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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

WRITERS GUILD OF AMERICA,)
WEST, INC.; MARK DISTEFANO;)
and GUINEVERE TURNER,)
Plaintiffs,)
v.)
BTG PRODUCTIONS, LLC,)
Defendant.)

CV 14-05828 RSWL (AJWx)
**RULING AND ORDER RE:
EVIDENTIARY HEARING**

On January 29, 2018, the Ninth Circuit issued a Mandate regarding this Court's prior decision on whether Third Party Myriad Pictures, Inc. ("Myriad") qualifies as an alter ego of Defendant BTG Productions, LLC ("BTG"). The Court had previously denied Plaintiffs Writers Guild of America, West, Inc. (the "Guild"); Mark DiStefano ("DiStefano"); and Guinevere Turner's ("Turner") (collectively, "Plaintiffs") Motion

1 to Add Judgment Debtors on February 9, 2016, holding
2 that Myriad was not an alter ego of BTG. The Ninth
3 Circuit remanded the matter and ordered this Court to
4 apply the alter ego test outlined in United Ass'n of
5 Journeyman & Apprentices Local 343 v. Nor-Cal Plumbing,
6 Inc., 48 F.3d 1465, 1470-71, 1473 (9th Cir. 1995). See
7 Mandate 2, ECF No. 49.

8 The Court held an evidentiary hearing on June 12,
9 2018 with both parties offering testimony and exhibits
10 into evidence. Having received, reviewed, and
11 considered the evidence presented, as well as the
12 parties' arguments at the hearing and in their
13 respective briefs, the Court makes the following
14 ruling: **IT IS HEREBY ORDERED, ADJUDGED, AND DECREED**
15 that Myriad is not an alter ego of BTG and therefore
16 cannot be added as a judgment debtor.

17 I. BACKGROUND

18 A. Factual Background

19 The Guild is a labor organization within the
20 meaning of 29 U.S.C. § 152(5), with its principal place
21 of business in Los Angeles, California. Compl. ¶ 1,
22 ECF No. 1. DiStefano and Turner are members of the
23 Guild. Id. BTG is a California limited liability
24 company formed on June 9, 2010. Decl. of Kevin
25 Forester in Supp. of Myriad's Statement ("Forester
26 Decl. II") ¶ 3, ECF No. 55-1. Third Party Kirk D'Amico
27 ("D'Amico") is an individual and the sole owner of BTG.
28 Id. BTG was formed to produce the motion picture at

1 issue—*Breaking the Girls*. Id.

2 At all relevant times, the Guild and BTG have been
3 parties to the Writers Guild of America Theatrical and
4 Television Basic Agreement (“MBA”), an industry-wide
5 collective bargaining agreement between the Guild and
6 various employers in the motion picture and television
7 industry. Compl. ¶ 9. Article 10 of the MBA calls for
8 the submission of disputes to arbitration, including
9 disputes over failure to pay compensation due to
10 credited writers and to make required contributions on
11 behalf of writers to the Writers Guild-Industry Health
12 Fund and the Producer-Writers Guild of America Pension
13 Plan (collectively, the “Plans”). Id. ¶ 10.

14 In 2012, a dispute arose between Plaintiffs and BTG
15 concerning BTG’s failure to pay compensation owed in
16 connection with *Breaking the Girls* to writers DiStefano
17 and Turner (collectively, the “Writers”). Id. ¶ 11.
18 On June 6, 2013, the Guild served BTG with a notice of
19 claim submitted to arbitration, outlining the
20 allegations that BTG failed to pay certain compensation
21 owed to the Writers and failed to make the attendant
22 contributions to the Plans. Id. ¶ 12. The arbitration
23 hearing was held on February 12, 2014. Id. ¶ 15. BTG
24 failed to appear at the hearing and had advised counsel
25 for the Guild by phone a few days before the hearing
26 that it did not intend to appear. Id.

27 On February 12, 2014, the arbitrator entered the
28 award and judgment against BTG, requiring BTG to pay

1 Plaintiffs over \$300,000 relating to credit bonus
2 provisions in the Writers' contracts for *Breaking the*
3 *Girls*. Id. ¶ 16. On February 14, 2014, the Guild
4 served the award on BTG, which has refused and
5 continues to refuse to comply with the terms of the
6 award. Id. ¶ 17.

7 **B. Procedural Background**

8 On July 25, 2014, Plaintiffs filed a Complaint [1]
9 against BTG to confirm the arbitration award. On
10 September 12, 2014, the Clerk entered default [14]
11 against BTG. On October 30, 2014, Plaintiffs filed a
12 Motion for Default Judgment against BTG, which included
13 a Motion to Confirm Arbitration Award [17]. On
14 February 3, 2015, this Court issued a Judgment [23],
15 granting Plaintiffs' request for default judgment and
16 confirming the award.

