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**UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA**

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Jes Solar Co., Ltd., a South Korean Corporation;
Airpark Co., Ltd., a South Korean Corporation;
and Hankook Technology, Inc., a South Korean
Corporation,

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Plaintiffs,

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v.

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Matinee Energy, Inc., a Nevada Corporation;
Samsun, L.L.C., a Virginia LLC., S. Chin Kim;
John S. Lee; Chun Rae Kim; Paul Jeoung; Tong
Soo Chung,

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Defendants,

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CV 12-626 TUC DCB

ORDER

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The Court has repeatedly described the circumstances of this case, including the delay in the case up-front because Defendants evaded service, failed to answer and appear until after default was entered against them, then filed motions to set aside the defaults, followed by motions for reconsideration. The Court refused to set aside the defaults as to: Defendant Matinee Energy, Inc. (Matinee) and S. Chin Kim, Paul Jeoung, and Tong Soo Chung, who were acting individually and within the course of their employment with Defendant Matinee, and Defendant Samsun, LLC (Samsun¹) and Defendant John S. Lee, who acted individually and within the course of his employment with Defendant Samsun. The Court granted Chun Rae Kim's motion and set aside the default, and he filed his Answer on August 7, 2013. (Answer (Doc. 74)).

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The Court issued a case management Scheduling Order on September 18, 2013, setting a deadline for discovery on December 31, 2013, with dispositive motions due February 17,

¹Samsun also referred to as Sam Sun. See D's MSJ. (Doc. 144.)

1 2014. On February 26, 2014, the Court granted a 30 day extension of discovery for the sole
2 purpose of allowing Plaintiffs to answer Defendant's discovery requests, which he had served
3 on them 15 days before the end of discovery. (Order (Doc. 99)). The Court granted the
4 extension to afford Plaintiffs 30 days to respond as provided for under Fed. R. Civ. P. 33(b)(2).
5 Discovery closed on March 26, 2014.

6 The parties both filed dispositive motions. On February 18, 2014, Plaintiffs filed a
7 Motion for Partial Summary Judgment and a Motion for Leave to File a Second Amended
8 Complaint. On February 19, 2014, the Defendant filed a Motion for Summary Judgment or, in
9 the Alternative to Dismiss for Forum Non Conveniens. Additionally, Defendant challenges the
10 Plaintiffs reliance on facts deemed admitted due to Defendant's alleged failure to timely object;
11 Defendant seeks to withdraw the admission that Chun Rae Kim "prepared or caused to be
12 prepared" an agreement between [Plaintiff] Hankook and Samsun." (Response to Ps, MPSJ²
13 (Doc. 162) at 2-5.) Plaintiffs charge that Chun Rae Kim spoliated critical evidence in the case
14 and seeks sanctions, including preclusion of any evidence negating his relationship with or
15 financial interest in Samsun and J&A Solar Inc. (J&A Solar) and/or an adverse inference
16 instruction at trial. (Motion for Spoliation (Doc. 168)). All motions are fully briefed and ready
17 for disposition.

18 For the reasons explained below, the Court grants the Motion to Amend to add facts in
19 support of Plaintiffs' claim of civil conspiracy against Defendant Chun Rae Kim. The Court
20 denies the Plaintiffs' Motion for Partial Summary Judgment on the civil conspiracy claim
21 because there are material questions of fact in dispute regarding Defendant Chun Rae Kim's
22 involvement in the alleged fraudulent conspiracy. Likewise, the Court denies the Defendant's
23 Motion for Summary Judgment. The Court allows the Defendant to withdraw his admissions,
24 which were deemed admitted pursuant to Fed. R. Civ. P. 36(a). The Court denies the motion
25 for sanctions for spoliation of evidence. The Court will set the case for trial.

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28 ²Plaintiffs' Motion for Partial Summary Judgment. (Doc. 137.)

1 1. Chun Rae Kim’s Motion to Dismiss for Forum Non Conveniens

2 Normally, this Court would have to weigh numerous private and public interest factors
3 to determine whether to dismiss a case for forum non conveniens: “dismissal will ordinarily be
4 appropriate where trial in the plaintiff’s chosen forum imposes a heavy burden on the defendant
5 or the court, and where the plaintiff is unable to offer any specific reasons of convenience
6 supporting his choice.” *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 249 (1981). The parties’
7 private interests include “relative ease of access to sources of proof; availability of compulsory
8 process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses;
9 possibility of view of premises, if view would be appropriate to the action; and all other
10 practical problems that make trial of a case easy, expeditious and inexpensive.” *Id.* at 241, n.
11 6. Public-interest factors may include “the administrative difficulties flowing from court
12 congestion; the local interest in having localized controversies decided at home; [and] the
13 interest in having the trial of a diversity case in a forum that is at home with the law.” *Id.*

14 But when venue is putatively governed by a valid forum selection clause, the
15 considerations change in three ways. *Atlantic Marine Constr. Co., Inc. v. United States District*
16 *Court*, 134 S. Ct. 568, 581 (2013). The Court may not accord any weight to the plaintiff’s
17 chosen forum. *Id.* The Court may not consider the parties’ private interests. *Id.* at 582. Where
18 there is a valid forum selection clause, the Court may only consider public interest factors. *Id.*
19 “In all but the most unusual cases, therefore, the interest of justice is served by holding parties
20 to their bargain.” *Id.* at 583.

