EXHIBIT A

Not Reported in F.Supp.2d
Not Reported in F.Supp.2d, 2002 WL 1315786 (N.D.Tex.)
(Cite as: Not Reported in F.Supp.2d, 2002 WL 1315786)

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North River Ins. Co. v. Transamerica Occidental Life Ins. Co.
N.D.Tex.,2002.
Only the Westlaw citation is currently available.
United States District Court, N.D. Texas, Dallas Division.
THE NORTH RIVER INSURANCE COMPANY and United States Fire Insurance Company, Plaintiffs,
v.
TRANSAMERICA OCCIDENTAL LIFE INSURANCE COMPANY, Defendant.
No. Civ.A. 399-CV-0682-L.

June 12, 2002.

MEMORANDUM OPINION AND ORDER

LINDSAY, J.
***1** Before the court is Plaintiffs' Pre-Trial Brief in Support of Petition to Compel Arbitration, filed March 26, 2002; Defendant's Brief on the Issue of Compelling Arbitration, filed April 18, 2002; and Plaintiffs' Reply Brief in Support of Petition to Compel Arbitration, filed May 3, 2002.[FN1]After having reviewed the parties' briefs, the evidence submitted, and the applicable law, the court grants Plaintiffs' motion to compel arbitration and sanctions Plaintiffs for their failure to comply with orders of the court.[FN2]

FN1. The court construes Plaintiffs' "Pre-Trial Brief in Support of Petition to Compel Arbitration" as a motion to compel arbitration made pursuant to sections 4 and 6 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1, *et seq.* Although the pretrial brief does not comply with the formal requirements for the submission of a motion under the Federal Rules of Civil Procedure or with our Local Rules, the court granted Transamerica additional time to respond to the issues presented by Plaintiffs' brief. In response, Transamerica filed its own brief, accompanied by a number of exhibits, to which Plaintiffs submitted a reply. Accordingly, the court construes Plaintiffs' pretrial brief as a motion and rules on the issues therein con- tained.

FN2. By request of the court, the parties also filed briefs to address certain evidentiary issues. On April 18, 2002, Transamerica filed Defendant's Brief on Evidentiary Issues. Plaintiffs filed their Brief in Response to Transamerica's Brief on Evidentiary Issues on may 3, 2002. After having reviewed the evidence submitted by Plaintiffs, the parties' briefs, and the applicable law, the court overrules Defendant's objections.

I. Factual and Procedural History

A. Factual History

In 1985, Plaintiffs United States Fire Insurance Company ("U.S.Fire") and North River Insurance Company ("North River") were subsidiaries of Crum & Forster, Inc. ("C & F"). At that time, the Aviation Office of America, Inc. ("AOA") was a Texas insurance company that acted as the managing general agent for C & F's aviation insurance business. As the managing general agent, AOA issued insurance policies on behalf of U.S. Fire and North River to cover worker's compensation claims made by workers in the aviation industry. AOA also arranged reinsurance protection for those policies.

The Zimmerman, Green Line Slip ("Line Slip") was a reinsurance pool which invested funds from a group of subscribers in various reinsurance contracts. The subscribers to the Line Slip were insurance companies that contracted with a pool manager to act as the agent for the member companies. In 1985, Zimmerman, Green Incorporated ("ZGI") acted as the managing agent for the Line Slip. ZGI entered into management agreements with each of its subscribers. These management agreements authorized ZGI to enter into reinsurance contracts on behalf of each subscriber, and specified the maximum percentage share to which ZGI was allowed to bind

each participant.

Effective January 1, 1985, Defendant Transamerica Occidental Life Insurance Company ("Transamerica") entered into a management agreement with ZGI (the "1985 Management Agreement"). Under the terms of the agreement, Transamerica authorized ZGI "to bind and accept for the purpose of procuring, underwriting, and servicing, on [Transamerica's] behalf, reinsurance of other insurance or reinsurance compan[ies]." Transamerica further agreed to accept a certain portion of the total risk borne by the reinsurance pool. Under the 1985 Management Agreement, Transamerica subscribed to a 23 .53 percent share in the Line Slip. The 1985 Line Slip subscribers, and their corresponding shares of the 1985 reinsurance pool, included the following member companies: (1) Transamerica (23.53 percent); (2) Beneficial Life Insurance Company (23.53 percent); (3) Federal Insurance Company (5.88 percent); (4) North American Life and Casualty Company (17.66 percent); (5) Oxford Life Insurance Company (11.76 percent); (6) Republic National Life Insurance Company (5.88 percent); (7) State Mutual Life Insurance Company of America (11.76 percent).

***2** By 1987, ZGI had changed its name to Zimmerman Line Slip, Inc. ("ZLSI"). In 1987, Transamerica entered into a similar management agreement with ZLSI (the "1987 Management Agreement"). Pursuant to the 1987 Management Agreement, Transamerica subscribed to a 6.81 percent share of the 1987 Line Slip. Similar to the 1985 Line Slip, the 1987 Line Slip was composed of a group of member insurance companies that subscribed to a specific share of premiums and losses arising from reinsurance contracts entered into on their behalf by ZLSI.

Effective December 15, 1985, ZGI entered into two reinsurance contracts ("treaties") with AOA (the "1985 Treaties") on behalf of the 1985 Line Slip. The first treaty, the "Primary Treaty," provided reinsurance for those policies issued by AOA on behalf of U .S. Fire and North River for losses up to $250,000. The second treaty, the "Excess Treaty," provided reinsurance for losses up to $750,000 beyond the first $250,000. Both treaties were "quota share" treaties. Under a "quota share" treaty, a group of reinsurers agrees to accept a fixed percentage of all risks declared under the treaty. Under both the Primary and Excess Treaties, for example, ZGI contracted on behalf of the 1985 Line Slip for 25 percent of the total risk declared under the Treaty.[FN3] The remaining percentage of risk was divided between a number of other insurance carriers. Both Treaties were renewed as of January 1, 1987, until December 31, 1987 (the "1987 Treaties").

> FN3. Transamerica, as a subscriber the 1985 Line Slip, was responsible for 25.53 percent of 25 percent of the total risks declared under the 1985 Treaty with AOA. Similarly, Transamerica would accept 25.53 percent of 25 percent of the premiums due under the Treaty. Under the 1987 Treaties, Transamerica would accept 6.81 percent of 25 percent of the total risks and premiums.

Under the terms of the 1985 and 1987 Treaties, reinsurers who were not admitted in the State of New York were required to post letters of credit as security for the payment of known and reported losses. On or about December 1, 1986, AOA requested letters of credit from Transamerica and from the other non-admitted line slip subscribers to secure their percentage share of the reported losses under the 1985 Treaty. Instead of obtaining letters of credit from Transamerica and the other non-admitted 1985 Line Slip subscribers, ZGI represented that one of the admitted 1985 Line Slip subscribers, State Mutual Insurance Company ("State Mutual"), would act as a "front" for the shares of the other non-admitted members.[FN4]Under the 1987 Treaties, ZLSI represented that Business Men's Assurance Company of America ("BMA") would act as the front.

> FN4. As explained by Judge Lifland:
>
> > Fronting occurs when one reinsurer ("A") agrees to indemnify ... "ceding" company ("B") if B sustains losses that are within the scope of the reinsurance coverage provided by the agreement between A and B. However, suppose reinsurer C wants to participate in reinsuring A, but may not do so for

> whatever reason. C can then enter into an agreement with B in which B agrees to represent C in the reinsurance agreement with A. For example, if B wants to participate in the reinsurance agreement for a 10% share and C for a 15% share, under a fronting agreement, B would enter into an agreement with A for a 25% [share] and then collect and distribute losses and premiums from C as appropriate (15%). In this case, C has an interest in the business assumed, albeit an indirect one, through B, which is "fronting."
>
> *General America Life Ins. Co. v. International Insurance Co.,* Civ. Action No. 98-5588(JCL), slip op. at 3 n. 1 (D.N.J. Jan. 3, 2000).

In effect, ZGI added the percentage interests of the non-admitted Line Slip members and represented their interests in the 1985 Line Slip under the admitted fronting company. For example, ZGI signed the 1985 treaties representing the Zimmerman Line Slip membership as:

Federal Insurance Co. (Chubb Group)	5.88%
North American Life and Casualty Co.	17.66%
State Mutual Life Assurance Co. of America	76.46%

The signature pages of the 1985 Treaties indicates that State Mutual owns a 76.46 percent share of the 1985 Line Slip. This 76.46 percent share, however, is the aggregate share of the shares owned by all of the non-admitted insurance companies that subscribed to the 1985 Line Slip. Similarly, the signature pages on the 1987 Treaties represent the 1987 Line Slip participation as follows:

Beneficial Life Insurance Co.	10.23%
Business Men's Assurance Co. of America	54.54%
Provident Mutual Life Ins. Co.	6.82%
Resources Life Ins. Co.	10.23%
Security Benefit Life Ins. Co.	11.36%
State Mutual Life Ins. Co. of America	6.82%

***3** On the 1987 Treaties, BMA's share represents the aggregate shares owned by the non-admitted subscribers to the 1987 Line Slip. As a result of these fronting arrangements, Transamerica's interests in the reinsurance arrangements with AOA does not appear on the signature lines of either the 1985 or the 1987 Treaties.

ZGI (and later ZLSI) (collectively, the "Zimmerman entities") never sought authorization from, nor entered into any agreement with, either State Mutual or BMA to front for Transamerica's obligations under the treaties. Premiums under the treaties, however, were collected and distributed according to the percentage shares of the 1985 and 1987 Line Slip, rather than the percentages specified on the signature pages of the Treaties. Transamerica accepted premiums and paid cash calls from AOA according to its Line Slip membership, even though Transamerica's participation in Line Slip is not noted on either of the Treaties.

Both the 1985 and the 1987 Treaties contain an arbitration clause .[FN5]In 1992, Plaintiffs commenced an arbitration proceeding against all of the reinsurers, including the Zimmerman Line Slip, with respect to certain disputes under the Treaties. In 1993, the Zimmerman Line Slip appointed its party-designated arbitrator. In 1995, the Zimmerman Line Slip ceased functioning, and since

that time, Transamerica has denied liability under the Treaties.

> FN5. The arbitration clauses in the 1985 and 1987 Treaties are identical and provide as follows:
>
> > If any dispute shall arise between the Reinsurer and the Reassured, either before or after termination of this Contract, with reference to the interpretation of this Contract or the rights of either party with respect to any transaction under this Contract, the dispute shall be referred to three arbitrators, one to be chosen by each party and the third by the two so chosen.... The arbitration shall take place in the State of Texas and the arbitration proceedings are to be governed by rules of the American Arbitration Association and the Texas State Arbitration Law.

B. Procedural History

Plaintiffs commenced this action on March 2, 1999, by filing their Original Petition in the District Court of Dallas County, seeking an order compelling arbitration under the TGAA. Transamerica removed from state court based on diversity of citizenship on March 29, 1999. On September 27, 1999, Plaintiffs moved for leave to file their first amended petition.

By order dated January 27, 2000, this court granted Plaintiffs' motion to file an amended petition and stated:

In granting Plaintiffs' motion, the court notes that Plaintiffs' Amended Complaint requests the court to enter an order compelling arbitration. Plaintiffs requested this same relief in their original petition. *If Plaintiffs, however, desire for the court to enter an order compelling arbitration, they must petition the court for such relief by submitting a properly filed motion.See*9 U.S.C. § 4.

(emphasis added). Plaintiffs, however, never filed a motion to compel Transamerica to arbitrate. On July 19, 2000, Plaintiffs moved for a default judgment against Transamerica. By Order dated March 30, 2001, this court denied Plaintiffs motion and again instructed Plaintiffs to file a motion to compel arbitration, stating:
Both parties appear to raise issues that may be dispositive of this case. Plaintiffs contend that this case should be arbitrated and request ... an order compelling arbitration. Defendant, on the other hand, contends that Plaintiffs lack standing to pursue this action, and therefore the court lacks subject matter jurisdiction. These are matters that should be addressed by motions. Accordingly, if any party intends to pursue an issue that may be dispositive of this case, it is directed to file a dispositive motion on the issue(s) no later than May 31, 2001.

***4** (emphasis in original). Despite having *twice* admonished Plaintiffs to submit a properly filed motion to compel arbitration, Plaintiffs have not done so. Instead, the parties submitted their pretrial materials in anticipation of the pretrial conference held on March 28, 2002.

On the eve of the pretrial conference, Plaintiffs submitted their "Pre-Trial Brief in Support of Petition to Compel Arbitration."In their briefing papers, Plaintiffs requested an evidentiary hearing and an order compelling arbitration. On the day of the pretrial conference, Plaintiffs submitted three binders of trial exhibits. Because the Defendant had not received Plaintiffs "Pre-Trial Brief" until the morning of the pretrial conference, and because the Defendant objected to many of the exhibits contained in the binders, the court continued the pretrial conference to allow for additional briefing. The matter having been fully briefed, the court now considers the issues presented.

II. Analysis

Plaintiffs contend that Transamerica is a party to the 1985 and 1987 Treaties, and as a party, is subject to the arbitration provisions contained in the contracts. Transamerica contends that it is not subject to the arbitration clause in the 1985 and 1987 Treaties because it never signed the contracts. In the alternative, Transamerica contends that Plaintiffs waived their right to pursue arbitration under the agreements by pursuing their claims in court.

A. Plaintiffs' Motion to Compel Arbitration

Transamerica first contends the FAA preempts Plaintiffs' claims under the TGAA. The FAA does not preempt state arbitration rules if the state rules do not undermine the goals and policies of the FAA. *Volt Informational Sciences, Inc. v. Board of Trustees of the Leland Stanford Junior Univ.,* 489 U.S. 468, 477 (1989). Both federal and Texas state law favor arbitration.*Moses H. Cone Memorial Hospital v. Mercury Constr. Co.,* 460 U.S. 1, 24-25 (1983); *Cantella & Co. v. Goodwin,* 924 S.W.2d 943, 944 (Tex.1996). Further, the Fifth Circuit has held that the Texas General Arbitration Act ("TGAA") can govern the scope of an arbitration agreement without undermining the federal policy underlying the FAA. *Ford v. NYLCare Health Plans of Gulf Coast, Inc.,* 141 F.3d 243, 247-48 (5th Cir.1998). Accordingly, the court applies Texas law in determining the scope and applicability of the arbitration clause in this case.

Under Texas law, a party seeking to compel arbitration must establish: (1) the existence of a valid agreement to arbitrate; and (2) that the claims asserted by the party attempting to compel arbitration are within the scope of the arbitration agreement. *ASW Allstate Painting & Constr. Co. v. Lexington Ins. Co.,* 188 F.3d 307, 311 (5th Cir.1999); *In re Oakwood Mobile Homes, Inc.,* 987 S.W.2d 571, 573 (Tex.1999). Texas law provides "[i]f a party opposing an application [for arbitration] denies the existence of the agreement, the court shall summarily determine that issue."Tex. Civ. Prac. & Rem.Code Ann. § 171.021. "If the facts shown by the affidavits, pleadings, discovery, and stipulations are undisputed, the trial court should hold a summary hearing, rather than a full evidentiary hearing, and apply the terms of the arbitration agreement to the facts."*ASW Allstate,* 188 F.3d at 311. "[I]f the material facts necessary to determine the issue are controverted by an opposing affidavit or otherwise admissible evidence, the trial court must conduct an evidentiary hearing to determine the disputed facts."*Id.* (*quoting Howell Crude Oil Co. v. Tana Oil & Gas Corp.,* 860 S.W.2d 634, 639 (Tex.App.-Corpus Christi 1993, no writ).

***5** A court should not deny arbitration "unless it can be said with positive assurance that an arbitration clause is not susceptible of an interpretation which would cover the dispute at issue."*Babcock & Wilcox Co. v. PMAC, Ltd.,* 863 S.W.2d 225, 230 (Tex.App.-Houston 1993, writ denied)."Courts must indulge every reasonable presumption in favor of arbitration, and all doubts as to the arbitrability of an issue must be decided in favor of arbitration."*In re FirstMerit Bank, N.A.,* 52 S.W.3d 749, 753 (Tex.2001). The party opposing arbitration bears the burden of proving that no valid arbitration agreement exists as to the dispute. *Fridl v. Cook,* 908 S.W.2d 507, 511 (Tex.App.-El Paso 1995, writ dism'd w.o.j.).

Notwithstanding the strong federal and state policies in favor of arbitration, arbitration is nevertheless a matter of contract law. *First Options of Chicago, Inc. v. Kaplan,* 514 U.S. 938, 943 (1995). Under this principle, "a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit."*Air Line Pilots Assoc. v. Miller,* 523 U.S. 866 (1998); *Volt,* 489 U.S. at 478 ("[T]he FAA does not require parties to arbitrate when they have not agreed to do so."); *EEOC v. Waffle House,* 122 S.Ct. 754, 763 (2002) (stating "we look first to whether the parties agreed to arbitrate a dispute ... It goes without saying that a contract cannot bind a non-party."). Here, Transamerica asserts that Plaintiffs have produced no written agreement binding the parties to arbitration. Specifically, Transamerica contends that it is not a party to the 1985 and 1987 Treaties because it is not listed as on the signature page along with the other members of the 1985 and 1987 Line Slips. The court disagrees.

Courts have recognized a number of theories arising out of common-law principles of contract and agency law to bind non-signatories to the arbitration agreements of others. *See Thompson-CSF, S.A. v. American Arbitration Assoc.,* 64 F.3d 773, 776 (2d Cir.1995) (stating "a non-signatory party may be bound by the 'ordinary principles of contract and agency."); *Letizia v. Prudential Bache Sec., Inc.,* 802 F.2d 1185, 1187 (9th Cir.1986) (same); *Grigson v. Creative Artists Agency, L.L.C.,* 219 F.3d 524, 532 (5th Cir.2000) (dissenting opinion, reciting applicable law). For example, courts have recognized at least five theories for binding non-

signatories to arbitration agreements, including: (1) alter ego or veil piercing; (2) incorporation by reference; (3) assumption of the arbitration agreement; (4) agency; and (5) equitable estoppel. *See Thompson,-CSF, S.A.,* 64 F.3d at 776. Using tradition principles of agency law, if a principal is bound under the terms of a valid arbitration clause, its agents, employees, and representatives are also covered by that agreement. *See Pritzker v. Merrill Lynch, Pierce, Fenner, & Smith, Inc.,* 7 F.3d 1110, 1121 (3d Cir.1993); *see also Arnold v. Arnold Corp.,* 920 F.2d 1269, 1281-82 (6th Cir.1990) (applying arbitration provision to non-signatory agents of corporation that was party to arbitration agreement). Similarly, an undisclosed principal may enforce a contract made for its benefit by an agent even though the signatory to the arbitration clause was unaware of the existence of the principal. *See Interbras Cayman Co. v. Orient Victory Shipping Co.,* 663 F.2d 4, 6-7 (2d Cir.1981). The principles of agency law have been further applied to bind non-signatory business entities to arbitration agreements. *See Pritzker,* 7 F.3d at 1122 (citing cases).

***6** In this case, traditional principles of agency law demonstrate that Transamerica was a party to the 1985 and 1987 Treaties entered into between AOA and the Zimmerman entities. Under Texas law, a principal is liable for contracts made by its agent acting within the scope of the agent's authority. *See, e.g., Medical Personnel Pool of Dallas, Inc. v. Seale,* 554 S.W.2d 211, 213 (Tex.App.-Dallas 1977, writ ref'd n.r.e.); *Ross F. Meriwether & Assoc., Inc. v. Aulbach,* 686 S.W.2d 730, 731 (Tex.App.-San Antonio 1985, no writ) ("An agent is not a party to, nor individually liable on a contract he enters into on behalf of his principal. It is the principal who enters into the contract.") Further, "a grant of authority to an agent includes the implied authority to do all things proper, usual, and necessary to exercise that authority."*Sheet Metal Workers Local Union No. 54 v. E.F. Etie Sheet Metal Co .,* 1 F.3d 1464, 1471 n. 6 (5th Cir.1993) (holding bargaining association impliedly authorized to enter into arbitration clause on behalf of its members, stating "an agent's power to use an arbitration clause includes the power to enter and to invoke it").

Transamerica cannot dispute that it was a subscriber to the 1985 and 1987 Line Slips, or that the Zimmerman entities acted as its duly authorized agents. The evidence demonstrates that Transamerica entered into a series of management agreements with the Zimmerman entities authorizing these entities to bind Transamerica to reinsurance contracts. The agency between Transamerica and the Zimmerman entities expressly authorized the Zimmerman entities "to bind and accept" on Transamerica's behalf, "in the procuring, underwriting, and servicing of Reinsurance Contract(s)." Pursuant to this authority, the Zimmerman entities entered into 1985 and 1987 reinsurance Treaties with AOA. Accordingly, the court concludes that Zimmerman entities, acting as Transamerica's authorized agents, bound Transamerica to the reinsurance Treaties at issue in this case.

That Transamerica does not appear on the signature page of the 1985 and 1987 Treaties is of no moment. Under Texas law, an undisclosed principal may be held liable, even when his agent acts without authority, if the principal retains the benefits of the transaction. *Land Title Co. of Dallas, Inc. v. F.M. Stigler, Inc.,* 609 S.W.2d 754, 756 (Tex.1980) ("When the benefits received are the direct, certain, and proximate result of the agent's unauthorized act, retention of those benefits after the principal acquires knowledge of the transaction constitutes affirmance of the act and ratification of the transaction."). A principal ratifies a contract when he retains the benefits of the transaction after acquiring full knowledge, even though he had no knowledge originally of the unauthorized act of his agent. *See id.;Hornblower & Weeks-Hemphill, Noyes v. Crane,* 586 S.W.2d 582, 588 (Tex.Civ.App.-Corpus Christi 1979, writ ref'd n.r.e.). Plaintiffs have submitted abundant evidence demonstrating that Transamerica received premiums and paid losses in accordance with the terms of the 1985 and 1987 Treaties. Moreover, the evidence indicates that Transamerica received premiums and paid losses in proportion to its Line Slip share for its given years of participation. Transamerica failed to controvert any of this evidence. Based on these facts, the court concludes that Transamerica ratified the contracts at issue.

***7** Transamerica's ratification of the Treaties includes

ratification of the arbitration provisions. A principal's ratification of an agent's act extends to the entire transaction. *Id.* at 757 ("A principal may not, in equity, ratify those parts of the transaction which are beneficial and disavow those which are detrimental."); *Condor Petroleum Co. v. Greene,* 164 S.W.2d 713, 721 (Tex.Civ.App.-Eastland, 1942, writ ref'd w.o.m.) (stating "principal who ... retains the benefits of a contract ... cannot repudiate that part of the contract which is unsatisfactory to him"). Transamerica therefore may not, on the one hand, accept premiums due under the 1985 and 1987 Treaties, and on the other hand, refuse to comply with the express provisions of the agreement.

Based on the substantial evidence submitted by the Plaintiffs, and the lack of relevant evidence submitted by the Defendant, the court concludes Transamerica has not carried its burden of proving that no valid arbitration agreements exists as to the dispute between the parties. On the contrary, the court finds that the uncontroverted evidence submitted by the Plaintiffs conclusively establishes the existence of a valid agreement to arbitrate. The evidence further demonstrates that Transamerica is a party to such an agreement by virtue of its agency relationship with the Zimmerman entities. Finally, the court finds that Plaintiffs claims fall within the scope of the arbitration agreements.

B. Waiver

Transamerica next contends that Plaintiffs waived their arbitration rights by substantially invoking the litigation process. The legal standard for determining waiver is the same under both the FAA and TGAA. *See Sedillo v. Campbell,* 5 S.W.3d 824, 826 (Tex.App.-Houston [14th Dist.] 1999, no writ). There is a strong presumption against waiver of arbitration. *See, e.g., Lawrence v. Comprehensive Bus. Servs. Co.,* 833 F.2d 1159, 1164 (5th Cir.1987) ("Waiver of arbitration is not a favored finding and there is a presumption against it."). A party alleging waiver carries a heavy burden.*Associated Builders v. Ratcliff Constr. Co.,* 823 F .2d 904, 905 (5th Cir.1987), and "all doubts regarding waiver should be resolved in favor of arbitration."*Valero Energy Corp. v. Teco Pipeline Co.,* 2 S.W.3d 576, 594 (Tex.App.-Houston [14th Dist.] 1999, pet. filed).

A court may find a party has waived its right to arbitrate when "the party seeking arbitration substantially invokes the judicial process to the detriment or prejudice of the other party."*Subway Equipment Leasing Corp. v. Forte,* 169 F.3d 324, 326 (5th Cir.1999) (internal quotations omitted); *Valero Energy Corp.,* 2 S.W.3d at 594. The waiver, however, must be intentional, *EZ Pawn Corp. v. Mancias,* 934 S.W.2d 87, 89 (Tex.1996), and "may only be implied from a party's actions if the facts demonstrate that the party seeking to enforce arbitration intended to waive its arbitration right."*Valero Energy Corp.,* 2 S.W.3d at 594;*see also Subway Equipment Leasing Corp.,* 169 F.3d at 329 (stating a party "must, at the very least, engage in some overt act in court that evinces a desire to resolve the arbitrable dispute through litigation rather than arbitration"). Prejudice, in this context, "refers to inherent unfairness-in terms of delay, expense, or damage to a party's legal position-that occurs when the party's opponent forces it to litigate an issue and later seeks to arbitrate that same issue."*Subway Equipment Leasing Corp.,* 169 F.3d at 327.