17 On October 21, 2015, Plaintiffs filed their Motion
18 to Add Judgment Debtors [24], which sought to add
19 D'Amico and Myriad as judgment debtors. On February 9,
20 2016, the Court denied Plaintiffs' Motion to Add
21 Judgment Debtors in its entirety [36]. Plaintiffs
22 appealed the Court's denial on March 3, 2016 [37].
23 Pursuant to the parties' stipulation, the Ninth Circuit
24 dismissed the appeal as to D'Amico on October 14, 2016
25 [45].

26 On January 5, 2018, the Ninth Circuit issued its
27 Memorandum [47] affirming in part and reversing in part
28 this Court's denial of Plaintiffs' Motion to Add

1 Judgment Debtors. The Ninth Circuit affirmed this
2 Court's holding that Plaintiffs' Motion to Add Judgment
3 Debtors was timely. Mem. ¶ 2, ECF No. 47. The Ninth
4 Circuit held that this Action involves a collective
5 bargaining agreement, thus requiring the application of
6 the federal rather than the state test for determining
7 whether Myriad is an alter ego of BTG. Id. ¶ 1. The
8 Ninth Circuit remanded for this Court to apply the
9 alter ego test outlined in Nor-Cal. Id. The Ninth
10 Circuit issued its Mandate [49] on January 29, 2018.
11 The Court held an evidentiary hearing regarding the
12 alter ego issue on June 12, 2018.

13 II. DISCUSSION

14 A. Legal Standard

15 To prove that a non-union entity is an alter ego of
16 a union entity, and thus subject to a collective
17 bargaining agreement, a plaintiff must make a showing
18 (1) that the two entities were a single employer "and
19 (2) that the non-union firm is used 'in a sham effort
20 to avoid collective bargaining obligations.'"

21 Resilient Floor Covering Pension Fund v. M&M
22 Installation, Inc., 630 F.3d 848, 852 (9th Cir. 2010)
23 (quoting Nor-Cal, 48 F.3d at 1470).

24 "The criteria for determining whether two firms
25 constitute a single employer are (1) common ownership,
26 (2) common management, (3) interrelation of operations,
27 and (4) centralized control of labor relations."

28 Nor-Cal, 48 F.3d at 1471. No factor is controlling,

1 and not every factor must be present. Id.

2 The second prong of the Nor-Cal test has been
3 defined in a number of ways:

4 "whether [the non-union employer] was created in
5 an attempt to avoid the obligations of [] [the
6 union employer's] collective bargaining
7 agreement through a sham transaction or a
8 technical change in operations"; whether the
non-union employer was used in a sham effort to
avoid collective bargaining obligations; and
whether some measure of fraud or
misrepresentation exists.

9 Resilient, 630 F.3d at 852 (quoting Nor-Cal, 48 F.3d at
10 1470, 1472).

11 **B. Analysis**

12 1. Single Employer

13 a. *Centralized Control of Labor Relations*

14 "The most important factor is centralized control
15 of labor relations, which can be demonstrated either by
16 showing common control of day-to-day labor matters or
17 by showing that the person in charge of the union
18 company's labor relations made the decision that the
19 second company would be non-union." Nor-Cal, 48 F.3d
20 at 1471 (internal citation omitted). At the
21 evidentiary hearing, D'Amico testified that he and
22 Kevin Forester, Myriad's chief operating and financial
23 officer, were responsible for making hiring decisions
24 for Myriad. D'Amico also testified that he generally
25 controlled the decision-making for BTG and was involved
26 in supervising the production of *Breaking the Girls*.

27 On the other hand, D'Amico testified that BTG hired
28 Melissa Wiley, a non-Myriad employee, as the line

1 producer for *Breaking the Girls*. In that role, Ms.
2 Wiley was responsible for hiring and firing production
3 employees and negotiating rates with vendors. In
4 addition to Ms. Wiley, Jamie Babbit (director of
5 *Breaking the Girls*) and Andrea Sperling (independent
6 producer of *Breaking the Girls*), who were also non-
7 Myriad employees, worked with D'Amico to supervise the
8 production staff working on *Breaking the Girls*. Ms.
9 Babbit and Ms. Sperling also provided notes to the
10 writers of *Breaking the Girls*. Ultimately, while
11 D'Amico may have been involved in the day-to-day labor
12 operations of both Myriad and BTG, there were at least
13 three non-Myriad employees significantly involved in
14 the day-to-day labor operations of BTG. Therefore,
15 this factor does not strongly weigh in favor of finding
16 Myriad and BTG were a single employer.

