

1 require additional discovery, but will affect the scope and breadth of the issues and
2 claims in this case”; and (5) MAdler cancelled his deposition with one day’s notice
3 because he was advised by counsel not to answer any questions besides his name or
4 biographical information pursuant to his Fifth Amendment rights. (Doc. 64 at 3-5.)

5 Defendants Jerome Wenger (JWenger) and Sharon Altman (SAltman) oppose
6 Erus’ Motion. (Doc. 74.) Specifically, they contend that they believe there is no basis
7 for liability against them in this action, the Court should deny Erus’ request to add
8 additional parties, and Erus has had sufficient time to complete discovery. MAdler has
9 not responded to Erus’ Motion, and the time to do so has passed. LRCiv 7.2(c).

10 As detailed below, the Court will grant Erus additional time to depose MAdler,
11 and will grant in part and deny in part Erus’ request to add new parties. Accordingly, the
12 Court will extend the case management deadlines in this matter as follows:

- 13 • The deadline for completing MAdler’s deposition is **September 16, 2016**.
- 14 • The deadline for completing fact discovery is **October 28, 2016**.
- 15 • The parties shall provide full and complete expert disclosures by **August 26, 2016**.
- 16 • Rebuttal expert disclosures shall be completed by **September 23, 2016**.
- 17 • Expert depositions shall be completed by **October 28, 2016**.
- 18 • Dispositive motions shall be filed no later than **December 16, 2016**.

19 **II. Motion to Compel MAdler’s Deposition²**

20 **a. Background**

21 On November 2, 2015, Erus noticed the deposition of MAdler for November 13,
22 2015, in Philadelphia. (Doc. 69-4 at 2-3.) The parties also scheduled the depositions of
23 JWenger and SAltman for the previous day, November 12, 2015, in Philadelphia. (Doc.
24 69 at 3.) MAdler’s counsel, Robert Mann, asserts that on November 10, 2015, he learned
25 that MAdler had received an SEC subpoena. (Doc. 78 at 2.) After a preliminary
26 investigation, Mr. Mann asserts, MAdler decided to invoke his Fifth Amendment

27
28 ² The Court finds that the Motion is suitable for resolution based on the briefs.
Accordingly, the Court denies the parties’ requests for oral argument. *See* Fed. R. Civ. P.
78(b); *Partridge v. Reich*, 141 F.3d 920, 926 (9th Cir. 1998).

1 privilege to questions asked during his deposition. (*Id.*) Mr. Mann informed counsel of
2 MADler's decision the day before MADler was to be deposed. (*Id.*) It appears that the
3 parties, after the other depositions were completed on November 12, 2015, put their
4 positions on the record:

5 BY MR. FRAME:

6 Q. Mr. Adler, my name is Paul Frame. I represent Erus
7 Builders in this matter, and I understand there's something
8 you want to put on the record about this deposition.

8 A. Yes.

9 Q. Okay. Go ahead, sir.

10 A. On the advice of counsel, I invoke my right under the Fifth
11 Amendment of the United States Constitution and all
12 applicable state constitutions not to answer on the grounds I
may incriminate myself.

13 MR. FRUTKIN: So I'll put on the record that with respect to
14 any substantive question, other than his name or basic
15 biographical information, that would be his response, and that
16 applies to any question based on a pending government
17 investigation.

16 MR. FRAME: Okay.

17 MR. HARVEY: This is Mr. Harvey. I would ask a series of
18 questions at this deposition if it wasn't asked by the plaintiff
19 about my client's noninvolvement in this deposition -- Ms.
20 Altman's noninvolvement and the fact that there's no basis
for liability against either of my clients. And do I understand
that he would answer -- he would refuse to answer all those
question on the same basis?

21 MR. FRUTKIN: Correct. And so, to the extent that you have
22 any questions that he's -- that he would otherwise respond to,
23 we'll preserve the record for you just as much as Erus, that he
refused to respond to those questions as well on Fifth
Amendment grounds.

24 MR. HARVEY: Okay. Well, we -- you know, I understand
25 your position. We don't agree with it. We think that there's
26 probably a lot of questions he could answer. We reserve the
right to move to compel as necessary, but I understand your
position, and there's no sense bringing him down.

27

28 MR HARVEY: Just to clarify, this was the deposition that
was going to take place tomorrow. Counsel just called me at
my office upstairs and asked me to come down. They

1 advised that this was going to happen. And so we're doing
2 this in lieu of having Mr. Adler appear at his deposition
3 tomorrow. And make this -- and I understand what you're
saying is, he would invoke his Fifth Amendment rights to
anything related to this beyond his name.

4 MR. FRUTKIN: Correct. And with that being said,
5 obviously, there may come a time where there is more
6 information known specifically about what the scope of the
7 inquiry is that would allow him the ability to respond to
various questions; however, right now, he's invoking that
with respect to any question whatsoever, so that we're clear.

8 (Doc. 69-8 at 4-7.)

9 Erus now moves to compel the Deposition of MADler. (Doc. 69.) Erus contends
10 that MADler improperly cancelled his deposition the day before it was scheduled to take
11 place, after Erus' counsel had traveled to the East Coast, based on an assertion that his
12 Fifth Amendment rights protect him from testifying in this matter.³ Erus also requests
13 the Court order MADler to pay Erus' attorneys' fees caused by his failure to appear at his
14 deposition. (*Id.* at 8.)

15 MADler opposes Erus' Motion, arguing that Erus failed to comply with the Court's
16 Scheduling Order, Erus failed to meet and confer regarding rescheduling MADler's
17 deposition, Erus chose to cancel the deposition, MADler did not fail to appear, MADler's
18 current counsel was not aware of the SEC Subpoena until November 10, 2015, and
19 MADler has a right to invoke his Fifth Amendment rights. (Doc. 78 at 3-15.) MADler
20 further seeks his attorney's fees incurred in having to respond to Erus' Motion to
21 Compel. (*Id.* at 16.)

22 **b. Discussion**

23 As an initial matter, the Court's Case Management Order provides the following:

24 6. Discovery Disputes

25 _____
26 ³ Erus further asserts that MADler has provided "incorrectly redacted or otherwise
27 illegible or wrongly redacted or edited bank materials." (*Id.* at 4.) It is unclear whether
28 Erus is seeking an order to compel MADler to produce further information. To the extent
Erus seeks such relief, the Court denies that request pursuant to Rule 37 of the Federal
Rules of Civil Procedure, Rule 37.1 of the Local Rules of Civil Procedure, and the
Court's Scheduling Order.

1 a. The parties may not file written discovery motions without leave of
2 Court.[] If a discovery dispute arises, the parties must promptly contact the
3 Court to request a telephonic conference concerning the dispute. The Court
4 will seek to resolve the dispute during the telephonic conference, and may
5 enter appropriate orders based on the conference. The Court may order
6 briefing, if necessary.

7 b. Parties shall not contact the Court concerning a discovery dispute
8 without first seeking to resolve the matter through personal or telephonic
9 consultation and sincere effort as required by LRCiv 7.2(j). Any briefing
10 ordered by the Court must also comply with LRCiv 7.2(j).

11 (Doc. 36 at 4.)⁴ Here, Erus did not seek leave before filing its Motion to Compel in
12 violation of the Court’s Case Management Order, which has caused delay and the parties
13 to incur additional and unnecessary fees in resolving this dispute. Erus acknowledges in
14 its Reply that it failed to comply with the Court’s Case Management Order, but asserts it
15 did so “in hopes of expediting [the] process.” (Doc. 85 at 8.)

16 **The parties must fully comply with the Court’s Orders. Such compliance is**
17 **NOT optional.** Although the Court could deny or strike Erus’ Motion for its failure to
18 comply with the Court’s Case Management Order, in the interest of judicial economy, the
19 Court will address Erus’ Motion based on the parties’ briefing.