***8** With this standard in mind, the court finds Transamerica has not demonstrated that Plaintiffs waived their right to arbitrate this matter. Since removal to this court, Plaintiffs have moved to file an amended complaint, moved to seek a default judgment, pursued their rights of discovery under the Federal Rules of Civil Procedure, and moved to take deposition testimony after the discovery deadline. These activities fall well short of what is required to establish waiver under the applicable standard in this circuit. *See, e.g., Williams v. Cigna Financial Advisors, Inc.,* 56 F.3d 656, 661 (5th Cir.1995) (finding *no* waiver despite removing action to federal court, filing a motion to dismiss, filing a motion to stay proceedings, answering complaint, asserting a counterclaim, and engaging in discovery); *Walker v. J.C. Bradford & Co.,* 938 F.2d 575, 576-77 (5th Cir.1991) (finding *no* waiver despite serving interrogatories, requesting production of documents, attending pretrial conference, and waiting thirteen months before seeking to compel arbitration); *Tenneco Resins, Inc. v. Davy Int'l, AG,* 770 F.2d 416, 420-21 (5th

Cir.1985) (finding *no* waiver despite seeking a stay, filing an answer to complaint, serving interrogatories, requesting production of documents, moving for a protective order, agreeing to a joint motion for continuance, requesting an extension of the discovery period, and waiting eight months before seeking to compel arbitration). Similarly, the court finds no evidence of prejudice as it is defined in this context.

Having found Plaintiffs have not waived their arbitration rights under the 1985 and 1987 reinsurance Treaties, the court believes the dispute between the parties must be submitted to arbitration in accordance with the agreement. Accordingly, the court compels arbitration in accordance with the TGAA and the arbitration provisions contained in the 1985 and 1987 Treaties.

C. Sanctions

Finally, the court believes sanctions are appropriate in light of Plaintiffs' disregard of two court orders. The court's orders were plain and unequivocal. Plaintiffs' failure to submit a properly filed motion to compel arbitration within the time constraints set forth by the court's orders caused unnecessary delay in the disposition of this matter. Had Plaintiffs filed their briefing papers in accordance with the court's instructions and served them on the Defendant before the eleventh hour, the court could have ruled on these issues well in advance of the trial setting. As a result of Plaintiffs' conduct, however, precious court time was wasted, causing the court to delay the resolution of other cases and the Defendant to incur additional expenses in the preparation for trial. For example, Defendant was required to amend and resubmit its pretrial materials and attend a pretrial conference, all of which was rendered unnecessary by Plaintiffs' untimely motion. Because these additional expenses incurred by Defendant was a direct result of Plaintiffs' failure to adhere to *two* prior orders, the court concludes they should be sanctioned for such failures.

***9** Defendant urges the court to dismiss Plaintiffs' arbitration claim with prejudice. "A dismissal with prejudice is appropriate only if the failure to comply with the court's order was the result of purposeful delay or contumaciousness, and the record reflects that the district court employed lesser sanctions before dismissing the action."*Long v. Simmons,* 77 F.3d 878, 880 (5th Cir.1996) (citation in footnote omitted). Finding no record of contumacious conduct or purposeful delay, the court believes dismissal of the arbitration claim is inappropriate.

The Fifth Circuit has set forth a number of lesser sanctions that a court is to consider before it dismisses with prejudice: "Assessments of fines, costs, or damages against the plaintiff or his counsel, attorney disciplinary measures, conditional dismissal, dismissal without prejudice, and explicit warnings are preliminary means or less severe sanctions that may be used to safeguard a court's undoubted right to control its docket."*Boudwin v. Graystone Ins. Co.,* 756 F.2d 399, 401 (5th Cir.1985). The court believes a monetary sanction is appropriate under the circumstances of this case. The court therefore orders Plaintiffs to pay all reasonable attorney's fees and costs incurred by the Defendant to amend its pretrial materials, to prepare for the pretrial conference, and to attend the pretrial conference on March 28, 2002.

III. Conclusion

For the reasons stated herein, the court grants Plaintiffs motion to compel arbitration and orders the parties to arbitrate this matter in accordance with the Texas General Arbitration Act and the provisions of the arbitration agreements.

It is further ordered, for the reasons previously stated, that Plaintiffs pay reasonable attorney's fees and costs as sanctions to the Defendant for its filing and preparation of pretrial materials as provided above. In the unlikely event a problem arises between the parties regarding the amount of sanctions to be awarded the Defendants, the parties may seek redress from the court.

Having determined all of the issues raised by the parties must be submitted to binding arbitration, and finding no other reason to retain jurisdiction over this matter, the court dismisses this case with prejudice. *See Alford v.*

Dean Witter Reynolds, Inc., 975 F.2d 1161, 1164 (5th Cir.1992).

N.D.Tex.,2002.
North River Ins. Co. v. Transamerica Occidental Life Ins. Co.
Not Reported in F.Supp.2d, 2002 WL 1315786 (N.D.Tex.)

END OF DOCUMENT

EXHIBIT B

SBRMCOA, LLC v. Bayside Resorts, Inc.
D.Virgin Islands,2007.
Only the Westlaw citation is currently available.FOR PUBLICATION
District Court of the Virgin Islands, Division of St. Thomas and St. John.
SBRMCOA, LLC, individually and on behalf of its members, Plaintiff,
v.
BAYSIDE RESORTS, INC., TSG Technologies, Inc., TSG Capital, Inc., Beachside Associates, LLC., Defendants.
No. 2006-42.

April 18, 2007.

James M. Derr, Esq., St. Thomas, U.S.V.I., for plaintiff SBRMCOA.
Arthur Pomerantz, Esq., St. Thomas U.S.V.I., for defendant, Bayside Resort, Inc.
Gregory H. Hodges, Esq., St. Thomas, U.S.V.I., for defendants TSG Technologies, Inc, and TSG Capital, Inc.
Paula D. Norkaitis, Esq., St. Thomas, U.S.V.I., for defendant Beachside Associates, LLC.

MEMORANDUM OPINION

GÓMEZ, C. J.
***1** Before the Court is the joint motion of defendants, TSG Technologies, Inc., and TSG Capital, Inc., (collectively, "TSG"), Beachside Associates, LLC ("Beachside") and Bayside Resorts, Inc. ("Bayside"), to dismiss or to stay pending arbitration.

I. FACTS

In 1998, Bayside recorded a Declaration of Condominium (the "Declaration") for the Sapphire Beach Resort and Marina condominiums ("Sapphire Beach"). SBRMCOA ("COA") was created to operate, manage and maintain the Sapphire Beach condominiums. Under the Declaration, COA was given "any and all powers granted by law, this Declaration, and the By-Laws to effectuate its purpose of operating, managing and maintaining the Condominium Property on behalf of all the Unit Owners...." [Mot to Dismiss, Ex. 8, Decl. at 4.A.] The By-Laws provide that, COA's Board of Directors "shall have the powers and duties necessary for the administration of the affairs of the Condominium and may do all such acts and things except those which by law or by the Declaration or by these By-Laws may not be delegated to the Board of Directors.... The Board of Directors shall have the power to delegate its powers to committee, officers and employees."[Mot to Dismiss, Ex. 8, By-Laws at 3-4.]

Under the Declaration, Bayside was obligated to provide fresh water and wastewater treatment services to the condominiums. The cost of this service was made dependant on the installation, construction, maintenance, and operating costs associated with the water procurement.

In 1999, Bayside and TSG entered into a contract (the "1999 Agreement"). At its core, the 1999 Agreement is an agreement to provide water to COA's members. Specifically, TSG agreed to construct, operate, and maintain a reverse osmosis water treatment system at Sapphire Beach to provide the condominiums, including COA's members, with potable water. Pursuant to the 1999 Agreement, Bayside retained ownership of the storage and distribution systems that supplied COA with water service as well as the property upon which the water plant would sit.

TSG charged Bayside approximately $0.02 per gallon of water provided to COA's members. Those who were not members of COA were charged a different amount. The 1999 Agreement included a dispute resolution section. TSG and Bayside agreed to first negotiate, then mediate, and finally to arbitrate "any claim, controversy or dispute arising out of or

relating to [the 1999] Agreement."(1999 Agreement at § 15.) Under these provisions, any necessary arbitration was to take place in St. Thomas, United States Virgin Islands.

In 2005, Bayside entered into an agreement with COA that similarly addresses the water supply to COA. Specifically, COA agreed to purchase water from Bayside for a price of $0.05 per gallon (the "2005 Water Supply Agreement").[FN1] The 2005 Water Supply Agreement was "contingent upon the execution of an agreement between Bayside and TSG pursuant to which TSG agrees to continue its sales of water to Bayside (or its designees) during the term of this Agreement provided payment is made by COA...." (2005 Water Supply Agreement at ¶ 17.) Like the 1999 Agreement, the 2005 Water Supply Agreement also addressed the ownership of the property related to the water plant:

> FN1. Beachside was assigned Bayside's mortgage on property in Sapphire Beach. According to the complaint, Bayside also holds a number of other outstanding debts to Beachside, and both Bayside and Beachside planned to use the Water Supply Agreement to help satisfy that debt.

***2** WHEREAS, Bayside owns (a) all of the real property described on Exhibit "A" annexed hereto (the "Real Property"); (b) all of the improvements situated on, in, or under the Real Property (the "Improvements") other than the Water Plant....
(2005 Water Supply Agreement at 1.)

Finally, the 2005 Water Supply Agreement included an arbitration clause that requires "any dispute or controversy arising out of or relating to" the 2005 Water Supply Agreement to be submitted to binding arbitration in the United States Virgin Islands. (2005 Water Supply Agreement at ¶ 16.)

Also in 2005, TSG, COA, and Bayside entered into a Consent to Assignment Agreement (the "Consent Agreement"). In the Consent Agreement, COA consented to the assignment by Bayside to TSG of the right to sell COA potable water pursuant to the 2005 Water Supply Agreement. The Consent Agreement was signed by representatives from COA, TSG and Bayside.[FN2]

> FN2. Both the 2005 Water Supply Agreement and the Consent Agreement were signed and executed by the then-president of COA's board, Myron Poliner. Beachside has attached an affidavit of Myron Poliner to a separate motion to dismiss.

On January 18, 2006, TSG stopped producing potable water for COA. COA "prevented TSG from shutting off all water service to COA."(Compl.¶ 24.) COA also changed the locks to the water facilities. (Compl.Ex.B.) [FN3]

> FN3. COA has attached a letter from the counsel for Bayside to COA, dated February 10, 2006, in which Bayside requests that COA stop entering the water facilities at Sapphire Beach and allow Bayside's representatives access to the same. Attachments to a complaint are considered part of a complaint. Fed.R.Civ.P. 10©. Accordingly, this letter may be considered by the Court.

On January 26, 2006, COA brought suit against Bayside and TSG in the Superior Court of the Virgin Islands. That suit was voluntarily dismissed.

On February 23, 2006, TSG's president sent COA an electronic message demanding that COA tender payment for past water service. TSG informed COA that failure to pay the requested amount would result in TSG turning off the water supply at Sapphire Beach. COA tendered a certified check in the amount of $57,097.73 that day, and received a receipt acknowledging "full payment and satisfaction of TSG demands relating to potable water and wastewater services" pursuant to the February 23, 2006 letter. (Compl.¶ 27.) TSG nonetheless shut off the water supply. COA thereafter forcibly restored water service to Sapphire Beach.

COA brought suit against TSG in this Court on March 8, 2006, alleging five separate counts. In Count One, COA alleges that TSG, Bayside, and Beachside violated the Racketeer Influenced Corrupt Organizations Act ("RICO") by conspiring together to extort money from COA in the form of increased water fees.

In Count Two, COA alleges a breach of contract by either Bayside or TSG. First, COA alleges that the 2005 Water Supply Agreement and the Consent Agreement are void. COA asserts that if they are found void by this Court, then Bayside has failed to fulfill its obligations under the Declaration to provide COA with water services. Alternatively, COA alleges that if the 2005 Water Supply Agreement and the Consent Agreement are valid, then TSG, as the assignee of Bayside, has breached its obligations to provide water to COA in accordance with the Declaration.

In Count Three, COA seeks a declaratory judgment that

in accordance with ... the Declaration of Condominium, the portions of the water treatment and wastewater treatment systems, together with associated pumps, plumbing, ponds, storage facilities, pipes, and other components of said system ... together with those portions of Parcel 16-1 Remainder upon which such items are located, constitute Condominium Property and Common Interests of COA, that title is vested solely in COA, and that said property is free from all purported liens and encumbrances....

***3** (Compl.¶ 50.) Alternatively, COA seeks a declaration that Bayside is obligated to convey such property to COA.

In Count Four, COA seeks a declaratory judgment against Bayside and TSG that the 2005 Water Supply Agreement and Consent Agreement are both void and without force. COA argues the agreements were the result of threats and coercion. Alternatively, COA argues the execution of the agreements were an *ultra vires* act by the Board.

In Count Five, COA seeks specific performance on the Declaration from Bayside to compel Bayside to convey to COA property not previously conveyed, including the water system.

Each Count incorporates by reference the preceding portions of the Complaint.

TSG has filed a motion to dismiss or stay pending arbitration. All defendants joined TSG's motion. The defendants note that COA's suit arises out of the 1999 Agreement and the 2005 Water Supply Agreement, both of which contain arbitration or mediation clauses. As such, the defendants argue this matter should be stayed and the parties ordered to arbitration, or the matter should be dismissed entirely. TSG has agreed to continue providing water services during the pendency of this litigation.

II. DISCUSSION

Congress enacted the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-16, to overcome judicial resistance to arbitration. *Buckeye Check Cashing, Inc. v. Cardegna,* 126 S.Ct. 1204, 1207 (2006).[FN4]"[U]pon being satisfied that the making of the agreement for arbitration ... is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement."9 U.S.C. § 4. If a party to an agreement that requires arbitration alleges wrongdoing that involves matters covered by an arbitration agreement, "the claims must be arbitrated, regardless of the legal labels ascribed to them."*RCM Tech., Inc. v. Brignik Tech., Inc.,* 137 F.Supp.2d 550, 553 (D.N.J.2001)."[T]he party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration."*Green Tree Fin. Corp. v. Randolph,* 531 U.S. 79, 91 (2000) (citing *Gilmer v. Interstate/ Johnson Lane Corp,* 500 U.S. 20, 26 (1991)).

FN4. The FAA provides that "[a] written provision in any maritime transaction or a

> contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract ... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."9 U.S.C. § 2.

III. Analysis

COA's Complaint challenges the validity of the 2005 Water Supply Agreement, which contains an arbitration clause. That clause provides that:

Subject to the provisions of Paragraph 7 [which grant COA and TSG the right to seek injunctive relief in the event that damages from a breach of the 2005 Water Supply Agreement are irreparable], any dispute or controversy arising out of or relating to this Agreement shall be submitted to and settled by mandatory binding arbitration to be held in the USVI, in accordance with the rules of the American Arbitration Association.

(2005 Water Supply Agreement ¶ 16.)

Under the FAA, federal courts are required to enforce written agreements to arbitrate disputes. *Circuit City Stores, Inc. v. Adams,* 532 U.S. 105, 111 (2001) ("The FAA compels judicial enforcement of a wide range of written arbitration agreements."); *see also Dluhos v. Strasberg,* 321 F.3d 365, 369 (3d Cir.2003). To determine whether this matter must be submitted to arbitration, this Court must first address the scope of this arbitration clause. Second, the Court must determine whether or not each claim is covered by the arbitration clause.

A. The Scope of the Arbitration Clause

***4** The 2005 Water Supply Agreement's arbitration clause applies to "any dispute or controversy arising out of or relating to" the 2005 Water Supply Agreement. Accordingly, the scope of this arbitration clause is considered broad. *See Calamia v. Riversoft, Inc.,* Civ. No. 02-1094, 2002 Dist. LEXIS 23855 at *9 (E.D.N.Y. Dec. 13, 2002) (distinguishing between narrow and broad arbitration clauses, and noting the "paradigm broad clause ... allows arbitration for 'any claim or controversy arising out of or relating to the agreement'...."). With broad arbitration agreements, "[i]f the allegations underlying claims, 'touch matters' covered by the arbitration clause in a contract, then those claims must be arbitrated, whatever the legal labels attached to them."*Brayman Constr. Corp. v. Home Ins. Co.,* 319 F.3d 622, 626 (3d Cir.2003) (citing *Genesco, Inc. v. T. Kakiuchi & Co.,* 815 F.2d 840, 846 (2d Cir.1987)).

B. Arbitrability of COA's Claims

1. Count One

The civil RICO claim, at its core, alleges that the defendants intentionally conspired to extort money from COA in the form of increased water fees. Water fees are one of the key terms in the 2005 Water Supply Agreement, which are squarely within the scope of the arbitration clause. *See RCM Tech. Inc.,* 137 F.Supp.2d at 556 ("In assessing whether a dispute falls within the scope of an arbitration clause, the court's focus is on the factual allegations in the complaint rather than the legal causes of action asserted."). Accordingly, Count One is arbitrable.

2. Count Two

Count Two asserts two alternate theories of relief, both relating to a breach of an obligation to provide water services to COA. One of these theories asserts that the 2005 Water Supply Agreement and the Consent Agreement are void and thus Bayside has breached its obligation to provide water services to COA. Alternatively, if the contracts are found valid, COA argues that TSG, as an assignee of Bayside, has breached its obligation to provide water services to COA.

The essential breach of which COA complains is the alleged failure-by either TSG or Bayside-to

provide water services to COA. The provision of water services is clearly at the center of the 2005 Water Supply Agreement. Stripped of all its labels, Count Two of COA's Complaint invites this Court to address a breach of an obligation to provide water. If the 2005 Water Supply Agreement is valid, however, that position could lead to competing tribunals-this Court and an arbitrator-each addressing an alleged factual circumstance-the failure to provide water. The purpose of arbitration would be turned on its head as this Court would be responsible for determining an arguably separate, but clearly related, matter that is also subject to arbitration. Congress clearly did not intend such an absurd result. The Court accordingly will decline COA's invitation to create such a situation. The factual underpinnings that give rise to Count Two are arbitrable. *See RCM Tech., Inc.,* 137 F.Supp.2d at 556.

***5** This Court also finds support in concluding that Count Two is arbitrable upon review of the nature of the legal claim made in Count Two. Generally, a claim that a contract is void is not arbitrable because it is for the court, not an arbitrator, to determine whether a contract exists. *Sandvik AB v. Advent Int'l Corp.,* 220 F.3d 99, 106-07 (citing *Three Valleys Mun. Water Dist. v. E.F. Hutton Co., Inc.,* 925 F.2d 1136, 1140 (9th Cir.1991)). However, an arbitrator will determine issues of contract validity when a party challenges a contract as voidable, by claiming that it was induced by "fraud, mistake, or duress, or where breach of a warranty or other promise justifies the aggrieved party in putting an end to the contract."*Id.* at 107 (quoting *Three Valleys Municipal Water Dist.,* 925 F.2d at 1140 (quoting Restatement (Second) of Contracts § 7 cmt. b (1981))); *see also Par-Knit Mills, Inc. v. Stockbridge Fabrics Co., Ltd.,* 636 F.2d 51, 53 (3d Cir.1980) (holding that whether the plaintiff entered into an arbitration agreement was a matter for judicial review); *cf. China Minmetals Materials Imp. and Exp. Co., Ltd. v. Chi Mei Corp.,* 334 F.3d 274, 282 (3d Cir.2003) (explaining that when a contract is alleged to be voidable, rather than void, arbitration may be appropriate).

"Only when there is no genuine issue of fact concerning the formation of the agreement should the court decide as a matter of law that the parties did or did not enter into such an agreement."*Par-Knit Mills, Inc.,* 636 F.2d at 54;*see also*9 U.S.C. § 4.

A party may, in an effort to avoid arbitration, contend that it did not intend to enter into the agreement which contained an arbitration clause.... An unequivocal denial that the agreement had been made, accompanied by supporting affidavits ... in most cases should be sufficient to require a jury determination on whether there had in fact been a meeting of the minds.

Par-Knit Mills, Inc., 636 F.2d at 55 (3d Cir.1980) (internal quotations omitted).

COA provides two alternative reasons why the agreements are void. COA first argues that the 2005 Water Supply Agreement and the Consent Agreement were *ultra vires* acts of the previous board of COA, because they were executed without an affirmative vote by two-thirds of the common interest of members of COA and without the approval of the first priority mortgage holders for the condominium units. In the alternative, COA alleges that the 2005 Water Supply Agreement and the Consent Agreement are void because they were obtained through coercion.

a. *Ultra Vires*

"The doctrine of 'ultra vires' has application only where the subject matter of the contract is foreign to the purposes for which the corporation was created."*In re Trimble Co.,* 339 F.2d 838, 844 n. 7 (3d Cir.1964). If the contract was beyond the power of the Board and is ultra vires, then it is void. *Cf. CSX Transp., Inc. v. City of Garden City,* 325 F.3d 1236, 1240 (11th Cir.2003) ("If a contract is beyond the power or competence of the local government, then the contract is termed ultra vires and is void.").

***6** COA's Complaint does not allege that COA lacked the capacity to enter into the 2005 Water

Supply Agreement or that entering the agreement was beyond the scope of COA's authority. In fact, the Declaration provides COA with "any and all powers granted by law, this Declaration, and the By-Laws to effectuate its purpose of operating, managing and maintaining the Condominium Property on behalf of all the Unit Owners...." [Mot to Dismiss, Ex. 8, Decl. at 4.A.] One could not reasonably argue that entering agreements to assure that utilities, including water, were supplied to the condominium units was beyond the scope of COA's authority. The subject matter of the 1999 Agreement, the 2005 Water Supply Agreement, and the Consent Agreement all addressed supplying water to COA. The supply of water is not foreign to the purposes for which COA was created-to operate, manage, and maintain the condominiums.

Rather than make a legitimate ultra vires claim, COA argues that the previous board did not comply with COA's internal operating requirements for approval of the 2005 Water Supply Agreement. COA has provided no evidentiary support for this. As the Third Circuit explained in *Par-Knit,* and recently restated, " '[a] naked assertion ... by a party to a contract that it did not intend to be bound by the terms thereof is insufficient' to raise an issue of fact about the existence of an agreement to arbitrate."*Digital Signal, Inc. v. Voicestream Wireless Corp.,* 156 Fed. Appx. 485, 487 (3d Cir.2005) (unpublished) (reversing order denying motion to dismiss and compel arbitration) (quoting *Par-Knit Mills, Inc.,* 636 F.2d at 55).

It is undisputed that there is a signed 2005 Water Supply Agreement containing an arbitration clause. The validity of that arbitration agreement is countered only by COA's denials. COA has provided no affidavits to support its argument that Myron Poliner did not have the authority or capacity to sign the 2005 Water Supply Agreement on behalf of COA. Beachside, on the other hand, has provided the Court with Poliner's affidavit indicating he was authorized by the Board to execute the agreement. [Mot. To Dismiss, Ex. 5.] Thus, COA's allegation that it did not intend to be bound by the 2005 Water Supply Agreement is simply an unsupported assertion that is insufficient to seriously raise an issue of fact regarding the existent of the agreement to arbitrate. *See Digital Signal, Inc.,* 156 Fed. Appx. at 487.

b. Coercion

COA also alleges that the 2005 Water Supply Agreement and the Consent Agreement were obtained through coercion and threats. While COA regards coercion and threats in contract formation as conditions that lead to a void contract, COA is mistaken. "If a party's manifestation of assent is induced by an improper threat by the other party that leaves the victim no reasonable alternative, the contract is voidable by the victim."Restatement (Second) of Contracts, § 175; *see also Halstead v. Am. Int'l Group, Inc.,* 2005 U.S. Dist. LEXIS 6549 (D.Del.2005) ("Contracts ... that are executed under duress are voidable."(citing Restatement (Second) of Contracts § 175)).

***7** A claim that a contract is voidable is arbitrable. *See China Minmetals Materials Imp.,* 334 F.3d at 282. Accordingly, Count Two is subject to arbitration.

3. Count Three

Count Three seeks a declaration that COA has title to certain property, including the property upon which the water treatment plant sits. The 2005 Water Supply Agreement explicitly states that Bayside owns the property about which COA seeks a declaration as to ownership. The issue of ownership of the property upon which the water treatment plant sits is squarely addressed within, and directly touches on matters covered by, the 2005 Water Supply Agreement. Count Three must be arbitrated as well. *See, e.g., Brayman Constr. Corp.,* 319 F.3d at 626 (finding that claims that arose under a workers' compensation insurance policy were subject to arbitration when they were sufficiently related to a

separate agreement that required an additional premium on the policy under certain circumstances when the separate agreement had an arbitration clause).

4. Count Four

Count Four seeks a declaration that the 2005 Water Supply Agreement and Consent Agreement are void because their execution were ultra vires acts and resulted from threats and coercion. Like Count Two, Count Four is substantively a claim that the 2005 Water Supply Agreement and Consent Agreement are voidable.

