties agreed to handle those shares as follows: (1) Alden would sell 770,833 shares concurrently with the execution of the Release to a third party or parties; (2) 250,000 would be reissued to Alden subject to a restrictive legend; and (3) the remaining 204,167 would be cancelled.¹⁰⁰ The parties also agreed to a “lockout period” during which Alden could not

⁹⁹ Release at 1 & ¶ 6.

¹⁰⁰ *Id.*; see also JX 131. Exhibit 131 is a letter from Case Financial’s attorney to Alden to which Case Financial objected on grounds of relevance and hearsay. The letter is relevant, however, to understanding the nature and extent of Alden’s stock ownership in Case Financial; thus, it is admissible under DRE 402. As to Case Financial’s hearsay objection, I note that I have relied on JX 131 for a limited purpose, namely, to show that in connection with the parties’ agreement on the Release, they addressed all of the 1,225,000 shares Alden had received in or around December 2002. The amount paid for the shares or the identities of the purchasers, for example, are immaterial. More importantly, I conclude that the letter comes within the residual exception of DRE 807, and, therefore, should not be excluded as hearsay. In particular, the letter has equivalent circumstantial guarantees of trustworthiness to those in the exceptions enumerated in Rules 803 and 804. In that regard, I note that JX 131 is offered as evidence of a material fact, namely, that the parties in connection with the Release addressed the certificate for 1,225,000 shares of Case Financial stock Alden had obtained and agreed to cancel over 200,000 of those shares. In addition, the document is one of almost 200 exhibits identified by the parties in the Pretrial Order and submitted to the Court. In combination with the documents on which the parties expressly relied in their post-trial submissions, JX 131 assists the Court in better understanding the background of the Release. Moreover, the following factors corroborate its trustworthiness: (1) that it purports to be from one of Case Financial’s counsel; (2) that it closely conforms to information specified in the Release and calls for exactly the same stock legend as the Release; and (3) that it appears to bear the signature of Alden as agreeing to and accepting the terms of the letter in the same general timeframe that he signed the Release. For these reasons, I find that the general purposes of the rules of evidence and the interests of justice will best be served by admitting JX 131 into evidence. I also find that

sell the shares he retained until either Case consummated a financing transaction resulting in net proceeds of \$2 million or 120 days passed. After the lockout period, Alden could sell a maximum of 37,500 shares in each of two successive 90-day periods. Thereafter, he could sell the shares as he wished.¹⁰¹

2. The parties' contentions

As discussed *supra*, the Release is subject to a Crime Exception. Case Financial contends that Alden's actions fall within that Exception because the certification he made to Computershare when directing the stock issuance was false and criminal. According to Plaintiff, Alden was not entitled to (1) the 700,000 shares that were allocated as a signing bonus because he never signed the Employment Agreement and (2) at least a portion of the 525,000 additional shares because he did not work for the company for three years. Case Financial further contends that because issuance of the shares was wrongful and criminal, the bonus Alden received to pay the taxes on those shares was wrongful and criminal as well. In particular, the company claims that by improperly taking stock and a cash bonus, Alden not only breached his fiduciary duties, but also violated California criminal law.¹⁰² Alden counters that the June 7, 2004 Release ratified

Alden's inclusion of JX 131 in the list of exhibits referenced in the Pretrial Order satisfied the notice requirements of Rule 807.

¹⁰¹ Release.

¹⁰² PPTB 20.

the stock issuance, and thus, Plaintiff cannot prove that he intended to defraud Case Financial or misappropriate the stock or bonus.¹⁰³

As discussed *supra*, my August 21, 2009 Opinion held that to take advantage of the Crime Exception, Case Financial must prove Alden acted with “criminal intent or scienter.”¹⁰⁴ Therefore, to decide whether the Crime Exception applies, I must determine whether Alden acted with the requisite intent to render his actions criminal. If not, Plaintiff’s claim against Alden based on his receipt of stock and a cash bonus is subject to the Release and must be dismissed.

3. Did Alden’s actions constitute a crime?

a. Applicable legal principles

Case Financial asserts that Alden violated three criminal statutes when he directed Computershare to issue the disputed shares: theft, embezzlement, and misappropriation by a fiduciary. A person commits theft when he “feloniously steal[s], take[s], carr[ies], lead[s], or drive[s] away the personal property of another, or . . . fraudulently appropriate[s] property which has been entrusted to him, or . . . knowingly and designedly, by any false or fraudulent representation[s] or pretense[s], defraud[s] any

¹⁰³ DPFLL ¶ 99.

¹⁰⁴ *Case Fin., Inc. v. Alden*, 2009 WL 2581873, at *28 (Del. Ch. Aug. 21, 2009).

other person of money, labor, or real or personal property”¹⁰⁵ And, theft requires “intent to defraud the owner of the property.”¹⁰⁶

A person is guilty of embezzlement when he “fraudulently appropriates to his own use, or secretes with a fraudulent intent to appropriate to his own use, any property of another which has come into his control or care by virtue of his employment”¹⁰⁷ “[F]raudulent intent is an essential element of the offense of embezzlement.”¹⁰⁸ A fiduciary is guilty of misappropriation when, “having in his control property for the use of any other person . . . [he] fraudulently appropriates it to any use or purpose not in the due and lawful execution of his trust, or secretes it with a fraudulent intent to appropriate it to such use or purpose”¹⁰⁹ Misappropriation by a fiduciary is a form of embezzlement, and like embezzlement, it requires specific intent to unlawfully deprive another of property.¹¹⁰

¹⁰⁵ CAL. PENAL CODE ANN. § 484 (2010).