20 As the parties appear to agree, the Fifth Amendment privilege must be invoked on
21 a question-by-question basis. (Doc 69 at 7-8; Doc. 78 at 13.) Specifically, “[t]he only
22 way the privilege can be asserted is on a question-by-question basis, and thus as to each
23 question asked, [MAdler] has to decide whether or not to raise his Fifth Amendment
24 right.” *Doe v. Glanzer*, 232 F.3d 1258, 1263 (9th Cir. 2000); *see also United States v.*
25 *Seifert*, 648 F.2d 557, 560 (9th Cir. 1980) (“[A] non-party witness cannot refuse to take
26 the stand. His privilege arises only when he asserts it as to a question put to him, and it is
27 for the court to say whether he is entitled to the privilege.”); *United States v. Tsui*, 646
28 F.2d 365, 367 (9th Cir. 1981) (“Even when the District Court is satisfied that the witness
has a valid Fifth Amendment claim with regard to some issues, the court must permit the
questioning to establish the scope of the witness’ claim and to determine whether there

⁴ The Court’s May 21, 2015 Case Management Order was modified by the Court’s
October 6, 2015 Order at Doc. 49 as to dates only.

1 are other issue as to which the witness would not be able to assert the privilege.”).
2 Therefore, a “blanket claim of privilege is simply not sufficient.” *Davis v. Fendler*, 650
3 F.2d 1154, 1160 (9th Cir. 1981).

4 Here, it appears from the record that MAdler conveyed his intent to assert his Fifth
5 Amendment rights to almost all of Erus’ questions. However, those questions were never
6 asked. Therefore, the Court cannot determine whether invocation of his Fifth
7 Amendment rights in response to Erus’ questions is proper.

8 Erus is entitled to depose MAdler because he is a named party. *See* Fed. R. Civ. P.
9 30(a)(1). And, as stated above, a blanket assertion of Fifth Amendment protections is not
10 a sufficient basis on which to not answer questions during a properly noticed deposition.
11 Accordingly, the Court will order MAdler to appear for a properly noticed deposition.
12 The parties shall have until **September 16, 2016** to complete the deposition. This
13 deadline will allow the Court time to address any discovery disputes regarding MAdler’s
14 deposition prior to the fact discovery cut off.⁵ MAdler may not assert a blanket claim of
15 privilege to all potential questions posed by Erus. MAdler may, instead, refuse on Fifth
16 Amendment grounds to answer any “questions which present a ‘real and appreciable
17 danger of self-incrimination.’” *McCoy v. Comm’r*, 696 F.2d 1234, 1236 (9th Cir. 1983)
18 (quoting *United States v. Neff*, 615 F.2d 1235, 1238 (9th Cir. 1980)).

19 The Court will deny the parties’ requests for fees. Erus’ counsel was already in
20 Philadelphia for other depositions, did not contact the Court when the issue arose, and
21 filed a Motion to Compel not authorized by the Court’s Case Management Order. The
22 Court will also deny MAdler’s request for attorneys’ fees because, as detailed above, his
23
24
25

26
27 ⁵ As stated in the Court’s Scheduling Order at Doc. 36, “[a]bsent extraordinary
28 circumstances, the Court will not entertain fact discovery disputes after the deadline for
completing fact discovery, and will not entertain expert discovery disputes after the
deadline for completing expert discovery.”

1 blanket invocation of his Fifth Amendment rights was not appropriate.⁶

2 **III. Motion to Add Parties**

3 Erus seeks to add eight new defendants: (1) Aztec Solar Power LLC (ASP); (2)
4 Aztec Solar Renewables, Inc. (ASR); (3) Skreem Studios, LLC (Skreem); (4) Martin
5 Consultants, Inc. (Martin Consultants); (5) Allstar Consulting and Entertainment, Inc.
6 (Allstar); (6) Jeffrey Martin (JMartin); (7) Thomas Moore (TMoore); and (8) Bruce
7 Wenger (BWenger). (Doc. 66 at 2-7.) In its “Notice,” Erus asserts various claims
8 against these new parties. (Id. at 1-2.)

9 JWenger and SATlman oppose Erus’ Motion, arguing that Erus failed to comply
10 with the Local Rules of Civil Procedure, and adding the parties Erus identifies would be
11 futile. (Doc. 75.) In reply, Erus attached a proposed First Amended Complaint that
12 includes new allegations and claims against the individuals and entities Erus seeks to add.
13 (Doc. 84.) On April 12, 2016, the Court ordered the parties to submit supplemental
14 briefing regarding whether any of Erus’ proposed amendments are futile. (Doc. 95.) On
15 April 26, 2016, Erus submitted a Supplemental Brief. (Doc. 98.) On May 10, 2016,
16 Defendants MADler, JWenger, and SALTman filed Responses to Erus’ Supplemental
17 Brief. (Docs. 110, 111.)⁷

18 **a. Amendment Standard Pursuant to Rules 15 and 20**

19 Erus seeks to amend its Complaint to add eight new defendants under Rule 20 of
20 the Federal Rules of Civil Procedure. (Doc. 66.) When a party seeks to amend a

21
22 ⁶ Erus and MADler each claim the other is responsible for “cancelling” the
23 deposition. However, the record does not provide the Court with a sufficient basis on
24 which to find any party acted in bad faith or to issue discovery sanctions. It appears from
the record that the parties agreed to cancel the November 13, 2015 deposition in light
MADler’s position that he would invoke his Fifth Amendment rights as to any substantive
questions asked at the deposition scheduled for the following day.

25 ⁷ The Court notes that MADler’s Response to Plaintiff’s Supplemental Briefing
26 does not specifically address Erus’ proposed amendments. (Doc. 110.) Rather, MADler
27 requests the Court first rule on his pending Motion for Summary Judgment, which seeks
judgment in MADler’s favor based on the allegations in Erus’ initial, and not proposed
28 First Amended, Complaint. As detailed in this Order, the Court will grant Erus’ Motion
to depose MADler and grant in part and deny in part Erus’ Motion to add parties.
Therefore, the Court will deny MADler’s request to first rule on his pending Motion for
Summary Judgment.

1 pleading, Rule 15 of the Federal Rules of Civil Procedure is generally applicable, even
2 where a party seeks to amend to add new parties. Because Rule 20 also regulates
3 whether parties may be joined, however, the court must consider whether the proposed
4 amended pleading to add parties meets the requirements of both Rules 15 and 20. *See*
5 *Desert Empire Bank v. Ins. Co. of N. Am.*, 623 F.2d 1371, 1374 (9th Cir. 1980); *Hinson v.*
6 *Norwest Fin. S. Carolina, Inc.*, 239 F.3d 611, 618 (4th Cir. 2001) (stating that a “court
7 determining whether to grant a motion to amend to join additional plaintiffs must
8 consider both the general principles of amendment provided by Rule 15(a) and also the
9 more specific joinder provisions of Rule 20(a).”) (citing *Desert Empire Bank*, 623 F.2d at
10 1374).

11 “In exercising the discretion provided by Rules 15 and 20, courts have shown a
12 strong liberality in allowing parties to amend their pleadings when such amendments
13 have satisfied the explicit requirements of the rules.” *Desert Empire Bank*, 623 F.2d at
14 1375-76. However, the Court should consider the following factors in determining
15 whether a motion to amend should be granted: (1) whether the pleading at issue has been
16 previously amended, (2) futility of the amendment, (3) bad faith, (4) undue delay, and (5)
17 prejudice to the opposing party. *Forman v. Davis*, 371 U.S. 178, 182 (1962); *see also*
18 *Texaco, Inc. v. Ponsoldt*, 939 F.2d 794, 798 (9th Cir. 1991); *W. Shoshone Nat’l Council*
19 *v. Molini*, 951 F.2d 200, 204 (9th Cir. 1991). “Generally, this determination should be
20 performed with all inferences in favor of granting the motion.” *Griggs v. Pace Am.*
21 *Group, Inc.*, 170 F.3d 877, 880 (9th Cir. 1999) (citing *DCD Programs, Ltd. v. Leighton*,
22 833 F.2d 183, 186 (9th Cir. 1987)).