A claim that an entire contract is voidable clearly touches on matters covered by the broad arbitration clause. *See Prima Paint Corp. v. Flood and Conklin Mfg. Co,* 388 U.S. 395 (1967) (holding that claims of fraud in the inducement of the entire contract must be considered by the arbitrator in the first instance); *see also Buckeye,* 126 S.Ct. at 1208-09 (holding that a claim that the contract as a whole is rendered invalid by a usurious finance charge must first be considered by an arbitrator). Count Four is also appropriate for arbitration.

5. Count Five

Count Five seeks an order compelling Bayside to convey the property to COA. As explained above, the ownership of the property to which COA seeks a conveyance is an issue directly addressed by the 2005 Water Supply Agreement. Therefore, under the broad arbitration clause, Count Five is subject to arbitration.

IV. CONCLUSION

For the reasons set forth above, the Court finds that all claims are subject to arbitration. Accordingly, the motion to dismiss will be granted and this matter shall be referred to arbitration. *See Seus v. John Nuveen & Co.,* 146 F.3d 175, 179 (3d Cir.1998) ("If all the claims involved in an action are arbitrable, a court may dismiss the action instead of staying it.") An appropriate order follows.

ORDER

Before the Court is the joint motion of defendants, TSG Technologies, Inc., and TSG Capital, Inc., (collectively, "TSG"), Beachside Associates, LLC ("Beachside") and Bayside Resorts, Inc. ("Bayside"), to dismiss or to stay pending arbitration. For the reasons set forth in the accompanying memorandum of even date, it is hereby

***8 ORDERED** that the motion to dismiss is **GRANTED;** and it is further

ORDERED that this matter is referred to arbitration.

D.Virgin Islands,2007.
SBRMCOA, LLC v. Bayside Resorts, Inc.
Slip Copy, 2007 WL 1795732 (D.Virgin Islands)

END OF DOCUMENT

EXHIBIT C

H

Pierce County v. Washington Shellfish, Inc.
Wash.App. Div. 2,2005.

NOTE: UNPUBLISHED OPINION, SEE RCWA 2.06.040

Court of Appeals of Washington,Division 2.
PIERCE COUNTY, Respondent,
v.
WASHINGTON SHELLFISH, INC., a Washington corporation; Seabed Harvesting, Inc., a Washington corporation; Family McRae, L.L.C., doing business as Washington Shellfish, Inc., and Seabed Harvesting, Inc.; and Douglas McRae, a single man, individually, and in his representative capacities for Washington Shellfish, Inc., Seabed Harvesting, Inc. and Family McRae, L.L.C., Appellants.
No. 31380-4-II.

March 8, 2005.

Appeal from Superior Court of Pierce County; Hon. Vicki Hogan, J.

Eric S. Merrifield, Patrick W. Ryan, Mark William Schneider, Perkins Coie LLP, Seattle, WA, for Appellant.
Bertha Baranko Fitzer, Pierce Co. Pros. Ofc/ Civil Div., Tacoma, WA, for Respondent.

UNPUBLISHED OPINION

BRIDGEWATER, J.
***1** Washington Shellfish, Inc. appeals from a partial summary judgment in favor of Pierce County concerning a lease agreement of tidelands located in Henderson Bay. We hold that the lease was not ultra vires and the County could enter into such a contract for the first five-year period. But we hold that the renewal clause that would have extended the contract for 30 years is prohibited by Pierce County ordinances requiring county council approval. But because of the severability clause in the contract, the renewal clause is stricken, leaving the initial five-year term viable. We reverse in part and remand the matter for trial on a genuine issue of material fact as to whether this lease for the five-year term was a gift of public funds.

FACTS

In late 2000, Washington Shellfish, Inc. (WSF) FN1 contacted Jan Wolcott, the director of the Pierce County Department of Parks and Recreation. WSF had an interest in leasing tidelands Pierce County (the County) owned. The company engaged in aquaculture and wanted to lease approximately 47 acres of submerged tidelands located in Henderson Bay at the Purdy Sand Spit Park located in Pierce County. The tidelands at issue are considered a public resource because they are one of a few places where the public can go to recreate and take shellfish for personal consumption.

> FN1. The appellants in this case are Washington Shellfish, Inc., Seabed Harvesting, Inc., Family McRae, L.L.C. and Douglas McRae, however, in this opinion we refer to them collectively as Washington Shellfish, Inc. (WSF).

Wolcott asked WSF to send the County its proposed lease and other required documentation. WSF faxed its lease proposal and other documents to Wolcott.

Wolcott had his assistant determine the value of the land. She determined the value to be between $360 and $1,800. This price did not include a value for any natural resources on the property. After receiving the sample lease, Wolcott notified WSF that Pierce County required one of its attorneys to draft the lease to insure that the lease contained standard boilerplate provisions. Wolcott contacted Lloyd Fetterly, a deputy prosecuting attorney for Pierce County, who drafted the lease. Wolcott gave Fetterly all the documents that WSF submitted, including its proposed lease.

Fetterly drafted the lease. The contract amount of the lease was $2,500. Its general purpose was for shellfish propagation, including harvesting. Initially the term of the lease was for a five-year period with rights of renewal. WSF had the option of renewing the lease for another five-year period. The rights of renewal expired following the fifth consecutive renewal of the lease agreement. The rent on the tidelands was $360 per year. Each year the rent increased by seven percent. The contract also contained a severability option in paragraph 21. The parties agreed that if any term or condition was found invalid, the invalidity would not affect other terms and conditions of the contract.

Wolcott mailed the lease to WSF with a cover letter asking WSF to sign the documents. He stated in his letter that after he secured the approval of the Pierce County Executive, he would send a fully executed copy to WSF. Doug McRae, an employee with WSF, reviewed the lease terms, signed the documents, and delivered them to the parks department.

***2** Wolcott circulated the lease to various Pierce County departments for approval after he signed the lease in January 2001. Fetterly next signed the lease. On January 23, Joe DeRosa from the Risk Management Department signed the lease. The following day, Dan Cagle, the director of Facilities Management, signed the lease. The last person to sign the lease was Patrick Kenney, the director of Budget and Finance, on February 15. The lease agreement does not contain the county executive's signature.

Eight months after WSF began its operations on the leased property, Pierce County began to question the validity of the lease. In October 2001, the new Pierce County Executive John Ladenburg asked the prosecuting attorney's office to research the validity of the lease. The prosecuting attorney's office concluded that the lease was invalid.

On June 14, 2002, Pierce County filed a complaint for declaratory relief declaring the lease null and void, for ejectment from county property, and for an order to cease and desist. The main issue in the complaint was that the lease was ultra vires and therefore void. WSF had harvested over 350,000 pounds of geoduck from the beginning of the lease agreement through December 31, 2002, for a total gross price of $2,401,931.

WSF filed an answer, affirmative defenses, and counterclaims on September 16, denying that the lease was ultra vires. It further asserted the court should estop the County from challenging the validity of the lease since it had approved the lease and accepted rental payments.

Pierce County amended its complaint on May 29, 2003, to add a new claim that WSF's harvesting of geoduck under the lease was an unconstitutional gift of public funds. Pierce County and WSF filed cross-motions for summary judgment on May 30.

In preparation for trial, the parties took several depositions. During his deposition, Pierce County Executive John Ladenburg discussed the process for approving contracts. He stated that the policy for approving contracts in January 2001, was for department directors to approve contracts under a certain amount. If a contract was over $50,000, it required his signature. When his administration took over, it changed the total contract amount from $50,000 to $250,000. Patrick Kenney, director of Budget and Finance, also testified in his deposition that the policy Pierce County Executive Ladenburg discussed was the County policy.

The trial court held a hearing on the motions on July 3, 2003. The trial court granted the County's motion in part, declaring the lease void. The trial court's decision focused on the length of the lease term and concluded the lease was ultra vires because the Pierce County Council had not approved the lease as Pierce County Code 2.110.140 required. The court also noted but failed to explain, that the leasehold property was ‘subject to the statutory criteria set forth in RCW 36.68, 36.34, 36.35 as well as Pierce County ordinance chapter

2.110.030.'Report of Proceedings at 58. The court did not consider whether the lease was an unconstitutional gift of public funds because it found the entire lease ultra vires due to the length of it.

***3** WSF sought reconsideration on July 14, 2003. The trial court denied its motion.

I. Standard of Review

When reviewing an order of summary judgment, we engage in the same inquiry as the trial court. *Citizens for Responsible Wildlife Mgmt. v. State,* 149 Wn.2d 622, 630, 71 P.3d 644 (2003). We consider the facts and all reasonable inferences from the facts in the light most favorable to the nonmoving party.*Right-Price Recreation, L.L.C. v. Connells Prairie Cmty. Council,* 146 Wn.2d 370, 381, 46 P.3d 789 (2002), cert. denied sub. nom, *Gain v. Wash.* 540 U.S. 1149 (2004). Summary judgment is appropriate if no genuine issue of material fact exists and the moving party is entitled to a judgment as a matter of law.CR 56(c). We grant the motion only if, from all the evidence, reasonable persons could reach but one conclusion. *Citizens for Responsible Wildlife Mgmt.,* 149 Wn.2d at 630-31.

II. Ultra Vires Doctrine

The ultra vires doctrine may render unauthorized contracts by government entities void. *Noel v. Cole,* 98 Wn.2d 375, 378, 655 P.2d 245 (1982), superseded by statute on other grounds bySnohomish *County v. State,* 69 Wn.App. 655, 850 P.2d 546 (1993), review denied, 123 Wn.2d 1003 (1994). An ultra vires contract is one done either without authority or in violation of existing statutes. *Dykstra v. Skagit County,* 97 Wn.App. 670, 677, 985 P.2d 424 (1999), review denied, 140 Wn.2d 1016 (2000). The rationale behind the ultra vires doctrine is 'the protection of those unsuspecting individuals whom the entity represents.'*Noel,* 98 Wn.2d at 378. A contract that is ultra vires is generally void and unenforceable. See *Noel,* 98 Wn.2d at 378.

WSF argues that the trial court erred when it found the lease agreement void as ultra vires. It contends that, at most, the lease was procedurally flawed and therefore irregular. In order to resolve this issue, the court must determine if the County acted beyond its authority when it entered into the contract with WSF or if the contract violates existing statutes. *Dykstra,* 97 Wn.App. at 677. A finding of either would make the lease agreement ultra vires and thus void.

A. The Authority to Lease County Lands

Pierce County Code 2.110.070 provides that the county executive or one of his designees may lease county property. The standard procedure for approving contracts in 2001 was for the department head to enter into the contract. The county executive only had to sign off on the contract if the value of the contract was more than a stated amount. At the time that WSF contacted the County, the amount of a contract had to be less than $50,000 for the department head to authorize it. Contracts worth more than $50,000 needed the county executive's signature on them.

Although the County argues that Wolcott did not have the authority to enter into the contract, the evidence is contrary. Wolcott did not have the authority to bind the County to a contract of more than $50,000. But, at the time that he viewed the contract, the stated amount of the contract was $2,500. It was only after the County realized the profit WSF had earned on the leased property that it realized that the property was worth more than originally valued. Based on the contract amount at the time the parties entered the contract, Wolcott acted within his authority as a designee of the county executive when he bound the County to the lease agreement.

B. Existing Statutes

***4** WSF's lease agreement is subject to several statutes. WSF asserts, however, that none of the stat-

utes is applicable because the County opted out of the statutes when it enacted the Pierce County Code.

Chapter 36.34 RCW governs how a county is to manage county property. RCW 36.34.005 provides that a county may choose to adopt its own comprehensive procedures for managing county property. Where a county establishes its own procedures, it is exempt from the provisions in chapter 36.34 RCW. RCW 36.34.005. Pierce County enacted its own procedures for managing county property in 1983. As such, it was exempt from the guidelines listed in chapter 36.34 RCW. Therefore, the court could not find the lease void under that statute.

Chapter 36.68 RCW deals with the management of county owned park lands. RCW 36.68.010 states in part: '{a} county may lease or sell any park property, buildings or facilities surplus to its needs, or no longer suitable for park purposes: PROVIDED, That such park property shall be subject to the requirements and provisions of notice, hearing, bid or intergovernmental transfer as provided in chapter 36.34 RCW.' Because the County failed to follow these requirements, it contends that Wolcott acted without authority rendering the contract ultra vires.

The County's contention ignores established rules of statutory construction.RCW 1.12.028 states: 'If a statute refers to another statute of this state, the reference includes any amendments to the referenced statute unless a contrary intent is clearly expressed.'The legislature enacted RCW 36.68.010 in 1963. At that time, chapter 36.34 RCW did not contain any language discussing an exemption. The legislature added the exemption language in 1973 to RCW 36.34.005. Thus, when the legislature amended chapter 36.34 RCW to provide the exemption, chapter 36.68 RCW incorporated that language. By exempting itself from chapter 36.34 RCW, the County also exempted itself from chapter 36.68 RCW.

The County asserted that it did not exempt itself from chapter 36 .68 RCW because the county ordinance is silent as to leasing park property. Thus, the County asserts that notice, hearing, and bid were required before the County could enter into the lease. But, the County ordinance is contrary. It specifically refers to the lease of real property, which would include park property, and P.C.C. 2.110.100 states, in part, the following: 'When Pierce County elects to dispose of real property by sale, lease, or exchange, the County shall advertise to the extent which it deems necessary to effect an advantageous sale.'Clerk's Papers (CP) at 442. Although there is not a specific reference to park property, there is a reference to any county real estate. And the requirement of notice and bid is clearly discretionary. The County's argument fails.

The final law at issue is chapter 2.110 of the Pierce County Code. PCC 2.110.140 discusses the County's authority to lease land. Under PCC 2.110.140(A), the Pierce County Executive has the power to lease county property. But PCC 2.110.070 provides that the Pierce County Executive or his designee is responsible for leasing County real property. While these two sections appear inconsistent, reading the entire code finds that PCC 2.110.070 refers to general powers of the county executive while PCC 2.110.140 discusses the specific procedure the county executive must follow in order to enter into a lease agreement.

***5** Here, it does appear the lease is invalid because the agreement did not contain the county executive's signature. But, WSF presented evidence showing that it was common practice for a department not to obtain the county executive's signature on contracts less than $50,000. In his deposition, Pierce County Executive John Ladenburg stated that in January 2001, department heads directly approved contracts under a certain amount. Patrick Kenney, the Budget and Finance director, also stated that the value of the contract determined whether the county executive signed the contract. Hence, for this contract, the county executive delegated the department head as his designee as the county ordinance provided.

The lease agreement does not implicate any statutes nor any sections of the Pierce County Code previously discussed. The County listed the contract amount as $2,500. That price was well under the amount requiring the county executive's signature.

III. Lease Terms

WSF contends the trial court erred by voiding the entire contract instead of severing the offending terms from the lease agreement. We agree.

As a threshold matter, we must determine whether the lease is ambiguous, a question of law. *Carlstrom v. Hanline,* 98 Wn.App. 780, 784, 990 P.2d 986 (2000). We give the words in a contract their ordinary meaning. *Fancher Cattle Co. v. Cascade Packing, Inc .,* 26 Wn.App. 407, 409, 613 P.2d 178,review denied, 94 Wn.2d 1012 (1980). In interpreting a contract, we construe the contract to reflect the parties' intent, but we do not make another or different contract for the parties under the guise of construction or interpretation. *Corbray v. Stevenson,* 98 Wn.2d 410, 415, 656 P.2d 473 (1982). A contract is ambiguous when 'its terms are uncertain or when its terms are capable of being understood as having more than one meaning.'*Mayer v. Pierce County Med. Bureau, Inc.,* 80 Wn.App. 416, 421, 909 P.2d 1323 (1995) (quoting *Shafer v. Bd. of Trs. of Sandy Hook Yacht Club Estates, Inc.,* 76 Wn.App. 267, 275, 883 P.2d 1387 (1994), review denied, 127 Wn.2d 1003 (1995)). But a contract provision is not ambiguous merely because the parties suggest opposite meanings. *McGary v. Westlake Investors,* 99 Wn.2d 280, 285, 661 P.2d 971 (1983). Nor will we read an ambiguity into a contract if we can reasonably avoid doing so by reading the contract as a whole. *McGary,* 99 Wn.2d at 285.

The lease agreement is not ambiguous. It begins with an initial five-year period. At the end of that five-year period, WSF could renew the lease an additional five years. If WSF used all of its renewal options, the lease would run for 30 years. A lease of this length required approval by the Pierce County Council under PCC 2.110.140(A). PCC 2.110.140(A) states in part: 'any lease for a period in excess of 25 years, including all rights of renewal, must be approved by ordinance of the Council.'CP at 444 (emphasis added). The Pierce County Council did not approve this lease. Thus, the lease agreement is ultra vires and void.

***6** But the well-established rule of contracts is that where an agreement contains an illegal part, it can be separated from the legal part. Eugene McQuillin, The Law of Municipal Corporations, sec. 29.95, 11(3rd ed.1999). Washington courts have applied this rule to municipal and other types of contracts. In *State v. Plaggemeier,* 93 Wn.App. 472, 483, 969 P.2d 519,review denied, 137 Wn.2d 1036 (1999), this court reviewed the intent of the parties and found a portion of a mutual aid agreement severable from the rest of the agreement. A more recent case from Division One of this court involved Regence Blueshield, a health care service contractor, and Kruger, an orthopaedic surgeon provider, and a provider agreement that contained an agreement to arbitrate. *Kruger Clinic Orthopaedics, LLC v. Regence Blueshield,* 123 Wn.App. 355, 98 P.3d 66, 68 (2004). Division One held that the unenforceable provisions of the agreement could be severed and 'the remainder of the arbitration provision enforced.'*Kruger Clinic Orthopaedics,* 98 P.3d at 75. The rule allowing for severability of contract provisions also applies to the present case.

Here, the lease agreement contains a severability option in paragraph 21. The provision at issue in the lease agreement is paragraph 6, which discusses the option of renewing the lease agreement. Since this portion is illegal under the Pierce County Code, we can sever it from the rest of the agreement. Thus, instead of invalidating the entire contract, the trial court should have severed the ultra vires portion.

IV. Gift of Public Funds

Alternatively, Pierce County argues that the lease agreement is void as a matter of law because it constitutes an unconstitutional gift of public funds. The public resource at issue in this case is the harvesting of shellfish and, particularly, geoduck from the lease property.

Article 8, section 7 of the Washington State Constitution prohibits a county from giving any money or property in aid of any company or corporation except for the poor and infirm. In determining whether a public expenditure is a gift under article 8, section 7, we focus on two factors: consideration and donative intent. *City of Tacoma v. Taxpayers of City,* 108 Wn.2d 679, 702, 743 P.2d 793 (1987). In order to show a violation of the constitutional prohibition against gifts, Pierce County must show that the lease amounts to 'a transfer of property without consideration and with donative intent.'*Gen. Tel. Co. v. City of Bothell,* 105 Wn.2d 579, 588, 716 P.2d 879 (1986).

The general purpose of the lease was 'for the use of shellfish propagation and harvesting and production.'CP at 8. This language clearly states that WSF could harvest shellfish, including geoduck. As stated above, Pierce County must prove both (1) lack of consideration and (2) presence of donative intent or grossly inadequate return in order to show that harvesting geoduck on the tidelands was an unconstitutional gift of public funds. The record is insufficient to do so.

***7** Both the County and WSF knew that geoduck were present on the land when they contracted. But before entering into its lease with WSF, the County failed to inspect the land to determine the amount of harvestable geoduck. Instead, after seeing WSF's harvest, the County decided it had entered into a bad agreement with WSF. In a memorandum sent to Wolcott, a staff person with the parks department stated that a 'provision allowing for maturity of shell fish might be appropriate in determining the lease amount.'CP at 221.

Courts use the donative intent or grossly inadequate return element to determine how closely to scrutinize the sufficiency of the consideration.*Adams v. Univ. of Wash.,* 106 Wn.2d 312, 327, 722 P.2d 74 (1986). If there is no proof of donative intent or grossly inadequate return, the court does not inquire into the adequacy of consideration. *Adams,* 106 Wn.2d at 327.

Here, there is a patent, grossly inadequate return. There is evidence that the lease agreement did not adequately provide for the amount of natural resources on the land. The County failed to survey the property for natural resources before entering into the lease agreement. Thus, WSF received the land and the natural resources on it for less than what the land was truly worth. By December 2002, WSF had grossed over $2 million off the sale of harvested geoduck. In contrast, WSF paid the County $360 for the first year of the lease. After the first year, the rent increased 107 percent from the previous year.

Once a determination is made that a grossly inadequate return exists, the court then looks at the adequacy of consideration. *Adams,* 106 Wn.2d at 327. Evidence in the record confirms that Pierce County did not consider the value of the natural resources before entering into the agreement with WSF. Claudia Peters, in determining lease value, did not include any value for the natural resources on the property. It is clear that WSF received a great return from its goeduck harvest. As the trial court did not rule on this issue because it found the whole contract ultra vires, but did opine that there were genuine issues of material fact concerning whether there was a gift of public funds, we remand for trial on this issue of consideration. We do not address a remedy if the contract was in fact a gift and thus void. Reversed in part, remanded for trial.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

We concur: HOUGHTON, P.J., and

, J.
Wash.App. Div. 2,2005.
Pierce County v. Washington Shellfish, Inc.
Not Reported in P.3d, 126 Wash.App. 1020, 2005 WL 536097 (Wash.App. Div. 2)

END OF DOCUMENT

EXHIBIT D

H

Lum v. Kauai County Council
D.Hawai'i,2007.
Only the Westlaw citation is currently available.
United States District Court, D. Hawai'i.
King C. LUM, Plaintiff,
v.
KAUAI COUNTY COUNCIL, et al., Defendants.
Civ. No. 06-00068 SOM/BMK.

May 18, 2007.

Clayton C. Ikei, Jerry P.S. Chang, Honolulu, HI, for Plaintiff.
Daniel K. Obuhanych, Gregg M. Ushiroda, John T. Komeiji, Karen Y. Arikawa, Watanabe Ing Kawashima & Komeiji, Richard F. Nakamura, Ronald T. Michioka, Zale T. Okazaki, Ayabe Chong Nishimoto Sia & Nakamura, Honolulu, HI, Lani D.H. Nakazawa, Office of the County Attorney, Matthew S.K. Pyun, Jr., Office of the County Attorney-Kauai, Lihue, HI, for Defendants.

ORDER GRANTING DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT

SUSAN OKI MOLLWAY, United States District Judge.

I. *INTRODUCTION.*

***1** Plaintiff King C. Lum ("Lum") has filed his Fourth Amended Complaint [FN1] ("Complaint") against Defendants County of Kauai ("the County"), Kauai County Council ("the Council"), Bryan Baptiste ("Mayor Baptiste"), Michael H. Tresler ("Director Tresler"), and Leon Gonsalves, Sr.[FN2] In the Complaint, Lum asserts the following claims: (1) discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.,* and Haw.Rev.Stat. § 378-2 (Count 1); (2) violation of 42 U.S.C. § 1981 (Count 2); (3) civil conspiracy to discriminate under 42 U.S.C. §§ 1981 and 1985 (Count 3); (4) violation of his procedural due process rights and of "the public policy of the State of Hawaii," and "breach of [Lum's] employment contract" (Count 4); and (5) violation of the Hawaii Whistleblowers' Protection Act, Haw.Rev.Stat. § 378-62 (Count 5). Lum prays for declaratory and injunctive relief, as well as compensatory and punitive damages.

FN1. Lum filed the Third Amended Complaint on December 14, 2006. At the May 7, 2007, hearing on this matter, the court, for reasons stated at the hearing, ordered Lum to file a Fourth Amended Complaint, which was to be identical to the Third Amended Complaint except for its title, no later than May 8, 2007. At the hearing, the court also deemed all moving papers filed after December 14, 2006, to relate to the Fourth Amended Complaint.

On May 8, 2007, Lum did file the Fourth Amended Complaint. As ordered earlier, the present motion and papers relate to the Fourth Amended Complaint.

FN2. Lum sues Baptiste, Gonsalves, and Tresler in their individual and official capacities.

On December 22, 2006, the County, the Council, Baptiste, and Tresler (collectively, "Defendants") moved for partial summary judgment on Lum's claim for violation of his procedural due process rights.[FN3]The court held a hearing on Defendants' motion on March 5, 2007, at which time the court requested supplemental briefing on whether Lum had a property interest in his employment entitling him to procedural due process. The court held another hearing on May 7, 2007, and thereafter requested further supplemental briefing. This order addresses issues raised in both the original and supplemental papers.

FN3. Defendant Leon Gonsalves, Sr., neither moved for summary judgment nor

joined in the present motion.

Regarding Lum's procedural due process claim, Defendants argue that Lum had no property interest in his job because his contract was void. Defendants also contend that, because Lum was an at-will employee, he could not have had any property interest in his employment. Alternatively, they argue that, even if Lum had a property interest in his employment, his "resignation from employment is a voluntary relinquishment of any property interests he might have had."In response, Lum argues that he had a property interest in his employment because "the wrongdoing alleged in the instant case was that of a third-person" and because he "had been working for several years as the Kauai Police Chief."Regarding his resignation, Lum argues that he was constructively discharged.