21 This is the most unusual of circumstances. Here, there is a forum selection clause in the
22 Samsun-Jes Solar agreement. The parties agreed to a “competent court” to resolve disputes, not
23 settled by the parties, which “shall be governed by the court where “A” [Jes Solar] is located,”
24 which is South Korea. (D’s MSJ,³ SOF Exhibits (Doc. 147) at Ex. 5: Collaborative
25 Construction Agreement ¶ 2.) Enforcing the forum selection clause will split Jes Solar’s civil
26 conspiracy case. Jes Solar alleges that Defendant Matinee Energy and its employees conspired
27 with each other and with Defendant Samsun and its employees, who likewise conspired with

28 ³Defendant’s Motion for Summary Judgment. (Doc. 144.)

1 each other and Matinee and its employees, to defraud the Plaintiffs by inducing Plaintiffs to
2 enter into several contracts, with Defendants never intending to fulfil their contractual
3 obligations related to the construction of the solar power plant. Money paid by Plaintiffs,
4 pursuant to the Samsun contract, was funneled to Defendant Matinee.

5 Plaintiffs would be forced to proceed piecemeal. Except for Samsun, Plaintiffs could
6 proceed, here, against all Defendants, including Chun Rae Kim, assuming that as he asserts he
7 has no affiliation with Samsun. If not separated from Samsun, dismissing the claims against
8 Chun Rae Kim, one of two Samsun employees, would contravene federal policy favoring
9 “efficient resolution of controversies.” *See Frigate Ltd. v. Damia*, 2007 WL 127996 *3 (Calif.
10 Jan. 12, 2007) (identifying a “plethora” of legal rules and doctrines designed to promote
11 efficient resolution of cases, such as Fed. R. Civ. P. 18-20 and Rule 22 for joinder of claims and
12 persons); *Curwood Inc. v. Prodo-Pak Corp.*, 2008 WL 644884 (E.D. Wis. March 7, 2008)
13 (citing *Frigate*). Given default is entered against Samsun and John S. Lee, forum non
14 conveniens would split the claims against Chun Rae Kim-Samsun out to be brought in South
15 Korea and leave the Samsun and John S. Lee-Samsun claims here. This would not serve the
16 interests of justice and would not be judicially economical.

17 2. Chun Rae Kim’s Motion for Summary Judgment on all Counts; Plaintiffs’
18 Motion for Partial Summary Judgment against Chun Rae Kim for Civil
19 Conspiracy.

20 “The court shall grant summary judgment if the movant shows that there is no genuine
21 dispute as to any material fact and the movant is entitled to judgment as a matter of law.”
22 Fed.R.Civ.P. 56(a). In determining whether to grant summary judgment, a court views the facts
23 and inferences from these facts in the light most favorable to the non-moving party. *Matsushita*
24 *Elec. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 577 (1986). A material fact is any factual
25 dispute that might effect the outcome of the case under the governing substantive law. *Anderson*
26 *v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A factual dispute is genuine if the evidence
27 is such that a reasonable jury could resolve the dispute in favor of the non-moving party. *Id.*

28 The moving party is under no obligation to negate or disprove matters on which the non-
moving party bears the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-325

1 (1986). Rather, the moving party need only demonstrate that there is an absence of evidence to
2 support the non-moving party's case. *Id.* If the moving party meets its burden, it then shifts to
3 the non-moving party to "designate 'specific facts showing that there is a genuine issue for
4 trial.'" *Id.* at 324 (quoting Fed.R.Civ.P. 56(e)). To carry this burden, the party opposing a motion
5 for summary judgment cannot rest upon mere allegations or denials in the pleadings or papers.
6 *Anderson*, 477 U.S. at 252. The non-moving party must "do more than simply show that there
7 is some metaphysical doubt as to the material facts." *Matsushita*, 475 U.S. at 586. "The mere
8 existence of a scintilla of evidence ... will be insufficient; there must be evidence on which the
9 jury could reasonably find for the [non-moving party]." *Anderson*, 477 U.S. at 252.

10 This trilogy of 1986 cases opened the door for the district courts to rely on summary
11 judgment to weed out frivolous lawsuits and avoid wasteful trials. *Rand v. Rowland*, 154 F.3d
12 952, 956 -957 (9th Cir. 1998); 10A Charles A Wright, Arthur R. Miller & Mary Kay Kane,
13 *Federal Practice & Procedure*, § 2727, at 468 (1998). As explained in *Celotex*: "the plain
14 language of Rule 56(c) mandates the entry of summary judgment, after adequate time for
15 discovery and upon motion, against a party who fails to make a showing sufficient to establish
16 the existence of an element essential to that party's case, and on which that party will bear the
17 burden of proof at trial." *Celotex*, 477 U.S. at 322.

