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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

SWARM, LLC,)	Case No. CV 10-03188 DDP (FFMx)
)	
Plaintiff,)	ORDER DENYING PLAINTIFF'S MOTION
)	TO ADD VICKI L. PORT a/k/a VICKI
v.)	WOSKOFF AS DEFENDANT
)	
MICAH A. COHEN et al.,)	[DKT No. 37]
)	
Defendants.)	

Before the court is Defendants Micah A. Cohen and Nancy Sidonie Cohen's Motion to Add Vicki L. Port a/k/a Vicki Woskoff as Defendant. Having considered the parties' submissions and heard oral argument, the court adopts the following order.

I. Background

This motion arises in the context of Defendants Micah A. Cohen and Nancy Sidonie Cohen's ("the Cohens") efforts to collect on a judgment in arbitration.

The underlying facts are set out in the court's December 7, 2012 Order Granting Defendants' Motion to Confirm Final Arbitration Award. (DKT No. 17.) Micah A. Cohen had been hired by Defendant

1 Swarm to design a line of men's apparel under the mark SHADES of
2 GREIGE. (Id. at 1.) Cohen subsequently resigned and began to
3 design clothing under the mark SHADES OF GREY. (Id. at 2.)
4 Plaintiff Swarm, LLC filed a complaint against Cohen and his mother
5 Nancy Sidonie Cohen (now Nancy Sidonie) for trademark infringement,
6 false designation of origin, federal and state unfair competition,
7 intentional interference with economic relations, breach of duty of
8 loyalty, and declaratory judgment. (Id.)

9 The parties stipulated to binding arbitration before a JAMS
10 arbitrator and this court ordered the matter to arbitration. (Id.)
11 Prior to the arbitration proceedings, the Cohens filed a cross-
12 complaint for breach of contract, conversion, and accounting,
13 naming Swarm and its principal, Jeff Port, as cross-respondents.
14 (Id.) Swarm also moved to add All Shades United, LLC ("All Shades")
15 as an additional defendant-respondent. (Id.)

16 The Honorable George P. Schiavelli, U.S.D.J. (Ret.) presided
17 over the arbitration proceedings. After prehearing discovery,
18 prehearing motions, and an eleven-day arbitration hearing, the
19 Arbitrator issued an Interim Award on March 27, 2012, followed by a
20 Final Award on October 5, 2012. (Id.) The Arbitrator awarded the
21 Cohens' damages, attorneys fees, and costs. (See Motion to Add
22 Defendant, Ex. 1, Final Award in Arbitration ("Award") at 41.)

23 Relevant to the instant motion, although he twice noted it was
24 a "close question," the Arbitrator determined that it would be
25 appropriate to pierce the corporate veil with respect to Swarm, LLC
26 and make Jeff Port jointly and severally liable, along with Swarm,
27 for damages in the case. (Award at 34-35.) In determining that
28 Swarm was an alter ego of Port under California law, the Arbitrator

1 noted evidence that (1) Swarm had no capital assets and had
2 approximately \$250.00 in its bank account at the time of the
3 hearing and as a general matter was undercapitalized; (2) that
4 Swarm's attorneys are also counsel for Port personally; (3) that
5 Port guaranteed the obligations of Swarm on at least two occasions
6 and personally paid Swarm's administrative fees for the
7 arbitration; and (4) that Port personally paid Swarm's expenses in
8 certain instances. (Id.) Prior to his death, Port owned 99% of
9 Swarm while his wife Vicki Port owed 1% of the company. (Id.)

10 The court confirmed the Final Arbitration Award and entered an
11 Order for Judgment, providing that Swarm and Jeff Port are liable,
12 jointly and severally, to Micah Cohen for \$130,231.00 in damages,
13 \$112,710.15 for arbitration fees and expenses, and \$474,889.21 for
14 attorney fees. (DKT No. 19.)