The court grants summary judgment on Lum's procedural due process claim. Because Lum's contract is void, it created no property interest in his employment.

Defendants' supplemental papers clarify that they seek summary judgment on the remaining claims in Count 4. Because those claims are based on the cancellation of Lum's void employment contract, and because Lum has had ample opportunity to address Defendants' arguments, the court grants summary judgment in favor of Defendants on those claims as well.

II. *LEGAL STANDARD.*

Summary judgment shall be granted when

the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

***2** Fed.R.Civ.P. 56(c); *see also Addisu v. Fred Meyer, Inc.,* 198 F.3d 1130, 1134 (9th Cir.2000). One of the principal purposes of summary judgment is to identify and dispose of factually unsupported claims and defenses.*Celotex Corp. v. Catrett,* 477 U .S. 317, 323-24 (1986).

Summary judgment must be granted against a party that fails to demonstrate facts to establish what will be an essential element at trial. See *Id.* at 323.A moving party without the ultimate burden of persuasion at trial-usually, but not always, the defendant-has both the initial burden of production and the ultimate burden of persuasion on a motion for summary judgment. *Nissan Fire & Marine Ins. Co. v. Fritz Cos.,* 210 F.3d 1099, 1102 (9th Cir.2000). The burden initially falls upon the moving party to identify for the court "those portions of the materials on file that it believes demonstrate the absence of any genuine issue of material fact."*T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n,* 809 F.2d 626, 630 (9th Cir.1987).

"When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts."*Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 586 (1986). The nonmoving party may not rely on the mere allegations in the pleadings and instead must "set forth specific facts showing that there is a genuine issue for trial."*Porter v. Cal. Dep't of Corr .,* 419 F.3d 885, 891 (9th Cir.2005)."A genuine dispute arises if the evidence is such that a reasonable jury could return a verdict for the nonmoving party."*California v. Campbell,* 319 F.3d 1161, 1166 (9th Cir.2003).

When "direct evidence" produced by the moving party conflicts with "direct evidence" produced by the party opposing summary judgment, "the judge must assume the truth of the evidence set forth by the nonmoving party with respect to that fact."*T.W. Elec. Serv.,* 809 F.2d at 631. In other words, evidence and inferences must be construed in the light most favorable to the nonmoving party. *Porter,* 419 F.3d at 891. The court does not make credibility determinations or weigh conflicting evidence at the summary judgment stage.*Id.* However, inferences

may be drawn from underlying facts not in dispute, as well as from disputed facts that the judge is required to resolve in favor of the nonmoving party. *T.W. Elec. Serv.,* 809 F.2d at 631.

III. *BACKGROUND FACTS.*

Lum joined the Kauai Police Department ("KPD") in 1983. Declaration of King C. Lum (2/13/2007) ("Lum Decl'n") ¶ 2. In March 2004, Lum, then a KPD lieutenant, applied to be the Chief of Police. *Id.* ¶ 4. On April 16, 2004, the Kauai Police Commission ("the Commission") appointed Lum Interim Chief of KPD for a term beginning on May 1, 2004, until September 29, 2004, when he was appointed Chief of Police. *Id.* ¶¶ 5-6.Michael Ching ("Commissioner Ching") was a member of the Commission that appointed Lum Chief of Police. Ex. A (attached to Motion) ¶ 1.

***3** Lum's employment contract with the Commission provided for a five-year term as the Chief of Police, to "end at midnight on September 28, 2009."Ex. A (attached to Opp.) at 1; Lum Decl'n ¶ 7. The employment contract also stated that Lum may be terminated as follows:

(a) *Pursuant to Charter:* By the Commission at any time prior to the expiration of the term of your employment under this agreement and after being given a written statement of the charges against you and a hearing before the Commission pursuant to Section 11.04 of the Charter. If you are terminated in this manner, all compensation to which you are entitled shall cease on the effective date of the termination; provided, however, that you will be entitled to receive all vested and/or accrued benefits for which you are eligible on the date of termination.

(B) *At expiration of term:* Unless extended by a separate written agreement, *K.C. Lum's* employment hereunder shall be terminated at the expiration of the term hereof.

Ex. A (attached to Opp.) at 1-2 (emphases in original).

Some time before February 23, 2006, the County appointed a hearing officer to hear and issue findings of fact and conclusions of law on whether Commissioner Ching had violated the Kauai County Charter and the Kauai County Code of Ethics in approving Lum to be the Chief of Police. *See generally* Ex. A (attached to Motion).

On February 23, 2006, the hearing officer issued his findings and recommendations. *Id.* at 23.The hearing officer found that Commissioner Ching "actively solicited support for Lum from [the State of Hawaii Organization of Police Officers ('SHOPO')]" and that he "used his position to secure an unwarranted advantage and treatment for [Lum] over the other candidates for Chief of Police."*Id.* at 20; Ex. D (attached to Motion) at 2. In light of those findings, the hearing officer concluded, "In nominating, advocating for and voting for [Lum] as Interim Chief, [Commissioner Ching] used his official position for the benefit of [Lum] and thereby violated the Kauai County Code of Ethics under the Kauai County Charter, Article XX, Section 20.02E and the Kauai County Code, Chapter 3, Article I, section [3]-1.6 ('Fair Treatment')."[FN4] Ex. A (attached to Motion) at 21. The hearing officer recommended that "this matter be referred to the County Council for appropriate action."*Id.*

> FN4. Section 20.02E of Article XX, Code of Ethics, Kauai County Charter provides: "No officer or employee of the county shall ... [u]se his official position to secure a special benefit, privilege or exemption for himself or others."At the May 7, 2007, hearing, Lum argued that Commissioner Ching violated section 20.03, but the hearing officer did not find that Ching violated that section. See Ex. A (attached to Motion) at 21.
>
> Chapter 3, Article I, section 3-1.6 of the Kauai County Code provides: "No coun-

> cilman or employee of the County shall use or attempt to use his official position to secure or grant unwarranted privileges, exemptions, advantages, contracts, or treatment for himself or others....”

On March 23, 2006, based on the hearing officer's findings and recommendations, the Kauai Board of Ethics (“Board of Ethics”) recommended to the Council that “the Director of Finance void the County's contract with [Lum].” Ex. G (attached to Motion) at 1. On April 12, 2006, the Council “accepted and ratified the recommendations of the [Board of Ethics] regarding ... [t]he cancellation of [Lum's] contract, in accordance with Section 3-1.11(a) and (b) of the Kauai County Code.”Ex. H (attached to Motion) at 1. Section 3-1.11 of the Kauai County Code provides:

***4** *Sec. 3-1.11 Violation; Penalties.*

(a) In addition to any other penalty provided by law, any contract entered into by the County in violation of this Article is voidable on behalf of the County at the option of the Director of Finance, provided that in any action to avoid a contract pursuant to this Section the interests of third parties who may be damaged thereby shall be taken into account, and the action to void the transaction is initiated within sixty (60) days after the determination of a violation under this Article. The County Attorney shall have the authority to enforce this provision.

(b) Any favorable county action obtained in violation of any of the standard for councilmen or employees is voidable in the same manner as voidable contracts as provided for under Section 3-1.11(a); and the County by the County Attorney may pursue all legal and equitable remedies available to it.

On April 27, 2006, pursuant to the Council's recommendation and section 3-1.11's requirement that the interests of third parties be considered, the Director of Finance, Director Tresler, sent a letter to Lum asking him to “please provide me with any facts, documents, reasons and/or justifications explaining why I should *not* cancel your employment agreement *within seven (7) calendar days from the date of this letter.”*Ex. I (attached to Motion) at 2 (emphases in original). On May 4, 2006, Lum's attorney sent a letter to Director Tresler, requesting that Lum “be given a hearing to afford him his due process rights as required by the Fifth and Fourteenth Amendments to the U.S. Constitution.”Ex. J (attached to Motion) at 2. Via letter dated May 12, 2006, Director Tresler's attorney told Lum:

[W]ith respect to your request for a hearing, KCC Section 3-1.11(a) provides in relevant part that, “in any action to avoid a contract pursuant to this section the interests of third parties who may be damaged thereby shall be taken into account.”KCC Section 3-1.11(b) does not provide any requirements for a hearing as it relates to an action to cancel a contract made pursuant to this section. This section requires that the interests of Chief Lum be taken into account.

Director Tresler will provide Chief Lum with an opportunity to make a private, transcribed oral presentation to him as to how his interest will be affected by the potential cancellation of the employment. We would request that this presentation be made within *seven (7) calendar days from the date of this letter.*However, it should be understood that this oral presentation will not entail the examination and/or cross-examination of any witnesses. Director Tresler will listen to Chief Lum's statement, but will not comment nor engage in any discussion regarding the substance of his claims. As Director Tresler will be accompanied by counsel, Chief Lum may be represented by counsel at the presentation.

Ex. K (attached to Motion) at 2. In response, Lum “decline[d] to make a personal appearance before [Director Tresler].” Ex. L (attached to Motion) at 2.

***5** On May 30, 2006, Director Tresler's attorney sent a letter to Lum's attorney, informing Lum that,

after "fully consider[ing] Lum's interests," Director Tresler concluded that "Lum's Employment Agreement is voidable." Ex. B (attached to Opp.) at 2. The letter also informed Lum of Director Tresler's "decision to cancel [Lum's] October 15, 2004 Employment Agreement ... with the [KPD] pursuant to Sections 3-1.11(a) and (b) of the Kauai County Code."Ex. B (attached to Opp.) at 1. The letter stated:

In considering the interests of Chief Lum, Director Tresler learned that a lieutenant's position is available within the [KPD]. We understand that Chief Lum may be reinstated in that position. In order to avoid a gap in his employment record with the County, which gap might adversely [a]ffect his retirement or employment status, Director Tresler will actually cancel the contract on June 7[, 2006]. During this one week period, if your client is inclined to return to his prior position of lieutenant, please have him make an appointment to see Gary Heu, the Mayor's executive assistant, so they can discuss his re-employment.

Ex. B (attached to Opp.) at 3.

On May 31, 2006, Lum sent a letter to the Commission stating:

My employment contract will be cancelled on June 8, 2006 by [Director Tresler].... A telephone conversation on May 31, 2006 with Gary Heu, the Mayor's Executive Assistant, revealed that I will no longer be considered an employee of the County on June 8, 2006. I must request reinstatement to my former rank of lieutenant before I can continue to be an employee of the County. When I asked Heu about the legality of the action, he stated, "the attorneys just have to beef it out."

As such, I will retire from police service at the close of business on June 7, 2006.

Ex. O (attached to Motion) at 2.

IV. *ANALYSIS.*

A. *Lum's Procedural Due Process Claim.*

Defendants argue that Lum's "employment agreement was void from the outset as a matter of law because it was entered into as the result of a tainted and flawed selection process."Defendants' 3/15/2007 Supp. at 6. Defendants contend, "An employment contract that is null and void is incapable of creating a property interest since such a contract cannot conceivably give rise to a legitimate expectation of continued employment."Motion at 11. Defendants assert that, because Lum's "employment contract was determined to have been entered into in violation of the Code of Ethics," Lum had "no property interest worthy of protection by the Due Process Clause."Motion at 15. Lum responds that he had a property interest in his employment because "the wrongdoing alleged in the instant case was that of a third-person" and because he "had been working for several years as the Kauai Police Chief."Lum's 4/18/2007 Supp. Opp. at 7. The court agrees with Defendants that Lum had no property interest in his employment.

The Fourteenth Amendment to the United States Constitution provides, "No State shall ... deprive any person of life, liberty, or property, without due process of law...." The Ninth Circuit says, "A procedural due process claim has two distinct elements: (1) a deprivation of a constitutionally protected liberty or property interest, and (2) a denial of adequate procedural protection."*Brewster v. Bd. of Educ. of the Lynwood Unified Sch. Dist.,* 149 F.3d 971, 982 (9th Cir.1998). Before examining whether Lum was deprived of a property interest in his position as Chief of Police without due process, the court must first determine whether Lum indeed had a protected property interest.

***6** "Property interests are not created by the Constitution."*Id.* (citing *Bd. of Regents v. Roth,* 408 U.S. 564, 577 (1972))."Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law-rules or understandings that secure certain benefits and that support claims of enti-

tlement to those benefits.'" *Id.* (citing *Roth,* 408 U.S. at 577). "In order to possess a property interest in a benefit, an individual must have more than 'an abstract need or desire for it' or 'a unilateral expectation of it.' " *Id.* Rather, an individual must possess "a legitimate claim of entitlement to it." *Id.*

Although Hawaii courts have not addressed the precise issue before this court, other courts that have addressed the issue hold that employment contracts or appointments that violate state or county law are void as a matter of law and do not create property interests in employment. For example, in *Bailey v. City of Lawrence, Indiana,* 972 F.2d 1447, 1448 (7th Cir.1992), the plaintiff, who had been appointed to the Lawrence Police Department the day before his thirty-sixth birthday, was terminated because Illinois law prohibited appointments "after the person has 'reached thirty-six (36) years of age.' " *Id.* The district court concluded on summary judgment that the plaintiff had no property interest in his employment, as the plaintiff "had been ineligible for appointment to the police force because Indiana had adopted the 'coming of age' rule under which [the plaintiff] had 'reached thirty-six (36) years of age' the day before his birthday." The appointment was therefore void. *Id.* On appeal, the Seventh Circuit acknowledged, "If [the plaintiff's] appointment was invalid, then he had no property interest and therefore had no right to due process before being discharged." *Id.* at 1449.However, because the Seventh Circuit found that the plaintiff "had not reached thirty-six (36) years of age" prior to his appointment, the court ultimately vacated the district court's decision that the appointment was void. *Id.* at 1452.

In another case originating in Illinois, *Shlay v. Montgomery,* 802 F.2d 918, 919 (7th Cir.1986), the plaintiff alleged that he had been wrongfully deprived of a property interest in continued employment as a Chicago assistant corporation counsel. The plaintiff was terminated from his job because he did not live in Chicago, a condition of employment. *Id.* The district court granted summary judgment to the defendants, and the plaintiff appealed. *Id.* The Seventh Circuit concluded that the employment contract was "in contravention of Illinois law at the time he was hired."*Id.* at 921-22.The court said, "[C]ontracts which are in violation of law are null and void."Because "contracts which are null and void are incapable of creating property interests since such contract cannot conceivably give rise to a legitimate expectation of continued employment," the plaintiff's employment contract did not create a protected property interest. *Id.*

***7** Similarly, in *Walters v. Village of Colfax,* 466 F.Supp.2d 1046, 1048-49 (C.D.Ill.2006), the plaintiff had a ten-year contract for employment as Chief of Police. The plaintiff was eventually terminated and sued village officials, claiming that they had deprived him of his employment without procedural due process. *Id* . at 1051.The defendants moved for summary judgment on the ground that no property interests arose from the employment contract because "the duration term in the 2002 contract violates Village Ordinances and municipal law."*Id.* The district court agreed with the defendants that, because the contract's duration was contrary to municipal law, the contract was "void from the moment of execution."*Id.* at 1056.The "completely void" employment contract "did not exist and cannot provide [the plaintiff] with a protectable property interest."*Id.* at 1057.

Other jurisdictions agree that void contracts create no protected property interests. In *City of Beaumont v. Spivey,* 1 S.W.3d 385, 387 (Tex.Ct.App.1999), the plaintiff was hired by the Beaumont Police Department, having scored "the second highest grade on the exam."After investigating allegations that the plaintiff "obtained a copy of the entry level exam from [a] former Beaumont police officer" and concluding that the plaintiff had studied a copy of the actual examination before taking the test, the city ended the plaintiff's employment. *Id.* at 388.The Texas Court of Appeals upheld "the factual sufficiency of the trial court's finding that Spivey was given the actual exam prior to taking it and that

he cheated on the examination."*Id.* at 395.Because the plaintiff's actions were contrary to state law, which required that his appointment be "based on a competitive examination," the court concluded that "his appointment as a police officer was not in substantial compliance with [state law] and is void *ab initio."Id.* at 395-96.As a result, he had no property rights in his employment under state law.*Id.* at 396.

Walsh v. Bollas, 612 N.E.2d 1252, 1254 (Ohio App.1992), also holds that no property interest arises from a void contract. In Walsh, the plaintiff appealed after the court of common pleas declared his employment contract void. The plaintiff had been hired by the sheriff's office, while his father-in-law was the county sheriff. *Id.* at 1253.State law "prohibited a county sheriff from authorizing a contract for employment of his family member as a public employee."The Ohio Court of Appeals affirmed the lower court's decision that the plaintiff's contract was void. *Id.* at 1255-56.Because "no rights may arise from an illegal contract," the plaintiff was not entitled to procedural guarantees. *Id.* at 1256.

Lum does not dispute that employment contracts or appointments that are contrary to state or municipal law are void and can create no property interest in employment. Instead, Lum argues that he had a property interest in his employment because "the wrongdoing alleged in the instant case was that of a third-person" and because "he had been working for several years as the Kauai Police Chief."Lum's 4/18/2007 Supp. Opp. at 2-7 (citing *Berns v. Civil Serv. Comm'n,* 537 F.2d 714 (2d Cir.1976); *Hewitt v. D'Ambrose,* 418 F.Supp. 966 (S.D.N.Y.1976); *In re Petitioner N,* 139 Misc.2d 634 (N.Y.Sup.Ct.1987)). Each case Lum relies on is distinguishable from the present case.

***8** In *Berns,* 537 F.2d at 716, and *Hewitt,* 418 F.Supp. at 969, the employees were found to have property interests in their employment because they had satisfactorily completed their six-month probationary periods. Thus, under New York law, the employees became "permanent employees" and were entitled to procedural due process. *Berns,* 537 F.2d at 716 ("Under New York law, Berns achieved [a property interest in her job] when she was retained beyond her six month probationary period."); *Hewitt,* 418 F.Supp. at 969 ("Hewitt, having satisfactorily completed his probationary period and having achieved 'permanent' employee status, was entitled to all of the procedural safeguards guaranteed by the fourteenth amendment."). In the present case, however, nothing in the record suggests that Lum was working under any provision or condition, such as completion of a probationary period, that transformed him into someone with a protected property interest in his job. Similarly, *In re Petitioner N,* 139 Misc.2d at 635, is distinguishable because the New York Supreme Court was faced with determining whether property rights arose from a contract for the sale of real property, not from an employment contract. The court is therefore unpersuaded by any of the cases Lum cites.

The hearing officer concluded that Commissioner Ching violated the Kauai County Code and the Kauai County Code of Ethics by "nominating, advocating for and voting for [Lum] as Interim Chief."Ex. A (attached to Motion) at 21. Based on the hearing officer's findings and recommendations, the Board of Ethics recommended to the Council that Director Tresler void Lum's employment contract. Ex. G (attached to Motion) at 1. The Council, having accepted and ratified the Board of Ethics' recommendations, referred "the matter of the cancellation of [Lum's] employment contract to" Director Tresler." Ex. H (attached to Motion) at 1-2. Pursuant to section 3-1.11(a) of the Kauai County Code, Director Tresler concluded, after fully considering Lum's interests, that Lum's employment contract was "voidable." Ex. B (attached to Opp.) at 2-3.

Although, given Lum's notice of resignation, Director Tresler did not actually declare the contract void or cancel the employment contract, Lum's appointment and contract became void as a matter of law once it was determined that Lum had become the Chief of Police via a process that violated

County law. *See Bailey,* 972 F.2d at 1448-49;*Shlay,* 802 F.2d at 921-22;*Walters,* 466 F.Supp.2d at 1057;*Walsh,* 612 N.E.2d at 1255-56;*Spivey,* 1 S.W.3d at 395-96. To conclude otherwise would allow Lum to create a property interest simply by resigning before a formal declaration that the contract was void (not just "voidable") had occurred. This would make no sense.

Hawaii courts recognize that a void contract is "no contract at all." *Standard Finance Co. v. Ellis,* 3 Haw.App. 614, 618, 657 P.2d 1056, 1059 (Haw.App.1983). Because void contracts create no property interests, no property interest in employment arose from Lum's void contract. *See Bailey,* 972 F.2d at 1449;*Shlay,* 802 F.2d at 922;*Walters,* 466 F.Supp.2d at 1056;*Walsh,* 612 N.E.2d at 1256;*Spivey,* 1 S.W.3d at 396. The court therefore grants summary judgment in favor of Defendants on Lum's procedural due process claim.[FN5]

> FN5. Because the court concludes that Lum had no property interest in his employment as Chief of Police, the court need not and does not address Defendants' alternative arguments that Lum was an at-will employee or that Lum's resignation negated any property interest in his employment.

B. *Lum's Remaining Claims in Count 4.*

***9** Although Defendants' original motion sought summary judgment on only the due process claim in Count 4, their supplemental papers clarify that they seek "summary judgment on the entire Fourth Claim for Relief."Defendants' 4/9/2007 Supp. at 2. Defendants posit, "It is undisputed that the Fourth Claim For Relief is based entirely on the operative facts pertaining to [Lum's] allegations concerning the cancellation of his employment agreement."Defendants' 4/9/2007 Supp. at 19. Defendants therefore contend, "if this Honorable Court finds that partial summary judgment on [Lum's] due process claim is proper, then partial summary judgment should also be granted as to the entire Fourth Claim For Relief."The court agrees.

Count 4 asserts three claims: "denial of due process and attempt to violate the public policy of the State of Hawaii and a breach of [Lum's] employment contract with County of Kauai."Complaint ¶ 65. The Complaint makes clear that all claims in Count 4 are based on the cancellation of Lum's employment contract. *Id.* ¶¶ 47-49, 65.Because the contract is void, any argument that its cancellation violated public policy or breached the contract fails as a matter of law. The court therefore grants summary judgment on the remaining claims in Count 4.

V. *CONCLUSION.*

The court grants summary judgment in favor of moving Defendants on Count 4. All other claims remain for future adjudication.

IT IS SO ORDERED.

D.Hawai'i,2007.
Lum v. Kauai County Council
Slip Copy, 2007 WL 1482403 (D.Hawai'i)

END OF DOCUMENT

EXHIBIT E

C

U.S. ex rel. Gulbronson v. D & J Enterprises
W.D.Wis.,1993.
Only the Westlaw citation is currently available.

United States District Court, W.D. Wisconsin.
UNITED STATES of America ex rel., Leonard GULBRONSON, Glenn Gulbronson, and Jan C. Hill, Plaintiffs,
v.
D & J ENTERPRISES, David Furlong, Jack Kiland, Kiland Distributing Corporation, John and Jane Does 1-99, and ABC Corps. 1-99,[FN1] Defendants.
No. 93-C-233-C.

Dec. 23, 1993.

Mitchell S. Paul, Minneapolis, MN, for U.S. ex rel. Leonard Gulbronson, Jan C. Hill.
Glenn F. Gulbronson, Milwaukee, WI, pro se.
Diane Townsend-Anderson, Townsend-Anderson, P.A., Fairbault, MN, for D & J Enterprises and David Furlong.
Charles Hoffman, Maslon Edelman Borman & Brand, Minneapolis, MN, for Jack Killand and Kiland Distributing Corp.

OPINION and ORDER

CRABB, Chief Judge.
***1** Plaintiffs Leonard Gulbronson, Glenn Gulbronson and Jan C. Hill filed this civil qui tam action on behalf of the United States seeking rescission of a contract they allege was entered into by the Stockbridge-Munsee Community without the approval of the Secretary of the Interior as required under 25 U.S.C. § 81. Now before the court is their motion for summary judgment. Defendants have brought their own motions for summary judgment, contending that (1) plaintiffs do not have standing to bring this suit; (2) plaintiffs have failed to join an indispensable party; and (3) the contract at issue is not covered by 25 U.S.C. § 81. Defendants Jack Kiland and Kiland Distributing Corporation add other grounds for their motion, contending that they cannot be held liable under 25 U.S.C. § 81 and that in any event the corporate veil should not be pierced in order to impose personal liability on Jack Kiland. The Kiland defendants have requested that sanctions be imposed upon plaintiffs under Fed.R.Civ.P. 11 for suing Jack Kiland as an individual. Also, the Kiland defendants have moved for a transfer of this action to the District of Minnesota.

I conclude that plaintiffs have standing to bring this suit; that they have not failed to join an indispensable party; that 25 U.S.C. § 81 applies to the contract at issue; and that the approval of the contract by the Secretary of the Interior was required. I conclude also that Kiland Distributing Corporation and Jack Kiland are not liable under 25 U.S.C. § 81.FN2 This disposition of the Kiland motions makes it unnecessary to address their motion for transfer.

To prevail on a motion for summary judgment, the moving party must show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 250 (1986); *Indiana Grocery, Inc. v. Super Valu Stores, Inc.,* 864 F.2d 1409, 1412 (7th Cir.1989). The opposing party may defeat the motion by setting forth specific facts showing that there is a genuine issue that must be resolved at trial. Fed.R.Civ.P. 56(e); *Matsushita Electric Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 586 (1986); *Fisher v. Transco Services-Milwaukee, Inc.,* 979 F.2d 1239, 1242 (7th Cir.1992). If a party fails to make a showing sufficient to demonstrate the existence of an essential element on which that party will bear the burden of proof at trial, all other facts are immaterial and summary judgment for the opposing party is proper. *Celotex Corp. v. Catrett,* 477 U.S. 317, 322-23 (1986); *A.V. Consultants, Inc. v. Barnes,* 978 F.2d 996, 1002 (7th Cir.1992).