¹⁰⁶ *People v. Sanders*, 79 Cal. Rptr. 2d 806, 811 (Cal. Ct. App. 2d Dist. 1998).

¹⁰⁷ CAL. PENAL CODE ANN. § 508 (2010).

¹⁰⁸ *People v. Talbott*, 28 P.2d 1057, 1061 (Cal. 1934). *See also People v. Hedrick*, 164 Cal. Rptr. 169, 172 (Cal. Ct. App. 1980) (intent is a necessary element of embezzlement); *People v. Swenson*, 274 P.2d 229, 232 (Cal. Dist. Ct. App. 1954) (to be guilty of embezzlement one must have intended to deprive the owner of his property unlawfully).

¹⁰⁹ CAL. PENAL CODE ANN. § 506 (2010).

¹¹⁰ *People v. Scholder*, 300 P.2d 284, 385 (Cal. App. Dep’t Super. Ct. 1956).

To be guilty of theft or embezzlement, therefore, Alden must have appreciated that he was not entitled to the stock or bonus he received, yet took them anyway. Relevant case law has held “that where an individual honestly believes that he is authorized to appropriate and use property which he is accused of embezzling, the fraudulent intent which is a necessary element of that crime is absent.”¹¹¹ California courts also recognized that lack of concealment can be used as evidence of a good faith belief in authority, and a lack of fraudulent intent.¹¹²

As Plaintiff, Case Financial has the burden to prove that Alden acted with specific intent to steal. It is undisputed that neither Alden nor Case Financial executed the Employment Agreement. Nevertheless, it appears that the parties treated execution as a mere formality and proceeded as if no further action was necessary after Case Financial’s Board approved Alden’s employment as CEO and he assumed his executive position at the company. Alden remained CEO of Case Financial for almost two years without any apparent objection from its Board or investors. Because both parties acted in accordance with the Employment Agreement, I find that Alden reasonably could have believed it was in effect and that he, therefore, was entitled to be compensated in accordance with its terms.

Furthermore, assuming the Employment Agreement was in effect, determining whether Alden acted with criminal intent in taking the disputed stock and bonus hinges

¹¹¹ *People v. Stewart*, 544 P.2d 1317, 1319 (Cal. 1976).

¹¹² *Id.* at 1321.

on his understanding of the compensation he was entitled to under that agreement. The burden is on Case Financial to prove that Alden understood causing the shares to be issued as he did violated the parties' agreement and that he purposely acted contrary to that agreement.

b. The stock issuance

The one-page MOU attached to the June 7, 2002 Board minutes lacks certain details, but appears to split the 1,225,000 shares into a 700,000 share "Signing Bonus," and a "Three year package" of 525,000 shares to be "allocated . . . 175,000 shares yearly." Read literally, the term "Signing Bonus" could mean that Alden was to be issued 700,000 shares only upon signing the Employment Agreement. Alternatively, the "Signing Bonus" simply could be a shorthand reference to Alden's "signing on" or starting work for Case Financial. Similarly, the MOU does not specify when the shares were to be issued or when they were to vest, if not upon issuance. The provision granting Alden 525,000 shares reasonably could mean either that all of the shares were to be issued immediately and vest yearly, or, alternatively, that three tranches of 175,000 shares each were to be issued annually over three years.

The unexecuted Employment Agreement, dated December 13, 2002, generally comports with the terms of the MOU, but provides more detail. While the probative value of the Employment Agreement may be limited because it was never signed, it still is instructive in determining whether Alden had the requisite criminal intent.

As of December 31, 2002, when Alden directed Computershare to issue him all 1,225,000 shares, both he and Case Financial undoubtedly knew he had not signed the

Employment Agreement, and had only worked for the company for nine months. There is no proof, however, that Alden knew these two facts made him ineligible to receive all 1,225,000 shares when he did. Stated differently, Plaintiff has not shown that Alden understood he was acting in violation of the parties' agreement when he caused the shares to be issued.

Both the MOU and the Employment Agreement contemplate a grant to Alden of 1,225,000 shares of stock. Under the MOU, 700,000 shares were labeled a "Signing Bonus" while the remaining 525,000 shares were to be earned in blocks of "175,000 shares yearly." Apparently drafted several months later, the Employment Agreement provided that 868,746 shares would vest immediately "upon execution," while the remaining 356,254 shares would "vest ratably" over the twenty-seven month period beginning December 15, 2002. While Alden did not "sign" or "execute" any agreement, the relevant documents suggest he would have earned a majority of the 1,225,000 shares upon commencing employment at Asia Web or Case Financial. Therefore, I conclude that after serving as CEO for approximately nine months with no objection from anyone at Case Financial, it was not unreasonable for Alden to believe that he was entitled to the stock grant he received in December of 2002. Indeed, both parties clearly envisioned such a grant, regardless of whether they adhered to all the formalities.