23 Here, Defendants JWenger and SAltman oppose Erus’ Motion to add new parties
24 as futile because the amendments would be subject to dismissal for failure to state a
25 claim. (Docs. 75, 111.) Below, the Court addresses whether Erus’ proposed amendments
26 are futile.

27 **b. Futility of Amendments – Failure to State a Claim**

28 Rule 8(a) of the Federal Rules of Civil Procedure provides that to state a claim for

1 relief, a complaint must contain (1) “a short and plain statement of the grounds for the
2 court’s jurisdiction,” (2) “a short and plain statement of the claim showing that the
3 pleader is entitled to relief,” and (3) “a demand for the relief sought.” The complaint also
4 must contain “sufficient factual matter, accepted as true, to ‘state a claim to relief that is
5 plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl.
6 Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim has facial plausibility when “the
7 plaintiff pleads factual content that allows the court to draw the reasonable inference that
8 the defendant is liable for the misconduct alleged.” *Id.* (citing *Twombly*, 550 U.S. at
9 556). “Where a complaint pleads facts that are ‘merely consistent with’ a defendant’s
10 liability, it stops short of the line between possibility and plausibility of entitlement to
11 relief.” *Id.* (quoting *Twombly*, 550 U.S. at 557) (internal quotation marks omitted).
12 “Threadbare recitals of the elements of a cause of action, supported by mere conclusory
13 statements, do not suffice.” *Id.* In reviewing a complaint for failure to state a claim, the
14 Court must “accept as true all well-pleaded allegations of material fact, and construe
15 them in the light most favorable to the non-moving party.” *Daniels-Hall v. Nat’l Educ.
16 Ass’n*, 629 F.3d 992, 998 (9th Cir. 2010). However, the Court does not have to accept as
17 true “allegations that are merely conclusory, unwarranted deductions of fact, or
18 unreasonable inferences.” *Id.*

19 **c. Erus’ Theories of Liability**

20 In addition to asserting direct claims of liability against the new parties Erus seeks
21 to add, Erus seeks to assert contract and/or tort claims against the parties under various
22 theories of derivative liability, including alter ego and joint venture theories. (Doc. 84 ¶¶
23 58-60, 65-66.) Arizona law recognizes a presumption of corporate separateness under
24 which one corporation is not liable for the actions of another. *See Deutsche Credit Corp.
25 v. Case Power & Equip. Co.*, 876 P.2d 1190, 1196 (Ariz. Ct. App. 1994). Similarly, in
26 Arizona, a corporation is treated as a separate entity, and the personal assets of a
27 corporate officer or shareholder generally may not be reached to satisfy corporate
28 liabilities. *Loiselle v. Cosas Mgmt. Group, LLC*, 228 P.3d 943, 950 (Ariz. Ct. App.

1 2010); *Honeywell, Inc. v. Arnold Const. Co., Inc.*, 654 P.2d 301, 307 (Ariz. Ct. App.
2 1982). However, there are exceptions to these rules, some of which are relevant here and
3 are discussed below.

4 **i. Alter Ego**

5 Erus asserts that the new parties are alter egos of each other and the other
6 Defendants. As an initial matter, the Court will deny Erus' Motion as to all of the
7 proposed new defendants to the extent Erus seeks to assert an independent claim for alter
8 ego against any them because Arizona does not recognize such an independent claim.⁸
9 *See Airbus Ds v. Nivisys LLC*, No. CV-14-02399-PHX-JAT, 2016 U.S. Dist. LEXIS
10 58684, at *7-8 (D. Ariz. May 2, 2016) ("Defendants are correct in noting that Arizona
11 does not recognize piercing the corporate veil[] or alter ego as an independent cause of
12 action."); *Five Points Hotel P'ship v. Pinsonneault*, 11-CV-00548-PHX-JAT, 2014 U.S.
13 Dist. LEXIS 60627, at *8-13 (D. Ariz. May 1, 2014) (finding that although the Arizona
14 Supreme Court has not directly addressed the issue, overwhelming persuasive
15 jurisprudence leads to the prediction that it would not recognize piercing the corporate
16 veil or alter ego as a standalone cause of action under Arizona law).

17 However, a plaintiff may plead derivative liability under an alter ego theory. The
18 alter ego doctrine is generally applied between private parent and subsidiary corporations
19 or between a private corporation and one of its shareholders. *See, e.g., Gatecliff v. Great*
20 *Republic Life Ins. Co.*, 821 P.2d 725, 728 (Ariz. 1991); *Dietel v. Day*, 492 P.2d 455, 457
21 (Ariz. Ct. App. 1972). To prevail on an alter ego theory, Erus must "prove both (1) unity
22 of control and (2) that observance of the corporate form would sanction a fraud or
23 promote injustice." *Gatecliff*, 821 P.2d at 728 (citing *Dietel*, 492 P.2d at 457).

24 Between corporations, the alter ego theory "allows a parent corporation to be held
25 liable for the acts of its subsidiary when the individuality or separateness of the
26 subsidiary corporation has ceased." *U-Haul Int'l v. Nat'l Fire Ins. Co.*, 10-CV-1047-

27
28 ⁸ Erus' Proposed First Amended Complaint includes a separate "Alter Ego" Count
(Count IV) against all Defendants. (Doc. 84 at 13.)

1 PHX-SMM, 2011 U.S. Dist. LEXIS 219, at *10 (D. Ariz. Jan. 3, 2011) (quoting
2 *Gatecliff*, 821 P.2d at 728). To establish unity of control, Erus must show that the parent
3 corporation “exerts ‘substantially total control over the management and activities’ of its
4 subsidiary.” *Id.* at *10. “Substantially total control may be proved” by a number of
5 factors, including “stock ownership by the parent; common officers or directors;
6 financing of subsidiary by the parent; payment of salaries and other expenses of
7 subsidiary by the parent; failure of subsidiary to maintain formalities of separate
8 corporate existence; similarity of logo; and plaintiff’s lack of knowledge of subsidiary’s
9 separate corporate existence.” *Gatecliff*, 821 P.2d at 728.

10 “The corporate fiction will [also] be disregarded when the corporation is the alter
11 ego or business conduit of a person.” *Dietel*, 492 P.2d at 457. In assessing unity of
12 control between a corporation and its shareholders, the Court considers: “payment of
13 salaries and expenses of the corporation by shareholders; failure to maintain corporate
14 formalities; undercapitalization; commingling of corporate and personal finances;
15 plaintiff’s lack of knowledge about a separate corporate existence; owners’ making of
16 interest-free loans to the corporation; and diversion of corporate property for personal
17 use.” *Great Am. Duck Races, Inc. v. Intellectual Solutions, Inc.*, 2:12-cv-00436 JWS,
18 2013 U.S. Dist. LEXIS 36190, at *7 (D. Ariz. Mar. 15, 2013) (citing *Deutsche Credit*
19 *Corp.*, 876 P.2d at 1195).

20 A plaintiff alleging alter ego liability “must do more than make conclusory
21 statements regarding an alter ego relationship between individual and corporate
22 defendants; the plaintiff must allege specific facts supporting application of the alter ego
23 doctrine.” *Barba v. Lee*, No. CV 09-1115-PHX-SRB, 2009 U.S. Dist. LEXIS 132415,
24 *31 (D. Ariz. Nov. 4, 2009). Isolated occurrences of some of the relevant factors are not
25 enough to establish alter ego liability. *Cornelis v. B&J Smith Associates LLC*, No. CV-
26 13-00645-PHX-BSB, 2014 U.S. Dist. LEXIS 63776, at *26 (May 8, 2014).