For the purpose of deciding the motions for sum-

mary judgment, I find that there is no genuine dispute with respect to the following material facts that I have taken from the parties' proposed findings of fact and from the Construction and Finance Agreement.

FACTS

Plaintiffs are members of the Stockbridge-Munsee Community, a federally recognized tribe of Native Americans located in Bowler, Wisconsin. Defendant Furlong is the sole proprietor of defendant D & J Enterprises, a business engaged in providing gaming-related goods and services to tribes. Defendant Jack Kiland is the vice president and an officer of defendant Kiland Distributing Corporation. Kiland owns 50% of the Kiland Distributing stock. Kiland Distributing is the distributor of Bally slot machines in Minnesota and Wisconsin and occasionally provides financing to purchasers of its equipment.

***2** D & J provided gaming equipment to the Community for use in its nonregulated gaming facilities such as its bingo hall. When the Community decided to expand its gaming facilities and build a casino, it began negotiations with D & J. On or about October 30, 1991, D & J Enterprises and the Community entered into a Construction and Finance Agreement for the new casino.

The agreement provided that D & J would finance and construct a gaming facility on Community trust land. The trust land was unaffected by the contract. D & J was to provide gaming equipment, furniture and fixtures; training for blackjack dealers until two weeks after the opening of the facility; start-up funds; uniforms for the staff; and billboards and signs. D & J had "the discretion and authority, after consultation with the Community, to select among various makes and models of gaming machines" those machines that were to be installed at the casino. This authority was to last for the duration of the Agreement. During that time the only machines that could be placed at the casino were those provided by D & J. D & J was to match the Community's outlay of money for other advertising and for bus tours.

The Construction and Finance Agreement provided that D & J would receive as compensation a flat sum, to be paid in monthly installments over three years, plus thirty percent of gross receipts, after payout of prizes to visitors but before payment of taxes and expenses, to be paid in weekly installments for the first three years of operation. Under the agreement, D & J was to retain title to the facility and equipment until the Community completed making its payments and it was to be responsible for repairing and maintaining the equipment throughout this period. The agreement was modified in May 1992 to provide that D & J "shall not have any legal or equitable interest whatsoever" in the casino building or the land. The Construction and Finance Agreement was not approved by the Secretary of the Interior either before or after the modification.

On or about November 6, 1991, about one week after D & J entered into the Construction and Finance Agreement with the Community, D & J entered into a finance agreement with Kiland Distributing, under which Kiland Distributing provided financing to D & J for construction costs and equipment purchases connected to the building of the Stockbridge-Munsee casino. The D & J agreement with Kiland Distributing provided that D & J and not the Community would make loan repayments to Kiland Distributing.

On or about May 22, 1992, the Community and D & J agreed that the Community's payments to D & J under the Construction and Finance Agreement would be paid into an escrow account. On or about February 25, 1993, the Community and D & J entered into an Agreement of Purchase and Sale of Assets, effective as of that date, under which D & J agreed to sell and the Community agreed to buy all of the "assets, properties and rights that pertain to ... the Construction and Finance Agreement." Part of the purchase price was the release of the money

in the escrow account. The Community agreed to indemnify D & J for any losses resulting from the Community's failure to fulfill its obligations under the May 22, 1992 Purchase Agreement. All payments made by the Community under the Purchase Agreement were made to D & J. The agreement was not submitted to the Bureau of Indian Affairs for approval.

***3** In a resolution dated July 6, 1993, the Stockbridge-Munsee Community Tribal Council stated that it opposed the lawsuit filed by plaintiffs under 25 U.S.C. § 81 and that it supported the Community's agreements with D & J. [FN3]

OPINION

A. *Standing*

25 U.S.C. § 81 provides in relevant part:

No agreement shall be made by any person with any tribe of Indians ... for the payment or delivery of any money or other thing of value, in present or prospective, or for the granting or procuring of any privilege to him, or any other person in consideration of services for said Indians relative to their lands, or to any claims ... under laws or treaties with the United States, unless such contract or agreement be executed and approved as follows:

....

Second. It shall bear the approval of the Secretary of the Interior and the Commissioner of Indian Affairs indorsed upon it.

....

All contracts or agreements made in violation of this section shall be null and void, and all money or other thing of value paid to any person by any Indian or tribe, or any one else, for or on his or their behalf, on account of such services ... may be recovered by suit in the name of the United States in any court of the United States, regardless of the amount in controversy; and one-half thereof shall be paid to the person suing for the same, and the other half shall be paid into the Treasury for the use of the Indian or tribe by or for whom it was so paid.

As a qui tam statute, § 81 operates to assign the claims of the United States to private persons willing to bring suits to remedy violations of the section. The qui tam plaintiff stands in the shoes of the United States; it is the United States that must have suffered injury in order to satisfy the prerequisites for standing of Article III of the Constitution. *United States ex rel. Kelly v. Boeing Co.,* 9 F.3d 743 (9th Cir.1993); *United States ex rel. Kreindler & Kreindler v. United Technologies Corp.,* 985 F.2d 1148 (2nd Cir.), *cert. denied,*113 S.Ct. 2962 (1993); *United States ex rel. Yellowtail v. Little Horn State Bank,* 828 F.Supp. 780, 786 (D.Mont.1992); *United States Dep't of Housing and Urban Development ex rel. Givler v. Smith,* 775 F.Supp. 172, 180-81 (E.D.Pa.1991); *see also National Ass'n of Realtors v. National Real Estate Ass'n,* 894 F.2d 937, 941 (7th Cir.1990) ("if an injured person assigns his right of action to someone else, the assignee has standing to enforce the right even though he is not the one who was injured by the defendant's wrongdoing"). This theory of standing is consistent with the purpose of qui tam provisions: to enlist private parties to assist the United States in enforcing the law. *Kelly,* 9 F.3d at 745.

In enacting § 81, Congress determined that enforcement of the statute would be assisted if private citizens were encouraged to sue on behalf of the United States when they became aware of contracts that had not been submitted to the Bureau of Indian Affairs for approval. By providing that prevailing qui tam plaintiffs will receive one-half the money paid pursuant to an unauthorized contract, Congress has ensured that disputes under the statute "will be presented in an adversary context ... [because] the party invoking federal court jurisdiction has 'a per-

sonal stake in the outcome of the controversy'..."*United States ex rel. Robinson v. Northrop Corp.,* 824 F.Supp. 830, 834 (N.D.Ill.1993) (quoting *Flast v. Cohen,* 392 U.S. 83, 101 (1968) (citation omitted)). The "legally protected interest" of the United States in overseeing contracts relative to Indian land "flows from its duties as trustee of tribal resources." *Ex rel. Yellowtail,* 828 F.Supp. at 787. The United States is injured when a contract is not properly submitted to the Bureau of Indian Affairs; under those circumstances, it does not have the opportunity to carry out its obligation to protect Indian lands from "improvident and unconscionable contracts." *In re Sanborn,* 148 U.S. 222, 227 (1893).

***4** In this case, the government is alleged to have suffered an injury traceable directly to the failure of the parties to obtain approval. The injury would be redressed in the event the contract was declared void. Because the United States would have standing to bring this suit, plaintiffs have standing.

B. *Joinder Under Fed.R.Civ.P. 19*

Defendants contend that this suit should be dismissed because the Community is a necessary party to this action under Fed.R.Civ.P. 19(a) that cannot be joined because of its sovereign immunity. Defendants are correct only if the Community is both "necessary" and "indispensable" under Rule 19. Making these determinations requires a two-step inquiry: (1) whether the absent party is necessary because it is a party "to be joined if feasible"; and (2), if the party is necessary and joinder is not feasible, whether "in equity and good conscience" the court should allow the action to proceed in the party's absence or whether it should treat the absent party as indispensable and dismiss the action. *Tillman v. Milwaukee,* 715 F.2d 354, 357 (7th Cir.1983) (citation omitted).

Fed.R.Civ.P. 19(a) provides in part:

(a) Persons to be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) complete relief cannot be accorded among those already parties, or (2) the person claims an interest related to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.

Defendants argue correctly that as a party to the agreement at issue, the Community has an interest in the subject of the action. However, they have not shown that the Community's absence will impair or impede its ability to protect that interest *as a practical matter.* As a general rule, an action to set aside a contract should not proceed without the presence of all parties to the contract, *see, e.g., Enterprise Management Consultants v. United States ex rel. Hodel,* 883 F.2d 890, 894 (10th Cir.1989). However, the Court of Appeals for the Seventh Circuit has explained that "[t]he application of Rule 19, of course, turns on the facts of each case." *Le Beau v. Libby-Owens-Ford Co.,* 484 F.2d 798, 800 (7th Cir.1973).

The defendants are litigating vigorously in support of the validity of the Construction and Finance Agreement. Plaintiffs are arguing its invalidity equally vigorously. It is not clear which result is the one desired by the Community's governing body, but it is clear that both positions are well represented. As a practical matter, the Community's ability to protect its interests is not impaired by its absence from the action. *See United States ex rel. Mosay v. Buffalo Brothers Management Inc.,* No. 92-C-925-S at 11 (W.D.Wis. Mar. 16, 1993); 3A James Moore, Moore's Federal Practice ¶ 19.07 [2.-.1] at 19-106 (2d ed. 1993). *See also Fidelity & Deposit Co. v. Sheboygan Falls,* 713 F.2d 1261, 1268 (7th Cir.1983) (interest of party whose alleged breach of

contract was key issue in lawsuit was protected by vigorous litigation of the issue by another party to suit).

***5** Defendants contend that the Community has a special interest in the integrity of the contract at issue not shared by any of the defendants. They argue that a declaration that the agreement is void is likely to deter outside companies from transacting business with Indian tribes and eventually bring about the demise of Indian gaming in the Midwest. This is just another way of saying that the Community has a strong interest in the preservation of the agreement-the same interest defendants are advancing.

The Kiland defendants raise one additional argument. They suggest that if D & J is ordered to return funds paid to D & J by the Community, D & J will sue the Community to enforce a provision in the Purchase Agreement that requires the Community to indemnify D & J for losses caused by any breach of the Purchase Agreement by the Community. If this happens, they argue, the Community may be required to return the assets it obtained under the Purchase Agreement. Whether such a lawsuit is likely to occur is unclear; D & J does not suggest that it will. This may be because it appears that D & J would be unlikely to prevail in such a lawsuit. Even if D & J is ordered to disgorge money received from the Community, that is not evidence that the Community failed to fulfill its obligations to pay the money in the first place. Furthermore, if the Construction and Finance Agreement is void under § 81, the Purchase Agreement would then stem from a void agreement. "It is a well settled doctrine that if an agreement grows immediately out of, or is connected with an illegal ... agreement, a court may not lend its aid to enforce it even though it is in fact a new agreement." 17A Am.Jur.2d Contracts § 310 (1991). More important for Rule 19(a) analysis, the presence of the Community in the lawsuit would not affect its ability to protect itself from subsequent lawsuits as a practical matter. Further legal entanglements would be avoided if the Construction and Finance Agreement remains intact. This is the position defendants are representing.

I conclude that the Community is not a necessary party. Therefore, it is unnecessary to consider whether, because the Community has sovereign immunity from suit, it should be regarded as an indispensable party in whose absence this suit would have to be dismissed.

C. *Applicability of 25 U.S.C. § 81*

Defendants do not deny that the Construction and Finance Agreement was not approved by the Secretary of the Interior, but they contend that the contract is not covered by the statute. Although I find the draconian remedy of the statute distasteful, I conclude that the contract provides for "services relative to Indian lands" and for that reason is subject to the requirements of 25 U.S.C. § 81, one of which is the approval of the Secretary of the Interior and the Commissioner of Indian Affairs.

Defendants D & J and David Furlong seek to characterize the Construction and Finance Agreement as a contract for the sale of goods rather than services and therefore outside the purview of § 81. *See, e.g., In re United States ex rel. Hall,* 825 F.Supp. 1422, 1432 (D.Minn.1993) (section 81 did not cover contracts for sale of goods for casinos or for non-management services such as leasing, delivering, installing and servicing equipment and training casino personnel); *United States ex rel. Littlejohn v. Holiday Wholesale Inc.,* No. 92-C-154-C (W.D.Wis. Oct. 1992) (section 81 not applicable to contracts for purchase of inventory). However, the Agreement at issue provided not only for the sale and lease of goods but for the construction of the casino and for the provision of numerous other services by D & J.

***6** Plaintiffs contend first that the Agreement is covered by the statute simply because it provides for construction on Indian trust property. They take

the position that any contract involving physical contact with tribal land is "relative to Indian lands." This is too literal an interpretation. As the Court of Appeals for the Seventh Circuit has explained, "Indian law cannot be interpreted in isolation but must be read in light of the common assumptions of the day and the assumptions of those who drafted [it]." *Wisconsin Winnebago Business Community v. Koberstein,* 762 F.2d 613, 618 (7th Cir.1985). When Congress drafted what is now 25 U.S.C. § 81, it was concerned with the vulnerability of Indian tribes to unscrupulous lawyers and claims agents who were "plundering" the tribes "under the plea of services rendered." Cong. Globe 1486 (1871). The legislation was not intended to require the government to oversee every transaction involving services that might cause a non-Indian merely to touch tribal lands when there was no accompanying danger of the tribe's losing legal or de facto control over the land. *See Hall,* 825 F.Supp. at 1434 ("Congress was not interested in requiring that such mundane transactions be federally approved"); *see also Sac & Fox Tribe of Indians v. Apex Constr. Co.,* 757 F.2d 221 (10th Cir.), *cert. denied,*474 U.S. 850 (1985) (discussing holding of court below that contract for construction for cultural center on tribal land was not governed by § 81 and affirming decision on another ground).

Under the interpretation urged by plaintiffs, even an arrangement whereby a non-Indian agreed to mow a lawn located on an Indian reservation would require the approval of the Secretary of the Interior. Courts addressing the applicability of § 81 to agreements for the construction of facilities on Indian property have not suggested that applicability of the statute rests solely on the physical connection to tribal land. Instead, the courts have analyzed the contracts in their entirety. *See, e.g., Koberstein,* 762 F.2d at 619; *A.K. Management Co. v. San Miguel Band of Mission Indians,* 789 F.2d 785, 787 (9th Cir.1986); *United States ex rel. Shakopee Mdewakanton Sioux Community v. Pan American Management Co.,* 616 F.Supp. 1200, 1218 (D.Minn.1985). Undertaking a similar analysis, I conclude that the Construction and Finance Agreement as a whole is "relative to Indian lands."

In the recent case of *Altheimer & Gray v. Sioux Manufacturing Corp.,* 983 F.2d 803, 811 (7th Cir.1993), *cert. denied*114 S.Ct. 621 (1993), the Court of Appeals for the Seventh Circuit enumerated the factors "important in determining whether a management contract is relative to Indian lands" and applied the factors to decide whether an Indian tribe had "cede[d] any right, interest or control of Indian lands." *Id.* at 812. The parties to this action dispute whether the *Altheimer* factors should be used to analyze the Construction and Finance Agreement: the Kiland defendants argue that they should; defendants D & J Enterprises and David Furlong contend that they should not because the Construction and Finance Agreement is not a management contract; and plaintiffs state in one brief that *Altheimer* applies to the agreement because it should be treated as a management contract but proclaim in another brief that "[d]efendants' reliance on *Altheimer* is bewildering [because] that case is far removed from the issues here." Regardless whether the Construction and Finance Agreement is a "management contract" per se, I conclude that an examination of the factors set forth by the *Altheimer* court should be undertaken because the court of appeals found them significant to the inquiry relevant here: whether a contract relates to Indian lands. *See Hall,* 825 F.Supp. at 1433-34 (applying the *Altheimer* factors to non-management service contracts).

***7** A threshold issue, and one not discussed by the parties, is the effect of the May 1992 modification of the October 1991 Construction and Finance Agreement.[FN4] If the agreement as it stood from October to May was "relative to Indian lands" and thus void under § 81, the modification could not have "cured" the seven months of violation of the statute because "a void contract is no contract at all,"*In re Gremler,* 127 B.R. 202, 204 (Bankr.E.D.Wis.1991) (citing 17A Am.Jur.2d Contracts § 7 (1964 & Supp.1990), and thus is void

when made. However, under traditional contract analysis, "[a]n agreement changed by the mutual assent of the parties becomes a new agreement consisting of new terms and as much of the old agreement as the parties have agreed shall remain unchanged." 17A C.J.S. § 379 (1963 & Supp.1993). Wisconsin appears to follow this analysis. *See Estreen v. Bluhm,* 79 Wis.2d 142, 152, 255 N.W.2d 473 (1977). Accordingly, if the modification removed those features of the original agreement that were "relative to Indian land," the May 1992 version of the contract may not have violated § 81.[FN5]

I will begin by analyzing the modified contract. Under the four-factor test delineated by the court in *Altheimer,* affirmative answers to the following questions indicate that an agreement is relative to Indian lands:

1) Does the contract relate to the management of a facility to be located on Indian lands? 2) If so, does the non-Indian party have the exclusive right to operate that facility? 3) Are the Indians forbidden from encumbering the property? 4) Does the operation of the facility depend on the legal status of an Indian tribe being a separate sovereign?

Altheimer, 983 F.2d at 811. It is important to note that "none of the above factors are the 'sine qua non' of a contract which relates to Indian lands." *Id.*

In finding that the agreement in *Altheimer* did not relate to the management of a facility on Indian lands, the court of appeals considered the fact that the facility was already in existence. *Id.* In this case, by contrast, although the Community already operated a bingo hall, the casino was a new facility constructed by D & J. Also, the contract did not give D & J control of the day-to-day management of the casino, but it did give D & J the ultimate and continuing authority to select gaming machines for the casino from among various makes and models of gaming machines.[FN6] This afforded D & J a measure of control over the casino's performance and operation although it does not provide the exclusive control required under the second factor of the *Altheimer* test.

The third factor, prevention of encumbrance, is met. The terms of the agreement precluded the Community from encumbering their property. The Kiland defendants do not agree that this makes the third factor applicable. They argue that it does not apply because the contract prevented the Community only from encumbering the facility and not the land beneath it. Their argument is unpersuasive. Even if the Community could convince a third party to accept a mortgage or lien that did not implicate the building affixed to the land, the existence of the casino so dictates the function of the land that the inability of the Community to encumber the facility effectively curtails the Community's control of its land.

***8** Finally, the fourth factor, the significance of the separate sovereignty of the tribe, applies because the "existence of the [casino] arises from the Indian tribe's sovereignty over tribal trust lands which makes state gambling laws inapplicable to games on reservations,"*Altheimer,* 983 F.2d at 811 (quoting *Shakopee Mdewakanton Sioux Community,* 616 F.Supp. at 1218). The "operation of the facility depends on the [Community's] legal status." *Id.* Quoting but not citing the opinion of the district court of Minnesota in *In re United States ex rel. Hall,* 825 F.Supp. at 1434, defendants argue that this factor "is not germane" to non-management contracts because if it were, even a contract for the provision of the most routine services would require government approval. However, I have found that the Construction and Finance Agreement did impart a degree of management authority to D & J. Moreover, although I share the concern expressed by the court in *Hall,* I am bound to consider the factors the court of appeals has identified as important; the problem identified by the *Hall* court can best be avoided by heeding the appeals court's caution that none of the four factors is necessarily dispositive. *See Altheimer,* 983 F.2d at 811.

In its discussion in *Altheimer,* the court of appeals

indicated that the key to finding that a contract is relative to Indian lands is a determination that a tribe has relinquished some significant element of its ownership rights. The inability of the Community to encumber its land substantially impaired its right of self-determination with respect to tribal property. Indeed, three of the four *Altheimer* factors apply to the modified Construction and Finance Agreement. Defendants have not identified any factors that would argue against a finding that the agreement is relative to tribal lands. Therefore, I conclude that the modified agreement is relative to Indian lands within the meaning of § 81.

The only relevant difference between the agreement as it existed between October 1991 and May 1992 and the May 1992 modification is that the pre-modification contract granted D & J "title to and ownership of" the casino building. This would make the original agreement even more clearly relative to Indian lands. Therefore, I conclude that both the pre- and post-modification versions of the Construction and Finance Agreement are subject to 25 U.S.C. § 81.

D. *The Claims against the Kiland Defendants*

Plaintiffs contend that Kiland Distributing and its vice president Jack Kiland was "at least involved, if not controlling, in the formation and performance of the Agreement" and that this involvement makes the Kiland defendants liable under § 81. They contend as well that even if Kiland Distributing and Kiland were not involved in the Construction and Finance Agreement, money paid to Kiland Distributing by D & J Enterprises is recoverable under §§ 81 because D & J received the money it used to repay its debt to Kiland Distributing from the Community pursuant to the Construction and Finance Agreement. Defendants deny that Kiland Distributing and Kiland were parties to any contract with the Community. They argue that Jack Kiland is not a proper defendant and plaintiffs have adduced no evidence that Kiland Distributing's "corporate veil" should be pierced.

***9** Plaintiffs contend that Kiland Distributing and Kiland were involved in the contract because they facilitated the negotiation of the Community's contracts with D & J. Plaintiffs have neither proposed facts nor adduced admissible evidence in support of their contention, and they have not explained why assisting two parties in coming to an agreement would render Kiland and Kiland Distributing liable under § 81. Plaintiffs try to tie the Kiland defendants to the Construction and Finance Agreement under the provision that 75% of the gaming machines are to be Bally machines and Kiland Distributing is the Wisconsin distributor of Bally slot machines. This connection is inadequate. Even if Kiland Distributing and Kiland stood to gain from the agreement between D & J and the Community, it does not follow that they were parties to the agreement or that they violated § 81. *See United States ex rel. Mosay v. Buffalo Brothers Management, Inc.,* 92-C-925-S at 7 (W.D.Wis. Aug. 17, 1993) ("There is nothing in the language of § 81 or the cases interpreting it which requires consideration [by the Secretary of the Interior] of independent 'collateral' agreements not affecting Indian lands in connection with the approval of an agreement which is relative to Indian lands.").

In their reply brief, plaintiffs argue that the Financing Agreement between Kiland Distributing and D & J was part of the Community's contract with D & J. They quote *James Talcott, Inc. v. P & J Contracting Co.,* 27 Wis.2d 68, 76, 133 N.W.2 473 (1965) to the effect that under traditional contract analysis, "[t]he general rule is that in the absence of anything to indicate a contrary intention, instruments executed at the same time, by the same contracting parties, for the same purpose, and in the course of the same transaction will be considered and construed together, since they are, in the eyes of the law, one contract or instrument." The quote is inapposite. In this case, the contracts were executed a week apart; the Community was not a party to the Finance Agreement and Kiland Distributing was not a party to the Construction and Finance Agreement; unlike the Construction and Fin-

ance Agreement, the purpose of the Finance Agreement was to lend money to D & J Enterprises; and the transaction between D & J and Kiland Distributing was separate from the transaction between D & J and the Community. The incorporation of the terms of the Construction and Finance Agreement into the Financing Agreement between D & J and Kiland Distributing did not cause a corresponding incorporation of the Financing Agreement into D & J's agreement with the Community. Plaintiffs have adduced no evidence that the parties' obligations under the Construction and Finance Agreement were dependent in any way on the agreement between D & J and Kiland Distributing. Kiland Distributing is mentioned in the Construction and Finance Agreement as "a provider of financing to D & J Enterprises," but it takes more to make an entity a party to a contract than a mention of the likelihood that the parties contemplated that Kiland Distributing would finance this particular project of D & J's.

***10** Plaintiffs suggest that the Kiland defendants are parties to the Construction and Finance Agreement because the agreement lists Kiland Distributing as a "party in interest." The Kiland defendants contend that the agreement provides explicitly that Kiland Distributing is not a "party in interest." The source of this confusion is the following provision:

17. *Parties in Interest.* The following entities and individuals are parties in interest to this Agreement.

a) Stockbridge-Munsee Community;

b) D & J Enterprises, a sole proprietorship, having the following owner:

i) Dave Furlong, sole owner.

c) *Although not a party in interest to this agreement,* Kiland Distributing Corporation is a provider of financing to D & J Enterprises....

(Emphasis added). The provision is not artfully drafted but a fair reading indicates that the parties intended to clarify that the Community and D & J were parties in interest and that Kiland Distributing was not.

Finally, plaintiffs contend that money paid to Kiland Distributing by D & J Enterprises under the Agreement is forfeitable under 25 U.S.C. § 81 because the Community was the original source of the money. The statute provides that "[a]ll money or other thing of value paid to any person by any Indian or tribe, or any one else, for or on his or her behalf, *on account of such services,* may be recovered by suit in the name of the United States...." 25 U.S.C. § 81 (emphasis added). "Such services" are described by the statute as services "relative to Indian lands" or to any claims arising under federal law. *Id.* The parties agree that no services relative to federal claims are involved in this lawsuit. Plaintiffs may not recover from the Kiland defendants money that the Kiland defendants did not receive for services for Indians relative to Indian lands. The Kiland defendants received money from D & J under an agreement between Kiland Distributing and D & J that obligated Kiland Distributing to provide financing to D & J. This was not a service to the Community relative to its lands. Regardless whether D & J provided "such services" to the Community under the Construction and Finance Agreement, the Kiland defendants were not part of the agreement and did not receive payment for those services. Summary judgment will be granted to defendants Kiland Distributing and Kiland.