By the time of his termination in February 2004, Alden also would have earned a substantial majority of any shares subject to vesting requirements or contingent on his continued employment for a certain duration. Under the terms of the Employment Agreement, Alden would have earned approximately 185,000 of the shares subject to

continued employment as of his termination date.¹¹³ It is reasonable to infer that the parties envisioned a vesting arrangement or something similar under the MOU as well. Assuming an effective date of March 15, 2002 (which comports with the approach taken in the Employment Agreement), Alden would have earned approximately 335,000 of the shares subject to a vesting requirement as of his termination date.¹¹⁴ Accordingly, under the terms of either framework, only between 170,000 and 190,000 shares would have been subject to possible forfeiture when Alden was terminated.

Additionally, there is no evidence that Alden sold any of the 1,225,000 shares of stock, much less any of the unvested shares, before he entered into the Release. Under the Release, the parties agreed that Alden was the record holder of 1,020,833 shares, which is close to what he would have earned under either the MOU or the Employment Agreement. Moreover, 204,167 shares, representing about 40% of the 525,000 shares he was to receive over three years, were cancelled pursuant to the Release. Because Alden actually worked for Case Financial for approximately 21 months and for Asia Web a

¹¹³ The Employment Agreement seems to provide that 356,254 shares were to vest ratably over the 27 month period beginning on December 15, 2002. Alden worked approximately 14 months after this date. Thus, he arguably would have been entitled to $356,254 * 14/27 = 184,724$ shares. As of February 2004, therefore, Alden would have earned a total of $868,746 + 184,724 = 1,053,470$ shares.

¹¹⁴ A total of 525,000 shares were subject to Alden's satisfactory continued employment at Case Financial. Before being terminated, he had worked approximately 23 months out of the 36 month period provided for in the MOU. Therefore, Alden effectively had earned $525,000 * 23/36 = 335,417$ shares as of February 2004. Under this approach, as of February 2004, Alden would have earned a total of $700,000 + 335,417 = 1,035,417$ shares.

couple of months before that, it is reasonable to infer that the cancellation of those shares bore some relation to the fact that Alden did not work a full three years for the company. There also is no evidence that Alden ever acted as though he was free to sell the shares he received without regard to how long he worked for Case Financial. The record on these details is incomplete, but based on the evidence presented, I am not convinced that Alden knew he was acting fraudulently or unlawfully when he caused the full 1,225,000 shares to be issued to him in December 2002.

The absence of proof that Alden attempted to conceal either the challenged stock issuance or the bonus further supports an inference that he acted in good faith and without fraudulent intent. Alden never attempted to conceal the fact that all 1,225,000 shares were issued to him up front. Case Financial had ample documentation regarding the transfer of these shares, and another board member, Pollock, also signed off on the issuance.¹¹⁵ Alden continued working for Case Financial for over a year after the stock issuance and the company never accused him of improperly taking company stock. It was only after relations broke down between investors and management that these allegations were made.¹¹⁶

¹¹⁵ See JX 33.

¹¹⁶ Indeed, in the negotiations leading to the Release that followed Alden's termination, Case Financial and Alden explicitly addressed the 1,225,000 shares he received. The fact that the settlement between Case Financial and Alden reflected in the Release appears to have accounted for all of the 1,225,000 shares reinforces the inference that both parties knew the details of this aspect of their dispute when they settled and did not intend to leave it open by way of the Crime Exception. For example, the provision in the Release requiring the cancellation of

Based on all of this evidence and the circumstances described here, I conclude that Case Financial has not met its burden to prove that Alden acted with scienter or criminal intent in connection with his receipt of the company's stock. Therefore, the Crime Exception does not apply and the Release bars further consideration of this claim.

c. The cash bonus

Case Financial's argument that the cash bonus was taken illegally rests on the premise that Alden wrongfully took the stock. As with the stock issuance, Case Financial accuses Alden of committing theft, embezzlement, and misappropriation by a fiduciary, all of which require proof of specific intent. Thus, to trigger the Crime Exception, Case Financial must show that Alden knew he was not entitled to the bonus and nevertheless caused Case Financial to grant it.

Plaintiff offers only scant evidence on this claim. For example, it points to the fact that only the Compensation Committee, and not the full Board, approved the bonus, to show that Alden misappropriated that money. Alden abstained from the Committee vote approving the bonus, however, and Case Financial adduced no evidence that he unduly influenced the other members of the Compensation Committee to grant him the bonus. Additionally, Plaintiff failed to show that bonus was out of the ordinary or that the full Board of Directors opposed or even was likely to have opposed granting tax-related

204,167 shares reasonably appears to be an attempt to account for the shares Alden had not yet earned. At a minimum, it reflects the parties' awareness of that dispute. If Case Financial intended to preserve its ability to sue Alden based on its concerns about the stock issuance and the bonus, fairness dictates that it needed to say so explicitly and not rely obliquely on the Crime Exception.

bonuses to Alden or other members of management. Nor did the Board ever question the propriety of the bonus during the additional year that Alden worked for Case Financial.