27 **ii. Joint Venture**

28 Erus also asserts claims against the entities based on a joint venture theory of

1 liability. The Arizona Supreme Court has described a joint venture as a “special
2 combination of two or more persons where in some special venture a profit is jointly
3 sought.” *Ariz. Pub. Serv. Co. v. Lamb*, 327 P.2d 998, 1000 (Ariz. 1958); *U-Haul Inter.*
4 *Inc.*, 2011 U.S. Dist. LEXIS 219, at *8-10. A joint venture requires five specific
5 elements: (1) an agreement, (2) a common purpose, (3) a community of interest, (4) an
6 equal right of control, and (5) participation in profits and losses. *Estate of Hernandez v.*
7 *Flavio*, 930 P.2d 1309, 1312 (Ariz. 1997).

8 Either expressly or impliedly, the agreement must indicate that “each
9 of the parties to such joint adventure has authority to act for all in respect to
10 the control of the means or agencies employed to execute such common
11 purpose.” *West*, 85 Ariz. at 262, 336 P.2d at 157. Each party to the joint
12 venture must have an “equal right to direct and govern the movements and
conduct of each other with respect thereto. Each must have some voice and
right to be heard in its control or management.” *Maloy v. Taylor*, 86 Ariz.
356, 359, 346 P.2d 1086, 1088 (1959) (citations omitted).

13 While the “equal right to control” element of a joint venture could
14 imply that each venturer must have an equivalent amount of control over
15 the venture’s operation, we believe it is more accurate to say that each joint
venturer must share, to some extent, in the control of the venture. In other
words, it is sufficient that a venturer has some voice or right to be heard in
the control and management of the venture.

16 *Flavio*, 930 P.2d at 1312.

17 **iii. Instrumentality Theory**

18 Erus does not explicitly reference an instrumentality theory of liability in its First
19 Amended Complaint. However, it repeatedly asserts that certain entities were “conduits”
20 for Volt’s⁹ and/or the individual Defendants’ alleged unlawful conduct. (Doc. 84 ¶¶ 59,
21 62, 74, 79, 85, 116.) Therefore, the Court will analyze whether Erus’ proposed First
22 Amended Complaint has asserted sufficient facts to state a claim against any of the
23 entities under this theory. As another Court in this District has explained:

24 Distinct from but similar to the alter ego theory is the fourth way in which a
25 parent company can be liable to a subsidiary: the instrumentality theory.
26 *Id.* at 729. “When one corporation so dominates and controls another as to
make that other a simple instrumentality or adjunct to it, the courts will

27 ⁹ Erus uses the term “Volt” to refer to both Volt Solar Systems, LLC and Volt
28 Solar Systems, Inc. (Doc. 84 ¶ 21; Doc. 98 n.2.) Defendants JWenger and Saltman
oppose that characterization. (Doc. 102 at 4-5.) However, for purposes of evaluating
Erus’ proposed amendments only, the Court will use “Volt” to refer to both entities.

1 look beyond the legal fiction of distinct corporate existence, as the interests
2 of justice require.¹⁰ *Walker v. Sw. Mines Dev. Co.*, 52 Ariz. 403, 81 P.2d
3 90, 95 (Ariz. 1938); *See also Savage v. Royal Props., Inc.*, 4 Ariz. App.
4 116, 417 P.2d 925, 927 (Ariz. Ct. App. 1966) (“[T]he fiction of corporate
5 entity must be disregarded where one corporation is so organized and
6 controlled, and its affairs are so conducted that it is, in fact, a mere
7 instrumentality or adjunct of another corporation.”). As with the alter ego
8 theory of liability, “[p]laintiffs must [] demonstrate some form of injustice
9 under an instrumentality theory.” *Gatecliff*, 821 P.2d at 730.

10 *U-Haul*, 2011 U.S. Dist. LEXIS 219, at *11.

11 Below, the Court analyzes Erus’ specific requests to add parties to the claims in its
12 First Amended Complaint.¹⁰

13 **d. Erus’ Amendments**

14 **i. Counts I and II – Breach of Contract and Breach of the
15 Covenant of Good Faith and Fair Dealing (Against ASP, ASR,
16 Skreem, Martin Consultants, and Allstar)**

17 Erus seeks to assert claims against ASP, ASR, Skreem, Martin Consultants, and
18 Allstar for breach of contract and breach of the covenant of good faith and fair dealing.
19 (Doc. 84 ¶¶ 67-79.)

20 To state a claim for breach of contract, Erus must allege the existence of the
21 contract, its breach, and resulting damages. *See Thomas v. Montelucia Villas*, 302 P.3d
22 617, 621 (Ariz. 2013). Further, Arizona law implies a duty of good faith and fair dealing
23 in every contract. *Rawlings v. Apodaca*, 726 P.2d 565, 569 (Ariz. 1986). The covenant
24 prohibits the parties to a contract from “any action which would impair the benefits
25 which the other had the right to expect from the contract or the contractual relationship.”
26 *Id.* at 570. Parties may “breach [the] duty of good faith without actually breaching an
27 express covenant in the contract.” *Wells Fargo Bank v. Ariz. Laborer, Teamster &
28 Cement Masons Local No. 395 Pension Trust Fund*, 38 P.3d 12, 29 (Ariz. 2002).

Here, Erus asserts that it entered into a contract with Volt. (*Id.* ¶ 27.) Erus does
not assert that any of the entities it seeks to add were a party to the contract. Rather, Erus
asserts that those entities are liable under theories of derivative liability because “they

¹⁰ In this Order, the Court only analyzes whether Erus’ proposed amendments are
futile. It does not address the sufficiency of Erus’ First Amended Complaint with regard
to claims against the Defendants named in Erus’ initial Complaint.

1 served as a conduit for Volt’s breach [of contract], and share a unity of interest between
2 and among them.” (*Id.* ¶¶ 59-60, 74, 79.)

3 The Court finds that Erus has stated a claim for relief against ASR and ASP in
4 Counts I and II of the First Amended Complaint. Specifically, Erus asserts that Volt had
5 an agreement with ASR and ASP to procure clients on Volt’s behalf, ASP made false
6 statements or misrepresentations, through JWenger and BWenger, regarding the product
7 Erus contracted to purchase, and ASP and ASR were used as shells in a conspiracy to
8 defraud Erus of the funds it gave to Volt under the contract. (*Id.* ¶¶ 42-43, 106-07.) Such
9 allegations, together, are sufficient to establish that ASP and ASR were directly involved
10 in the breach and/or acted as joint ventures with Volt. *Gatecliff*, 821 P.2d at 728; *Farr v.*
11 *Transamerica Occidental Life Ins. Co.*, 699 P.2d 376, 386 (Ariz. Ct. App. 1984).
12 Accordingly, the Court will grant Erus’ Motion to add ASP and ASR to Counts I and II
13 of the First Amended Complaint.

14 The Court finds that Erus has failed to state a claim for relief against Skreem,
15 Martin Consultants, and Allstar in Counts I and II of the First Amended Complaint.
16 Although Erus asserts that Volt transferred funds to Skreem after Erus made its payment
17 to Volt, and the transfers “contributed to Volt’s insolvency,” Erus does not specifically
18 allege any direct involvement by Skreem in the contract, or Volt’s breach of the contract.
19 (Doc. 84 ¶¶ 45-48.)¹¹ Importantly, Erus does not assert any factual allegations regarding
20 who directed the transfers to be made from Volt to Skreem or for what purpose the
21 transfers were made. Although in its Supplemental Brief Erus asserts that Skreem was
22 “involved in the dealings between the parties and benefited from [Erus’] payments to
23 Volt,” and in its First Amended Complaint asserts that all of “the ALTER EGO
24 COMPANIES,” combined, served as a “conduit for Volt’s breach,” Erus fails to include
25 any factual allegations regarding the transfer of funds between Volt and Skreem other
26

27 ¹¹ Erus asserts that it paid Volt a total of \$625,000 between May 8, 2014 and May
28 26, 2014, and \$105,598 on some date after August 4, 2014. (*Id.* ¶¶ 27-34.) Erus asserts
that Volt paid Skreem a total of \$116,600, out of two different accounts, in 11 payments,
between July 14, 2014 and October 22, 2014. (*Id.* ¶¶ 46-47.)