E. *Relief*

In plaintiffs' brief in support of their summary judgment motion they say that they seek to recover "money which has been or may be escrowed, and which was to have been paid to Defendants" under the Construction and Finance Agreement. Under § 81, plaintiffs can be awarded only the money paid to any person by or on behalf of any tribe. Money from escrow accounts not delivered to defendants is not money that has been paid to any person by or on behalf of the tribe. Legal title to funds in escrow not yet delivered to the grantee remains in the de-

positor. 30A C.J.S. Escrows § 11 (1992 & Supp.1993); *see Turck v. Seefeldt,* 268 Wis. 559, 564, 68 N.W.2d 534, 537 (1955) (funds in escrow belong to depositor before time of release). Plaintiffs request also that defendants be ordered to disgorge those funds paid to them "under color of" the Construction and Finance Agreement. Plaintiffs are entitled to the relief they seek from defendants D & J and David Furlong. Therefore, I will order these defendants to turn over the payments made to them "under color of" the void agreement, that is, all funds received by D & J and David Furlong from the Community between October 30, 1991 and February 25, 1993, the period during which the Construction and Finance Agreement was ostensibly in effect. One-half of the funds are to be paid to plaintiffs; one-half are to be returned to the Community. The money to be recovered by plaintiffs and the Community does not include the funds that were placed in escrow pursuant to the escrow agreement of May 22, 1992 because those funds were released to defendants pursuant to the Purchase Agreement and not the Construction and Financing Agreement. In their complaint, plaintiffs asserted a claim to funds paid under the Purchase Agreement, but they have not reiterated their claim or presented any arguments regarding it at the summary judgment stage. Because this issue was not properly raised it will not be addressed.

***11** Although I am compelled to reach the result I reach today, I believe further comment is necessary. There is no evidence here that the Community entered into the Construction and Finance Agreement with D & J under duress, with fraudulent motives, or without the benefit of competent legal advice. Both parties performed their obligations under the contract and established what appears to be a successful gaming operation. The parties have proffered nothing to suggest that the agreement has been anything less than beneficial to the Stockbridge-Munsee Community. Yet a year and a half after the execution of the agreement and ten months after the agreement was terminated, plaintiffs are able to have the contract declared void and one-half the payments made under the agreement diverted to their own benefit. Plaintiffs have succeeded in doing this without presenting any factual evidence that the contract was made in bad faith or that it caused undesirable results for the Community.

Section 81 was enacted to protect the Indian tribes at a time when Congressmen believed that "[t]here are no Indians, as a tribe or as individuals, that are competent to protect themselves against the enterprise and the fraud of the white man." Cong.Globe 1484 (remarks of Senator Davis). As it stands today, 25 U.S.C. § 81 imposes a penalty out of proportion to the purely technical violations it proscribes. It seems likely that tribes may be hurt rather than protected by the disruption of their successful business relationships. My preference would be to stay judgment in this case and have the agreement submitted to the Secretary of the Interior for approval. Only if the Secretary declined to approve the agreement, indicating that it was not beneficial to the tribe, would I declare the contract void. In that way, the statute would fulfill its intended purpose of protecting the tribes rather than its actual effect of bestowing windfalls. However, neither the statute nor the case law affords this discretion.

ORDER

IT IS ORDERED that

1) plaintiffs' motion for summary judgment with respect to defendants D & J Enterprises and David Furlong is GRANTED; and it is declared that the Construction and Finance Agreement entered into by D & J Enterprises and the Stockbridge-Munsee Community on October 30, 1991 and modified on May 22, 1992, is null and void under 25 U.S.C. § 81;

2) defendants D & J Enterprises and David Furlong are to pay to plaintiffs one-half of the funds D & J and David Furlong received from the Community between October 30, 1991 and February 25, 1993,

when the Construction and Finance Agreement purported to be in effect, not including any funds that were placed in escrow pursuant to the May 22, 1992 escrow agreement, and defendants D & J Enterprises and David Furlong are to return to the Community one-half of the funds D & J and David Furlong received from the Community between October 30, 1991 and February 25, 1993, when the Construction and Finance Agreement purported to be in effect, not including those funds that were placed in escrow pursuant to the May 22, 1992 escrow agreement;

***12** 3) plaintiffs' motion for summary judgment with respect to defendants Kiland Distributing and Jack Kiland is DENIED and the cross-motion for summary judgment of defendants Kiland Distributing and Jack Kiland is GRANTED.

FN1. Plaintiffs have yet to identify these unnamed parties and have provided no evidence that they have been served. Accordingly, they must be dismissed from this action.

FN2. In a footnote in a brief, the Kiland defendants suggest that sanctions be imposed on plaintiffs for suing Jack Kiland as an individual. If they wish to pursue this suggestion, they must do more than mention it in a footnote.

FN3. In a letter to the court dated December 2, 1993, plaintiffs' attorney states that a new Tribal Council was elected at the end of November and that the new council "will be considering a resolution in *support* of the plaintiffs in this action as an early order of business." I have ignored this statement because it was submitted well after the deadline for briefing on the motions and because it relies on hearsay. In any event, whether the resolution is an authentic reflection of the Community's position does not affect the analysis of this case.

FN4. The lack of discussion may be partially attributable to the fact that the court received two reply briefs from defendants D & J Enterprises and David Furlong, one of which mentions the modification and one of which does not. It is unclear from the record which brief was served upon the other parties. Although defendants D & J and Furlong have included the modification in the record, no mention of the modification is made by these defendants in any of their other submissions to the court and none of the other parties to the lawsuit appear even to be aware of it.

FN5. It may be that a modified agreement based on a void agreement remains void even if the modification would have cured the illegality. I need not address this issue here because it does not affect the disposition of the case.

FN6. In a brief, defendants D & J and Furlong assert that they had no control over the selection of gaming machines. Defendants have not proposed any facts in support of this assertion, which is directly contradicted by the terms of the contract.

W.D.Wis.,1993.
U.S. ex rel. Gulbronson v. D & J Enterprises
Not Reported in F.Supp., 1993 WL 767689 (W.D.Wis.)

END OF DOCUMENT

EXHIBIT F

Not Reported in F.Supp.2d
Not Reported in F.Supp.2d, 2003 WL 174207 (N.D.Ill.), 30 Employee Benefits Cas. 1426
(Cite as: Not Reported in F.Supp.2d, 2003 WL 174207)

C

Board of Trustees of Masons and Plasterers Pension Fund Local 56 Dupage County, IL v. O'Donnell Plastering, Inc.
N.D.Ill.,2003.

United States District Court,N.D. Illinois, Eastern Division.
BOARD OF TRUSTEES OF THE MASONS AND PLASTERERS PENSION FUND LOCAL 56 DUPAGE COUNTY, ILLINOIS, et al., Plaintiffs,
v.
O'DONNELL PLASTERING, INC., Defendant.
No. 01 C 9257.

Jan. 27, 2003.

MEMORANDUM OPINION AND ORDER

COAR, J.
***1** Plaintiffs Board of Trustees of the Masons and Plasterers Pension Fund Local 56, DuPage County, Illinois, Board of Trustees of the Brick Masons Welfare Fund of DuPage County (56), Board of Trustees of the Masons and Plasterers Pension Fund, Local Union No. 74 of DuPage County, Illinois, Board of Trustees of the Bricklayers and Allied Craftworkers Welfare Fund, Local Union No. 74 of DuPage County, Illinois, Board of Trustees of the District Council Training Center Fund, Board of Trustees of the Bricklayers and Trowel Trades International Pension Fund, and Board of Trustees of the International Masonry Institute Promotional Trust ("Plaintiffs" or "Funds"), bring an ERISA action against O'Donnell Plastering, Inc. ("O'Donnell"). Plaintiffs sue for contributions allegedly due under the collective bargaining agreements between O'Donnell and the Bricklayers and Allied Craftsmen Locals 56 and 74 (the "Union" or "Local 56/74"). Before this Court is Plaintiffs' motion for summary judgment. For the following reasons, this Court DENIES the motion.

I. Summary Judgment Standard

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."Fed.R.Civ.P. 56(c); *Kamler v. H/N Telecom. Servs., Inc.,* 305 F.3d 672, 677 (7th Cir.2002). A genuine issue of material fact exists for trial when, in viewing the record and all reasonable inferences drawn from it in a light most favorable to the non-movant, a reasonable jury could return a verdict for the non-movant.*Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986); *Fritcher v. Health Care Servs. Corp.,* 301 F.3d 811, 815 (7th Cir.2002).

The movant bears the burden of establishing that no genuine issue of material fact exists. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986); *Hedberg v. Indiana Bell Tel. Co.,* 47 F.3d 928, 931 (7th Cir.1995). If the movant meets this burden, the non-movant must set forth specific facts that demonstrate the existence of a genuine issue for trial. Rule 56(e); *Celotex,* 477 U.S. at 324. A scintilla of evidence in support of the non-movant's position is insufficient, and the non-movant "must do more than simply show that there is some metaphysical doubt as to the material fact."*Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 586 (1986); *seealsoAnderson,* 477 U.S. at 250. Weighing evidence, determining credibility, and drawing reasonable inferences are jury functions, not those of a judge deciding a motion for summary judgment. *Anderson,* 477 U.S. at 255.

II. Background

The following facts are taken from the parties Local Rule 56.1 materials. Plaintiffs are a group of Funds that have been established pursuant to collective bargaining agreements between the Union and the

employer association, GDCNI/CAWCC ("GDCNI"), whose member-employers authorizing GDCNI to bargain on their behalf are covered by the collective bargaining agreement with the Union. The Funds are maintained and administered in accordance with and pursuant to the provisions of the National Labor Relations Act, as amended, and other applicable state and federal laws, and also pursuant to the terms of the agreements and Declarations of Trust that establish the funds.

***2** Defendant O'Donnell is an Illinois corporation. Geraldine O'Donnell, an authorized O'Donnell representative, contacted Trygve Espeland, Business Manager of Local 56, in April 1996 to inform him that she employed a Local 56 member. According to Geraldine O'Donnell, Espeland told her that she needed to sign a "Memorandum of Understanding" to have benefits transferred from Plasterer's Local 5 to Local 56/74 pursuant to a reciprocity agreement. On April 8, 1996, Espeland forwarded the Memorandum of Understanding to O'Donnell with a cover letter that stated in part, "Enclosed is the 'Memorandum of Understanding' (the Contract)." The cover letter also contains a handwritten note stating, "Please keep a copy for your files ... I'll send you a copy of the 'Memorandum' after I've signed it."On April 15, 1996, Geraldine O'Donnell signed the Memorandum of Understanding on behalf of O'Donnell and returned it to Local 56. The document she signed states that it is a Union Agreement between O'Donnell and Bricklayers International Union Locals 56/74. O'Donnell claims it never received a copy of the Memorandum signed by the Union.

According to Plaintiffs, O'Donnell, by signing the Memorandum of Understanding, is bound to the collective bargaining agreement between Locals 56 and 74 and GDCNI. Per paragraph 4 of the Memorandum of Understanding, also known as the "Evergreen Clause," the April 15, 1996 agreement rolled over, which means that Defendant is bound to all successive agreements since April 15, 1996.FN1The June 1, 1993 collective bargaining agreement was effective from June 1, 1993 through June 30, 1997; the July 1, 1997 collective bargaining agreement was effective from July 1, 1997 through June 30, 2001; and the July 1, 2000 Memorandum of Understanding Adopting the Former Collective Bargaining Agreement is effective from July 1, 2000 through June 30, 2004 (collectively the "successive agreements").

> FN1. Defendant disputes that it is bound to the collective bargaining agreement, as it was not aware it was signing a Collective Bargaining Agreement. Defendant therefore also disputes that it is bound to the successive collective bargaining agreements.

Paragraph 5 of the Memorandum of Understanding states:

The Employer agrees to pay the amounts of the contributions which it is bound to pay to the several fringe benefit funds described in the Association Agreement and agrees to and is hereby bound by and considered to be a party to the agreements and declarations of trust creating each of said trust funds, together with any restatements or amendments thereto which have been or may be adopted, as if it had been a party to and signed the original copies of the trust instruments. The Employer ratifies and confirms the appointment of each of the employer trustees, who shall, together with their successor trustees designated in the manner provided in the agreements and declarations of trust, and, where applicable, jointly with an equal number of trustees representing employees, carry out the terms and conditions of the trust instruments.

According to provisions in the successive agreements:
The employer shall contribute the amounts specified per hour for work performed by all employees covered by this Agreement, which amounts shall be used for the purpose of the particular fund in accordance with the agreement and declaration

of trust establishing each such fund....

***3** GDCNI bargains contracts with Plasterers Locals 56 and 74 for its member employers that have given their authorization to bargain. O'Donnell joined GDCNI on February 23, 1999. On June 14, 2000, the Executive Director for GDCNI forwarded to Locals 56 and 74 a list of contractors who have assigned their bargaining rights for the purpose of negotiation with the Union. O'Donnell is listed as a contractor.[FN2]Plasterers Union Local 5 filed a petition for a National Labor Relations Act Section 9(a) election in Case Number 13 RC 20542 before the National Labor Relations Board ("NLRB"), seeking to solely represent the plasterer employees at O'Donnell. Geraldine O'Donnell was a party to the NLRB proceeding and Locals 56/74 intervened as an interested party. At the hearing, Geraldine O'Donnell admitted she signed the Memorandum of Understanding, and her attorney had no objections when the hearing officer stated on the record: "The Employer for the Association and the Intervener are parties to an 8-F agreement expiring on June 30, 2004...." Defendant contends that any stipulation made at the NLRB hearing was for the sole purpose of conducting an election for O'Donnell's plasterers to choose either Local 56/74 or Plasterers Local 5 Union as their bargaining representative. Local 56/74 lost the election on April 24, 2001, which precipitated this lawsuit. In the six years that Plaintiffs claim they had an agreement with O'Donnell, they never audited it. Local 5 Union audited O'Donnell three times during that six-year period and found that no money was owed.

> FN2. Defendant contends that GDCNI included O'Donnell on that list in error.

Local 56/74 never requested a Wage and Fringe Benefit Bond from O'Donnell, nor did it request proof of Workman's Compensation or Liability Insurance. The Union never sent O'Donnell Wage/Fringe Benefit Rates. Further, the Union never sent O'Donnell monthly contribution reports for the period of 1996 through April 2001, and O'Donnell never received correspondence by phone, mail, or fax from April 1996 until the letter dated April 2, 2001, which was after the NLRB election.[FN3]From January 2001 through June 2001, O'Donnell filed fringe benefit report forms and made payments to Plaintiff Funds as required by the collective bargaining agreements. The report forms, which were unsigned, state: "I hereby certify the above is a true and complete report of all hours worked by the Plasterers and Apprentices during the month. In accordance with the obligations assumed by me to the Fringe Benefit Funds of Local # 74, I enclose payment as indicated to the left."

> FN3. Plaintiffs dispute this fact, but the exhibits they cite do not support their dis- pute.

Geraldine O'Donnell gave Plaintiffs a list of all projects performed in DuPage County by O'Donnell where the company did not pay the benefits to Plaintiffs as required under the alleged Union contract. From April 1996 through April 2001, Defendant did not pay benefits for 1814 hours of potentially covered work performed. Pursuant to a fringe benefit audit covering the period of April 15, 1996 through April 30, 2001, O'Donnell failed to make $12,265.48 of the contributions allegedly required to be paid to the Plaintiff Funds according to the collective bargaining agreements and Trust Agreements.

***4** The Plaintiffs seek benefit for hours worked by the following individuals: Wesley Booth, Frank Czuprynski, James Geraghty, Tommy Hardy, Noel McMahon, Brenden O'Donnell, Josef Soja, Andrzej Swedura, Everado O'Campo, Matias O'Camp, and Shawn Burton. These employees are members (or former members) of Local 5 and O'Donnell paid benefits to Local 5 trust funds for the hours claimed due by Plaintiffs in their audit. Plaintiffs contend that the amount they seek for the hours worked by these individuals is alternative recovery, which only includes the differences in rates between the Local 5 and the Local 56/74 Pension and Welfare Funds. Pursuant to reciprocity agreements between Trust Funds of Local 56/74 and Local 5, said Funds

agreed to transfer contributions which have been received from an employer for members of adjacent local unions at the lower contribution rate.

O'Donnell claims that it never assigned its bargaining rights to GDCNI for purposes of collective bargaining with the Union.[FN4]Rather, O'Donnell contends that it only authorized GDCNI to bargain for a contract with Plasterers Local 5 Union. O'Donnell did not make any contributions to the trust funds for Local 56/74 in 1996, 1997, 1998, 1999, or 2000. O'Donnell submitted contributions from approximately April 2001 through August 2001, after it received a letter from Local 74 dated April 2, 2001 requesting funds for DuPage projects. O'Donnell contacted the NLRB and Local 5 to inquire whether or not payment should be made to Local 74. Local 5 advised O'Donnell to made contributions to Local 56/74; the NLRB did not have advice.

> FN4. Plaintiffs dispute this fact, arguing that, through the recognition clauses in the agreements between the Union and GDCNI, Defendant assigned its bargaining rights. However, the recognition clauses state: "Any plastering contractor who has a collective bargaining agreement with the Union and not in dispute with the Union, and becomes a member of the Association shall be recognized as a member of the Association for collective bargaining purposes."Since O'Donnell disputes it has a collective bargaining agreement with the Union, it is not clear that these recognition clauses establish that O'Donnell assigned its bargaining rights.

III. Discussion

The crux of this dispute is whether O'Donnell entered into a collective bargaining agreement with the Union when it signed the "Memorandum of Understanding" on April 15, 1996. Though the first line of paragraph 1 clearly states, "The Employer hereby recognizes the Union as the sole and exclusive collective bargaining agent for all Plasterers and Apprentices employed by the Employer....," Defendant contends that it did not know it was signing a collective bargaining agreement; rather, O'Donnell believed it was signing a document that permitted the transfer of contributions from Local 5 Union to Local 56/74. Defendant argues that, since it did not believe it was signing a collective bargaining agreement, and since it did not engage in a course of conduct recognizing the Union, there is at least an issue of material fact regarding whether the Defendant is bound to a collective bargaining agreement with the Union. In the alternative, Defendant argues that, even if it has a collective bargaining agreement with the Union, O'Donnell paid contributions to Local 5 and Local 5's trust funds transferred such payments to Plaintiffs for the two members of Local 56/74 that O'Donnell employed. This Court addresses each argument in turn.

The Collective Bargaining Agreement

Because Defendant claims to have been unaware that it was signing a collective bargaining agreement when it signed the Memorandum of Understanding, it asserts "fraud in the execution" as a defense in this action. "Fraud in the execution entails deceiving a party to an agreement as to the very nature of the instrument it signs so that the party actually does not know what it is signing, or does not intend to enter into a contract at all."*Laborers Pension Fund et al. v. A & C Environmental, Inc.,* 301 F.3d 768, 779 (7th Cir.2002) (citations omitted). If a defendant proves fraud in the execution, the agreement is *void ab initio,* meaning it is as if the contract never existed. *Id.* To establish the defense of fraud in the execution, O'Donnell must prove that it did not know it was signing a collective bargaining agreement that obligated it to make contributions to the Funds and that its ignorance was excusable because it had reasonably relied on the representations of the union representative. *Id.* at 780*citingIll. Conf. of Teamsters & Employers Welfare Fund v. Steve Gilbert Trucking,* 71 F.3d 1361, 1365-66 (7th Cir.1995) and *Southwest Adm'rs, Inc. v. Rozay's Transfer,* 791 F.2d 769, 774

(9th Cir.1986).

***5** Defendant looks to *Operating Engineers Pension Trust v. Gilliam,* 737 F.2d 1501 (9th Cir.1984) to support its defense of fraud in the execution. In *Gilliam,* the defendant employer wanted to apply for union membership as an owner-operator so that he could work on a union-controlled job. *Id.* at 1501-02.The union representative gave the defendant several documents to sign and told him that they were "standard forms signed by owner-operators." *Id.* at 1504.The documents, however, contained a collective bargaining agreement that obligated his company to make pension fund contributions for its workers.*Id.* Relying on the union representative's word, the defendant did not read the documents and the Ninth Circuit held that no binding agreement was created because the defendant did not know what he was signing and his ignorance was reasonable. *Id.* at 1505.

In *A & C Environmental,* however, the Seventh Circuit held under similar circumstances that the defendant-employer's ignorance was not reasonable. In that case, the union representative misrepresented the nature of the contract to the defendant by stating that the contract only would cover certain employees at a particular location. 301 F.3d at 770. The defendant was given a one-page form, which he filled out himself, writing the name of his company directly below the caption "collective bargaining agreement ." *Id.* at 781.Even though the defendant only reviewed the document for one or two minutes, and he was in the company of the union representative and he was also answering questions of eager employees, the Seventh Circuit held that defendant's ignorance of the nature of the contract was not excusable. *Id.* Indeed, though the defendant's representative only had a high school education, the court stated that, "as a representative of A & C with the power to enter into contracts for the company, [he] ought to have known not to sign something on behalf of the company without reading it first."*Id.;see alsoHill v. Gateway 2000, Inc.,* 105 F .3d 1147, 1148 (7th Cir.1997) ("A contract need not be read to be effective; people who accept take the risk that the unread terms may in retrospect prove unwelcome.).

Like the defendant in *A & C Environmental,* O'Donnell cannot establish that its ignorance to the nature of the contract was reasonable. Not only did the Memorandum of Understanding state it was an agreement between O'Donnell and Local 56/74, but it also stated that the "Employer hereby recognizes the Union as the sole and exclusive collective bargaining agent."Even if Espeland misrepresented the nature of the contract, Geraldine O'Donnell, as president of the company with the power to enter into contracts on behalf of the company, clearly should have known not to sign the document on behalf of the company without first reading it. This Court thus rejects O'Donnell's fraud in the execution defense, finding that O'Donnell's reliance on the union representative's representation was unreasonable, and its ignorance of the nature of the contract is not excusable.

***6** Defendant also argues that the Union's course of "non-dealing" shows that no Collective Bargaining Agreement existed between the parties. Namely, Defendant asserts that the Union: (1) never requested a Wage and Fringe Benefit Bond; (2) never requested proof of Workman's Compensation or liability insurance; (3) did not send O'Donnell monthly contribution reports to remit for the period of 1996 through April 2001; (4) did not correspond with Defendant by phone, mail, or fax from April 1996 until the letter dated April 2, 2001, which was after the NLRB election; and (5) never audited O'Donnell. While it is well-settled that, in the absence of a signed instrument, an employer may adopt a collective bargaining agreement by its actions or a course of conduct that demonstrates an intent to abide and be bound by the terms of such an agreement, *seeRobbins v. Lynch,* 836 F.2d 330, 332 (7th Cir.1988), Defendant cites no cases establishing that, despite a signed collective bargaining agreement, a union's course of dealings can negate the existence of such agreement. Indeed, miscon-

duct or breach by the union does not relieve the employer of its obligations to make pension contributions. *Central States, Southeast and Southwest Areas Pension Fund v. Gerber Truck Servs., Inc.,* 870 F.2d 1148, 1152 (7th Cir.1989)*citingLewis v. Benedict Coal Corp.,* 361 U.S. 459, 469-71 (1960). Thus, because this Court finds, as a matter of law, that a valid collective bargaining agreement between the Union and O'Donnell exists, the Union's failure to collect contributions or collect paperwork from the employer does not relieve O'Donnell of its obligation to make contributions. *SeeTeamsters & Employers Welfare Trust of Illinois v. Gorman Bros. Ready Mix,* 283 F.3d 877 (7th Cir.2002) (holding that any reliance by employer on trust's prior failure to seek delinquent contributions, and alleged statement by chairman of trust that as a favor he had made audit revealing prior delinquency "go away," was not reasonable, so that employer could not assert defense of laches or equitable estoppel to bar suit).

Amount of Contributions

Defendant argues in the alternative that, even if O'Donnell has a valid, enforceable collective bargaining agreement with the Union, O'Donnell not only paid contributions to Local 5, but Local 5's trust funds transferred such payments to Plaintiffs for the two members of Local 56/74 that O'Donnell employed. Thus, O'Donnell disputes the auditor's findings to the extent of the amount due Plaintiffs.

Plaintiffs assert that payment to another fund is not a defense, and they cite a plethora of cases where courts decided that employers were obligated to pay two unions. *See e.g.,Hutter Constr. Co. v. Op. Eng.,* 862 F.2d 641, 645 n. 17 (7th Cir.1988) ("We recognize that Hutter will now pay two unions for work that was performed by one. This unfortunate result, however, is solely attributable to Hutter's decision to enter into conflicting bargaining agreements."); *Robbins v. Lynch,* 836 F.2d 330, 334 (7th Cir.1988) ("Given that funds are entitled to the full contributions called for by the collective bargaining agreements, it follows that [defendant] is not entitled to recoup sums already paid against this obligation."); *see alsoGerber Truck,* 870 F.2d at 1148 n. 1*citing,* among others, *Maxwell v. Lucky Constr. Co.,* 710 F.2d 1395 (9th Cir.1983) (holding that employer must make full contributions promised in agreement even though employer had paid, and could not recoup, an identical sum to another pension plan based on an oral agreement with union, and employees would get their benefits from that other plan) and *Operating Engineers Pension Trust v. Giorgi,* 788 F.2d 620 (9th Cir.1986) (holding fund entitled to full contribution promised outside of a collective bargaining agreement even though employer was required to, and did, make identical payments to another fund).