The last argument Case Financial advances for characterizing the bonus as criminal is that at the time the Compensation Committee approved it, the company did not have adequate financial resources to cover the bonuses.¹¹⁷ In that regard, Plaintiff suggests that Alden timed the resolution regarding the bonuses to coincide with the company's anticipated receipt of money from an investor. Case Financial, however, cited no statute or case law for the proposition that adopting a resolution to issue a future bonus in the absence of adequate available funds constitutes a crime. It also failed to demonstrate how Alden's knowledge that Case Financial soon would receive money from an investor supports its allegation that Alden had the requisite criminal intent when he took the bonus. In sum, Case Financial has failed to prove that Alden acted with the criminal or fraudulent intent required to prove theft, embezzlement, or misappropriation by a fiduciary as to the bonus. Thus, Case Financial also cannot recover on this claim.

D. The Aladdin Transaction

1. Relevant facts behind the case advance and transaction

As part of making loans to plaintiffs' attorneys, Old Case, and later Case Financial, had a system in place to vet potential cases. Before lending money for a particular case, the company would perform due diligence through its underwriting department, led by Pollock. Once a loan of greater than \$25,000 was approved by the

¹¹⁷ PPFLL ¶ 83.

underwriter, it was sent to a Loan Committee comprised of four persons.¹¹⁸ After approval by the Loan Committee, case managers of Case Financial assumed oversight responsibility for it and the attorney borrower had to produce evidence of money having been spent on the case before any part of the loan would be released. Board approval was not required to make any particular loan. The funds advanced pursuant to a loan were secured by the underlying case, but Case Financial did not track how those funds were spent by the attorney. Instead, the company used the LEG program to reimburse attorneys for funds they already spent in a particular case.¹¹⁹

In 2001, Sayre approached Old Case and requested a \$1,000,000 loan to cover the expenses associated with the Chiang Litigation. Old Case hired Richard Fine to analyze the transaction. After Fine recommended against making the loan until the court allowed the case against the government to proceed and a class was certified, Old Case declined to make the loan.¹²⁰

In March of 2003, after the class action had been certified, Sayre approached Alden again seeking a \$1,000,000 loan to be secured by the Chiang Litigation. As of March 13, 2003, Sayre already had spent \$2 million on that litigation.¹²¹ Sayre advised Alden that if the loan were granted, he intended to use some of the funds to invest in a

¹¹⁸ T. Tr. 485-86 (Pollock).

¹¹⁹ *Id.* at 511 (Lewis), 619 (Alden).

¹²⁰ T. Tr. 494-96 (Pollock), 610-11 (Alden).

¹²¹ Sayre Dep. 216-17.

venture to purchase the Aladdin Hotel & Casino in Las Vegas out of bankruptcy.¹²² Sayre offered to give investors an ownership interest in the Aladdin Hotel as additional consideration for the loan and offered his fee in the Chiang Litigation as collateral. Alden later conveyed this offer to investors he contacted on behalf of Case Financial.¹²³

Pursuant to Case Financial's procedures, Sayre's loan request was reviewed and approved by Pollock and by the Loan Committee. Despite these approvals, Alden decided not to make the bulk of this loan to Sayre from the funds of Case Financial because he felt the loan was too large and would take too long to resolve.¹²⁴ In that regard, Alden observed that the entire Case Financial portfolio of loans was then "somewhere around 2-1/2 or \$3 million"; so, a loan of \$1,000,000 would have constituted about one quarter of the company's portfolio.¹²⁵ Instead, Alden tried to find outside investors to fund the loan.

On March 19, 2003, Alden wrote to CCWIPP attaching Sayre's March 13, 2003 letter describing the details of the transaction, including that the money was to be invested in a bid for the Aladdin Hotel and that Case Financial would receive 25% of the proceeds from the Chiang Litigation. Alden's letter to investors also stated that Sayre was offering "additional consideration in the form of a 1/2% interest in a real estate

¹²² T. Tr. 611-12 (Alden).

¹²³ *See, e.g.*, JX 4.

¹²⁴ Sayre Dep. 192-93; T. Tr. 614 (Alden).

¹²⁵ T. Tr. 628 (Alden).

investment in which the principals of the law firm are now participating.”¹²⁶ Consistent with that comment, the Aladdin bid proposal ultimately listed Alden as holding a 2.5% interest in the hotel project. It appears, however, that all or most of this interest was given to CCWIPP, which controlled any further distribution of it among investors.¹²⁷

Alden persuaded four investors to enter into split funding agreements totaling \$960,000 to fund the loan to Sayre secured by the Chiang Litigation. CCWIPP invested \$750,000; Red Sands, a corporation controlled by Cliff Evans, head of the investment committee for CCWIPP, invested \$60,000; Harvey Bibicoff, a director of Case Financial, invested \$100,000; and Reuben Kitay, Alden’s stepfather, invested \$50,000. These split funding agreements explicitly specified that the investors’ money would fund the Chiang Litigation.¹²⁸ After receiving the money from the investors, Alden wired the \$960,000 to Sayre.