15 The Cohens subsequently sought to collect on the judgment
16 against Swarm and Jeff Port. They obtained a Writ of Execution from
17 the court on February 14, 2013 and subsequently, they assert,
18 executed levies on various bank accounts suspected to belong to
19 Jeff Port. However, despite previously holding substantial funds,
20 these accounts were for the most part empty. (Mot. at 5;
21 Declaration of Matthew J. Norris in Support of Motion ¶ 7.)

22 In the course of these proceedings, on March 3, 2013, Jeff
23 Port passed away. The Cohens learned of Mr. Port's passing on April
24 26 via notices from attorneys Lyle R. Mink and Adam Streltzer.
25 (Mot. at 5.) According to the Cohens' counsel, Streltzer indicated
26 that he represented Vicki Port and demanded that the Cohens cease
27 all collection and judgment enforcement activities under
28 California's Enforcement of Judgment's Law and that the Cohens

1 proceed to enforce their judgment in accordance with the California
2 Probate Code. (Norris Decl. ¶ 9.) Attorney Norris asserts that he
3 requested to be informed by Strelzer when Mr. Port's estate was
4 probated but received no reply and has since verified that no
5 probate proceedings have been commenced. (Id. ¶ 10.)

6 Swarm's registration has been suspended by the California
7 Secretary of State, and its registered agent resigned September 17,
8 2013, but the company has not been formally dissolved. (Mot., Ex.
9 4, California Secretary of State Business Entity Detail Records.)

10 11 **II. Legal Standard**

12 The Ninth Circuit has held that Federal Rule of Civil
13 Procedure 69(a) "empowers federal courts to rely on state law to
14 add judgment-debtors under Rule 78(a), which permits creditors to
15 use judgment creditors to use any execution method consistent with
16 the practice and procedure of the state in which the district court
17 sits." In re Levander, 180 F.3d 1114, 1120-1121 (9th Cir. 1999).

18 The applicable state law, Section 187 of the California Code
19 of Civil Procedure, allows the amendment of a judgment to add
20 additional judgment debtors on the grounds that a person or entity
21 is the alter ego of the original judgment debtor, but only in
22 circumstances that do not offend due process. NEC Electronics v.
23 Hurt Hurt, 208 Cal. App. 3d. 772, 778 (1989). As the court
24 explained in NEC Electronics:

25 This is an equitable procedure based on the theory that the
26 court is not amending the judgment to add a new defendant but
27 is merely inserting the correct name of the real defendant.

28 (Mirabito v. San Francisco Dairy Co., supra, 8 Cal.App.2d at

1 p. 57; Thomson v. L.C. Roney & Co., Inc. (1952) 112 Cal.App.2d
2 420, 428-429 [246 P.2d 1017].) Such a procedure is an
3 appropriate and complete method by which to bind new
4 individual defendants where it can be demonstrated that in
5 their capacity as alter ego of the corporation they in fact
6 had control of the previous litigation, and thus were
7 virtually represented in the lawsuit." (1A Ballantine &
8 Sterling, Cal. Corporation Laws (4th ed.) § 299.04, p. 14-45.)
9 In other words, "[i]f the claim of individual liability is
10 made at some later stage in the action, the judgment can be
11 made individually binding on a person associated with the
12 corporation only if the individual to be charged, personally
13 or through a representative, had control of the litigation and
14 occasion to conduct it with a diligence corresponding to the
15 risk of personal liability that was involved." (Rest.2d,
16 Judgments, § 59, p. 102.)

17 Id. See also Katzir's Floor & Home Design, Inc. v. M-MLS.com, 394
18 F.3d 1143, 1150 (9th Cir. 2004) ("We believe that NEC represents
19 the law that the California Supreme Court would apply if faced with
20 this issue, and we therefore follow it.")

