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**UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA**

Great American Duck Races, Inc.,
Plaintiff,
vs.
Intellectual Solutions, Inc., ASAP
Sales, LLC; Claypool Resources,
LLC; Mervin Dayan; Vivian Dayan;
Maurice Dayan; Jennifer Dayan,
Defendants.

2:12-cv-00436 JWS

ORDER AND OPINION

[Re: Motion at Docket 58]

I. MOTION PRESENTED

At docket 58, defendants Mervin Dayan, Vivian Dayan, Maurice Dayan, and Jennifer Dayan (collectively “the Dayans”) move pursuant to Rule 12(b)(2) to be dismissed for lack of personal jurisdiction. Plaintiff Great American Duck Races, Inc. (“plaintiff” or “Great American”) opposes at docket 59. The Dayans’ reply at docket 64. Oral argument was heard on February 25, 2013.

II. BACKGROUND

Great American is an Arizona corporation that manufactures and sells pool and spa products. One of its products is the Underwater Light Show (“ULS”), which creates an elaborate light display in swimming pools. ULS is sold at many retailers, including Target and Walmart. Great American is the exclusive licensee of two patents—United States Patent Number 7,413,319 and United States Patent Number 7,717,582—both entitled “METHOD AND SYSTEM FOR UNDERWATER LIGHT DISPLAY,” and both of

1 which contain disclosures pertaining to the ULS. Plaintiff maintains that the defendants
2 in this case have offered for sale virtually identical copies of ULS products that infringe
3 on both patents. The allegedly infringing products are sold in boxes displaying the
4 GOOD TIMES mark.

5 Intellectual Solutions, Inc. (“Intellectual Solutions”) is a Delaware corporation with
6 its principal place of business in New Jersey. It is an intellectual property holding
7 company. It owns the GOOD TIMES mark. Intellectual Solutions licenses the GOOD
8 TIMES mark to Claypool, LLC (“Claypool”). Claypool is a limited liability company
9 organized under Delaware law with its principal place of business in New Jersey.
10 Claypool imports the allegedly infringing products into the United States and sells them
11 to ASAP Sales, LLC (“ASAP”). ASAP sells the allegedly infringing products to retailers.

12 Intellectual Solutions, Claypool, and ASAP are each owned by Vivian and
13 Jennifer Dayan. Their respective husbands, Mervin and Maurice Dayan, have been
14 delegated managerial authority over each company. Maurice Dayan is the son of
15 Mervin and Vivian Dayan.

16 Great American filed suit in federal court asserting claims against ASAP,
17 Intellectual Solutions, Claypool, Mervin Dayan, Vivian Dayan, Maurice Dayan, and
18 Jennifer Dayan. Plaintiff has asserted two claims for patent infringement, and one state
19 law claim for unfair competition.

20 Intellectual Solutions, Claypool, and the Dayans previously moved the court for
21 dismissal based on lack of personal jurisdiction. After briefing on the issue, Intellectual
22 Solutions conceded that plaintiff had made a prima facie showing that it is subject to
23 personal jurisdiction in Arizona. The court ruled that plaintiff had also made a prima
24 facie showing that Claypool is subject to personal jurisdiction in Arizona. However, the
25 court found that it did not have enough evidence to determine whether it could exercise
26 personal jurisdiction over the Dayans based on a theory of veil piercing as plaintiff

1 argued, and thus, the court ordered limited discovery on the issue.¹ After a period of
2 limited discovery, the Dayans filed the current motion to dismiss. Plaintiff defends
3 against the motion by filing under seal evidence in support of its veil-piercing theory at
4 docket 63.

5 **III. STANDARD OF REVIEW**

6 “Where a defendant moves to dismiss a complaint pursuant to Federal Rule of
7 Civil Procedure 12(b)(2), for lack of personal jurisdiction, the plaintiff bears the burden of
8 establishing that a court has personal jurisdiction over a defendant.”² Where the motion
9 is based only upon written materials, rather than an evidentiary hearing, the plaintiff is
10 required only to make a prima facie showing of personal jurisdiction.³ This prima facie
11 burden holds even after the court has ordered limited jurisdictional discovery.⁴
12 Uncontroverted allegations in the complaint are taken as true, and conflicts over
13 statements contained in affidavits are resolved in favor of the plaintiff.⁵

14 “Where, as here, there is no applicable federal statute governing personal
15 jurisdiction, the district court applies the law of the state in which the district court sits.”⁶
16 Arizona Rule of Civil Procedure 4.2(a) authorizes the exercise of jurisdiction to the
17 extent permitted by federal due process requirements.⁷ Due process requires that the
18 defendant “have certain minimum contacts with [the forum] such that the maintenance
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20
21 ¹Doc. 31.