In the end, both the Chiang Litigation and the Sayre/Kennedy bid for the Aladdin Hotel were unsuccessful. None of the four investors recovered anything on their investment. For its part, Case Financial never realized anything on its 25% interest in the proceeds from the Chiang Litigation, but there is no evidence the company lost any principal under this arrangement with Sayre.

¹²⁶ JX 4.

¹²⁷ JX 14; T. Tr. 632-34 (Alden).

¹²⁸ JX 9.

2. Did Alden commit any crime in connection with the loan to Sayre for the Chiang Litigation?

Case Financial contends that Alden committed a series of crimes in arranging the split funding agreements for the Chiang Litigation. Specifically, it accuses Alden of committing the federal crimes of wire fraud, attempted wire fraud, conspiracy to commit wire fraud, money laundering, and RICO violations.¹²⁹ Plaintiff also relies on a litany of California crimes including theft, larceny, embezzlement, agency embezzlement, and fiduciary embezzlement. To show Alden committed any of these crimes, however, Case Financial would have to show that Alden acted with criminal intent or scienter.¹³⁰ Therefore, at the outset, my analysis will focus on whether Case Financial has proven that Alden acted with the requisite culpable state of mind.

At their core, each of the enumerated crimes requires that Case Financial prove that Alden intended to defraud it. Plaintiff's allegations focus on the fact that funds that should have been used to finance cases actually were used to finance a real estate project.

¹²⁹ For purposes of this Opinion, I do not analyze separately Plaintiff's RICO allegations, because to succeed on a RICO claim, Plaintiff would have to prove at least one of the underlying crimes it has alleged. 18 U.S.C. § 1961 (1)(B). Case Financial has failed to prove any underlying crime by a preponderance of the evidence for the reasons stated in this section of the Analysis. Thus, it also has failed to prove a RICO violation.

¹³⁰ To qualify for the Crime Exception to the Release, Case Financial must prove either that Alden acted with scienter or fraudulent intent or that the crime alleged involves some other "comparable factor" in addition to the elements of any analogous tort. *Case Fin., Inc. v. Alden*, 2009 WL 2581873, at *13 (Del. Ch. Aug. 21, 2009). Because Plaintiff has not argued that the "comparable factor" analysis applies here, it must meet the scienter requirement.

Moreover, it argues that Alden improperly received a personal interest in a transaction financed with Case Financial's resources. After carefully reviewing the evidence, however, I find that Case Financial has failed to prove that Alden acted with the requisite fraudulent intent.

As evidence of such intent, Case Financial cites the fact that Alden allowed Sayre to use company funds for a real estate project rather than the case for which they were advanced. It is undisputed, however, that Case Financial had a program, the LEG, under which it reimbursed attorneys for funds they already had expended on their cases. While the attorneys were required to submit proof of expenditure to obtain those funds, there was no restriction on their use of the loan proceeds. According to Sayre, the loan in question was made under the auspices of the LEG program.¹³¹ Although Case Financial disputes this, it has not produced sufficient evidence to demonstrate that Alden must have known either that the loan was being made outside of the LEG program or that the contemplated use of the proceeds was unlawful. Rather, Alden proved that he openly discussed the intended use of the proceeds with prospective investors who nonetheless decided to fund the loan. This evidence rebuts Case Financial's assertion that Alden acted with fraudulent intent.

Case Financial further attempts to support its claim that Alden intended to defraud the company by pointing to Kennedy's bid proposal materials listing Alden as the owner of a 2.5% stake in the Aladdin venture. It argues that this evidence shows Alden sought

¹³¹ JX 24. *See also* T. Tr. 648 (Alden).

to use the company's resources to gain a personal benefit. I am not persuaded, however. Alden's explanation—that this interest actually was earmarked for investors such as CCWIPP—comports with the disclosures he made to prospective investors. Although it is unclear whether all of the 2.5% interest was intended for investors, Case Financial has not adduced sufficient evidence to prove that Alden intended to steal from the company when he obtained this alleged interest.

Based on the record developed at trial, it is at least equally plausible that, rather than trying to defraud Case Financial, Alden sought to gain a benefit for the company without exposing it to undue risk. The additional facts that the company appears to have followed proper procedures for vetting the Chiang Litigation and the company's underwriting and loan committees approved lending money for the case further supports this conclusion. Thus, because Case Financial has not proven that Alden acted with an intent to defraud the company, its criminal claims regarding the proposed Aladdin transaction are not covered by the Crime Exception, and must be rejected as barred by the Release.

E. The Radisson Transaction

1. Relevant facts regarding the Tanguay Litigation and the Radisson venture

On January 20, 2003, Case Financial and Sayre signed a credit agreement giving Sayre a \$500,000 line of credit, subject to certain restrictions. The Credit Agreement required Sayre to use the money he borrowed to pay expenses he incurred to "Providers," a term that included expert witnesses, accident reconstruction companies, court reporters,

and other legal service providers.¹³² The agreement is silent as to whether loan advances could be used only to fund future expenses Sayre incurred of that nature or whether they could be used to reimburse Sayre for covered expenses he previously incurred. Before Sayre could obtain funds for a specific case, he had to pay Case Financial a consulting fee equal to 10% of the line limit for that case. In addition, if Sayre prevailed in the case, he was required to pay Case Financial a success fee of 65% of the total amount he borrowed for the case, less the consulting fee he had paid.