***7** In this case, however, Defendant not only asserts that it paid contributions for employees identified by the Union to Local 5 Union, but it also asserts that, pursuant to a reciprocity agreement, Local 5 transferred such payments to Plaintiffs for two of the members who were employed by Local 56/74 (Everard Ocampo and Matias Ocampo). Thus, Defendant argues that Plaintiffs' total is incorrect because Plaintiffs did receive contribution from O'Donnell for these two employees. Plaintiffs muddy the issue further in their reply brief by offering to decrease the amount O'Donnell owes to $2,332.85, arguing that there is a difference between the amount Defendant paid to Local 5 Union and the amount owed to the Union because there is no reciprocity agreement "other than for Pension and Welfare."Plaintiffs also assert for the first time in their reply brief that they also are seeking the full § 29 U.S.C. 1132(g)(2) remedies, even though in Plaintiffs' Local Rule 56 Statement of Material Facts they state they are not seeking dues and they do not include the $2,332.85 audit costs in their calculation. Thus, this Court finds that, on the issue of damages, there remains a genuine issue of material fact and summary judgment is DENIED.

IV. Conclusion

For the foregoing reasons, Plaintiffs Motion for Summary Judgment is DENIED, but pursuant to Rule 56(d), the facts as to liability as stated herein are deemed established. By separate order, this matter will be set for trial solely on the issue of damages.

N.D.Ill.,2003.
Board of Trustees of Masons and Plasterers Pension Fund Local 56 Dupage County, IL v. O'Donnell Plastering, Inc.
Not Reported in F.Supp.2d, 2003 WL 174207 (N.D.Ill.), 30 Employee Benefits Cas. 1426

END OF DOCUMENT

EXHIBIT G

Not Reported in F.Supp.2d
Not Reported in F.Supp.2d, 2003 WL 22327176 (D.Kan.)
(Cite as: Not Reported in F.Supp.2d, 2003 WL 22327176)

H

Dodson Intern. Parts, Inc. v. Hiatt
D.Kan.,2003.
Only the Westlaw citation is currently available.
United States District Court,D. Kansas.
DODSON INTERNATIONAL PARTS, INC. a Kansas Corporation, Plaintiff,
v.
Mary HIATT, Jerry Hiatt, Action Aircraft Parts, an entity doing business in Texas, and MRP Enterprises, Inc., a Texas Corporation, Defendants.
No. 02-4042-SAC.

Sept. 25, 2003.

Donald G. Scott, R. Pete Smith, Rebecca D. Martin, McDowell, Rice, Smith & Gaar, Kansas City, MO, Mark L. Bennett, Jr., Bennett & Hendrix, LLP, Topeka, KS, for Plaintiff.
Clinton W. Lee, Mark A. Buck, Fairchild & Buck, P.A., Topeka, KS, for Defendant.

MEMORANDUM AND ORDER

SAM A. CROW, District Judge.
***1** The case comes before the court on the defendants' motion for partial summary judgment (Dk.70) and the plaintiff's motion for summary judgment (Dk.71). Asserting multiple theories of Kansas tort law, the plaintiff seeks to recover for a series of allegedly illicit transactions between the defendants and some of the plaintiff's employees. The parties agree that diversity jurisdiction exists and that Kansas law governs.

SUMMARY JUDGMENT STANDARDS

A court grants a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure if a genuine issue of material fact does not exist and if the movant is entitled to judgment as a matter of law. The court is to determine "whether there is the need for a trial-whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party."*Anderson v.. Liberty Lobby, Inc.,* 477 U.S. 242, 250 (1986)."Only disputes over facts that might affect the outcome of the suit under the governing law will ... preclude summary judgment."*Id.* There are no genuine issues for trial if the record taken as a whole would not persuade a rational trier of fact to find for the nonmoving party. *Matsushita Elec. Indust. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587 (1986). More than a "disfavored procedural shortcut," summary judgment is an important procedure "designed 'to secure the just, speedy and inexpensive determination of every action.'Fed.R.Civ.P. 1."*Celotex Corp. v. Catrett,* 477 U.S. 317, 327 (1986). The court must view the evidence of record and draw all reasonable inferences in the light most favorable to the nonmovant. *Thomas v. International Business Machines,* 48 F.3d 478, 484 (10th Cir.1995).

The initial burden is with the movant to "point to those portions of the record that demonstrate an absence of a genuine issue of material fact given the relevant substantive law."*Thomas v. Wichita Coca-Cola Bottling Co.,* 968 F.2d 1022, 1024 (10th Cir.), *cert. denied,*506 U.S. 1013 (1992). If this burden is met, the nonmovant must "set forth specific facts' that would be admissible in evidence in the event of trial from which a rational trier of fact could find for the nonmovant."*Adler v. Wal-Mart Stores, Inc.,* 144 F.3d 664, 671 (10th Cir.1998). (citations omitted)."To accomplish this, the facts must be identified by reference to affidavits, deposition transcripts, or specific exhibits incorporated therein."*Id.* A party relying on only conclusory allegations cannot defeat a properly supported motion for summary judgment. *White v. York Intern. Corp.,* 45 F.3d 357, 363 (10th Cir.1995)."It is well settled in this circuit that we can consider only admissible evidence in reviewing an order granting summary judgment."*Gross v. Burggraf Constr. Co.,* 53 F.3d 1531, 1541 (10th Cir.1995). The nonmovant's bur-

den is more than a simple showing of "some metaphysical doubt as to the material facts ."*Matsushita,* 475 U.S. at 586. "All material facts set forth in the statement of the movant shall be deemed admitted for the purpose of summary judgment unless specifically controverted by the statement of the opposing party."*Vasquez v. Ybarra,* 150 F.Supp.2d 1157, 1160 (D.Kan.2001) (citing *See Gullickson v. Southwest Airlines Pilots' Ass'n,* 87 F.3d 1176, 1183 (10th Cir.1996) (applying local rules of District of Utah)); see also D. Kan. Rule 56.1(b)(1).

STATEMENT OF UNCONTROVERTED FACTS

***2** 1. Dodson International Parts, Inc. ("Dodson, Inc.") is a privately owned Kansas corporation formed in 1984 to operate as an aviation salvage business buying and selling used and salvaged aircraft parts. Robert Lee Dodson, Jr. is the President of Dodson, Inc. At all times relevant to this lawsuit, Phil Altendorf was the President of Dodson, Inc.'s helicopter division, and Jeff Altendorf was Vice-President of the same division. Phil and Jeff are the stepbrothers of Robert Lee Dodson, Jr.

2. Prior to 1998 and through the dates of the transactions alleged in this lawsuit, MRP Enterprises, Inc. was doing business as Action Aircraft Parts and was a customer of Dodson, Inc. Mary and Jerry Hiatt were the officers and shareholders of MRP Enterprises, Inc. and owned 55% and 45% of the shares respectively. In 2002, MRP Enterprises, Inc. converted into Action Aircraft, L.P. (It is a controverted fact whether the plaintiff was on notice that the defendants were acting in a corporate capacity when they participated in the transactions.)

3. At all times relevant to the transactions alleged in this lawsuit, Mary and Jerry Hiatt knew that Phil and Jeff Altendorf were employees of Dodson, Inc. and that they were in charge of Dodson, Inc.'s helicopter division.

4. An important part of Dodson, Inc.'s business was to submit salvage bids on damaged or downed fixed wing aircraft and helicopters. In locating them, Dodson, Inc. relied primarily on invitations or solicitations from insurers or owners of the damaged or downed aircraft and helicopters. (The plaintiff has not come forth with evidence supported by a proper foundation to establish that the solicitations were "based upon the relationship, trust, and reputation that Dodson, Inc. had developed over the years.") It was Dodson, Inc.'s business practice that upon receipt of a bid solicitation or offer to sale it would send one or more employees, including Phil and Jeff Altendorf, to the site of the aircraft or helicopter. The employees would inspect and determine the condition of the aircraft or helicopter and advise Robert Lee Dodson, Jr. or others with the plaintiff whether to submit a bid and what amount to bid.

5. If its bid was accepted, Dodson then either salvaged the parts or had the parts repaired and restored before selling. (The record provided in the summary judgment filings do not establish as an uncontroverted fact that the plaintiff purchased, repaired and sold whole aircraft and/or helicopters as part of its business).

6. Action Aircraft Parts did not receive solicitations for bids or offers to sale from insurance companies. Nor was it in the business of buying complete aircraft.

7. As employees in charge of the plaintiff's helicopter division, Phil and Jeff Altendorf were responsible for locating and purchasing aircraft for the plaintiff, receiving solicitations or offers from insurers and owners and forwarding them to Dodson, Inc., and selling certain helicopter inventory of the plaintiff.

***3** 8. In 1998, while still employed by Dodson, Inc., Phil and Jeff Altendorf formed a limited liability company, Circle H, L.L.C., without the knowledge, approval, authorization or consent of Robert Lee Dodson, Jr. or the plaintiff. On their own and through Circle H, Phil and Jeff Altendorf entered into business transactions and/or relationships with

the defendants.

C-20-R Engine

9. Phil Altendorf went to Korea to pick up a Bell 214B aircraft that the plaintiff had purchased from the insurance company, Lloyds of London. In retrieving the aircraft and its logbooks, he dealt with Jong Sub Lee, an employee of Hongick Air Service, which was the prior owner of the aircraft. While talking with Mr. Lee, Phil Altendorf learned that Hongick also had a C-20-R engine for sale.

10. Phil Altendorf testified that he negotiated and purchased the C-20-R engine for Circle H, that the defendants did not provide any of the purchase price, and that the defendants did not know of the engine until after he had completed the purchase.

11. By at least January of 1998, Phil Altendorf and/or Altendorf Investments and/or Circle H placed the engine on consignment with Action Aircraft Parts. When the engine was later sold, the net sale proceeds were split with 70% or $56,150.60 going to Phil Altendorf and/or his business entities and 30% or $30,914.26 going to Action Aircraft Parts.

12. At the time of this transaction, Mary and Jerry Hiatt knew Phil Altendorf was employed by the plaintiff and further knew his duties included the location of helicopters and parts for resale by the plaintiff.

C-30-P Engine-Serial No. 895671

13. No later than January 15, 1998, the plaintiff sold to Action Aircraft Parts a C-30-P helicopter engine for $50,000. Phil Altendorf was the employee who negotiated and completed the sale on behalf of the plaintiff.

14. When he learned in January of 1998 of this sale, Robert Dodson Jr. was upset with Phil Altendorf for selling the engine for only $50,000. Robert Dodson, Jr. believed the C-30-P engine was worth $75,000 when it was sold.

15. Action Aircraft Parts subsequently sold the engine for approximately $80,000 to Northern Turbine Services. Because Phil Altendorf had provided the defendants with the referral of Northern Turbine Services, the defendants paid him a commission of $15,000 on January 16, 1998. Only after the taking of Mary Hiatt's deposition did the plaintiff learn that the $15,000 paid to Phil Altendorf was a sales referral commission.

16. Robert Dodson Jr. avers that Northern Turbine Services was one of the plaintiff's existing customers prior to 1998. Phil Altendorf testified he had no recollection of ever selling anything to Northern Turbine Services but that he was not involved in sales and that he never personally handled any deals with Northern Turbine Services.

17. At the time of this transaction, Mary and Jerry Hiatt knew Phil Altendorf was employed by the plaintiff and further knew his duties included selling aircraft parts.

Bell 212 Transmission

***4** 18. In July of 1998, as evidenced by the defendant's purchase order, Action Aircraft Parts purchased a Bell 212 transmission from the plaintiff through Phil Altendorf. Based on the manual, Phil Altendorf considered the transmission to be scrap with little value and believed that $3,000 was a good selling price. In November of 1998, the plaintiff invoiced Action Aircraft Parts for $3,000 for the transmission.

19. After the defendants purchased the transmission, they had it inspected and tested by another company which determined that the transmission was repairable and not scrap. In August of 1998, Action Aircraft Parts sold the transmission to Eagle Copters for $90,000. Phil Altendorf and/or Circle H provided the defendants with the sales referral of Eagle Copters, and the defendants paid them commissions of $34,501.50 in August and $7,500 in

November for this referral. (The plaintiff argues the Altendorfs knew the transmission was not scrap or they would not have been entitled to any commissions for the sales referral.)

20. At the time of this transaction, Mary and Jerry Hiatt knew Phil Altendorf was employed by the plaintiff and further knew his duties included selling aircraft parts.

C-47 Engine

21. The plaintiff purchased a Bell 407 helicopter from Interamericana de Seguros, S.A., for a total of $170,000 on December 19, 1997. This helicopter consisted of the airframe, a C-47 engine, rotor brake, particle separator, VHF provisions, transponder, radio, and dual controls.

22. At least one month before the plaintiff's purchase, Phil Altendorf contacted Jerry Hiatt of Action Aircraft Parts about purchasing the C-47 engine and received an offer for $170,000. Phil Altendorf did not contact any other customers about purchasing the engine and had not received any other offers. It was necessary in this transaction to "presell" the parts of the Bell 407 to help with financing the purchase. At least one month prior to December 19, 1997, the plaintiff accepted Action Aircraft Parts's offer and verbally agreed to sell it the C-47 engine for $170,000. The purchase was completed on January 13, 1998.

23. Action Aircraft Parts sold the C-47 engine to International Turbine Parts for $230,000. Because Phil Altendorf and/or Circle H provided the defendants with the sales referral of International Turbine Parts, Altendorf or Circle H received a sales commission on January 14, 1998, for $30,000. International Turbine Parts was an existing customer of the plaintiff.

24. At the time of this transaction, Mary and Jerry Hiatt knew Phil Altendorf was employed by the plaintiff and further knew his duties included selling aircraft parts.

C-30-P Engine-Serial No. 895654

25. The defendants learned from their Mexican contacts that a C-30-P engine was for sale. Jerry Hiatt contacted Phil Altendorf about this opportunity. In December of 1998, the defendants purchased this C-30-P engine from Compos Sui for $50,275.00. The Altendorfs and/or Circle H contributed one-half of the purchase price. When the defendants then sold the engine, they split the profits of $63,350.36 with the Altendorfs. At the time of this transaction, Mary and Jerry Hiatt knew the plaintiff employed Phil Altendorf as president of its helicopter division with duties that included locating helicopters and parts for resale.

Two C-30-S Engines

***5** 26. In May of 1999, the plaintiff purchased from Nordic Air Claims a S-76 helicopter that had two C-30-S engines. Sometime prior to this purchase, Phil Altendorf for the plaintiff had "presold" or had verbally agreed to sell the two engines to the defendants for $145,000. Phil Altendorf contacted only the defendants about the purchase of these engines and had received no other offers.

27. In July of 1999, the plaintiff completed the sale of the two engines to the defendants for $145,000. Robert Dodson, Jr. authorized Phil Altendorf to sell the engines for $175,000, and when he learned in July of 1999 that the selling price was $145,000, he chastised Phil Altendorf.

28. On or about July 13, 1999, the defendants sold the two engines to Rotocraft Technologies for $230,000. The defendants paid Phil Altendorf and/or Circle H a commission of $21,250 for the referral of this customer. At the time of this transaction, Mary and Jerry Hiatt knew the plaintiff employed Phil Altendorf as president of its helicopter division with duties that included sales.

Fair Market Value

29. The defendants submit a written report from their expert witness who opines that the fair market value of the C-30-P and C-30-S engines was no more than $30,000 each and that the fair market value of the C-47 engine was no more than $50,000. The plaintiff argues the expert's opinion on fair market value is controverted by the actual selling prices that the defendants were able to obtain on these engines.

30. Phil Altendorf testified that Robert Dodson, Jr. approved all bids and approved those sales that exceeded a certain amount and that this amount fluctuated with the condition of the company.

PLAINTIFF'S CLAIMS

For each of these six transactions discussed above, the plaintiff asserts the following legal theories of recovery: (1) conspiracy to participate in a breach of trust; (2) unfair competition; (3) tortious interference with prospective business advantage and employment relationship; (4) fraud by silence; (5) unjust enrichment; and (6) participation in the Altendorfs' breach of fiduciary duty.

STATUTE OF LIMITATIONS

LENGTH

The parties agree the two-year statute of limitations in K.S.A. 60-513 govern the different theories except the theory of unjust enrichment. The defendants argue the three-year limitations period in K.S.A. 60-512 governs the unjust enrichment theory, while the plaintiff advocates the four-year provision found in K.S.A. 84-2-725. The court will apply the three-year limitation period of K.S.A. 60-512 to the unjust enrichment theory, as two of the alleged transactions do not involve any sale arrangement between the plaintiff and the defendants and as the remaining transactions turn on allegations sounding more in tort for unjust enrichment than in any breach of a contract for sale and recovery for that breach. *See Socophi S.P.R.L. v. Airport Systems International, Inc.,* 2001 WL 474301, at *4 (D.Kan. Apr. 19, 2001), *aff'd,*30 Fed. Appx. 862, 2002 WL 220604 (10th Cir. Feb. 13, 2002); *Atlas Industries, Inc. v. National Cash Register Co.,* 216 Kan. 213, 217, 531 P.2d 41 (1975).

ACCRUAL

***6** A statute of limitations begins to run when a claim accrues. *Pancake House, Inc. v. Redmond,* 239 Kan. 83, 87, 716 P.2d 575 (1986). For those causes of actions covered by K.S.A. 60-513, they are not deemed to have accrued:

until the act giving rise to the cause of action first causes substantial injury, or, if the fact of injury is not reasonably ascertainable until some time after the initial act, then the period of limitation shall not commence until the fact of injury becomes reasonably ascertainable to the injured party, but in no event shall an action be commenced more than 10 years beyond the time of the act giving rise to the cause of action.

K.S.A. 60-513(b). Kansas courts construe the phrase, "substantial injury," to mean "actionable injury." *Roe v. Diefendorf,* 236 Kan. 218, Syl. ¶ 2, 689 P.2d 855 (1984)."The rule which has developed is: The statute of limitations starts to run in a tort action at the time a negligent act causes injury if both the act and the resulting injury are reasonably ascertainable by the injured person."*Id.* at 222."[T]he term 'reasonably ascertainable,' ..., suggests an objective standard based upon an examination of the surrounding circumstances."*P.W.P. v. L.S.,* 266 Kan. 417, 425, 969 P.2d 896 (1998)."Inherent in 'to ascertain' is 'to investigate.' " *Davidson v. Denning,* 259 Kan. 659, 675, 914 P.2d 936 (1996). When there is reason to suspect a wrongful act and when there exists information "that is available through a reasonable investigation of sources" from which the wrongful act can be determined, the limitations period will start. *Id.* at 675-76.In short, "Kansas 'fact of injury' standard

postpones the running of the limitations period until the time the plaintiff is able to determine that her injury may be caused by some act of the defendant." *Benne v. International Business Machines Corp.,* 87 F.3d 419, 427 (10th Cir.1996).

The use of "substantial injury" in K.S.A. 60-513(b) is not intended to require that a plaintiff must have knowledge of the full extent of his injuries before the statute of limitations commences. *Roe v. Diefendorf,* 236 Kan. at 222. It does require that the plaintiff experience a "sufficient ascertainable injury [as] to justify an action for recovery of the damages."*Id.* The extent of the injury is legally irrelevant, for a plaintiff is entitled to recover so long as "the injury is the fault of another. *Id.*"The true test to determine when an action accrues is that point in time at which the plaintiff could first have filed and prosecuted his action to a successful conclusion."*Kansas Public Employees Retirement System v. Reimer & Koger Assocs., Inc.,* 262 Kan. 110, 116, 936 P.2d 714 (1997) (quoting *Pancake House, Inc.,* 239 Kan. at 87).

If after examining all the surrounding circumstances, the court finds the evidence in dispute over when plaintiff's injury became reasonably ascertainable as so defined above, then the issue is one for the jury.*Gilger v. Lee Const., Inc.,* 249 Kan. 307, 311, 820 P.2d 390 (1991). On the other hand, if no genuine issues of material fact surround the onset date of the plaintiff's injury, then summary judgment is appropriate. *Id.*

***7** The statute of limitations for fraud begins to run when "the fraud is discovered." K.S.A. § 60-513(a)(3). Discovery has been said to occur when the injured party gains actual knowledge of the fraud or when the fraud could have been discovered with reasonable diligence. *Augusta Bank & Trust v. Broomfield,* 231 Kan. 52, 62-63, 643 P.2d 100 (1982). Mere suspicion of wrong is not sufficient. *Id.* A person must be aware of enough facts indicating fraud that a reasonably prudent person would investigate. *See Wolf v. Brungardt,* 215 Kan. 272, 281, 524 P.2d 726 (1974). Further, the Kansas Supreme Court has explained that while a party's suspicions may have been aroused, that party "may be lulled into confidence by certain representations and forego any further investigation."*Broomfield,* 231 Kan. at 63 (citation omitted). Because the statute of limitations is still not triggered until the claim accrues, a plaintiff alleging fraud must file the action within two years of discovering the fraud if an ascertainable injury was suffered at the time and if none was, then within two years of when a substantial injury resulting from the fraud is reasonably ascertainable. *Bryson v. Wichita State University,* 19 Kan.App.2d 1104, 1107, 880 P.2d 800,*rev. denied,*256 Kan. 994 (1994).

For the unjust enrichment theory under K.S.A. 60-512, the claim accrues when the elements are present and the plaintiff could have filed and maintained a successful suit. *Pancake House, Inc.,* 239 Kan. at 87. The basic elements of unjust enrichment are: (1) the plaintiff conferred a benefit on the defendant; (2) the defendant knows of or appreciates the benefit received; and (3) the defendant accepts or retains the benefit under circumstances that make it inequitable. *Haz-Mat Response, Inc. v. Certified Waste Services Ltd.,* 259 Kan. 166, 177, 910 P.2d 839 (1996).

ARGUMENT AND ANALYSIS

C-30-P Engine, Serial No. 895671

The defendants argue that the plaintiff had actual notice of its injury by no later than January 1998 when Robert Dodson, Jr. learned that Phil Altendorf had sold this engine to Action Aircraft for $50,000 which was $25,000 less than what Dodson believed the engine was worth. The defendants alternatively contend this knowledge was enough to prompt a reasonable person to inquire further as to why this engine was sold for this price. The plaintiff counters that this sale to Action Aircraft Parts, one of the plaintiff's existing customers, revealed nothing wrong and raised no suspicion of

wrongdoing by Action Aircraft Parts. The plaintiff further points out that the defendants offer no uncontroverted facts to establish the plaintiff's knowledge of the defendants separately transacting business with the Alterndorfs or paying commission fees or sales referral fees to the Altendorfs.

It is true that in January of 1998 the plaintiff believed it had lost $25,000 on the sale of engine, but this uncontroverted fact alone does not establish as a matter of law that the plaintiff was able to determine this loss was caused by some act of the defendants rather than simply the poor business judgment of the plaintiff's own employee. The defendants have not carried their burden in this summary judgment proceeding of proving that the plaintiff had reason to suspect the defendants of wrongdoing and that the plaintiff through a reasonable investigation of sources would have determined or discovered the defendants' wrongful actions more than two years prior to filing this suit. The court denies summary judgment on this ground.

Two C-30-S Engines

***8** Concerning this transaction, the defendants seek summary judgment on all claims governed by a two-year statute of limitations. The defendants argue Robert Dodson, Jr. knew no later than July 1999 that the plaintiff had been injured because Phil Altendorf had sold these engines for $145,000 which was $30,000 less than Dodson's approved sales price. Alternatively, the defendants insist the injury was reasonably ascertainable. Similar to its position on the C-30-P engine, the plaintiff points to the fact that a sale of engines to an existing customer reveals nothing wrong on its face and raises no suspicion of wrongdoing on the part of Action Aircraft Parts. The plaintiff also highlights the defendants' failure to offer any uncontroverted facts establishing that the plaintiff knew or should have known more than two years before filing this action that the defendants had engaged in separate transactions with the Alterndorfs or paid commission fees or sales referral fees to the Altendorfs.

Like the C-30-P engine claims, the court is not persuaded that the defendants have sustained their summary judgment burden on the two C-30-S engine claims. There are genuine issues of material fact concerning whether the plaintiff had reason to suspect the defendants of wrongdoing and whether the plaintiff through a reasonable investigation of sources would have determined or discovered the defendants' wrongful actions more than two years prior to filing this suit. The court denies summary judgment on this argument.