21 Accordingly, California court's have adopted a two-part test
22 to determine whether a defendant may be added after judgment is
23 entered: "The ability under section 187 to amend a judgment to add
24 a defendant, thereby imposing liability on the new defendant
25 without trial, requires *both* 1) that the new party be the *alter ego*
26 of the old party and (2) that the new party had controlled the
27 litigation, thereby having had the opportunity to litigate, in
28 order to satisfy due process concerns." Toho-Towa Co., Ltd v.

1 Morgan Creek Productions, Inc, 217 Cal.App.4th 1096, 1106, quoting
2 Triplett v. Farmers Ins. Exchange 24 Cal.App.4th 1415, 1421 (1994)
3 (emphasis in original). The applicable burden of proof is a
4 preponderance of the evidence. Wollersheim v. Church of
5 Scientology, 69 Cal.App.4th 1012, 1017 (1999).

6
7 **III. Discussion**

8 Because it is dispositive of the motion, the court addresses
9 the second prong first, concerning whether the Cohens have
10 demonstrated that Mrs. Port "controlled" the prior litigation. As
11 explained below, the court finds that they have not.

12 As a general matter, "[c]ontrol of the litigation sufficient
13 to overcome due process objections may consist of a combination of
14 factors, usually including the financing of the litigation, the
15 hiring of attorneys, and control over the course of the
16 litigation." NEC Electronics Inc, 208 Cal.App.3d at 781, quoting
17 1A Ballantine & Sterling, Cal. Corporation Laws (4th ed.) § 299.04,
18 pp. 14-45-14-46, fn. omitted. "[S]ome active defense of the
19 underlying claim is contemplated." Id., quoting Minton v. Cavaney
20 (1961) 56 Cal.2d 576, 581 (1961). Additionally, courts have
21 considered an important factor whether the new defendant had a duty
22 to appear and defend herself in the earlier litigation. See id. at
23 778, citing Motores De Mexicali v. Superior Court 51 Cal.2d 172,
24 331 (1958); Katzir's Floor & Home Design, Inc. v. M-MLS.com, 394
25 F.3d 1143, 1150 (9th Cir. 2004) (defendant was improperly added
26 post-judgment in part because he had "no personal duty to defend
27 the underlying lawsuit.")

28

1 In contending that Mrs. Port controlled the earlier
2 litigation, the Cohens make three assertions. First, they assert
3 that following Micah Cohen's announcement of his resignation, Mrs.
4 Port attended a meeting with her husband and two business advisors
5 to discuss what to do about the issues posed to Swarm by Cohen's
6 resignation--a meeting they assert led to their litigation against
7 Cohen. (Motion at 17, citing Testimony of Scott Rusczyk, 9 H.T.,
8 2424:22 to 2426:4.) Second, they assert that Mrs. Port attended all
9 of the two-week arbitration hearing and consulted with her husband
10 throughout the proceedings. (Motion, Ex. 7, Declaration of Micah
11 Cohen ¶ 25; Ex. 8, Declaration of Gary Cohen ¶¶ 18-20; Norris Decl.
12 ¶¶ 15-16.) Third, they assert that Mrs. Cohen and Mrs. Cohen
13 jointly financed the litigation against the Cohens and employed Mr.
14 Mink to represent Swarm and Jeff Port through use of the couple's
15 community property. (Id.)

16 In response, Mrs. Port argues first that she was not a named
17 party to the lawsuit and had no duty to defend herself in the suit.
18 (Opposition at 14.) She notes that she never retained an attorney
19 to represent her and had no contact or involvement with Swarm's
20 outside counsel. (Id.; Vicki Port Decl. ¶ 26.) Mrs. Port did not
21 testify during the hearing. (Vicki Port Dec. ¶ 22.) She
22 acknowledges that she was present for all eleven days of the
23 hearing but asserts that her role was simply to provide support and
24 encouragement for her husband, who was in poor health having
25 shortly before been diagnosed with stage-four kidney cancer. (Vicki
26 Port Decl. ¶ 23.) She also asserts that she assisted her husband,
27 who was deaf in one ear, in following what was said in the
28 proceedings. (Id.) She states that she occasionally did Google

1 searches on her laptop to look for information about retailers or
2 merchandise that were mentioned during the course of the testimony
3 at the hearing. (Id. at 24.) Ms. Port acknowledges her jointly held
4 savings account was drawn upon to help fund the litigation, though
5 she asserts that this occurred without her advance knowledge or
6 consent. (Vicki Port Decl. ¶ 21.)