In separate transactions on September 3 and 10, 2003, Sayre borrowed \$150,000 and an additional \$100,000 under this agreement for the Tanguay Litigation.¹³³ On September 8, 2003, Case Financial and Sayre entered into a “Notice of Selected Case and Amendment to Credit Agreement” for that case (the “Tanguay Notice”).¹³⁴ This document stated that the Tanguay Litigation was qualified for funds under the Credit Agreement, subject to a \$250,000 “Line Limit.” The Tanguay Notice also indicated that, for the Tanguay Litigation, the Credit Agreement had been amended to waive the “Consulting Fee” and “Success Fee” and replace them with a monthly interest rate of 6.25%.¹³⁵

¹³² JX 16.

¹³³ JX 17.

¹³⁴ JX 18.

¹³⁵ *Id.*

Although Sayre did not use the money he received to fund additional expenditures in the Tanguay Litigation, he did submit invoices for previous expenses which met Case Financial's underwriting standards.¹³⁶ Moreover, the underwriting committee reviewed and approved the Tanguay Litigation in accordance with its standard procedures. In addition, Sayre disclosed that he would be using at least a portion of the loan proceeds to finance the purchase of a hotel in the Bahamas, *i.e.*, the Radisson.¹³⁷

Alden later personally invested \$125,000 in E&F, an entity that he and Sayre formed to hold a 25% interest in the Radisson venture, giving Alden a 12.5% equity stake in that venture.¹³⁸ Subsequently, Alden advised the Case Financial Board that he had co-invested with a client of the firm in a foreign real estate project.¹³⁹ There is no evidence, however, that Alden disclosed that the funds advanced to Sayre to finance the Tanguay Litigation were used to finance Sayre's contribution to the same venture.

Ultimately, the Sayre group did not succeed in purchasing the Radisson, but Case Financial still made a positive return on the challenged loan. Later, after Alden had been terminated, Case Financial granted a request from Sayre that it transfer \$100,000 of the loan secured by the Tanguay Litigation to another case, *Barcenas v. Ford* ("the Barcenas

¹³⁶ T. Tr. 648-49 (Alden).

¹³⁷ *Id.*

¹³⁸ JX 21-22.

¹³⁹ JX 120-21.

Litigation”).¹⁴⁰ Sayre successfully settled both the Tanguay Litigation and the Barcenas Litigation, but he refused to pay Case Financial. After the company sued Sayre to collect on its outstanding loans, the parties reached a settlement under which Sayre paid \$900,000 in connection with loans having a total principal amount of \$330,000. Case Financial allocated \$322,937.24 of the settlement proceeds to the Tanguay Litigation and \$214,465.56 to the Barcenas Litigation.¹⁴¹

2. Did Alden commit any crime by advancing money for the Tanguay Litigation or investing personally in the Radisson venture with a client?

Case Financial contends that Alden committed the same array of crimes as to the Tanguay Litigation/Radisson matter as he did in connection with the Chiang Litigation/Aladdin transaction. It again accuses Alden of a number of federal offenses, including wire fraud, conspiracy to commit wire fraud, and money laundering, as well as the California crimes of theft, larceny, embezzlement, agency embezzlement, fiduciary embezzlement, and conspiracy. For similar reasons to those discussed in Part II.D.2, *supra*, I hold that Case Financial has failed to prove that Alden committed any crimes in connection with the Radisson venture or that its claims come within the Crime Exception to the Release.

As with several of the transactions discussed *supra*, Alden’s conduct with regard to the Radisson venture reflects poorly on his professionalism, his sense of ethics, and his

¹⁴⁰ T. Tr. 291 (Stephenson); JX 23, 79.

¹⁴¹ JX 79; T. Tr. 80 (Penczek), 198-201 (Stephenson).

suitability to handle other people's money. In many respects, Alden's disregard for good accounting practices, proper recordkeeping, and full disclosure in his role as a fiduciary present a legitimate cause for concern. But, this case is not about whether Alden is a good or bad fiduciary. Rather, it is about whether his actions were criminal and, therefore, outside the scope of the Release he obtained in his settlement with Case Financial. Hence, it is through that lens that I must analyze Alden's conduct with respect to the Radisson transaction.

To show that Alden committed wire fraud under 18 U.S.C. § 1343, or conspiracy to commit wire fraud under 18 U.S.C. § 1349, Case Financial must prove that he acted with a specific intent to defraud the company. It has not met that burden. Here, Case Financial invested in a case that its underwriting committee approved in accordance with its normal procedures. Further, the company has not shown either that its funds were diverted improperly to the personal benefit of Alden or that Alden acted contrary to the best interests of Case Financial. Indeed, the evidence suggests that Sayre was free to use the money he received from Case Financial for the Radisson venture, because he already had incurred at least that amount of expenses in connection with the Tanguay Litigation. In that regard, I also note that Case Financial apparently achieved a substantial return on its investment. The gravamen of its complaints seems to be that Alden arguably usurped a corporate opportunity when he personally invested, through E&F, in the Radisson venture and failed to make full disclosure to the Case Financial Board regarding that venture. Because Plaintiff failed to show that Alden committed those alleged

improprieties with fraudulent intent, however, it has not demonstrated that he violated either § 1343 or § 1349.

