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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

DELEGAT'S WINE ESTATE	)	
LIMITED,	)	
	)	No. C10-2215 BZ
Plaintiff,	)	
	)	
v.	)	PRETRIAL ORDER
	)	
AMERICAN WINE DISTRIBUTORS,	)	
INC. and MICHAEL DENNY,	)	
individual,	)	
	)	
Defendants.	)	
_____	)	

The pretrial conference in this case was held on January 24, 2012. Plaintiff was represented at the conference by Andrew Bayne and David Rosenbaum. Defendants were represented by Lawrence Smith.

This Order shall control the subsequent conduct of the case and be modified only to prevent manifest injustice. See Fed. R. Civ. P. 16(e).

**1. LENGTH AND TIME OF TRIAL**

Trial shall begin on **Monday, February 13, 2012 at 8:30 a.m.**, in **Courtroom D**, 15th Floor, Federal Building, 450 Golden Gate Avenue, San Francisco, California 94102 and is

1 expected to last five days. The trial schedule is as follows:  
2 8:30 a.m. - 1:30 p.m. Counsel shall meet in chambers by  
3 **8:15 a.m. on February 13, 2012.** Plaintiff will have seven  
4 hours to present evidence. Defendants will have six hours.

5 Plaintiff shall be prepared to call witnesses Monday,  
6 February 13, 2012. Each side shall schedule witnesses to  
7 avoid any interruption in the presentation of testimony.  
8 During the trial, witnesses, other than counsel and their  
9 clients, shall remain sequestered outside the courtroom until  
10 they are called to testify.

11 **2. VOIR DIRE**

12 Any objections to the voir dire questions distributed at  
13 the conference, or requests for additional questions, shall be  
14 filed by **February 1, 2012.** Plaintiff may submit additional  
15 voir dire questions for the Court's consideration.

16 **3. BIFURCATION**

17 The request to bifurcate the trial is denied.

18 **4. AMENDMENT OF THE COMPLAINT**

19 In its pretrial conference statement, Plaintiff indicated  
20 that it sought leave to amend the complaint to add a count  
21 alleging alter ego liability against Defendant Denny.  
22 Plaintiff did not file a motion for leave to amend the  
23 complaint pursuant to Federal Rule of Civil Procedure 15.  
24 To the extent that Plaintiff's statement in the pretrial  
25 conference statement constitutes a motion to amend, it is  
26 **DENIED.** The proposed amendment would be unduly consumptive of  
27 time, prejudicial to Defendants, and would be confusing to the  
28 jury. The issue of alter ego liability is an equitable one

1 for the Court, not for the jury. Alexander v. Abbey of the  
2 Chimes, 104 Cal.App.3d 39, 163 Cal.Rptr. 377 (1980) ("When  
3 considering the application of the alter ego doctrine to a  
4 particular situation, it must be remembered that it is an  
5 equitable doctrine and, though courts have justified its  
6 application through consideration of many factors, their basic  
7 motivation is to assure a just and equitable result."); Leek  
8 v. Cooper, 194 Cal.App.4th 399, 419 (2011) ("Under some  
9 circumstances, a judgment against a corporation may be amended  
10 to add a nonparty alter ego as a judgment debtor. 'This is an  
11 equitable procedure based on the theory that the court is not  
12 amending the judgment to add a new defendant but is merely  
13 inserting the correct name of the real defendant.'" (quoting  
14 NEC Electronics, Inc. v. Hurt, 208 Cal.App.3d 772, 778, 256  
15 Cal. Rptr. 441 (1989)) (internal citations omitted).

16 **5. MOTIONS**

17 **Plaintiff's Motion No. 1**, to preclude Defendants from  
18 rebutting Plaintiff's expert report, is **GRANTED IN PART**.  
19 Defendants may not introduce lay opinion testimony to rebut  
20 the opinions of Plaintiff's expert that Defendant American  
21 Wine was insolvent during the periods set forth in the  
22 expert's report. However, Defendants are not prohibited from  
23 introducing lay testimony regarding foundational factual  
24 issues that may be in the expert's report.