18 The Judge's role on a motion for summary judgment is not to determine the truth of the
19 matter or to weigh the evidence, or determine credibility, but to determine whether there is a
20 genuine issue for trial. *Anderson*, 477 U.S. at 252.

21 Chun Rae Kim asserts that there are no genuine issues of fact in dispute and no evidence
22 to support any of Plaintiffs' claims against him. In response, Plaintiffs "clarify their claims
23 against Mr. Kim. . . . [T]he primary count, among others, that Plaintiffs claim as to Mr. Kim,
24 is civil conspiracy to commit a tort– fraud and conversion." (Ps' Response to D's MSJ (Doc.
25 167) at 2.) Plaintiffs seek partial summary judgment against Chun Rae Kim for civil conspiracy.
26 "Additionally, as to Mr. Kim, Plaintiffs claim breach of contract and unjust enrichment in
27 conjunction with their alter ego theory." *Id.*

1 By default, the following allegations in the Plaintiffs' First Amended Complaint (FAC)
2 have been established. Defendants represented to Plaintiffs that they had initiated a solar power
3 plant construction project with a project budget of more than \$5 billion in the States of
4 California, Arizona and Nevada (the "Matinee Project") (First Amended Complaint (FAC)
5 (Doc. 25) ¶¶ 24, 43.) Defendants represented that the Matinee Project was funded by a U.S.
6 government subsidy and financing from JP Morgan Chase in the amounts of \$1.3 billion and
7 \$3.6 billion, respectively. *Id.* ¶¶ 24, 45. These were false representations. *Id.* ¶¶ 38-40, 72, 74,
8 89, 100, 110.

9 Relying on these and other representations by Defendants, Plaintiffs entered into several
10 agreements with Defendants Samsun and Matinee. *Id.* ¶¶ 28, 29, 31, 48, 52, 65. Defendants
11 demanded advance fee payments by Plaintiffs to Samsun, Matinee's agent, if Plaintiffs desired
12 to participate as a contractor in the Matinee Project. *Id.* ¶¶ 27, 48-49. Plaintiffs paid the
13 requested advance fees as follows: Plaintiff Hankook paid Defendant Samsun \$500,000 over
14 the course of July 26, 2010 through November 5, 2010, *id.* ¶ 28; the Consortium (Jes Solar-
15 Airpark) paid Samsun \$500,000 by two payments in August and September of 2011 and paid
16 \$60,000 to New EnerTech Co., Ltd, a South Korean Corporation designated by Samsun as its
17 subcontractor, *id.* ¶ 55; and on November 1, 2011, the Consortium wired \$1 million dollars to
18 J&A Solar, *id.* ¶ 66, an Arizona corporate entity created as a special purpose company to assist
19 the Consortium in its performance for the Matinee Project, (Ps' MPSJ, SOF (Doc. 140), Ex B:
20 Hong Depo. ¶ 7). Plaintiffs' money was transferred from J&A Solar to Samsun and Matinee.
(FAC (Doc. 25) ¶ 66.)

21 Defendants knew their representations were false and made them with the intent to
22 induce the Plaintiffs, in reliance on the misrepresentations, to pay approximately \$2 million
23 dollars to Defendants. *Id.* ¶¶ 113-117. "Prior to the execution of the Agreements and the
24 demands to Plaintiffs for advance payments, Defendants, in conjunction with each other, had
25 the intent to promote or aid in the commission of an offense or unlawful objective, namely to
26 defraud Plaintiffs." (FAC (Doc. 25) ¶ 101.) Plaintiffs have proved the tort claim of fraud and
27 the claim of conspiracy to defraud claim as to the defaulted Defendants.
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1 By default, Plaintiffs have established that Matinee is a sham corporation, which serves
2 as the alter ego of Defendants Chin, Paul and Tong, and Samsun is a sham corporation, which
3 serves as the alter ego of Defendant John S. Lee. The Plaintiffs may pierce the corporate veil
4 for both Matinee and Samsun and hold Defendants Chin, Paul and Tong personally responsible
5 for the obligations of Matinee and hold Defendant John S. Lee personally responsible for the
6 obligations of Samsun. (FAC (Doc. 25) ¶¶ 126-128.) Whether Samsun is the alter ego of
7 Defendant Chun Rae Kim remains in dispute and hinges on the unity between Samsun and
8 Chun Rae Kim. *Standage v. Standage*, 711 P.2d 612, 615 (Ariz. App. 1985). The
9 determination of whether a corporate entity is a mere instrumentality of an individual is a
10 question of fact. *Id.*; *Servo Kinetics, Inc. v. Tokyo Precision Instruments Co. Ltd.*, 475 F.3d
11 783, 798 (6th Cir. 2007). Plaintiffs have established the existence of a fraudulent conspiracy.
12 It remains a question of fact: whether Chun Rae Kim was a member of this conspiracy.