1 than the dates and amounts. (Doc. 98 at 5-6; Doc. 84 ¶¶ 43-46.) Erus' conclusory
2 allegations that all of the entities were created by all the individuals Erus identifies, as
3 part of a fraudulent scheme, are insufficient. *Iqbal*, 556 U.S. at 678. Erus likewise fails to
4 assert any specific allegations of direct involvement in the contract and/or breach by
5 Martin Consultants or Allstar.

6 Erus also fails to assert claims against these three entities under any derivative
7 liability theory. Lumping the entities together, Erus asserts that (1) they "were involved"
8 with Volt in exchange for the forgiveness of debt owed by JMartin and related
9 (unidentified) entities controlled by him; (2) they "served as a conduit for Volt's breach,
10 and share a unity of interest between and among them"; (3) they are "now a mere shell
11 and naked framework," which the individual Defendants use "as a conduit for the
12 conduct of their personal business, property and affairs"; (4) they were created "pursuant
13 to a fraudulent plan, scheme and device conceived and operated by the individual
14 Defendants, whereby the income revenue and profits of [each of the companies] were
15 diverted by the individual Defendants to themselves and to other [unspecified]
16 corporations controlled by the individual Defendants"; (5) the entities have the same
17 business location, telephone number, and e-mail system; and (6) all of the entities
18 "pooled assets, revenues, or use of one corporation's financial resources to pay or
19 guaranty the other's obligations." (Doc. 84 ¶¶ 59, 109.) Erus also asserts that JMartin is
20 an Officer of Skreem and an owner of Volt. (*Id.* ¶¶ 23, 51.)

21 Erus' allegations are too conclusory and vague to state claims for breach of
22 contract or breach of the covenant of good faith and fair dealing against Skreem, Martin
23 Consultants, or Allstar under alter ego, joint venture, or instrumentality theories of
24 liability. Although Erus asserts that the individual Defendants all controlled these
25 entities, and used them to perpetuate a fraudulent scheme, Erus fails to set forth sufficient
26 specific factual allegations to show that any of these three entities were the alter ego of
27 Volt. Erus asserts that all of the entities have the same e-mail, business location and
28 telephone, and asserts there is a common Officer/owner between Volt and Skreem in

1 JMartin. (*Id.* ¶¶ 23, 59, 51.) However, beyond those allegations, Erus fails to set forth
2 any specific allegations demonstrating that Skreem, Martin Consultants, or Allstar
3 exerted “substantially total control over the management and activities of” Volt,
4 sufficient to allow any of the three entities to be liable for Volt’s breach of the contract
5 with Erus.¹²

6 Erus also fails to sufficiently plead liability against the three entities under a joint
7 venture theory. Erus asserts that Martin Consultants, Allstar, and Skreem “were involved
8 with Volt in exchange for the forgiveness” of JMartin’s debt and the debt of other,
9 unidentified entities. (*Id.* ¶ 109.) However, Erus fails to allege that any of the three
10 entities had an equal right of control or participated in both profits and losses with Volt or
11 that there was any agreement between them. Therefore, Erus has failed to sufficiently
12 plead liability in Counts I and II against these three entities under a joint venture theory.

13 Finally, Erus fails to sufficiently plead liability against these entities under an
14 instrumentality theory. Although Erus alleges that the entities were each a “conduit for
15 Volt’s breach,” Erus has failed to assert any factual allegations to show that Volt “so
16 dominat[ed] and control[ed]” Martin Consultants, Allstar, and/or Skreem as to make any
17 of them the instrumentality of Volt (or vice versa). Notably, although Erus alleges that
18 JMartin is an Officer Skreem and an owner of Volt, Erus asserts that Volt has other
19 owners and officers who are not affiliated with Skreem, Martin Consultants, or Allstar.
20 (*Id.* ¶ 23.) And, Erus’ conclusory allegation that all of the individual Defendants used all
21 of the entities as conduits for fraudulent conduct is insufficient. Therefore, the Court will
22

23 ¹² The Court also finds that Erus has failed to sufficiently plead Skreem, Martin
24 Consultants, or Allstar were, or are, the alter ego of JMartin. As stated above, Erus
25 asserts conclusory allegations with regard to all of the Defendants as one group. Erus
26 does not assert specific factual allegations with regard to JMartin’s relationship with
27 Skreem, Martin Consultants, or Allstar, other than he is an Officer of Skreem, in
28 exchange for these three entities being “involved” in some unidentified way with Volt,
Volt forgave debt owed by him, and the Board tendered shares of Volt to him. (*Id.* ¶¶ 51,
109.) These allegations are insufficient. *Cornelis*, 2014 U.S. Dist. LEXIS 63776, at *28
 (“Although [p]laintiffs apparently include B&J Smith Associates and B&J Smith
Investments under the collective term ‘corporate defendants,’ they failed to set forth facts
regarding each separate entity’s relationship with Eatza Pizza and how each separate
entity exercised substantially total control over the management and activities of Eatza
Pizza.”).

1 deny Erus' Motion to add Skreem, Martin Consultants, and Allstar to Counts I and II of
2 the Complaint.

3 **ii. Count III – Negligent Misrepresentation (Against ASP, ASR,
4 Skreem, Martin Consultants, Allstar, JMartin, TMoore, and
5 BWenger)**

6 To state a claim for negligent misrepresentation, (1) there must be incorrect
7 information given for the guidance of others in business dealings; (2) the party giving the
8 false information intended, or could reasonably foresee, that the other parties would rely
9 on that information; (3) the party giving the false information failed to exercise
10 reasonable care in obtaining or communicating that information; (4) the other parties
11 actually relied on the incorrect information to their detriment and were justified in doing
12 so; and (5) such reliance caused their damages. *See Taeger v. Catholic Family & Cmty.
13 Serv.*, 995 P.2d 721, 730 (Ariz. Ct. App. 1999).

14 Rule 9(b) requires that a plaintiff alleging fraud or mistake “state with particularity
15 circumstances constituting fraud or mistake.” Fed. R. Civ. P. 9(b). Rule 9(b) has been
16 interpreted by the Ninth Circuit Court to require the plaintiff to “state the time, place, and
17 specific content of the false representations as well as the identities of parties to the
18 misrepresentation.” *Schreiber Distrib. Co. v. Serv-Well Furn. Co.*, 806 F.2d 1393, 1401
19 (9th Cir. 1986); *see also Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1103 (9th Cir.
20 2003) (“Averments of fraud must be accompanied by the who, what, when, where, and
21 how of the misconduct charged.”). The plaintiff must also “set forth an explanation as to
22 why the disputed statement was untrue or misleading when made.” *Yourish v. Cal.
23 Amplifier*, 191 F.3d 983, 993 (9th Cir. 1999).

24 Here, Erus asserts in its First Amended Complaint that Volt, ASP, JWenger, and
25 BWenger made misrepresentations regarding the use of the money Erus paid Volt, the
26 need to tender additional funds, the date of delivery, and where the funds would be held,
27 Erus relied on those misrepresentations, and such reliance caused Erus damage. (Doc. 84
28 ¶¶ 28-34, 36.) Further, with regard to at least some of the alleged misrepresentations,
Erus provides a timeframe of when the statements were made and who made them. (*Id.*

1 ¶¶ 31, 33-34, 36.) Therefore, the Court finds that Erus has sufficiently pled claims for
2 negligent misrepresentation against ASR, ASP, BWenger, and JWenger, and will grant
3 Erus' Motion to add those parties to Count III of the First Amended Complaint.