Similarly, Case Financial has not proven that Alden illegally laundered money under 18 U.S.C. § 1956. Such a violation requires proof of a scheme or transaction that was designed in whole or in part to conceal or disguise the nature, location, source, ownership, or control of proceeds derived from specified unlawful activity.¹⁴² In addition to lacking proof of fraudulent intent,¹⁴³ Case Financial's argument is fatally flawed because it has not shown that the proceeds in question derived from illicit activity. The funds allegedly laundered by Alden were obtained through legitimate means from Case Financial investors and were used for their intended purpose—to finance lawsuits that were approved by the company's underwriting committee.

Likewise, Case Financial has failed to prove that Alden committed theft, larceny, embezzlement, agency embezzlement, fiduciary embezzlement, or conspiracy to engage in any of these crimes. In particular, Plaintiff has not demonstrated that Alden acted with an intent to deceive or misappropriated any of Case Financial's property by unlawful means, both of which are critical elements to proving the alleged crimes and avoiding the Release. Rather, Alden appears to have had a good faith basis for believing that

¹⁴² *United States v. Elder*, 90 F.3d 1110, 1124 (6th Cir. 1996).

¹⁴³ As discussed *supra* Part II, a prerequisite for every allegation of criminal activity sufficient to come within the Crime Exception of the Release is a showing that Alden acted with fraudulent intent.

financing the Tanguay Litigation would be a profitable investment for Case Financial and serve its best interests.

Having concluded that Alden's conduct in advancing funds to Sayre on behalf of Case Financial for the Tanguay Litigation and personally investing in the Radisson venture do not come within the Crime Exception or even constitute a crime, I will dismiss the company's claims for breach of fiduciary duty arising out of that transaction as barred by the Release.

F. The Shalom Loan

1. Relevant facts of the Shalom loan and repayment

In January 2004, Alden's uncle, David Shalom, loaned \$100,000 to Case Capital so that it could lend that amount to Sayre for the Barcenas Litigation. On January 12, 2004, Case Capital executed a Secured Promissory Note to Shalom confirming its receipt of the \$100,000 and agreeing to use the money to fund the Barcenas Litigation. Under its terms, the note was prepayable "without penalty or premium" at any time before its maturity.¹⁴⁴ Shortly thereafter, Cliff Evans, a representative of CCWIPP, made a demand that Alden be removed as CEO.¹⁴⁵

Soon thereafter, Alden notified Shalom that CCWIPP was trying to remove him as CEO and a director. At this point, Shalom allegedly asked for his money back. Alden then issued and signed a check from Case Financial to Shalom for \$100,000, but the

¹⁴⁴ JX 26.

¹⁴⁵ JX 121; T. Tr. 9-21 (Penczek). While ultimately successful, this demand for Alden's removal initially was rebuffed.

check was never cashed. On January 16, 2004, Case Financial wired \$100,000 to Sayre for the Barcnas Litigation. The corresponding entry on the bank's wire transfer activity report states the following under the heading "Originator to Beneficiary Information": "loan (funded by David Shalom)."¹⁴⁶ Another bank document indicates that the money was for "repayment to David Shalom per EA [Eric Alden]."¹⁴⁷ In addition, Sayre listed the loan on his books as being from C&R Resources, a company owned by Alden's family and managed by him.

The evidence also shows that roughly contemporaneously Shalom loaned a total of another \$100,000 to Case Capital in two separate installments of \$25,000 and \$75,000 to fund cases under the supervision of Stuart Fest and the law firm of Hackard & Holt.¹⁴⁸ Funding agreements were executed for these two transactions on December 5, 2003 and January 10, 2004, respectively.¹⁴⁹ Later, after Alden had left Case Financial, Shalom called the company to inquire about his \$100,000 advance, without specifying to which \$100,000 advance he was referring.¹⁵⁰

¹⁴⁶ JX 27.

¹⁴⁷ JX 63.

¹⁴⁸ T. Tr. 644-45 (Alden); JX 108.

¹⁴⁹ JX 108.

¹⁵⁰ T. Tr. 370-71 (M. Schaffer).

2. Did Alden commit a crime by wiring \$100,000 to Sayre, purportedly to repay the Shalom loan?

Case Financial claims once again that Alden committed the same wide range of crimes as in both the Aladdin bid and the Radisson venture. These crimes include wire fraud, money laundering, embezzlement, and larceny. As before, however, Case Financial has failed to prove by a preponderance of the evidence that any of its allegations in this regard are sufficient to avoid the Release by way of the Crime Exception.

The critical element necessary to prove that a defendant committed wire fraud is the existence of a scheme to defraud. After carefully reviewing the evidence presented by both sides, I am not convinced there was any such scheme to defraud Case Financial. The company essentially argues that Alden was shifting money around in an inappropriate manner by fraudulently issuing checks and wiring money without properly notifying either Case Financial or the investor whose funds were being transferred.