7 The court finds that there is not sufficient evidence before
8 it to support the conclusion that Mrs. Port controlled the
9 litigation such that she was "virtually represented" in the
10 proceedings. First, Mrs. Port's participation in a meeting that may
11 have led to the litigation against Micah Cohen is not evidence that
12 she was actively involved in defending herself against Cohen's
13 subsequently filed counterclaims, particularly as she was not named
14 as a defendant in those counterclaims. Second, the fact that Mrs.
15 Port was present throughout the arbitration hearing does not
16 establish that she maintained any control over the litigation. Her
17 explanation for her presence--that she was present to provide
18 emotional support her ailing husband and assist him in following
19 the discussions--is reasonable. Her presence does not indicate that
20 she controlled the litigation "with a diligence corresponding to
21 the risk of personal liability" that would be involved were she
22 herself a defendant. NEC, 208 Cal. App. 3d. at 778. Third, while
23 Mrs. Port has acknowledged that community property was used to pay
24 for the litigation, the funding of a proceeding is not sufficient
25 to demonstrate control over the proceeding. See Minton v. Cavaney,
26 56 Cal. 2d 576, 581 (1961) (holding new defendant's supplying of
27 funds for previous litigation was insufficient to show control over
28 the litigation).

1 This conclusion is further supported by a comparison between
2 the present case and the cases relied upon by the Cohens where
3 California courts found allowed the amendment of a judgment to add
4 a defendant based on the defendant's control over the previous
5 litigation.

6 The Cohens cite Jack Farenbaugh & Son v. Belmont Constr.,
7 Inc., 194 Cal. App. 3d 1023, 1030 (Ct. App. 1987) as "allowing
8 amendment of judgment to add judgement-debtor when new debtor, an
9 owner of the defendant entity, was present at the original trial."
10 (Motion at 16.) However, the appeals court in Farenbaugh did not
11 approve the addition of the defendant based solely on the
12 defendant's presence during the trial. Rather, the court noted the
13 trial judge's observation that the defendant had "figured very,
14 very prominently in the original trial," having testified, been
15 cross examined, and "was giving instructions to his attorney as to
16 what he wanted done." Id. at 1030-31. None of these additional
17 circumstances demonstrating control are present in the instant case
18 with respect to Mrs. Port.

19 Similarly, the Cohens cite Alexander v. Abbey of the Chimes,
20 104 Cal.App.3d 39, 46 (Ct. App. 1980). (Motion at 16.) There, the
21 court allowed the sole shareholder of a corporation to be added
22 following a judgment against the corporation. Yet the court in
23 Alexander based its approval of the post-judgment addition of the
24 defendant on evidence that the defendant was deeply involved in the
25 corporation's litigation strategy. The court cited testimony from
26 the lawyer who tried the case on behalf of the defendant
27 corporation to the effect that the newly added individual defendant
28 "participated in the litigation both as chief operating officer [of

1 the defendant corporation] and as a lawyer," that the defendant was
2 his key liaison on the case, that he discussed the case with the
3 defendant "on a lawyer-to-lawyer basis," that the defendant
4 prepared documents that were used in the litigation, that hearings
5 were continued and reset at times convenient to the defendant.
6 Alexander, 104 Cal. App. 3d at 46. No such evidence of meaningful
7 control over the litigation is present with respect to Mrs. Port in
8 the instant case.