13 The Court set aside the default as to Chun Rae Kim because he asserted that he had been
14 dragged into the matter by his father-in-law, John S. Lee, and his involvement was limited to
15 translating Korean to English on documents and at meetings. He had received no compensation
16 for his services. The Court found he “alleged sufficient facts that, if true, would constitute a
17 defense because a jury might find he was not an agent or employee of Samsun.” (Amended
18 Order (Doc. 71) at 14.)

19 Since the default was set aside for Defendant Chun Rae Kim, the parties have conducted
20 discovery. By deposition, Chun Rae Kim admits he and John S. Lee were the only two
21 employees of Samsun, that he was promised a salary of \$2000 a month, but he asserts he was
22 never paid the promised salary. (P’s MPSJ, SOF (Doc. 140), Ex. D: Kim Depo. at 40, 111,
23 212.)

24 Chun Rae Kim reurges his affidavit, which accompanied his Motion to Set Aside
25 Default, as evidence to support his Motion for Summary Judgment and to rebut Plaintiffs’
26 Motion for Partial Summary Judgment. Plaintiffs challenge the affidavit as self-serving. While
27 the Court cannot reject Defendant’s evidence because it consists only of his self-serving
28 testimony, *United States v. One Parcel of Real Property*, 904 F.2d 487, 492 (9th Cir. 1990), a

1 self-serving affidavit lacking detailed facts or supporting evidence is insufficient to create a
2 genuine issue of material fact. *Id.*; *Federal Trade Commission v. Publishing Clearing Home,*
3 *Inc.*, 104 F.3d 1168 (9th Cir. 1997); *Nilsson v. City of Mesa*, 503 F.3d 947, 952 n. 2 (9th Cir.
4 2007). But for this self-serving affidavit, Plaintiffs assert there is no evidence to support Chun
5 Rae Kim’s assertion that he was involved only to a very limited extent and did not know of nor
6 intend to be involved in the conspiracy to defraud the Plaintiffs.

7 Plaintiffs submit documentary evidence to counter Chun Rae Kim’s assertions of
8 “limited involvement” and “lack of knowledge.” For example, domain history for Samsun’s
9 website reflects creation on September 20, 2010, with Chun Rae Kim as the registrant and
10 administrator of the official website, using his address and telephone number. (Ps’ MSJ, SOF
11 (Doc. 140) at Exs. A1 and A2: website and domain history.)⁴ The website reflects Samsun as
12 being an expert in the energy industry, well staffed, and highly experienced in both the
13 regulatory and functional areas of utility operations. *Id.* at Ex. A1. Chun Rae Kim admits to
14 having no personal expertise related to the solar power industry; he owns a restaurant and is a
15 part time mortgage broker. While he refuses to admit to knowing that his father-in-law had no
16 expertise in the solar power industry, he was forced to admit he was unaware of any training
17 or experience on the part of his father-in-law which would qualify John S. Lee to perform the
18 services advertised on the Samsun website. (Ps’ MPSJ, SOF (Doc. 140), Ex. D: Kim Depo. at
19 130-136, 183-186.) Arguably, these admissions reflect that Chun Rae Kim knew the
20 representations made on Samsun’s website were false. (Ps’ MPSJ (Doc. 137) at 4-6.) But,
21 Chun Rae Kim denies being responsible for the website. He asserts he only helped John S. Lee
22 find a domain name and introduced him to a web-developer, who designed the Samsun website.
23 *Id.* at 137, 141.

24 Chun Rae Kim’s home address is listed with the Virginia Corporation Commission as
25 Samson’s principle office address. (Ps’ MSJ, SOF (Doc. 140) at Ex. A3.) By law, Samsun’s
26 business records must be kept there, specifically: the company’s articles of organization, federal

27 ⁴The documents indicate Joseph Kim as the registrant and administrator. See (P’s MPSJ,
28 SOF (Doc. 140), Ex. D: Kim Depo. at 13 (admitting to using the name Joseph Kim).

1 and state tax returns, written operating agreement, cash statement, description and statement of
2 property valuation and right of any member to receive distributions. VA Code Ann § 13.1-
3 1028. At his deposition, Chun Rae Kim expressed surprise regarding the use of his residence
4 address as Samsun's principle office and his legal record keeping responsibilities. ((D's MSJ,
5 SOF, Exhibits (Doc. 146) at Ex. 2: Kim Depo. at 111-112.)