17 b. *Common Ownership*

18 It is clear from D'Amico's testimony that BTG and
19 Myriad have common ownership. While Isabell Von
20 Alvensleben owns thirty percent of Myriad, D'Amico owns
21 the remaining seventy percent, and D'Amico is the sole
22 owner of BTG. Accordingly, this factor weighs in favor
23 of finding BTG and Myriad were a single employer.

24 c. *Common Management*

25 "Under this factor, the court examines whether the
26 entities have common officers, directors, and
27 managers." EEOC v. Con-Way, Inc., No. CV 06-1337-MO,
28 2007 U.S. Dist. LEXIS 66727, at *14 (D. Or. Sept. 4,

1 2007) (citations omitted). Further, "the court looks
2 to whether the common officers or managers exert
3 regular control, i.e. day-to-day, over the operations
4 of both entities." Id.

5 It is clear that BTG and Myriad shared common
6 officers, who were involved in the day-to-day
7 operations of both companies. Mr. Forester testified
8 that he served as the chief financial officer for both
9 BTG and Myriad and was responsible for overseeing the
10 finances for both entities. D'Amico testified that he
11 and Mr. Forester share in the final decision-making for
12 hiring employees at Myriad. D'Amico was also a
13 decision-maker in the decision for BTG to hire Myriad
14 as a sales representative, as well as the decision to
15 hire the bond company.¹ D'Amico made the decision to
16 hire the director of *Breaking the Girls*, Ms. Babbit,
17 and the independent producer for *Breaking the Girls*,
18 Ms. Sperling. Finally, D'Amico specifically admitted
19 that he was in control of BTG.

20 Additionally, Craig Kessler worked in business and
21 legal affairs at Myriad and was also responsible for
22 hiring writers for *Breaking the Girls*. David Ducar was
23 an officer of BTG and served as counsel for both Myriad
24 and BTG, handling legal issues for both, including
25 grievances BTG had with the Guild throughout the
26 production of *Breaking the Girls*.

27
28 ¹ The bond company guarantees completion of the
film to various investors.

1 However, D'Amico testified that Ms. Sperling, who
2 was under contract with BTG, not Myriad, was also
3 responsible for hiring and firing BTG employees.
4 Further, BTG had a line producer, Ms. Wiley, who was
5 not an employee or officer of Myriad, and Ms. Wiley was
6 involved in many of the day-to-day operations of BTG,
7 including serving as the production liaison with the
8 unions.

9 Ultimately, while BTG may have had non-Myriad
10 employees managing some of its day-to-day operations,
11 see Int'l Longshore & Warehouse Union, Local 40 v.
12 Columbia Grain, No. 3:13-CV-00513-AC, 2014 U.S. Dist.
13 LEXIS 136326, at *20 (D. Or. July 21, 2014) (noting
14 lack of common management when "each company had its
15 own 'general manager' who saw to each company's
16 day-to-day operations"), Myriad and BTG shared a number
17 of officers who were all involved in different areas of
18 both entities' operations, see Haley & Haley, Inc. v.
19 NLRB, 880 F.2d 1147, 1151 (9th Cir. 1989) ("Although
20 the evidence did not conclusively demonstrate that the
21 same individuals played a significant role in the
22 day-to-day operations of both companies, there was
23 substantial evidence to indicate that Larry Haley was a
24 dominant figure in major as well as minor management
25 decisions for both companies."). This factor thus
26 weighs in favor of finding BTG and Myriad were a single
27 employer.

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1 d. *Interrelated Operations*

2 "Evidence relevant to a finding of close
3 interrelationship of operations includes, but is not
4 restricted to, shared use of office space, supplies and
5 equipment, similar client base and operations, as well
6 as any joint undertakings or financial relationships."

7 Haley, 880 F.2d at 1151. In the 2011 Letter of
8 Adherence BTG submitted to the Guild regarding BTG's
9 adherence to the MBA, BTG listed Myriad's physical
10 address as well as Myriad email addresses as the
11 contact for BTG, thus suggesting BTG and Myriad shared
12 office space. Pls.' Ex. 6. However, the 2011 Letter
13 of Adherence also lists a production address different
14 than Myriad's address and a non-Myriad email address
15 for Ms. Wiley, the line producer for *Breaking the*
16 *Girls*. D'Amico confirmed in his testimony that this
17 separate production address was the address BTG used
18 during the production of *Breaking the Girls*.