25 **Plaintiff's Motion No. 2**, to prohibit Defendants from  
26 introducing lay testimony concerning Defendants' illegality  
27 defense, is **GRANTED IN PART**. Defendants are barred from  
28 presenting lay opinion testimony regarding the legality of

1 the parties' relationship. Defendants may present lay  
2 testimony as to the factual basis for their relationship, and  
3 to the extent relevant and not prejudicial, as to beliefs  
4 about the legality of their relationship.

5 Plaintiff's Motion No. 3, to exclude introduction of  
6 evidence related to pre-2008 course of dealings by the  
7 parties, is DENIED. Evidence of the parties' pre-2008 course  
8 of dealings, and in particular, the parties' 2005 AWD  
9 Distribution and Administrative Services Agreement, is  
10 relevant to the question of the contours of the subsequent,  
11 unwritten business relationship.

12 Defendants' Motion, to prohibit Plaintiff from referring  
13 to the financial solvency of Defendant American Wine and from  
14 referring to any payment of funds from American Wine to  
15 Denny, is DENIED. Defendants argue that evidence of solvency  
16 and payment of funds to Denny is only relevant to Plaintiff's  
17 claim for breach of fiduciary duty, which should be dismissed  
18 because Plaintiff lacks standing. Defendants appear to be  
19 improperly seeking a dispositive ruling in the guise of a  
20 motion in limine. Nonetheless, the motion is denied.  
21 Defendants have failed to show that Plaintiff lacks standing.  
22 In Berg & Berg Enterprises v. Boyle, 178 Cal.App.4th 1020,  
23 1027 (2009), the court stated that:

24 An action is derivative, that is, in the corporate  
25 right, if the gravamen of the complaint is injury  
26 to the corporation, or to the whole body of its  
27 stock and property without any severance or  
28 distribution among individual holders, or it seeks  
to recover assets for the corporation or to prevent  
the dissipation of its assets. On the other hand, a  
creditor's individual or direct claim is one for  
which the creditor does not seek to recover on

1           behalf of the corporation for injury done to it.  
2           The injury need not be different from that suffered  
3           by a class of shareholders or be unique to the  
4           plaintiff and it still may affect a substantial  
5           number of shareholders or in this case, creditors.  
6           But the direct claim is simply one that reflects an  
7           injury that is not incidental to an injury to the  
8           corporation as a whole.

9           Berg, 178 Cal.App.4th at 1027, n.5 (internal citations  
10          omitted). Here, Plaintiff claims it is not seeking to  
11          recover on behalf of the corporation but on an individual  
12          claim for damages that is "not incidental to an injury to the  
13          corporation as a whole." Id.

#### 14          6.   EXHIBITS

15                 Exhibits shall not be a part of the record or go to the  
16                 jury unless sponsored by a witness or otherwise brought to  
17                 the jury's attention. The parties must lodge the original  
18                 and one copy of the entire transcript of all depositions they  
19                 anticipate using at trial by the start of trial.

20                 Defendant's objections to Plaintiff's exhibits 22-36 are  
21                 **SUSTAINED** unless Plaintiff can show that there is some reason  
22                 to admit these exhibits not covered by the insolvency  
23                 stipulation.

24                 Defendant's objections to Plaintiff's exhibits 38-40 are  
25                 **OVERRULED**.

26                 Defendant's objections to Plaintiff's exhibit 41 is  
27                 **SUSTAINED** unless Plaintiff can show that there is some reason  
28                 to admit this exhibit not covered by the insolvency  
29                 stipulation.

30                 Defendant's objections to Plaintiff's exhibit 42 is  
31                 **OVERRULED**. Defendants may provide additional portions of the

1 email string, if they are relevant.

2 Defendant's objections to Plaintiff's exhibits 46-47 are  
3 **OVERRULED** to the extent that the exhibits relate to punitive  
4 damages.

5 Defendant's objections to Plaintiff's proffer of  
6 Miller's deposition excerpts is **SUSTAINED** to the extent that  
7 Plaintiff has not shown that Miller is unavailable to  
8 testify. If, on the first day of trial, Plaintiff  
9 demonstrate Miller's unavailability, the deposition may be  
10 used if still needed.

11 **7. WITNESSES**

12 Defendant's objections to Plaintiff's witnesses on the  
13 grounds that the descriptions of the witnesses' testimony are  
14 insufficient are **OVERRULED**.