6 Defendant Chun Rae Kim was responsible for incorporating J&A Solar and signed the
7 incorporation disclosure documents for J&A Solar, Inc. as President. He gave his address as
8 the address for individuals representing Jes Solar, who actually resided in Korea. *Id.* at Ex. A4.
9 He and Jeoung Dong Song, an employee of Jes Solar, opened a bank account for J&A Solar at
10 Wells Fargo in Tucson, Arizona. (Supp. Motion to Vacate Default (Doc. 65), Ex. 2: Chun Rae
11 Kim Affidavit ¶ 13.) Chun Rae Kim's name was on the account when the money transfers
12 totaling \$1 million were made November 2011, *id.* ¶ 14, until January 1, 2012, when his name
13 was removed by Jeoung Dong Song, which was after the Consortium money was transferred
14 from J&A Solar to Defendants in November 2011, *id.* ¶¶ 14,17.

15 Plaintiffs charge Chun Rae Kim with spoliation of evidence for his failure to retain or
16 secure corporate books and records, and other business and administrative documents or files
17 for Samsun and J&A Solar. Plaintiffs assert these documents would reflect Chun Rae Kim's
18 involvement or role in the fraudulent conspiracy, where the money went, and whether Chun Rae
19 Kim benefitted from the transferred funds. (Ps' Spoliation Motion (Doc. 168) at 4.)

20 "A party seeking sanctions for spoliation of evidence must prove the following
21 elements: 1) the party having control over the evidence had an obligation to preserve it when
22 it was destroyed or altered, 2) the destruction or loss was accompanied by a 'culpable state of
23 mind,' and 3) the evidence that was destroyed or altered was relevant to the claims or defenses
24 of the party that sought the discovery of the spoliated evidence.'" *Surowiec v. Capital Title*
25 *Agency, Inc.*, 790 F. Supp. 2d. 997, 1005 (D. Ariz. 2011) (quoting *Goodman v. Praxair Servs.,*
26 *Inc.*, 632 F. Supp. 2d 494, 509 (Md. 2009)).

27 Defendant Chun Rae Kim asserts he never had any Samsun records and so could not
28 destroy them and has no control over Defendants John S. Lee and Samsun and so could not

1 secure and/or produce Samsun’s business records. He asserts that he filed the incorporation
2 documents for J&A Solar at the request and direction of the Plaintiffs, and Plaintiffs and their
3 agents should have the records for J&A Solar. (D’s Response to Ps’ Spoliation Motion (Doc.
4 175) at 2.)

5 Plaintiffs assert Chun Rae Kim had an affirmative duty to preserve evidence that he
6 knew or reasonably should have known to be relevant to this litigation. *Id.* at 7-8 (citing *Souza*
7 *v. Fred Carries Contracts, Inc.*, 955 P.2d 3, 6 (Ariz. App. 1997). The duty is not passive; it
8 requires litigants to take affirmative actions. *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212,
9 218 (S.D.N.Y. 2003); *In re Napster, Inc. Copyright Litigation*, 462 F. Supp.2d 1060 (Calif.
10 1987)). Plaintiffs argue that Chun Rae Kim “intentionally (or at least negligently) avoided his
11 affirmative duty to preserve or retrieve key evidence to the detriment of Plaintiffs[.]” *Id.*

12 The Court finds that the Plaintiffs have not established that Chun Rae Kim had control
13 over any business records for Samsun or J&A Solar or that he destroyed any such business
14 records. Plaintiffs assertion of control is based on the statutory requirement that Samsun’s
15 corporate records be kept at Chun Rae Kim’s residence address. Therefore, Plaintiffs’ argue,
16 he had an affirmative duty to get the Samsun records from his father-in-law, John S. Lee, and
17 that all he had to do was ask for them. But, the case law relied on by Plaintiffs, which requires
18 corporate officers to communicate to employees that they have an obligation to preserve
19 discoverable material in their possession, does not reach so far. There is no evidence that Chun
20 Rae Kim had any corporate officer authority over John S. Lee or any power to demand John S.
21 Lee produce or turn over to Chun Rae Kim the Samsun business records sought by Plaintiffs.
22 Plaintiffs can and have secured corporate documents for Samsun from the Virginia corporation
23 commission, and Plaintiffs have as much, if not more access than Chun Rae Kim, to J&A
24 Solar’s business records. The Court denies the Spoliation Motion.⁵

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26 ⁵To prevail on its spoliation motion, Plaintiffs must persuade the Court on the ultimate
27 question of fact: the extent of Defendant Chun Rae Kim’s relationship with Samsun and his
28 involvement in the conspiracy to defraud the Plaintiffs. As a sanction, Plaintiffs ask the Court
to preclude Chun Rae Kim “from offering any evidence or testimony to negate any matters
regarding Samsun and J&A Solar, including, but not limited to, his relationship with or financial