22 ²*Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 800 (9th Cir. 2004).

23 ³*Dole Food Co., Inc. v. Watts*, 303 F.3d 1104, 1108 (9th Cir. 2002).

24 ⁴*Bauman v. Daimler Chrysler Corp.*, 644 F.3d 909, 918-19 (9th Cir. 2011) (applying the
25 prima facie burden after jurisdictional discovery).

26 ⁵*Brayton Purcell LLP v. Recordon & Recordon*, 575 F.3d 981, 985 (9th Cir. 2009).

27 ⁶*Fred Martin Motor Co.*, 374 F.3d at 800.

28 ⁷Ariz. R. Civ. P. 4.2(a).

1 of the suit does not offend traditional notions of fair play and substantial justice.”⁸
2 Federal courts that have considered the issue conclude that “it is compatible with due
3 process for a court to exercise personal jurisdiction over an individual . . . that would not
4 ordinarily be subject to personal jurisdiction in that court when the individual . . . is an
5 alter ego . . . of a corporation that would be subject to personal jurisdiction in that court.”⁹
6 The theory behind finding personal jurisdiction in such alter-ego situations is that,
7 because the corporation and individual are considered to be the same entity, the
8 jurisdictional contacts of one are the jurisdictional contacts of the other for purposes of
9 the due process analysis.¹⁰

10 **IV. DISCUSSION**

11 Plaintiff asserts that Intellectual Solutions, Claypool, and ASAP are alter-egos of
12 the Dayans and that the Dayans should be kept in the lawsuit and held liable for the
13 actions of their companies. In diversity actions, federal courts apply state law when
14 evaluating alter-ego status.¹¹ In Arizona, “alter-ego status . . . exist[s] when there is
15 such unity of interest and ownership that the separate personalities of the corporation
16 and owners cease to exist.”¹² Factors bearing on this question include: payment of
17 salaries and expenses of the corporation by shareholders; failure to maintain corporate
18 formalities; undercapitalization; commingling of corporate and personal finances;
19 plaintiff’s lack of knowledge about a separate corporate existence; owners’ making of
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21 ⁸*Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (internal quotations omitted).

22 ⁹*Patin v. Thoroughbred Power Boats Inc.*, 294 F.3d 640, 653 (5th Cir.2002); *see also*
23 *Estate of Thomson ex rel. Estate of Rakestraw v. Toyota Motor Corp. Worldwide*, 545 F.3d 357,
24 362 (6th Cir.2008); *American Tel. & Tel. Co. v. Compagnie Bruxelles Lambert*, 94 F.3d 586, 591
(9th Cir.1996).

25 ¹⁰*Patin*, 294 F.3d at 653.

26 ¹¹*Hambleton Bros. Lumber Co. v. Balkin Enterprises., Inc.*, 397 F.3d 1217, 1227 (9th Cir.
27 2005).

28 ¹²*Dietel v. Day*, 492 P.2d 455, 457 (Ariz. Ct. App. 1972).

1 interest-free loans to the corporation; and diversion of corporate property for personal
2 use.¹³

3 A finding of alter-ego status is not enough for the court to be able to disregard the
4 corporate form under Arizona law. In order to impose liability on an individual through
5 veil piercing, there must also be a showing that the observance of the corporate form
6 would sanction a fraud or promote injustice.¹⁴ Thus, plaintiff must also set forth at least
7 a prima facie showing that failure to include the Dayans in this case would create an
8 injustice.

9 The court notes that unlike Intellectual Solutions, which is a corporation, Claypool
10 and ASAP are limited liability companies. Both parties assume that veil piercing under
11 an alter-ego theory applies to limited liability companies, but “it has not been explicitly
12 determined under Arizona law whether a party may pierce the [LLC] veil.”¹⁵ Regardless,
13 this court concludes that the rationale behind piercing the veil of a corporation would
14 also apply to an LLC given the similar liability shields that are provided by corporations
15 and LLCs to their respective owners.¹⁶

16 **A. Alter Ego Status**

17 Based on the deposition excerpts and documents filed in support of its
18 opposition, plaintiff has made at least a prima facie showing that Intellectual Solutions,
19 Claypool, and ASAP are the alter egos of the Dayans based on a failure to maintain
20 corporate formalities; the Dayans’ lack of knowledge about the separate corporate
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22 ¹³See *Deutsche Credit Corp. v. Case Power & Equip. Co.*, 876 P.2d 1190, 1195 (Ariz.
23 Ct. App. 1994).