15 Plaintiff's motion for witness Jacqui Ivcevich to be  
16 excused from personal attendance at trial is **GRANTED** subject  
17 to the following requirements. Ms. Ivcevich shall testify  
18 at trial by video-conference. Plaintiff shall arrange for a  
19 neutral person to serve as a deposition officer to be present  
20 with Ms. Ivcevich during the deposition. Plaintiff shall  
21 ensure that Ms. Ivcevich has a complete set of both parties'  
22 trial exhibits with her during her testimony. Any documents  
23 that Defendant intends to use to cross-examine Ms. Ivcevich  
24 shall be sent in a sealed envelope to the deposition officer  
25 prior to trial. These documents shall be opened only by the  
26 deposition officer during trial at Defendants' counsel  
27 direction. Plaintiff's counsel shall inform the Court the  
28 day before Ms. Ivcevich will testify so that the video-

1 conferencing equipment can be set up. No later than  
2 **February 1, 2012**, the parties shall communicate with the  
3 Court's **judicial extern Sarah Hwang at 415-522-4038** regarding  
4 the technical requirements for video-conferencing. Also no  
5 later than **February 1, 2012**, the parties shall file a  
6 stipulation regarding what the Court should tell the jury  
7 about why Ms. Ivcevich is not personally attending the  
8 trial.

9 Christine Kolda may testify at trial on the condition  
10 that she be made available for deposition at a mutually  
11 convenient time and place prior to trial. Ms. Kolda may be  
12 deposed for a total of three hours, divided into two hours  
13 for Defendants' questioning and one hour for Plaintiff's  
14 questioning. If Defendants decline to depose her, Plaintiff  
15 may satisfy the condition that she be made available by  
16 offering to make her available at a specified time.

17 The Court granted Defendants leave to depose Jaime  
18 Reyes, who may testify at trial whether or not Defendants  
19 deposes him. Mr. Reyes may be deposed for a total of three  
20 hours, divided into two hours for Defendant's questioning and  
21 one hour for Plaintiff's questioning.

## 22 **8. JURY INSTRUCTIONS**

23 Rulings on the instructions were made on the record at  
24 the pretrial conference. The court will distribute a  
25 proposed set of jury instructions. Final instructions will  
26 be driven by the evidence and will be settled shortly before  
27 the jury is to be instructed.

28 No later than **February 1, 2012**, the parties shall file,

1 jointly if possible, the following proposed jury  
2 instructions: (1) Ninth Circuit Civil Model Instruction 1.2  
3 and (2) Ninth Circuit Civil Model Instruction 5.1 that  
4 includes the measure of damages sought. No later than  
5 **February 1, 2012**, the parties may propose additional  
6 instructions as discussed at the pretrial conference.

7 **9. Additional submissions from parties**

8 No later than **February 1, 2012**, the parties shall file  
9 the following documents. The Court prefers joint filings,  
10 but will accept separate filings if the parties cannot, in  
11 good faith, agree.

12 A. A proposal regarding what to tell the jury about  
13 the parties' stipulation that Defendant owes  
14 Plaintiff \$336.131.37. If the parties fail to file  
15 a stipulation, the Court will assume the issue of  
16 the amount due will be tried to the jury and will  
17 give the common count jury instructions.

18 B. A stipulation regarding American Wine's insolvency,  
19 including American Wine's stipulation to Newton's  
20 four expert opinions and that the insolvency is in  
21 the amount of approximately \$400,000.

22 **10. MISCELLANEOUS**

23 Any party who desires a transcript of the trial must  
24 make arrangements with the Court Services Coordinator, Debra  
25 Campbell. Any party who needs an interpreter or audio or  
26 visual equipment shall make its own arrangements for same and  
27 clear all such equipment with court security personnel. For  
28 any equipment the parties seek to bring into Court, they



1 shall file a proposed order seeking permission to do so. The  
2 parties shall arrange with Courtroom Deputy Kristen Seib at  
3 415-522-3694 to set up any audio-visual equipment on Friday,  
4 February 10, 2012. The parties shall notify the Court  
5 immediately if this action should settle before the  
6 commencement of trial.

7 Dated: January 25, 2012

8   
9 Bernard Zimmerman  
United States Magistrate Judge

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11 ORDER.BZ VERSION.wpd

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