1 In addition to the evidence related to Chun Rae Kim's involvement with Samsun and
2 J&A Solar, the official website for the Arizona Corporation Commission reflects that on August
3 30, 2011, Chun Rae Kim signed incorporation disclosure documents for SN Solar, Inc., a solar
4 energy consulting company. Chun Rae Kim identified himself as President and one of four
5 directors, and gave his residence address for all the directors. (Ps' MPSJ, SOF (Doc. 140) , Ex.
6 A5.) Jeoung Dong Song, Jes Solar's employee associated with J&A Solar was identified as
7 SN Solar's Director, but Jes Solar was unaware of SN Solar's creation and did not approve
8 Jeoung Dong Song acting as Director. *Id.*, Ex. B: Hong Affid.; Ex. C: Choi Affid; *see also* (Ps'
9 MPSJ, SOF (Doc. 140), Ex. D: Kim Depo. at 199.) Jes Solar has sued Jeoung Dong Song in
10 Korea. *Id.*: Ex. B: Hong Affid. ¶ 7; Ex. C: Choi Affid. ¶ 8. Also, on September 27, 2011, Chun
11 Rae Kim incorporated Samsun Energy, Inc., in Arizona, with Chun Rae Kim as one of three
12 directors, and John S. Lee and his wife, Mary Sun Lee, as the other two directors. (Ps' MPSJ,
13 SOF (Doc. 140), Ex. A6.)

14 On July 16, 2011, Chief Executive Officer for Plaintiff Jes Solar, Jae Kyung Choi, met
15 in New York with Matinee and Samsun. Chun Rae Kim picked him up at the airport and drove
16 him to his hotel. Chun Rae Kim was introduced as staff of Samsun and was present at the
17 meeting which took place in the lobby coffee shop. The meeting was conducted in Korean and
18 took two to three hours. Chun Rae Kim indicated agreement with Matinee's executive officer,
19 Paul Jeoung, who explained the solar power construction project to Jae Kyung Choi. *Id.* Ex.
20 C: Choi Affid. at 1-2.

21 Towards the end of the meeting, John S. Lee, explained that "the partnership agreement
22 between Jes Solar and Samsun would require Jes Solar to pay fees to Samsun and to set up a
23 company in the United States [J&A Solar] in which Samsun would participate in return for

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25 interest in them." (Spoliation Motion (Doc. 168) at 10.) While Plaintiffs submit they seek only
26 limited relief, if all testimony and evidence negating Chun Rae Kim's involvement with Samsun
27 and J&A Solar, "including, but not limited to, his relationship with or financial interest in
28 them," is precluded, his defense of innocence fails because it is based on his assertions of not
being involved, financially or otherwise, in Samsun or J&A Solar. Plaintiffs would be entitled
to summary judgment; this is not a limited sanction.

1 Samsun’s professional services including a procurement of a contract for Jes Solar in the
2 Matinee Project.” *Id.* ¶ 6. Either John S. Lee or Chun Rae Kim demanded that the Jes Solar-
3 Samsun partnership agreement be signed immediately or Samsun, acting as Matinee’s sole
4 agent, would look for another investor. *Id.* Choi signed the agreement and Chun Rae Kim then
5 drove him to S. Chin Kim’s residence, where S. Chin Kim explained the overall Matinee
6 Project, which Chun Rae Kim and John S. Lee listened to, and Choi signed the Jes Solar-
7 Matinee agreement. *Id.*

8 On October 27, 2011, Young Joon Hong, Director of Plaintiff Airpark, met with Matinee
9 in Tucson. *Id.* Ex. D: Hong Affid. ¶¶ 2-3. John S. Lee and Chun Rae Kim attended the meeting
10 as Samsun employees, acting as Matinee’s agent. *Id.* Hong understood the meeting was being
11 held for Samsun as the service provider to the Consortium to make a general presentation
12 regarding the progress of the Matinee Project in Arizona. *Id.* ¶ 5. The meeting lasted two hours,
13 with John S. Lee explaining Samsun’s expertise in solar business, its experienced staff, its
14 readiness to begin the project, and the project’s progress regarding necessary permits and
15 financial arrangements. *Id.* Chun Rae Kim expressed his agreement with what John S. Lee was
16 saying, nodded his head, made brief remarks, and answered a few questions. *Id.* Hong signed
17 the Consortium-Matinee agreement and attended a groundbreaking ceremony in Benson,
18 Arizona. *Id.* ¶ 6.

19 Having denied Plaintiffs motion to preclude for spoliation, the Court considers
20 Defendant Chun Rae Kim’s rebuttal that none of the Plaintiffs-Samsun contracts reflect him as
21 a signatory, and he argues that none of the contracts were relevant to him: Hankook-Samsun
22 Partnership Agreement (July 25, 2010); Jes Solar-Samsun Partnership Agreement (July 16,
23 2011), and the translation of the Jes Solar-Samsun Partnership Agreement. Chung Rae Kim’s
24 rebuttal, especially his denial that he never saw nor translated the Jes Solar-Samsun Partnership
25 Agreement, (Ps’ MPSJ, SOF, Ex. D: Kim Depo. at 171, 219-221), bumps against his admission
26 that the primary reason John S. Lee enlisted his services was to translate documents. These
27 agreements were the mechanisms by which Samsun committed the fraud, and the fraudulent
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1 transfers were made via J&A Solar, the entity Chun Rae Kim admittedly incorporated,
2 designating himself as President.