4 The Court likewise finds that Erus has sufficiently pled claims for negligent
5 misrepresentation against JMartin and TMoore based on an alter ego theory.
6 Specifically, Erus asserts that JMartin is an owner of Volt (*id.* ¶ 23), the Volt Board of
7 Directors authorized the issuance of common stock in exchange for the forgiveness of the
8 total principal and interest balances owed to JMartin and related entities (*id.* ¶¶ 52-54),
9 the debt forgiven was \$190,822 but the transaction was valued at \$1,927,211 (*id.* ¶ 53),
10 and JMartin contributed to undercapitalizing Volt and diverted corporate funds for his
11 own personal use (*id.* ¶¶ 52-55, 59, 62). Further, Erus asserts that TMoore was an Officer
12 of Volt and had control over Volt's finances and accounts, and, along with the other
13 individual Defendants, comingled corporate funds from the escrow account to pay
14 personal debt. (*Id.* ¶¶ 56, 57, 62, 86, 133-34.) Erus further asserts that both individuals
15 were part of an agreement to defraud Erus of the funds it paid to Volt. (*Id.* ¶ 133.)
16 Finally, Erus asserts that all of the Defendants participated in a fraudulent plan and
17 scheme to divert Erus' funds to other corporations. (*Id.* ¶ 59.) The Court finds these
18 allegations, taken together, are sufficient to assert claims that JMartin and TMoore, as
19 owners and/or Officers of Volt, are liable for the alleged negligent misrepresentations
20 made by Volt.

21 The Court finds, however, that Erus has failed to sufficiently plead claims for
22 negligent misrepresentation against Skreem, Martin Consultants, and Allstar. Erus does
23 not allege any direct involvement by any of these three entities in the transactions
24 between Erus and Volt. As detailed above, Erus asserts that Volt transferred \$116,600 to
25 Skreem over the course of several months and that the transfers contributed to Volt's
26 insolvency. (*Id.* ¶¶ 45-48.) Erus also alleges that all of the entities, including Skreem,
27 were used as a "conduit for Volt's breach, and share a unity of interest between and
28 among them." (*Id.* ¶¶ 74, 79.) Erus further claims that JMartin is an Officer of Skreem

1 and an owner of Volt, and Skreem, Martin Consultants, and Allstar “were involved” with
2 Volt in some unidentified way “in exchange for the forgiveness of the total principal and
3 interest balances owed to Jeffrey Martin and related entities controlled by him.” (*Id.* ¶¶
4 23, 51, 109.) However, these allegations, alone, do not establish that Skreem was directly
5 involved in the transactions between Erus and Volt.

6 Furthermore, Erus fails to sufficiently plead any theories of derivative liability
7 against these three entities. Notably, Erus does not allege any specific allegations
8 regarding any substantial control between these three entities, on one hand, and Volt,
9 ASP, ASR, BWenger, or JWenger—the entities and individuals who made the
10 representations—on the other. Erus does not allege that BWenger or JWenger are owners
11 of any of the three entities, and Erus does not allege that JMartin, an Officer of Skreem,
12 made any misrepresentations. Erus further does not allege that Skreem, Martin
13 Consultants, or Allstar shared in the profits and losses of Volt, ASP, or ASR. Therefore,
14 the Court will deny Erus Motion to Add Skreem, Martin Consultants, and Allstar to
15 Count III of the First Amended Complaint.

16 **iii. Count V¹³ – Fraud (Against BWenger, ASR, and ASP)**

17 “A showing of fraud requires (1) a representation; (2) its falsity; (3) its materiality;
18 (4) the speaker’s knowledge of its falsity or ignorance of its truth; (5) the speaker’s intent
19 that it be acted upon by the recipient in the manner reasonably contemplated; (6) the
20 hearer’s ignorance of its falsity; (7) the hearer’s reliance on its truth; (8) the right to rely
21 on it; [and] (9) his consequent and proximate injury.” *See Echols v. Beauty Built Homes,*
22 *Inc.*, 647 P.2d 629, 631 (Ariz. 1982); *Carrel v. Lux*, 420 P.2d 564, 568 (Ariz. 1966). Erus
23 must plead this claim with particularity. *See Fed. R. Civ. P. 9(b); Vess*, 317 F.3d at 1102
24 (“Averments of fraud must be accompanied by the ‘who, what, when, where, and how’ of
25 the misconduct charged.”); *Neilson v. Union Bank of Cal., N.A.*, 290 F. Supp. 2d 1101,
26

27 ¹³ Count IV of Erus’ First Amended Complaint asserts an independent claim for
28 alter ego. As detailed in section III.c.i. above, Arizona does not recognize such an
independent claim. Therefore, the Court will deny Erus’ Motion to add parties to Count
IV.

1 1141 (C.D. Cal. 2003) (“It is well-established in the Ninth Circuit that both claims for
2 fraud and negligent misrepresentation must meet Rule 9(b)’s particularity requirements”).

3 Here, Erus seeks to add BWenger, ASR, and ASP to Count V of its First Amended
4 Complaint. For the reasons stated above with regard to Erus’ claims for negligent
5 misrepresentation, the Court finds that Erus has stated claims for relief for fraud against
6 these individuals and entities, and will grant Erus’ Motion to add them to Count V.

7 **iv. Count VI – Money Had and Received (Against ASP, ASR,
8 Skreem, Martin Consultants, Allstar, JMartin, TMoore, and
BWenger)**

9 Erus asserts claims for “Money Had and Received” against each of the eight new
10 defendants it seeks to add. A claim for money had and received may be maintained by
11 evidence “showing that the defendant has received or obtained possession of money of
12 the plaintiff which in equity and good conscience he ought to pay over to the plaintiff.”
13 *Copper Belle Mining Co. v. Gleeson*, 134 P. 285, 287 (Ariz. 1913). Erus claims that
14 “Defendants improperly removed the funds from an escrow account. Plaintiff is
15 informed and believes that the funds were improperly used by Defendants for personal
16 use and not for the benefit of Erus.” (Doc. 84 ¶ 99.) In a later Count, Erus more
17 specifically asserts that MAdler, SAltman, JWenger, JMartin, TMoore, and BWenger
18 “removed funds or induced Volt to remove funds from the escrow account designated for
19 the Agreement for among other things, corporate debt and personal use.” (*Id.* ¶ 134.)
20 Erus also asserts generally that Volt transferred \$116,600 to Skreem over the period of
21 several weeks, and all of the entities, including Skreem “served as a conduit for Volt’s
22 breach.” (*Id.* ¶¶ 45-48, 74, 79, 116.)

23 Several of Erus’ allegations lump the defendants together and are vague and
24 conclusory. However, in reviewing the First Amended Complaint in its entirety, the
25 Court finds that Erus has sufficiently set forth facts to state claims for relief in Count VI
26 against ASP, ASR, BWenger, JMartin, and TMoore. Erus sets forth sufficient allegations
27 that each of these entities or individuals directly took the funds from the escrow account
28 and/or was directly involved in the transaction between Erus and Volt. (*Id.* ¶¶ 39, 42-43,

1 45-48, 52-57, 134.) Therefore, the Court will grant Erus' Motion as it relates to these
2 entities and individuals in Count VI of Erus' First Amended Complaint.

3 However, for the reasons already discussed, Erus fails to sufficiently plead claims
4 against Skreem, Martin Consultants, and Allstar. Therefore, the Court will deny Erus'
5 Motion to add those entities to Count VI.