In support of this contention, Case Financial cites a phone call it received in which Shalom inquired about the whereabouts of his \$100,000 investment. This is unpersuasive for at least three reasons. First, the record as to Shalom's inquiry is ambiguous. Shalom may have been referring to the \$100,000 he loaned to Case Financial for the Barcenas Litigation, as Plaintiff contends, or he might have meant the combined \$100,000 he loaned in two separate installments for Stuart Fest and Hackard & Halt. The two possibilities are equally plausible. Second, Alden contemporaneously recorded the wire transfer to Sayre on the books of Case Financial in a manner consistent with his

explanation that it was a repayment of the Shalom loan.¹⁵¹ And third, there is no evidence Shalom ever followed up on his telephone inquiry by, for example, filing a claim. Alden's handling of the Shalom investment in the Barcenas Litigation falls far short of good accounting practices, but Case Financial has not proven that it rises to the level of criminality.

I also reject Case Financial's accusations of conspiracy to commit wire fraud. An essential element of this crime is the existence of an agreement to commit wire fraud. Plaintiff has not proven that Alden and Sayre (or anyone else) had an agreement to defraud Case Financial in connection with Shalom's Barcenas loan. Rather, Sayre appears to have had a reasonable belief that he legitimately received funds from Shalom, through Alden, to fund the Barcenas Litigation. Nor has Case Financial shown that Alden was motivated by any intent to defraud the company as regards the Shalom loan. To the contrary, the evidence suggests Alden sought to reroute Shalom's money so that it was invested in the Barcenas Litigation in accordance with Shalom's wishes, but through an entity other than Case Financial. Although Alden may have been negligent in neither returning the money directly to Shalom nor documenting more clearly the basis on which he wired the money to Sayre, Case Financial has not shown that Alden took any of the challenged actions with a specific intent to defraud the company. By wiring the money to Sayre, purportedly on behalf of C&R Resources, Alden arguably satisfied both Shalom's previously demonstrated desire to fund the Barcenas Litigation and his subsequent

¹⁵¹ See JX 61.

request to get his money back from Case Financial in view of the threatened removal of Alden as CEO and a director.

Briefly, while Case Financial also accuses Alden of money laundering in connection with the Shalom transaction, it has not proven he committed a crime in that regard either. Case Financial has failed to show that any of the transactions involved the proceeds of “specified unlawful activity.” To the contrary, Case Financial held the money in question as the result of a loan agreement it had with Shalom and Alden transferred that money out of Case Financial in accordance with Shalom’s instructions.

Case Financial further accuses Alden of theft and embezzlement. Each of these crimes requires a specific intent to deprive the owner of possession of his property unlawfully.¹⁵² Under the promissory note, Case Financial was permitted to repay Shalom at any time without premium or penalty. Plaintiff has not shown by a preponderance of the evidence that Alden lacked a good faith belief that he was complying with the terms of the note and Shalom’s wishes when he took the challenged actions. While those actions may have been negligent, Case Financial has not proven that Alden specifically intended to deprive the company or Shalom of their property. In this regard, I further note that Shalom has not pursued a claim against Alden or Case Financial for the disputed \$100,000.

¹⁵² *People v. Avery*, 27 Cal. 4th 49, 52 (Cal. 2002); *People v. Swenson*, 274 P.2d 229, 232 (Cal. App. 1954).

Accordingly, because Alden's actions as to the Shalom loan for the Barcenas Litigation have not been shown to be criminal, the Release bars further consideration of Case Financial's claims regarding that loan.

III. CONCLUSION

For the foregoing reasons, I hold that none of the activity complained of by Case Financial falls within the Crime Exception to the Release entered into by the parties in June 2004. Accordingly, all of its claims are barred by the Release. Therefore, I am entering concurrently with this Opinion a final judgment dismissing all of Case Financial's claims with prejudice.

In the Pretrial Order, Alden stated that the relief he seeks is "the dismissal of all claims and an award of his costs and reasonable attorneys' fees." As the prevailing party, Alden is entitled to his costs under Court of Chancery Rule 54(d). His claim for attorneys' fees, however, is not well-founded. Alden did not address that issue in his Pretrial Brief, Post-Trial Brief, or Proposed Findings of Fact. Therefore, he arguably has waived that claim.¹⁵³ Moreover, even if that were not true, Alden would not be entitled to recover his attorneys' fees because he does not qualify for any exception to the American rule that parties to litigation generally must bear their own attorneys' fees.¹⁵⁴ In

¹⁵³ See, e.g., *Emerald P'rs v. Berlin*, 726 A.2d 1215, 1224 (Del. 1999); see also *Murphy v. State*, 632 A.2d 1150, 1152 (Del. 1993); *Loudon v. Archer-Daniels-Midland Co.*, 700 A.2d 135, 140 n.3 (Del. 1997).

¹⁵⁴ *FGC Hldgs. Ltd. v. Teltronics, Inc.*, 2007 WL 241384, at *5 (Del. Ch. Jan. 22, 2007).

particular, I find that Case Financial's maintenance of this action was neither vexatious nor in bad faith. Instead, Plaintiff was able to assert colorable claims due to the slipshod way in which Alden carried out the transactions that formed the basis for this action. The American rule and the equities of this situation, therefore, warrant the denial of Alden's claim for attorneys' fees.