3 As to the Hankook-Samsun Partnership Agreement, pursuant to Fed. R. Civ. P. 36(a)(3),
4 Chun Rae Kim failed to timely answer or object to Plaintiffs' request for admissions and,
5 thereby is deemed to have admitted that he prepared and caused it and a letter requesting
6 advance payment of fees to be sent to Plaintiff Hankook. Chun Rae Kim's discovery responses
7 were due December 4, 2013. Late, he sought an extension of time to respond. According to
8 Plaintiffs, they agreed in part to extend the time for him to produce documents, but refused the
9 extension for him to respond. According to Chun Rae Kim, Plaintiffs agreed to the extension
10 of time, without any reservation as to the request for admissions. Chun Rae Kim answered on
11 December 12, 2013, and denied preparing or sending either the agreement or the letter.

12 The record reflects that upon receiving the late responses to the requests for admissions,
13 Plaintiffs did in fact request that Chun Rae Kim file a Rule 36(b) motion to withdraw. (D's
14 Response to Ps' MPSJ (Doc. 162), Ex. 2: email 12/16/2013 at 2:49pm.) Chun Rae Kim, who
15 was then proceeding *pro se*, replied by email asking what Plaintiffs meant by a motion to
16 withdraw and whether they were referring to his affidavit. *Id.* at email 12/16/2013; 2:33pm.
17 These emails support Plaintiffs position. However, on December 17, 2013, Plaintiffs emailed
18 Chun Rae Kim that they had reviewed his December 12, 2013, discovery responses and asked
19 him to lift his "improper" objections and to properly respond to the requests for admissions.
20 Plaintiffs presented this email as being a good faith effort to settle the discovery dispute which
21 included the "improper" responses to their requests for admissions and Chun Rae Kim's failure
22 to produce documents. *Id.* at email 12/17/2013; 1:04pm. These emails support Chun Rae
23 Kim's position.

24 On December 27, 2013, Chun Rae Kim provided Plaintiffs with substituted admissions.
25 Plaintiffs inquired about subject matter in the substituted admissions during Chun Rae Kim's
26 deposition on December 30, 2013. Ps' MPSJ, SOF, Ex. D: Kim Depo. at 210-212. In light of
27 Plaintiffs' emails which suggested withdrawal to be unnecessary, the Court finds Chun Rae
28 Kim's delay reasonable in not filing the motion to withdraw until Plaintiffs sought to rely on

1 this one fact as deemed admitted in Plaintiffs' Motion for Partial Summary Judgment. Chun
2 Rae Kim is now represented by counsel.

3 Under Fed. R. Civ. P. 36(b), two requirements must be met before an admission may be
4 withdrawn: 1) presentation of the merits of the action must be subserved, and (2) the party who
5 obtained the admission must not be prejudiced by the withdrawal." *Conlon v. United States*, 474
6 F.3d 616, 625 (9th Cir.2007). "The first half of the test in Rule 36(b) is satisfied when
7 upholding the admissions would practically eliminate any presentation of the merits of the
8 case." *Id.* at 622 (citing *Hadley v. United States*, 45 F.3d 1345, 1348 (9th Cir. 1995)). "Thus, the
9 question is not whether allowing the deemed admissions would have any effect on a trial on the
10 merits of the case; it is whether it would eliminate the need to reach a trial on the merits at all."
11 *Carden v. Chenega Security & Protection Servs., LLC*, 2011 WL 1344557, at *2 (E.D.Cal.
12 Apr.8, 2011).

13 Plaintiffs assert the question hinges on whether withdrawal will subserve the important
14 interests of presentation of the merits of the action, and the withdrawal of this one admission
15 is not dispositive because it is just one piece of evidence suggesting the degree of involvement
16 by Chun Rae Kim. Plaintiffs, however, fail to address the motion to withdraw in the context
17 of all the deemed admissions, if Chun Rae Kim's December 27, 2013, substituted answers are
18 rejected. Plaintiffs assert they are prejudiced because they do not have any documentary
19 evidence to prove the degree of involvement by Chun Rae Kim in the alleged conspiracy
20 because of Chun Rae Kim's spoliation. Plaintiffs assert prejudice because they relied on the
21 admission and did not delve into the matter admitted during his deposition. The Court has
22 rejected Plaintiffs' assertion of spoliation. The answers were only seven days late, and
23 Plaintiffs had every opportunity to challenge Chun Rae Kim's denial at his deposition. The
24 Court grants Chun Rae Kim's request to withdraw the admissions and substitute them for the
25 admissions mailed to Plaintiffs on December 27, 2013.