6 **v. Count VII – Conversion (Against ASP, ASR, Skreem, Martin
7 Consultants, Allstar, Martin, Moore, and BWenger)**

8 In Arizona, “conversion is an intentional exercise of dominion or control over a
9 chattel which so seriously interferes with the right of another to control it that the actor
10 may justly be required to pay the other the full value of the chattel.” *Miller v. Hehlen*,
11 104 P.3d 193, 472 (Ariz. Ct. App. 2005) (quoting Restatement (Second) of Torts §
12 222A(1) (1965)). Erus points to the same allegations to support this claim against all of
13 the Defendants as those discussed above with regard to Erus' claim for money had and
14 received. Therefore, for the reasons detailed in the previous section, the Court will grant
15 Erus' Motion to add Defendants ASP, ASR, JMartin, BWenger, and TMoore to Count
16 VII. The Court will deny the Motion as to the other entities.

17 **vi. Count VIII – Waste of Corporate Assets (Against JMartin,
18 TMoore, and BWenger)**

19 Erus does not address this claim in its Supplemental Brief and, therefore, the Court
20 assumes that Erus abandons its request to add parties to this claim in its First Amended
21 Complaint. (Doc. 98 at 10.)

22 **vii. Count IX – Aiding and Abetting Breach of Fiduciary Duty
23 (Against ASP, ASR, Skreem, Martin Consultants, Allstar,
24 Martin, Moore, and BWenger)**

25 To establish a claim of aiding and abetting tortious conduct, proof of three
26 elements is necessary: “(1) the primary tortfeasor must commit a tort that causes injury to
27 the plaintiff; (2) the defendant must know that the primary tortfeasor's conduct
28 constitutes a breach of duty; and (3) the defendant must substantially assist or encourage
the primary tortfeasor in the achievement of the breach.” *Cal X-Tra v. W.V.S.V.
Holdings, L.L.C.*, 276 P.3d. 11, 97 (Ariz. Ct. App. 2012) (citing Restatement (Second) of

1 Torts § 876(b)).

2 Here, Erus asserts that Volt breached its contract with Erus and engaged in tortious
3 conduct. (Doc. 84 ¶¶ 27-36, 80-83, 88-93.) For the reasons detailed above, the Court
4 finds that Erus has sufficiently pled that ASR, ASP, BWenger, JMartin, and TMoore
5 were directly involved/assisted Volt in converting the escrow funds. Also for the
6 reasons discussed above, the Court finds that Erus has failed to sufficiently plead liability
7 against Skreem, Martin Consultants, and Allstar.

8 **viii. Count X – Intentional Interference with Contractual Relations**
9 **(Against ASP, ASR, Skreem, Martin Consultants, Allstar,**
10 **JMartin, TMoore, and BWenger)**

11 “To recover for tortious interference under Arizona law, [Erus] must prove: (1) the
12 existence of a valid contractual relationship; (2) [Defendants’] knowledge of the
13 relationship; (3) [Defendants’] intentional interference in inducing or causing the breach;
14 (4) the impropriety of [Defendants’] interference; and (5) resulting damages. *MDY*
15 *Industries, LLC v. Blizzard Entertainment, Inc.*, 629 F.3d 928, 955 (9th Cir. 2011)
(citation omitted).

16 Here, the Court finds that Erus has pled a claim for intentional interference with
17 contractual relations against ASP, ASR, BWenger, JMartin, and TMoore. Erus asserts
18 that the individuals removed or assisted in removing the funds from the escrow account,
19 and used those funds for personal debt, which contributed to the failure of Volt to
20 perform its obligations under the contract. (*Id.* ¶¶ 121, 134.) Erus also asserts that
21 BWenger was acting on behalf of ASP and ASR. (*Id.* ¶¶ 38-43.) The Court finds these
22 allegations sufficient.

23 The Court finds, however, that Erus has failed to assert any factual allegations
24 tying the funds transferred from Volt to Skreem to the transaction at issue, or allegations
25 showing intentional, interfering conduct by Skreem. The fact that the funds were paid
26 from Volt to Skreem on the time frame alleged, alone, is insufficient to plead liability
27 against Skreem.

28 Likewise, Erus fails to allege any interfering conduct by Martin Consultants and

1 Allstar. Again, Erus' vague and conclusory allegations that all of the Defendants
2 generally diverted money from the escrow account are insufficient to state a claim.
3 Finally, as detailed above, Erus fails to sufficiently plead derivative liability against
4 Skreem, Martin Consultants, or Allstar. Therefore, the Court will deny Erus' Motion to
5 add these entities to Count X of the First Amended Complaint.

6 **ix. Count XI – RICO, 18 U.S.C. § 1961 (Against ASP, ASR, Skreem,
7 Martin Consultants, Allstar, JMartin, TMoore, and BWenger)**

8 The Federal Racketeer Influenced and Corrupt Organizations Act (“RICO”), 18
9 U.S.C. §§ 1961 *et seq.*, provides a private cause of action for “[a]ny person injured in his
10 business or property by reason of a violation of section 1962 of this chapter.” 18 U.S.C.
11 § 1964(c). Section 1962(c) of RICO makes it “unlawful for any person employed by or
12 associated with any enterprise engaged in, or the activities of which affect, interstate
13 commerce, to conduct or participate, directly or indirectly, in the conduct of such
14 enterprise’s affairs through a pattern of racketeering activity or collection of unlawful
15 debt.” Thus, to state a claim under section 1962(c), “a plaintiff must allege (1) conduct,
16 (2) of an enterprise, (3) through a pattern, and (4) of racketeering activity.” *Jarvis v.*
17 *Regan*, 833 F.2d 149, 151-52 (9th Cir. 1987) (internal citations omitted).

18 Here, Erus asserts that Volt and all of the other Defendants, in making multiple
19 fraudulent misrepresentations through the mail or wire transfers, “have conducted, and
20 have conspired to conduct, the affairs of Volt through a pattern of racketeering activity in
21 violation of 18 U.S.C. § 1962(c), (d).” (Doc. 84 ¶¶ 127-31.) The Court will grant Erus’
22 Motion to add ASP, ASR, and BWenger to this claim, as Erus asserts specific allegations
23 regarding their involvement in making alleged misrepresentations regarding use of the
24 funds Erus paid Volt, delivery of the product, and the need for additional payments from
25 Erus. (*Id.* ¶¶ 27-36, 39, 41-43.) The Court will further grant Erus’ Motion with regard to
26 JMartin and TMoore because Erus asserts that, as owners or Officers, JMartin and
27 TMoore specifically either removed Erus’ money out of the escrow account or induced
28 Volt to do so “for among other things, corporate debt and personal use.” (*Id.* ¶¶ 133-34.)

The Court will deny Erus’ Motion to add Skreem, Martin Consultants, and Allstar

1 to this Count because Erus fails to allege any direct participation in the alleged
2 racketeering activity by any of these entities. Erus asserts in its Supplemental Brief that
3 these entities “made multiple false statements and fraudulent misstatements – or
4 conspired with other Defendants to do so.” (Doc. 98 at 13.) However, Erus fails to
5 identify any such fraudulent statements made by any of these entities, or any facts to
6 establish that they “conspired” to make such statements. *Wasco Prods. v. Southwall*
7 *Techs., Inc.*, 435 F.3d 989, 990 (9th Cir. 2006) (Courts “have required the plaintiff to
8 plead at least the basic elements of the conspiracy, especially the existence of an
9 agreement.”) Therefore, the Court will grant Erus’ Motion to add ASR, ASP, BWenger,
10 JMartin, and TMoore to Count XI of the First Amended Complaint, and will deny the
11 Motion as to the remaining entities Erus seeks to add.