24 ¹⁴*Gatecliff v. Great Republic Life Ins. Co.*, 821 P.2d 725, 728 (Ariz. 1991)

25 ¹⁵*All Custom Exteriors, Inc. v. Bilyea*, No. 1-CA-CV-10-0702, 2011 WL 5964528, at *4
26 (Ariz. Ct. App. Nov. 29, 2011).

27 ¹⁶*NetsJets Aviation, Inc. v. LHC Communications, LLC*, 537 F.3d 168 (2d Cir. 2008)
28 (applying the principles of corporate veil piercing to LLCs under Delaware law and noting that
emerging case law illustrates that LLC veil piercing and corporate veil piercing are similar).

1 existences; undercapitalization; members making interest-free loans to the corporate
2 entities; and commingling of corporate and personal finances.

3 **1. Failure to maintain corporate formalities/lack of basic information**

4 The three companies are blurred both in the minds of the Dayans and in practice.
5 The Dayans' understanding of who manages what company is muddled. Vivian testified
6 that both Mervin and Maurice manage all three companies, but the evidence shows that
7 Mervin is the designated manager of Intellectual Solutions and Claypool, and Maurice is
8 the designated manager of ASAP.¹⁷ The Dayans' answers to plaintiff's interrogatories
9 state that Mervin is the designated manager of Intellectual Solutions and is assisted
10 from time to time by Maurice, but Maurice's affidavit does not mention that he does any
11 work for Intellectual Solutions and only says that he has management responsibilities
12 for ASAP.¹⁸ Mervin's affidavit says he is also involved in the management of ASAP, but
13 then he testified at his deposition that he does not do anything for ASAP.¹⁹ Not only is
14 there a lack of complete understanding about who is in charge of each company, the
15 owners of the companies, Jennifer and Vivian, do not actually know the difference
16 between the three companies.²⁰

17 The evidence shows a blurring of the companies in practice as well. All three
18 companies share an office.²¹ All three companies are listed as insureds on one
19 commercial property insurance policy, which appears to have been obtained only after
20 the filing of this lawsuit.²² The companies share the same financial officer, Warren
21 Sidosky. Sidosky's affidavit submitted by the Dayans in support of the motion states

22 ¹⁷Doc. 63, Exh. 6 at 21-22.

23 ¹⁸Doc. 63, Exh. 8; Doc. 58-3.

24 ¹⁹Doc. 58-1; Doc. 63, Exh. 4 at 41.

25 ²⁰Doc. 63, Exh. 6 at 22; Doc. 63, Exh. 7 at 8.

26 ²¹Doc. 63, Exh. 6 at 10; Doc. 63, Exh.3.

27 ²²Doc. 63, Exh. 3 (evidence of commercial insurance policy).

1 that he is the CFO of Intellectual Solutions, but the defendants' answers to plaintiff's
2 interrogatories state that Sidosky is the CFO of Claypool.²³ Mervin, as the Rule 30(b)(6)
3 representative of Intellectual Solutions, testified during deposition that Sidosky is an
4 employee of Claypool who does work for Intellectual Solutions as needed, but Mervin
5 was not sure if Intellectual Solutions paid Claypool for Sidosky's services to the
6 corporation and did not know how Sidosky was paid for his work.²⁴ Maurice, as the
7 Rule 30(b)(6) representative of ASAP, testified during deposition that Sidosky is the
8 accountant for ASAP, even though he admitted that ASAP does not pay Sidosky's
9 salary and does not technically employ Sidosky.²⁵ Financial decisions related to
10 Claypool and Intellectual Solutions are often made by Stanley Nasberg, who is the
11 family's financial advisor and not listed as an employee of any of the three companies.²⁶

12 Plaintiff's evidence not only indicates that the Dayans have blurred the
13 boundaries between the corporate entities and do not understand the companies'
14 distinct existences, it shows that they have failed to follow corporate formalities.
15 Intellectual Solutions's Certificate of Incorporation states that an annual meeting of the
16 shareholders shall be held on June 21st of every year and that a secretary must keep
17 minutes of these meetings, but the Dayans could not give details about any meetings
18 and did not provide minutes for any meetings.²⁷ Mervin testified that there had been an
19 informal meeting that year, but he could not provide details. He was not sure if
20 Intellectual Solutions has a secretary or treasurer.²⁸ Vivian, one of the owners of
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22 ²³Doc. 58-5; Doc. 63, Exh. 9.