26 Chun Rae Kim attests that Plaintiffs' claims against him fail because he is an owner of
27 a Korean Tofu Restaurant in Centerville, Virginia and works part-time as a mortgage broker.
28 (D's MSJ, SOF, Exhibits (Doc. 146) at Exs. 1 and 2: Kim Depo. at 20.) He has no knowledge,

1 experience, or skills related to solar power plants or their construction. *Id.* at 47-48. He was
2 hired as an employee for Samsun and promised a salary of \$2000 per month, *id.* at 30, but never
3 received any form of compensation from Samsun or from Defendant John S. Lee, *id.* at 33.
4 Chun Rae Kim is not an officer, director, or member of Samsun. *Id.* at 117. He had no
5 knowledge that Defendant John S. Lee listed his home as Samsun's principal place of business.
6 *Id.* at 111-112. As an employee with no expertise on solar power, he was not aware of the
7 intricacies of Samsun's business or its operations. *Id.* at 61. His duties were limited to
8 translating, booking travel, getting coffee, and driving for Defendant John S. Lee. *Id.* at 66-67,
9 68, 77. Chun Rae Kim attests that Defendant John S. Lee did not inform him of matters relating
10 to the company but kept them confidential. *Id.* at 61.

11 Chun Rae Kim denies that on the two particular occasions when Plaintiffs met with
12 Samsun and Matinee, he did not make any representations or participate in the meetings. *Id.*
13 at 62, 66-67, 68, 77. He asserts he incorporated J&A Solar Inc. at the instruction of Plaintiff
14 Jes Solar. *Id.* at 160, 163. He did not participate in any matters of the J&A Solar enterprise, *id.*
15 at 161, and only helped due to his United States citizenship, *id.* at 162. He did not know of the
16 alleged unauthorized transfers prior to, or at the completion of, the transfers, (Supp. Motion to
17 Vacate Default (Doc. 65), Ex. 2: Chun Rae Kim Affidavit ¶¶ 16), which were done at the
18 direction of Plaintiffs' agent J.D. Song, *id.* at 18, who plaintiffs are currently suing in South
19 Korea, *id.* at 19.

20 The Court finds that material questions of fact exist which preclude summary judgment
21 for either side. Plaintiffs present documentary evidence suggesting that Chun Rae Kim was
22 more involved than only translating some documents for his father-in-law, driving, and bringing
23 coffee to the other participants involved in the conspiracy.

24 By default Plaintiffs have established a civil conspiracy: that two or more people agreed
25 to accomplish an unlawful purpose or to accomplish a lawful object by unlawful means, here,
26 fraud, causing damages. *Wells Fargo Bank v. Arizona Laborers, Teamsters . . . Local 395*
27 *Pension Trust Fund*, 38 P.3d 12, 37 (Ariz. 2002) (citations omitted). The question is whether
28 Chun Rae Kim was a member of that conspiracy or aided and abetted it. To prove their claim

1 against Chun Rae Kim, Plaintiffs must establish by clear and convincing evidence he actually
2 agreed to participate in the conspiracy. *Id.* at 36-37. Chun Rae Kim may also be liable for
3 damages if he knowingly acted to substantially aid another to commit the conspiracy to defraud
4 the Plaintiffs. *Id.* at 37.

5 “The existence of a conspiracy may be inferred from the nature of the acts, the
6 relationship of the parties, ‘the interests of the conspirators, or other circumstances,’ and
7 ‘express agreement or tacit concert will, if proven, suffice to create liability.’” *Mohave Electric*
8 *Cooperative v. Byers*, 942 P.2d 451, 465 (Ariz. App. 1997). “‘The easiest situation in which
9 to draw the inference of agreement is where the parties are on the scene together at the same
10 time performing acts in support of one another.’” (Ps’ MPSJ (Doc. 137) at 13 (citing
11 *Halberstam v. Welch*, 705 F.2d 472, 481 (D.C. Cir. 1983)).

12 Here, Plaintiffs present evidence to raise a question of fact that Chun Rae Kim was
13 acting in concert with John S. Lee, as an agent of Samsun, or intentionally acting pursuant to
14 a common course of conduct to defraud the Plaintiffs of approximately \$2,000,000. Plaintiffs
15 certainly present evidence to raise a question of fact that Chun Rae Kim substantially assisted
16 John S. Lee in making representations regarding Samsun’s expertise and services it could
17 provide, which Chun Rae Kim knew to be false.

18 On the other hand, Chun Rae Kim offers detailed attestations by deposition and affidavit
19 which suggest he did not intend to participate in the alleged conspiracy to defraud the Plaintiffs.
20 For example, he attests to not knowing about Samsun being incorporated with his home address
21 as its place of business address and that he did not do Samsun’s web design, but only registered
22 its domain name. Intent is a question for the fact finder. *Wells Fargo*, 38 P.3d at 33 (citing
23 *Snow v. Western Savings & Loan Assn.*, 730 P.2d 204, 211 (Ariz. 1987)). This is enough,
24 without any additional supporting evidence.

25 The Court concludes: “Clearly, it [will] make a world of difference which version of
26 events the trier of fact believes.” *1 Parcel of Real Property, Lot 4, Block 5 of Eaton Acres*, 904
27 F.2d at 492. The Court denies the parties’ summary judgment motions.

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