19 Therefore, it would appear that BTG and Myriad did not
20 share office space during the production of *Breaking*
21 *the Girls*.

22 However, the invoices Myriad submitted to BTG for
23 Myriad's services related to *Breaking the Girls* show a
24 common address for both entities. Myriad's Ex. 4. The
25 checks BTG wrote to Myriad for these services also show
26 a common address for both entities. Myriad's Ex. 5.
27 Further, Mr. Forester testified that in dealing with
28 these invoices, he took them to another Myriad employee

1 in Myriad's office who signed the checks to Myriad on
2 behalf of BTG. Therefore, Myriad and BTG's accounting
3 business took place in the same office; Myriad did not
4 even have to leave the office to get paid for the
5 services it was providing to BTG.

6 BTG and Myriad did not at any point share bank
7 accounts, and there has never been any commingling of
8 funds. However, as noted in the Completion Agreement,
9 which the bond company provided regarding financing of
10 *Breaking the Girls*, Myriad did invest approximately
11 \$88,000 into BTG for the production of *Breaking the*
12 *Girls*. Myriad's Ex. 12 at 2. Mr. Forester signed the
13 Completion Agreement on behalf of BTG as its chief
14 financial officer. Id. at 9. Mr. Forester also signed
15 the Collection Account Management Agreement² on behalf
16 of BTG, while D'Amico signed on behalf of Myriad.
17 Myriad's Ex. 10 at 56. This intertwining of Myriad's
18 and BTG's operations and officers evidences that this
19 factor weighs in favor of finding Myriad and BTG were a
20 single employer.

21 Because at least three of the four factors weigh in
22 favor of finding Myriad and BTG are a single employer,
23 Plaintiffs have satisfied the first prong of the Nor-
24 Cal alter ego test.

25 ///

26
27 ² According to Mr. Forester, the Collection Account
28 Management Agreement is provided by a third party who is
responsible for receiving payments related to the film and then
issuing account statements.

1 2. Intent to Avoid Union Obligations

2 While Plaintiffs have provided evidence sufficient
3 to satisfy the first prong of the Nor-Cal test,
4 Plaintiffs must still provide evidence to satisfy the
5 second prong to successfully prove Myriad is an alter
6 ego of BTG. See Resilient, 630 F.3d at 853 (holding
7 that a plaintiff cannot prevail on an alter ego theory
8 simply by showing the union and non-union entities are
9 a single employer). Typically, the Nor-Cal alter ego
10 test applies when a union entity creates a non-union
11 entity to avoid its collective bargaining obligations
12 with the union. See id. at 854. The Ninth Circuit has
13 specifically held that the test “does not apply in the
14 ‘reverse’ where a non-union employer creates a union
15 company because the non-union employer has no
16 collective bargaining obligations to avoid.” S. Cal.
17 Painters & Allied Trades v. Rodin & Co., 558 F.3d 1028,
18 1033 (9th Cir. 2009). Importantly, under the alter ego
19 doctrine, “a non-union company cannot be guilty of
20 evading a collective bargaining agreement that it never
21 entered into.” Id.

22 This “reverse alter ego” scenario is the scenario
23 here—Myriad, the non-union entity, was created in 1998,
24 twelve years prior to BTG, the union entity. In such a
25 situation, the Ninth Circuit has declined to recognize
26 a “reverse alter ego doctrine,” and instead only finds
27 alter ego liability when there is “an indication that
28 the union entity was using the non-union entity to

1 avoid union obligations." Id. Therefore, to add
2 Myriad as a judgment debtor under an alter ego theory,
3 Plaintiffs must provide evidence that BTG used Myriad
4 to avoid BTG's union obligations.

5 Plaintiffs have not provided sufficient evidence
6 showing that BTG used Myriad to avoid BTG's union
7 obligations. While BTG and Myriad worked closely
8 together in producing *Breaking the Girls*, there is no
9 evidence that BTG transferred union work to Myriad to
10 avoid any of BTG's union obligations. See id.

11 ("[T]here is no evidence that [the non-union entity]
12 diverted union work from [the union entity] at all, let
13 alone that [the non-union entity] did so to help [the
14 union entity] avoid [the union entity]'s obligations
15 under the [collective bargaining agreement]."); Nor-
16 Cal, 48 F.3d at 1472 (finding manager used the non-
17 union entity "to do work that would have been performed
18 by [the union entity] if [the non-union entity] had not
19 been created"); see also Bds. of Trs. of the Cement
20 Masons & Plasterers Health & Welfare Tr. v.