23 ²⁴Doc. 63, Exh. 1 at 12-13.

24 ²⁵Doc. 63, Exh. 3, at 21-22.

25 ²⁶Doc. 63, Exh. 1 at 36, 38; Doc. 63, Exh. 2 at 18.

26 ²⁷Doc. 63, Exh. 1.

27 ²⁸Doc. 63, Exh. 1 at 9-11.

1 Intellectual Solutions, testified at her deposition that there have been meetings, but she
2 was not sure when these meetings were held or for what company.²⁹

3 The Dayans also lack a basic understanding about the three companies, despite
4 the fact that they are the owners and managers of the companies. The owners, Vivian
5 and Jennifer, are not sure what the three companies do and could not describe how the
6 companies are different.³⁰ They have never seen financial reports for the companies.³¹
7 Even the managers of the three companies, Mervin and Maurice, do not know anything
8 about the companies' profits, losses, accounts receivable, or indebtedness.³²

9 **2. Undercapitalization**

10 Plaintiff has put forward enough evidence to make a prima facie case that the
11 three companies were not adequately capitalized upon formation.³³ Neither the owners,
12 Vivian or Jennifer, nor the managers, Mervin or Maurice, could testify about the initial
13 capitalization of the companies. Mervin, as the manager of Intellectual Solutions, did
14 not know how much capital Intellectual Solutions had at its formation.³⁴ The Dayans'
15 attorney represented on the deposition record that the initial capitalization of Intellectual
16 Solutions was not a lot of money.³⁵ As for Claypool, Mervin testified on behalf of
17 Claypool that family and friends gave him money to fund the company, but when
18 testifying on behalf of ASAP, Mervin clarified that he was not sure if he put that money

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20 ²⁹Doc. 63, Exh. 6 at 12.

21 ³⁰Doc. 63, Exh. 6 at 22; Doc. 63, Exh. 7 at 8.

22 ³¹Doc. 63, Exh. 6 at 13; Doc. 63, Exh. 7 at 10.

23 ³²Doc. 63, Exh. 1 at 24, 36, 38; Doc. 63, Exh. 2 at 34-35; Doc. 63, Exh. 3 at 10, 12, 43,
24 57, 63.

25 ³³*Norris Chemical Co. v. Ingram*, 679 P.2d 567, 570 (Ariz. Ct. App. 1984) (noting that
26 when determining whether the corporate form should be disregarded the capitalization of a
corporation is evaluated at the time that it is established).

27 ³⁴Doc. 63, Ex. 1 at 38-40.

28 ³⁵Doc. 63, Exh. 1 at 49.

1 toward ASAP or Claypool.³⁶ The Dayans' interrogatory answers state that Vivian and
2 Jennifer capitalized ASAP, but Jennifer could not testify as to whether she made any
3 contribution.³⁷ Furthermore, there is evidence that ASAP was formed in 2010 but did
4 not have a bank account until 2011, and as of January 2012, there is evidence that
5 ASAP had little cash on hand.³⁸ While not enough to prove undercapitalization in fact, it
6 is enough to meet the requisite prima facie showing, and the Dayans did not submit
7 anything to clarify the capitalization issue.

8 **3. Members making interest-free loans to the corporate entities**

9 Mervin testified that Claypool has outstanding loans from friends and family, but
10 he could not provide any details regarding these loans and did not have written
11 documentation about the loans.³⁹ He asserted that Claypool owes him money as well,
12 but he could not provide details and did not submit written documentation related to any
13 loans despite plaintiff's request for loan documentation during discovery.⁴⁰ Claypool
14 transfers funds to Intellectual Solutions so that Intellectual Solutions can pay its
15 corporate debts, but there are no loan documents associated with these transfers.⁴¹
16 One of Claypool's bank statements shows that Claypool paid \$50,000 to Jacob Dayan,
17 Mervin's son, as repayment for a loan Jacob made only three days before the
18 repayment.⁴² Again, there is no written documentation of this loan. Stanley Nasberg,
19 the family's financial advisor, withdrew \$50,000 from Claypool's bank account in what
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21 ³⁶Doc. 63, Exh. 2 at 18; Doc. 63, Exh. 3 at 10.