9 Finally, the Cohens rely on Mirabito v. San Francisco Dairy
10 Co., 8 cal. App. 2d 54 (1935), apparently for the proposition that
11 any defense Mrs. Port might have raised at the arbitration was
12 adequately presented by Swarm in its defense of her husband. (Reply
13 at 11.) In Mirabito, a California appeals court upheld a trial
14 court's decision to add Dairy Delivery Company, Inc. as a defendant
15 after judgement was entered against what it determined was its
16 alter ego, San Francisco Dairy. The two companies shared the same
17 president, vice-president, and secretary, occupied the same office,
18 and the president admitted acknowledging that "these companies were
19 one." Id. at 58.

20 Mirabito provides little support for the Cohens' position.
21 Decided in 1935, Mirabito did not explicitly address the question
22 of whether the newly added party exercised control over the prior
23 litigation. The court did note that there was no indication in the
24 record that naming Dairy Delivery Company in the original action
25 "could have produced a scintilla of evidence that would have in any
26 way effected the results of the trial." Id. at 60. However, the
27 same could not be said of the present case. Had Mrs. Port been
28 named as a defendant, the Arbitrator may well have found that Vicki

1 Port was not an alter ego of Swarm. The Arbitrator based his
2 conclusion that her husband Jeff Port was an alter ego of Swarm in
3 part on facts that were unique to Jeff Port, including that he
4 personally guaranteed the obligations of Swarm and paid certain of
5 the company's fees. (See Award at 34-35.) Mrs. Port has denied
6 having made such guarantees or payments or otherwise involving
7 herself in Swarm's business in any substantial way and the court
8 has no evidence before it to the contrary. (See, e.g., Vicki Port
9 Decl. ¶ 19.) The case put on for Jeff Port does not constitute
10 virtual representation of his wife. As a California appeals court
11 noted in denying a motion to add the wife of a judgement debtor as
12 a defendant after judgment was entered against her husband, "it can
13 no longer be rationally claimed that a wife is one and the same
14 person as her husband or, as it used to be said, that *uxor non est*
15 *sui juris, sed sub potestate viri.*" Oyakawa v. Gillet, 8 Cal. App.
16 4th 628 (1992).¹

17 In sum, the court finds that the Cohens have not presented
18 sufficient evidence to support a finding that Mrs. Port controlled
19

20 ¹ The court recognizes that Oyakawa does not control the
21 current case in its entirety because, unlike the Plaintiff in
22 Oyakawa, the Cohens have not asserted that Vicki Port is liable as
23 an alter ego based solely on her relationship with her husband.
24 However, the general proposition that a claim against one spouse
25 does not suffice as a claim against the other is applicable here,
26 where Plaintiffs have advocated that the court treat the Ports as a
27 unit. (See, e.g., Mot. at 17 ("The Ports also completely controlled
28 the litigation.")) Additionally, to the extent that Plaintiffs
assert that Mrs. Port is liable as a defendant because the Ports'
interest in Swarm was a community property asset, (Mot. at 12), the
court notes Oyakawa's holding that: "Although community property is
liable for a debt incurred by either spouse during marriage (Civ.
Code, § 5120.110, subd. (a)), it does not follow that a wife can be
added to a judgment rendered against her husband in an action in
which she was not named and had no opportunity to defend." Oyakawa,
8 Cal. App. 4th at 631 (1992).

1 the earlier litigation. As a result, it would offend due process to
2 amend the judgment to add her as a defendant at this juncture.
3 Because this finding is fatal to the assertion that the court may
4 add Vicki Port as a defendant post-judgment, the court need not
5 address the question of whether Mrs. Port was or is Swarm's alter
6 ego.

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8 **IV. Conclusion**

9 For the reasons set forth above, the court DENIES Plaintiffs'
10 Motion to Add Vicki L. Port as Defendant.

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12 IT IS SO ORDERED.

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15 Dated: December 16, 2013

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DEAN D. PREGERSON
United States District Judge

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