21 Concreteman, Inc., No. C13-1698JLR, 2014 U.S. Dist.
22 LEXIS 65253, at *12 (W.D. Wash. May 12, 2014) (noting
23 potential for union animus when manager of union entity
24 transferred all union work to non-union entity upon
25 dealing with payment of benefits to union employee).
26 In fact, BTG was created for the sole purpose of
27 producing *Breaking the Girls*, while Myriad provides
28 sales representative services to many movies and

1 currently has a library of around 110 films. See
2 Rodin, 558 F.3d at 1033 (noting union entity never
3 generated the quantity of business that the non-union
4 entity performed—the union entity handled seventeen
5 jobs in the same time the non-union entity handled 2500
6 jobs).

7 Further, BTG was not wholly reliant on Myriad for
8 its existence; while Myriad performed sales
9 representative services for BTG and invested money into
10 the production, Myriad only invested approximately one-
11 tenth of the budget of the movie, and non-Myriad
12 employees, including Ms. Sperling, Ms. Wiley, and Ms.
13 Babbit, had a hand in managing the production.³ See
14 Resilient Floor Covering Pension Fund v. M & M
15 Installation, Inc., No. C08-5561 BZ, 2012 U.S. Dist.
16 LEXIS 26354, at *20 (N.D. Cal. Feb. 29, 2012)
17 (concluding that the union entity's "collective
18 bargaining obligations could only be met if [the non-
19 union entity] funded them"). BTG functioned
20 irrespective of Myriad and Myriad's finances; there was
21 no commingling of funds, Myriad did not receive the
22 profits of *Breaking the Girls*, and Myriad was only one
23 piece of the production puzzle, not the primary
24 investor and manager of the production. Cf. id.
25 (noting union entity received all of its contracts and

27 ³ There were also another fifty non-Myriad employees who
28 worked directly for BTG and made up the cast and crew of *Breaking
the Girls*.

1 income from the non-union entity and the non-union
2 entity took all of the union entity's profits for
3 itself); Trs. of the Bricklayer & Allied Craftworkers
4 Local 13 v. Commercial Union Tile & Stone, No.
5 2:15-cv-02129-APG-NJK, 2017 U.S. Dist. LEXIS 123782, at
6 *5 (D. Nev. Aug. 4, 2017) (finding manager "operated
7 the two entities to avoid [collective bargaining
8 agreement] obligations by inflating [the union
9 entity]'s bids by forty percent or more[,] " ensuring
10 the non-union entity would win the bid).

11 Finally, it is hard to show how BTG could even use
12 Myriad to avoid its union obligations, especially since
13 Myriad was created so many years prior to BTG. Cf. Bd.
14 of Trs. of the Pipe Trades Dist. Council No. 36 Health
15 & Welfare Tr. Fund v. Clifton Enters., No. 11-05447 JST
16 (JSC), 2013 U.S. Dist. LEXIS 77068, at *32 (N.D. Cal.
17 May 31, 2013) (finding second prong satisfied when non-
18 union entity "was established in an attempt to continue
19 [union entity's] operations while avoiding [union
20 entity's] liability for failure to abide by its
21 collective bargaining obligations"). The truth of the
22 matter is that BTG was capitalized to fund *Breaking the*
23 *Girls*, but after the film did not do as well as the
24 producers hoped, BTG ran out of money and did not have
25 sufficient funds to pay the Writers of *Breaking the*
26 *Girls* pursuant to their contracts. As single-purpose
27 entities like BTG are common in the film industry, it
28 would be illogical to expect any third-party entity

1 that works on a film to be liable for any remaining
2 debts of the single-purpose entity after production of
3 the film ends. This is not the purpose the alter ego
4 doctrine seeks to serve. See Rodin, 558 F.3d at 1033
5 ("The alter ego doctrine was never intended to coerce a
6 non-union company into becoming a union company by
7 requiring its compliance with a collective bargaining
8 agreement it never signed, with a union its employees
9 never authorized to represent them.").

10 Because Plaintiffs have failed to provide evidence
11 of BTG's intent to use Myriad to avoid BTG's union
12 obligations, Plaintiffs have failed to satisfy the
13 second prong of the Nor-Cal alter ego test.

14 **III. CONCLUSION**

15 Based on the foregoing, the Court declines to find
16 Myriad is an alter ego of BTG, and therefore, Myriad
17 cannot be added as a judgment debtor.

18 **IT IS SO ORDERED.**

19
20 DATED: July 3, 2018

s/ RONALD S.W. LEW
HONORABLE RONALD S.W. LEW
Senior U.S. District Judge