22 ³⁷Doc. 63 Exh. 10; Doc. 63, Exh. 7 at 9.

23 ³⁸Doc. 63, Exh. 10.

24 ³⁹Doc. 63, Exh. 2 at 26.

25 ⁴⁰Doc. 63, Exh. 2 at 27.

26 ⁴¹Doc. 63, Exh. 1 at 35-36.

27 ⁴²Doc. 63, Exh. 2 at 43.

1 was documented as partial repayment of a \$200,000 loan Nasberg made to the
2 company, but the Dayans did not provide any written documentation of this loan.⁴³

3 **4. Commingling of corporate and personal finances**

4 By far the strongest factor weighing in favor of alter-ego status is the pervasive
5 commingling of the companies' finances and the Dayans' personal finances. Mervin
6 admitted to making personal transfers from Claypool's bank account.⁴⁴ Mervin also
7 testified during his deposition as Claypool's representative that he took money out of
8 Claypool's bank account to give Maurice so Maurice could pay his personal real estate
9 taxes.⁴⁵ Maurice admitted that he would receive money from Claypool on occasions
10 when he asked Mervin or the family's financial advisor for it.⁴⁶ There is also evidence
11 that Maurice's personal American Express bills were paid out of Claypool's bank
12 account.⁴⁷ Maurice testified that transfers to him out of Claypool's accounts were
13 personal loans from Mervin.⁴⁸ Mervin also testified that the various payments to
14 Maurice were loans.⁴⁹ However, in an affidavit filed with the Dayans' reply brief, Mervin
15 says that payments to Maurice were actually business draws.⁵⁰ The affidavit does not
16 specify why Maurice would be taking draws from Claypool if he considers himself
17 employed by ASAP, but regardless, given the standard of review, the court resolves all
18 factual disputes in favor of plaintiff and so the court concludes the transfers to Maurice

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20 ⁴³Doc. 63, Exh. 2 at 61.

21 ⁴⁴Doc. 63, Exh. 2 at 23.

22 ⁴⁵Doc. 63, Exh. 2 at 48.

23 ⁴⁶Doc. 63, Exh. 5 at 59.

24 ⁴⁷Doc. 63, Exh. 2 at 49; Doc. 63, Exh. 5 at 58-59.

25 ⁴⁸Doc. 63, Exh. 5 at 57.

26 ⁴⁹Doc. 63, Exh. 2 at 47-49.

27 ⁵⁰Doc. 64 at ¶ 18.

1 were personal in nature as suggested by plaintiff's evidence. Claypool also provided
2 \$50,000 to another one of Mervin's sons, Jacob, as repayment for a mysterious three-
3 day loan.⁵¹

4 Money is freely commingled between companies as well. As noted above,
5 Claypool transferred money to Intellectual Solutions so that Intellectual Solutions could
6 pay its bills. Claypool also transferred money to inactive companies. One of these
7 transfers was to Road Master U.S.A. purportedly to pay for that company's payroll taxes
8 even though that company was defunct and inactive about two years prior to the
9 transfer.⁵² It appears that Claypool also covered the payroll taxes for other companies,
10 such as Development Prop. and Mervin, as manager, could not explain why.⁵³

11 **B. Injustice**

12 While a closer call, the court concludes that plaintiff has also made a prima facie
13 showing that failure to include the Dayans in this case would result in injustice. "The
14 term injustice or unjust act as used in the Arizona cases is not easy to define."⁵⁴ It really
15 falls within the realm of equity.⁵⁵ Given the requirement at this stage that plaintiff simply
16 make a prima facie case for personal jurisdiction, the scales tip in favor of including the
17 Dayans. The evidence presented by plaintiff shows that the Dayans use their
18 companies, particularly Claypool, as personal piggy banks and not like corporate
19 entities with investors, shareholders/members, and lenders. The evidence also shows
20 that not only the Dayans but also third-parties like Nasberg and Sidosky have access to
21 the companies' assets and can move money from the companies' accounts without
22 authorization or recourse. This loose management of company assets works to the

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24 ⁵¹Doc. 63, Exh. 2 at 42-44.

25 ⁵²Doc. 63, Exh. 2 at 40-41.

26 ⁵³Doc. 63, Exh. 2 (Bank Account Statement dated 9/30/11).

27 ⁵⁴*Youngren v. Rezzonico*, 543 P.2d 142, 144 (Ariz. Ct. App. 1976).

28 ⁵⁵*Id.*