12 **x. Count XII – Conspiracy (Against JMartin, TMoore, and**
13 **BWenger)**

14 “[L]iability for civil conspiracy requires that two or more individuals agree and
15 thereupon accomplish ‘an underlying tort which the alleged conspirators agreed to
16 commit.’” *Zowine v. Prussin*, No. CV-14-00892-PHX-GMS, 2016 U.S. Dist. LEXIS
17 17533 (D. Ariz. Feb. 12, 2016) (quoting *Wells Fargo*, 38 P.3d at 36). “A mere agreement
18 to do a wrong imposes no liability; an agreement plus a wrongful act may result in
19 liability.” *Id.*

20 Here, Erus asserts that on or about August 4, 2014, JMartin, TMoore and
21 BWenger “and each of them knowingly and willfully conspired and agreed among
22 themselves to damage the plaintiff by depriving it of the benefits of this contract by
23 inducing Volt to breach the Agreement,” and each individual “removed funds or induced
24 Volt to remove funds from the escrow account.” (Doc. 84 ¶¶ 133-34.) For the reasons
25 detailed above, the Court finds that Erus has sufficiently pled claims for conspiracy
26 against JMartin, BWenger, and TMoore. Therefore, the Court will grant Erus’ Motion to
27 add them to this Count.

28 **IV. Motion for Settlement Conference**

On April 6, 2016, MADler filed a Motion for Referral to a Magistrate Judge for a

1 Settlement Conference. (Doc. 94.) In his Motion, MAdler asserts that “[n]o good faith
2 settlement discussions have occurred. Emails on the subject been exchanged in the past
3 few days regarding settlement, but nothing specific. No offers have been made by any
4 party.” No other party has responded to MAdler’s Motion, and the time to do so has
5 passed. LRCiv. 7.2(c).

6 The Court’s Scheduling Order in this matter (Doc. 36), amended by the Court’s
7 Order at Doc. 49, provides the following:

8 8. Good Faith Settlement talks

9 All parties and their counsel shall meet in person and engage in good faith
10 settlement talks no later than **[January 18, 2016]**. Upon completion of such
11 settlement talks, and no later than **seven days** after the deadline set forth in
12 the preceding sentence, the parties shall file a Joint Report on Settlement
13 Talks. The Report shall (a) inform the Court that the parties engaged in
14 good faith settlement talks; (b) state the outcome of such talks; and (c)
indicate whether the parties need assistance from the Court in seeking
settlement of the case. The parties shall promptly file a Notice of
Settlement with the Court at any time when settlement is reached during the
course of this litigation.

15 However, MAdler’s Motion indicates that the parties have not yet engaged in good
16 faith discussions. Further, the docket reflects that the parties have not filed the required
17 Joint Report on Settlement Talks. Accordingly, the Court will Order the parties to show
18 cause why sanctions should not be imposed for their failure to comply with the Court’s
19 Order.¹⁴

20 Accordingly,

21 **IT IS ORDERED** that Erus’ Ex Parte Application to Amend Case Management
22 Order, or Alternatively, to Vacate Dates and Schedule New Case Management
23 Conference (Doc. 64) is granted as provided in this Order. The Court’s Case
24 Management deadlines are extended as follows:

- 25 • The deadline for completing MAdler’s deposition is **September 16, 2016**.
- 26 • The deadline for completing fact discovery is **October 28, 2016**.

27 ¹⁴ Notably, Erus’ Motion to modify the Court’s case management deadlines does
28 not include a request for an extension of the deadline to engage in good faith settlement
discussions. (Docs. 64, 65.)

- 1 • The parties shall provide full and complete expert disclosures by **August 26, 2016**.
- 2 • Rebuttal expert disclosures shall be completed by **September 23, 2016**.
- 3 • Expert depositions shall be completed by **October 28, 2016**.
- 4 • Dispositive motions shall be filed no later than **December 16, 2016**.

5 **IT IS FURTHER ORDERED** that Erus' Motion to Compel Deposition of
6 MADler (Doc. 69) is granted as provided in this Order.

7 **IT IS FURTHER ORDERED** that Erus' Motion to amend to add parties (Doc.
8 66) is granted in part and denied in part as follows:

- 9 • Erus' Motion to add parties to Count IV (Alter Ego) is denied.
- 10 • Erus' Motion to add parties to Count VIII (Waste of Corporate Assets) is denied.
- 11 • Erus' Motion to add ASP and ASR to Counts I, II, III, V, VI, VII, IX, X, and XI is
12 granted.
- 13 • Erus' Motion to add BWenger to Counts III, V, VI, VII, IX, X, XI, and XII is
14 granted.
- 15 • Erus' Motion to add JMartin and TMoore to Counts III, VI, VII, IX, X, XI, and
16 XII is granted.
- 17 • Erus' Motion to add Martin Consultants, Skreem, and Allstar is denied.

18 **IT IS FURTHER ORDERED** that within **14 days** of the date of this Order, Erus
19 shall file a clean (non-redlined) First Amended Complaint that is consistent with this
20 Order (specifically, omitting any claims/Defendants the Court did not permit leave to
21 amend to add).

22 **IT IS FURTHER ORDERED** that Erus is responsible for serving the newly
23 added Defendants pursuant to Rule 4 of the Federal Rules of Civil Procedure.

24 **IT IS FURTHER ORDERED** that service under Rule 4(m) of the Federal Rules
25 of Civil Procedure runs from the date of **THIS ORDER** (not the filing of the First
26 Amended Complaint as authorized herein).

27 **IT IS FURTHER ORDERED** that if any Defendant believes Erus failed to
28 comply with this Order in the to-be-filed First Amended Complaint, such Defendant may

1 file a motion to dismiss.

2 **IT IS FURTHER ORDERED** that all new Defendants are bound by the Court's
3 Rule 16 Scheduling Order (Doc. 36), as amended by the Court's Order at Doc. 49 and
4 this Order, unless such Defendant moves for a supplemental Rule 16 conference
5 contemporaneous to responding to the First Amended Complaint.

6 **IT IS FURTHER ORDERED** that Erus shall serve a copy of the Court's Rule 16
7 Scheduling Order (Doc. 36), the Court's October 6, 2015 Order amending the Rule 16
8 Order (Doc. 49), and this Order on each newly added Defendant with the summons and
9 amended complaint.

10 **IT IS FURTHER ORDERED** that in light of the Court's Orders on Erus' Motion
11 to add parties, and extending the discovery and dispositive motion deadlines, the Motions
12 for Summary Judgment pending at Docs. 102 and 104 are denied without prejudice. The
13 Court grants Defendants MADler, SALTman, and JWenger leave to each file **one**
14 additional motion for summary judgment on Erus' claims in its to-be-filed First Amended
15 Complaint.¹⁵

16 **IT IS FURTHER ORDERED** that Erus' Motion Pursuant to Rule 56(d) (Doc.
17 112) is denied as moot.

18 **IT IS FURTHER ORDERED** that within **14 days** of the date of this Order, the
19 parties shall show cause in writing why sanctions should not be imposed for the parties'
20 failure to comply with the Court's Orders to engage in good faith settlement talks no later
21 than January 18, 2016, and to file a Joint Report on Settlement. In their responses, the

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26 ¹⁵ Defendants are reminded that they must fully comply with the Local Rules of
27 Civil Procedure in filing a motion for summary judgment, including that motions must
28 "be in a fixed-pitch type size no smaller than ten (10) pitch (10 letters per inch) or in a
proportional font size no smaller than 13 point, including any footnotes." LRCiv.
7.1(b)(1). All motions for summary judgment must also fully comply with the
requirements of Rule 56.1 of the Local Rules of Civil Procedure.

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parties shall also provide their positions as to whether this case should be referred to another Magistrate Judge for the purposes of conducting a settlement conference.

Dated this 7th day of June, 2016.



Honorable John Z. Boyle
United States Magistrate Judge