Unjust Enrichment

For the reasons stated above, the court applies the three-year statute of limitations of K.S.A. 60-512 to the plaintiff's claims on this theory. To avoid the bar of this shorter limitations period, the plaintiff argues the defendants were existing customers and are subject to running account exception found in *Sheldon Grain & Feed Co. v. Schuetz,* 207 Kan. 108, 109 483 P.2d 1033 (1971), which is expressed in these terms:

Items of a mutual, open, running account which are within the period of the statute of limitations draw after them items beyond that period. In such cases, the statute of limitation does not run against each item separately, but only against the balance due. It commences to run from the time the last item is rightfully credited to the party against whom the balance is due. (citations omitted). In such case the last item so credited to the party against whom the balance is due is not payment of any particular item against him, but is in a sense treated as part payment of every item rightfully charged against him in the entire account.

207 Kan. at 109. There are no facts of record to support applying this exception here. The plaintiff offers no proof that a mutual, open running account with the defendants was used in the transactions alleged in this case. Nor is there proof of a charge to that account within the limitations period. Thus, the uncontroverted facts appearing in the defendants'

motion establish they are entitled to summary judgment on the plaintiff's unjust enrichment theory on all claims except for the two C-30-S engines.

TORTIOUS INTERFERENCE WITH PROSPECTIVE ECONOMIC ADVANTAGE

Theory and Claim

***9** The plaintiff pleads this as a theory of recovery for each of its claims. As alleged in the pretrial order, this theory is first alleged in the factual contentions as the defendants having "tortiously interfered with Plaintiff's employment contracts and relationships with the Altendorfs and prospective business advantage ."(Dk.76, p. 8). Later in the "Theories of Recovery" section, this theory is alleged in these terms: "The Defendants tortiously interfered with Plaintiff's contractual relationship with the Altendorfs and with Plaintiff's prospective economic advantages by using Plaintiff's employees to divert Plaintiff's business opportunities to Defendants, and Plaintiff was damaged because it lost business opportunities and profits."(Dk.76, p. 21). Finally, as to this particular theory of recovery for tortious interference with prospective business advantage and employment relationship, the pretrial order lays out the essential elements and includes the issues of fact related to this theory. (Dk.76, pp. 35-42).

Governing Law

"Kansas law recognizes that one who, without justification, induces or causes the breach of a contract to which it is not a party will be answerable for damages caused thereby."*Classic Communications v. Rural Telephone Service Co., Inc.,* 956 F.Supp. 910, 921 (D.Kan.1997) (citing *Turner v. Halliburton Co.,* 240 Kan. 1, 722 P.2d 1106 (1986)). The plaintiff must prove the following five elements to recover:

1. The existence of a contract between the plaintiff and a third party;

2. The defendant's knowledge thereof;

3. The defendant's intentional procurement of the contract's breach;

4. The absence of justification for procuring the breach; and

5. Damages resulting from the breach.

L & M Enterprises, Inc. v. Bei Sensors & Systems, Co., 45 F.Supp.2d 879, 886 (D.Kan.1999) (citations omitted), *aff'd,*231 F .3d 1284 (10th Cir.2000).

Kansas law likewise recognizes a claim for tortious interference with a prospective business advantage. *See Noller v. GMC Truck & Coach Div.,* 244 Kan. 612, 620, 772 P.2d 271 (1989) (citing *Turner v. Halliburton Co.,* 240 Kan. at 12). The plaintiff's burden consists of five elements:

(1) the existence of a business relationship or expectancy with the probability of future economic benefit to the plaintiff; (2) knowledge of the relationship or expectancy by the defendant; (3) that, except for the conduct of the defendant, plaintiff was reasonably certain to have continued the relationship or realized the expectancy; (4) intentional misconduct by defendant; and (5) damages suffered by plaintiff as a direct or proximate result of defendant's misconduct.

Macke Laundry Service Ltd. Partnership v. Mission Associates, Ltd., 19 Kan.App.2d 553, 561, 873 P.2d 219 (quoting *Turner,* 240 Kan. at 12),*rev. denied,*255 Kan. 1002 (1994)

Based on what appears in the pretrial order, the court construes plaintiff's theory as both a claim for tortious interference with the employment contract of the Altendorfs and tortious interference with prospective business advantage. Although "these torts tend to merge somewhat in the ordinary course, the former is aimed at preserving existing contracts and the latter at protecting future or potential contractual relations."*Turner v. Halliburton Co.,* 240 Kan. at 12.

Arguments

C-20-R Engine

***10** The defendants argue the plaintiff is unable to prove that it had any business relationship or expectancy with Mr. Lee or Hongick Air Service Company, that the defendants knew of this relationship or expectancy, that any such relationship or expectancy was reasonably certain to continue but for the defendants' conduct, that the defendants engaged in any intentional misconduct, or that the plaintiff suffered damages as a result of the defendants' conduct. Saying the defendants have misstated its claim, the plaintiff points to its employment relationship with Phil Altendorf, to Altendorf' duties to locate helicopters and parts for resale, to the plaintiff's business expectancy that while Altendorf was in Korea on behalf of the plaintiff that he would present the engine as a business opportunity for the plaintiff, and to the defendants' knowledge of Phil Altendorf's relationship and responsibilities to the plaintiff.

C-47 Engine

Relying on their agreement to purchase this engine for $170,000 prior to the plaintiff ever bidding on and purchasing the helicopter and also relying on Phil Altendorf's decision to contact only the defendants for a bid on the engine, the defendants say the plaintiff cannot prove any expectancy or relationship between it and the International Turbine Service, the company which later purchased the engine from the defendants. The plaintiff responds that it had a business expectancy that its employee, Phil Altendorf would solicit the highest bid from all of its customers and not accept a low bid in order to obtain a larger referral fee from the defendant.

Two C-30-S Engines

Relying on facts similar to the C-47 Engine situation, the defendants argue the same position that the plaintiff cannot prove an expectancy or relationship with Rotorcraft Technologies, the company which purchased the engines from the defendants. The plaintiff similarly responds that it had a business expectancy in Phil Altendorf soliciting the highest bid for the engines and not engaging in a secret transaction with the defendants.

Analysis

The plaintiff accuses the defendants of "misstat[ing]" its claim of tortious interference and offers that its claim is "for tortious interference with prospective business advantage and employment relationship."(Dk.75, p. 20). It appears, however, from its response to the defendants' arguments, that the plaintiff has overstated its tortious interference claim on these transactions. The plaintiff neither articulates nor offers evidence of a business relationship or expectancy with the seller of C-20-R engine or with the eventual purchasers of C-47 engine and the two C-30-S engines. In each instance, the plaintiff's brief relied on its relationship and contractual expectancy in Phil Altendorf as an officer and employee of the plaintiff. Consequently, the defendants are entitled to summary judgment on the plaintiffs' theory of tortious interference with prospective business advantage concerning these three transactions. As far as summary judgment on the plaintiff's theory of tortious interference with Altendorfs' employment contract, the court need not concern itself with this theory, because the defendants' motion does not address it.

UNJUST ENRICHMENT

***11** Only one claim, the two C-30-S engines, is not barred by the three statute of limitations applicable to this theory. As previously stated, the elements of this theory are: (1) the plaintiff conferred a benefit on the defendant; (2) the defendant knows of or appreciates the benefit received; and (3) the defendant accepts or retains the benefit under circumstances

that make it inequitable. *Haz-Mat Response, Inc. v. Certified Waste Services Ltd.,* 259 Kan. at 177.

Arguments and Analysis

The defendants ask for summary judgment arguing that the circumstances are not inequitable for them to accept and retain the profit from buying the engines for $145,000 from the plaintiff and then selling the same engines for $230,000 to Rotocraft Technologies. The defendants emphasize that Phil Altendorf accepted their bid without seeking other bids and agreed to sell the engines before ever purchasing the helicopter in order to finance the purchase. Having provided the plaintiff with the funds for purchasing the helicopter, the defendants doubt that their subsequent profit from selling the engines could be termed inequitable.

The plaintiff counters that the inequitable circumstances are established by the defendants' complicity in the Altendorfs' wrongdoing of selling the engines for less than their value and in providing the defendants with a sales referral that earned him a commission of $21,250. "If the transaction had been arms length, there would have been no need for the Defendants to agree or to pay the Altendorfs a sales referral fee."(Dk.75, p. 30).

Based on the summary judgment record, the court is unable to say as a matter of law that the circumstances of this transaction are equitable. There are questions of material fact as to whether the plaintiff needed to sell the engines to finance its purchase of the helicopter, what was the fair market value of the engines, and whether the defendants so participated in or encouraged the Altendorfs' alleged wrongdoing. The defendants have not shown they are entitled to summary judgment on this claim.

FRAUD BY SILENCE

Governing Law

Under Kansas law, a plaintiff claiming fraud by silence must prove the following by clear and convincing evidence:

(1) that defendant had knowledge of material facts which plaintiff did not have and which plaintiff could not have discovered by the exercise of reasonable diligence; (2) that defendant was under an obligation to communicate the material facts to the plaintiff; (3) that defendant intentionally failed to communicate to plaintiff the material facts; (4) that plaintiff justifiably relied on defendant to communicate the material facts to plaintiff; and (5) that plaintiff sustained damages as a result of defendant's failure to communicate the material facts to the plaintiff.

Miller v. Sloan, Listrom, Eisenbarth, Sloan and Glassman, 267 Kan. 245, 978 P.2d 922 (1999) (citations omitted). The critical element to prove is that the defendant was under an obligation to communicate material facts to the plaintiff. *DuShane v. Union Nat'l Bank,* 223 Kan. 755, 760, 576 P.2d 674, 678-79 (1978); *OMI Holdings, Inc. v. Howell,* 260 Kan. 305, 345, 918 P.2d 1274, 1299 (1996)."Suppression of a material fact is not fraudulent unless the silent party is under some legal obligation to disclose."*Flight Concepts Ltd. Partnership v. Boeing Co.,* 38 F.3d 1152, 1158 (10th Cir.1994) (citation omitted). The question of what gives rise to a legal or equitable obligation to communicate is not always an easy question to resolve, but generally the duty must arise from a relationship existing between the parties when the suppression or concealment is alleged to have occurred." *DuShane,* 223 Kan. at 760. The obligation to disclose generally may arise in two situations: "(1) a contracting party who has superior knowledge, or knowledge that is not within the reasonable reach of the other party, has a legal duty to disclose information material to the bargain; and (2) parties in a fiduciary relationship must disclose material information to one another."*Zhu v. Countrywide Realty, Co., Inc.,* 165 F.Supp.2d 1181, 1202 (D.Kan.2001) (quoting *Plastic Packaging Corp. v.*

Sun Chemical Corp., 136 F.Supp.2d 1201, 1205 (D.Kan.2001) (citing *DuShane v. Union Nat'l Bank,* 223 Kan. at 760;*Denison State Bank v. Madeira,* 230 Kan. 684, 691-93, 640 P.2d 1235 (1982)); *see OMI Holdings, Inc. v. Howell,* 260 Kan. 305, 347, 918 P.2d 1274 (1996) (Equity and good conscience alone are not enough to impose a duty to disclose, but a duty may arise when the party " 'knows that the other is about to enter into the transaction under mistake as to such facts, and that the other, because of relationship between them, the customs in trade, or other objective circumstances, would reasonably expect disclosure of such facts.' " (quoting *Boegel v. Colorado Nat. Bank of Denver,* 18 Kan.App.2d 546, 560, 857 P.2d 1362,*rev. denied,*253 Kan. 856 (1993)). The determination of any contractual or fiduciary duty to disclose is based on the facts and circumstances of each case. *Plastic Packaging Corp,* 136 F.Supp.2d at 1205 (citing *Ensminger v. Terminix Intern. Co.,* 102 F.3d 1571, 1574 (10th Cir.1996)).

Arguments and Analysis

C-20-R Engine and C-30-P Engine (Serial No. 895654)

***12** The defendants assert the plaintiff is unable to establish any obligation on their part to disclose material facts about these transactions. It is uncontroverted that Phil Altendorf purchased the C-20-R engine without assistance from the defendants and that the defendants did not know of this engine until after Altendorf had purchased it. The plaintiff was not a party to or involved in Altendorf's consignment transaction with the defendants. Concerning the C-30-P engine, the defendants and the Altendorfs purchased this engine from Compos Sui, and the plaintiff had no interest in the engine and was not party or otherwise involved with the transaction. Thus, as to both transactions, the plaintiff and the defendants had no relationship, contractual or fiduciary, with respect to the purchase or the sale of those engines.

In response, the plaintiff does not attempt to articulate any factual or legal basis for a relationship arising out of either transaction. The plaintiff, instead, points to the defendants' knowledge of Altendorfs' employment with the plaintiff and the defendants' choice not to communicate Altendorfs' fraudulent activity to the plaintiff. The plaintiff's contention is a vague effort to create a duty to disclose from equity or good conscience. That the defendants had been customers of the plaintiff in other transactions and had gained knowledge of the plaintiff's operations as a result are not circumstances creating a relationship which Kansas courts have recognized as including a legal duty to disclose about other transactions to which the plaintiff was not a party. From the uncontroverted facts concerning these two transactions, it appears the plaintiff is unable to articulate an obligation on the defendants' part to disclose material facts. The defendants are entitled to summary judgment on the theory of fraud by silence on the claims of the C-20-R engine and the C-30-P engine (Serial No. 895654).

UNFAIR COMPETITION

The defendants contend the plaintiff's claims of unfair competition are not cognizable in Kansas, because they are outside the realm of intellectual property law. The defendants rely on *Altrutech, Inc. v. Hooper Holmes, Inc.,* 1998 WL 398231, at *2-*3 (D.Kan. Jan. 26, 1998), and *Wichita Clinic v. Columbia/HCA Healthcare Corp.,* 45 F.Supp.2d 1164 (D.Kan.1999), for the rule that the tort of unfair competition in Kansas applies only to claims of misuse of intellectual property. Because the plaintiff's claim here does not involve intellectual property, the defendants ask for summary judgment on this claim.

The plaintiff responds that the federal district courts in Kansas are divided on this issue and that another federal district court judge has predicted that the

Kansas Supreme Court would "allow an unfair competition claim based on misuse of trade secrets and other confidential business information."*Airport Systems Intern., Inc. v. Airsys. ATM, Inc.,* 144 F.Supp.2d 1268, 1270 (D.Kan.2001). The plaintiff characterizing its unfair competition claims as "arising out of the use of confidential business information provided by the Altendorfs."(Dk.75, p. 32).

***13** The court need not decide on which side of this issue it would come down, for the plaintiff has not pleaded a claim of unfair competition based on the misuse of confidential information. The theory of unfair competition set forth in the pretrial order does not include any issue of fact that the defendants misused the plaintiff's confidential business information. Instead, the pretrial order simply states that the defendants and Altendorfs engaged in the different transactions "for the purpose and in such a way as to be unfair and detrimental to Plaintiff."(Dk.76, p. 32). In articulating its burden of proof under this theory, the plaintiff asserts it need only prove that "[t]he business transactions entered into between Defendants and the Altendorfs as officers and employees of Plaintiff, were intentionally entered for the purpose and in such a way as to be unfair and detrimental to Plaintiff."*Id.* Having never pleaded an unfair competition theory based on the misuse of confidential information, the plaintiff cannot avoid summary judgment. The defendants are entitled to summary judgment on this theory of recovery.

RATIFICATION

The defendants argue the plaintiff is unable to recover on any theory on its claims for the C-30-P (Serial No. 895671) and the two C-30-S engines, because it ratified both transactions when instead of repudiating Phil Altendorf's unauthorized sales to the defendants it retained the sale proceeds. The plaintiff counters that its failure to repudiate either transaction is not ratification, as the plaintiff did not know of the secret arrangements between the Altendorfs and the defendants that resulted in Altendorfs being paid a commission fee for making a sales referral.

Kansas law on "ratification holds that upon acquiring knowledge of an agent's unauthorized act, a principal should promptly repudiate the act; otherwise it will be presumed that he has ratified and affirmed the act."*BioCore, Inc. v. Khosrowshahi,* 41 F.Supp.2d 1214, 1231-1232 (D.Kan.1999) (citing *Schraft v. Leis,* 236 Kan. 28, 37, 686 P.2d 865 (1984)). Ratification can occur either by the acceptance of benefits or by the failure to repudiate the transaction.*Vanier v. Ponsoldt,* 251 Kan. 88, 106, 833 P.2d 949 (1992). In defining ratification, Kansas law emphasizes that it is "the acceptance of the result of an act with an intent to ratify, and with full knowledge of all the material circumstances ."*Prather v. Colorado Oil & Gas Corp.,* 218 Kan. 111, 117, 542 P .2d 297 (1975)[FN1] (citations omitted); *see E.F. Corp. v. Smith,* 496 F.2d 826, 829 (10th Cir.1974) ("For ratification to be efficacious, it must be made with knowledge of the material facts"); *Clark v. Associates Commercial Corp.,* 149 F.R.D. 629, 635 (D.Kan.1993) ("acceptance of benefits is not ratification if principal does not have knowledge of the material facts surrounding the transaction" (quoting 3 Am.Jur.2d *Agency* § 195 (rev. ed.1986)). A fuller statement of this rule is found in an earlier decision from the Kansas Supreme Court:

> FN1. The Court found that plaintiff did not have the intent to ratify when he accepted the sublease deposit refund check. 218 Kan. at 117. The plaintiff "was falsely told he had no contract, and believing the representation to be true he responded as if he had no valid sublease."*Id.*

***14** As a general rule, in order that a ratification of an unauthorized act or transaction of an agent may be valid and binding, it is essential that the principal have full knowledge, at the time of the ratification, of all material facts and circumstances relative to the unauthorized act or transaction, or that some

one authorized to represent the principal, except the agent, have such knowledge, unless the principal is willfully ignorant or purposely refrains from seeking information.
Allison v. Borer, 131 Kan. 699, 704, 293 Pac. 769 (1930) (quoting 2 C.J. 476, 477). The intent of the party who is alleged to have ratified an act is generally a question of fact for the jury. *Cherryvale Grain Co. v. First State Bank of Edna,* 25 Kan.App.2d 825, 830-31, 971 P.2d 1204 (1999).

There are genuine issues of material fact that preclude summary judgment on the issue of ratification. One issue is whether the plaintiff had sufficient knowledge of the material facts so as to be capable of ratifying the sale of the engines. Another is whether the plaintiff intended to ratify the sales regardless of any secret arrangements between the Altendorfs and the defendants. The court denies the defendants' motion for summary judgment on this ground.

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

As there appears to be no real benefit in analyzing the plaintiff's motion in detail, the court will not lengthen this order with a discussion of the plaintiff's claims and the genuine issues of material facts surrounding each claim. Simply put, the success of the plaintiff's motion depends largely upon resolving factual issues (*e.g.,* intent and agreement) on which the courts agree that summary judgment is generally inappropriate. Instead of coming forth with the evidence and arguments to show that its case is an exception to this general rule, the plaintiff's filings offer a cursory analysis of the elements and the relevant facts and relies only on inferences over which finders of fact could reasonably disagree. After reviewing the parties' memoranda, the court is satisfied that there are multiple genuine issues of material fact that preclude summary judgment on each of the plaintiff's claims. In addition, the court already has determined that genuine issues of material fact exist as to the defendants' challenges to the statutes of limitation and ratification. The court denies the plaintiff's motion for summary judgment.

IT IS THEREFORE ORDERED that the defendants' Motion for Partial Summary Judgment (Dk.70) is granted on the statute of limitations bar to the plaintiff's unjust enrichment theory on all claims except for the two C-30-S engines; on the theory of tortious interference with prospective business advantage on the claims concerning the C-20-R engine, the C-47 engine, and the two C-30-S engines; on the theory of fraud by silence on the claims concerning the C-20-R engine and the C-30-P engine (serial no. 895654); on the theory of unfair competition as to all claims; and it is denied in all other respects;

***15** IT IS FURTHER ORDERED that the plaintiff's motion for summary judgment (Dk.71) is denied.

D.Kan.,2003.
Dodson Intern. Parts, Inc. v. Hiatt
Not Reported in F.Supp.2d, 2003 WL 22327176 (D.Kan.)

END OF DOCUMENT

EXHIBIT H

Not Reported in Cal.Rptr.3d
Not Reported in Cal.Rptr.3d, 2005 WL 2293512 (Cal.App. 1 Dist.)
(Cite as: Not Reported in Cal.Rptr.3d, 2005 WL 2293512)

Heller Ehrman White & McAuliffe v. Price
Cal.App. 1 Dist.,2005.
Only the Westlaw citation is currently available.

California Rules of Court, rule 8.1115, restricts citation of unpublished opinions in California courts.

Court of Appeal, First District, Division 3, California.
HELLER EHRMAN WHITE & McAULIFFE,
Plaintiff and Appellant,
v.
Carol L. PRICE, Defendant and Respondent.
No. A106899.
(City and County of San Francisco Super. Ct. No. 418636).

Sept. 21, 2005.

Sean Michael SeLegue, Rogers, Joseph, O'Donnell & Phillips, San Francisco, CA, for Plaintiff-Appellant.
Charles M. Kagay, Spiegel Liao & Kagay, LLP, Bruce Jackson, Baker & Mckenzie, San Francisco, CA, for Defendant-Respondent.
PARRILLI, J.
***1** Heller Ehrman White & McAuliffe ("Heller Ehrman") sued Carol Price to enforce an alleged settlement agreement. Price cross-complained, seeking a declaratory judgment to establish there was no binding settlement. On cross-motions for summary judgment, the trial court ruled in Price's favor and entered judgment for her. We affirm.

BACKGROUND

In 1998, Price sued Heller Ehrman and other defendants for malpractice. In March 2000, she engaged the firm of Tehin & Partners to represent her in that lawsuit. In 2001, the trial court granted Heller Ehrman summary judgment on statute of limitations grounds. Price appealed. On June 28, 2002, the State Bar filed an application to have Nikolai Tehin and his wife and law partner Pamela Stevens involuntarily enrolled as inactive members of the Bar, based in part on accusations of misappropriating client funds. Price was not informed of this development.

On July 8, 2002, Heller Ehrman sent Tehin & Partners a written settlement offer, stating that if Price would dismiss her appeal and provide Heller Ehrman with a release before it had to prepare an appellate brief, Heller Ehrman would pay her $25,000 and waive its right to recover its costs. The offer was contingent upon obtaining a good faith determination and on Price "agreeing to do whatever is necessary to assist Heller in obtaining a good faith determination that will bar any potential claims for contribution or indemnity against Heller by the other defendants."

Christopher Miller, an attorney with the Tehin firm, advised Price in a July 22 fax to accept the offer because he did not believe her appeal would succeed. Price asked Miller to send her the documents on which Heller Ehrman obtained summary judgment. Miller did so, and reminded Price that her opening brief was due August 9. On August 1, Tehin advised the State Bar that he intended to withdraw his response to the charges against him, and offered to stipulate to enrollment as an inactive member of the Bar. The State Bar did not accept the stipulation. Tehin chose not to oppose the proceedings, which went on without his participation.

In early August, Price consulted with Thomas Clarke and Susan Handelman, attorneys at Ropers Majeski, who told her that her chances on appeal were not good. On August 8, she faxed Miller a letter, telling him Handelman had been unable to find any documentation in the record supporting her claim that she had sustained injury as a result of Heller Ehrman's malpractice in March 1997. Price said: "If there are, in fact, no facts in evidence supporting my pleading that I was not injured until ...

March 17, 1997 and that I did not discover my cause of action against Heller Ehrman until I was informed of the loss that had occurred on March 17 and was able to inquire why that loss had occurred, I have no alternative but to abandon hope of appeal and accept Heller's current offer.... [¶] If you can find any facts in evidence of my actual injury and my subsequent discovery of the cause of that injury, I wish to pursue the appeal with Sue Handelman.... [¶] I would appreciate very much your attention to the relevant missing information, so that my decision can be communicated to Heller Ehrman's attorneys in time to preserve their current offer."

***2** On August 9, Miller replied that he had sent Price all the documents supporting her showing on the summary judgment motion, and that it would make no difference to document an injury in March 1997 if the evidence established an earlier injury. Price responded the same day, saying she would still like to know if there were any facts supporting her claim of injury in March 1997. She stated: "You have asked for my decision again. I thought I made myself clear in my letter yesterday. If you can find one fact placed in evidence in the trial court substantiating my pleadings with respect to the harm I suffered in March and May, 1997 and my subsequent discovery of the cause of that harm, I wish to pursue an appeal. If you cannot find one such fact, then the best advice I have been able to obtain convinces me that an appeal would be unlikely (at best) to succeed and my decision would have to be to take Heller's offer.... [¶] I do not wish to jeopardize Heller's offer."Price also mentioned that Pamela Stevens was seeking an extension of the time for filing her opening brief on appeal.

Miller answered Price on August 12, reaffirming that she had all the information she needed to make her decision. Miller told Price she could either authorize the Tehin firm to accept Heller's offer, engage other appellate counsel, or pursue the appeal with Tehin & Partners, in which case "you must deposit with the firm a $10,000 retainer no later than Wednesday, August 14th, 2002. We do not recommend this appeal.... [¶] If you do not communicate your decision to us within the time specified above, we will file a motion to withdraw as counsel of record in the appeal."

Price replied the next day, expressing bewilderment because she believed her prior letters were clear. She said: "I have asked you if we overlooked anything or if you can find one such fact [supporting a March 1997 injury], and you have been silent in response to that question. Therefore, I see no alternative but to reiterate once again that I have no choice but to accept Heller's offer. *And, unless you can state one such fact that is in the trial court record or can think of some way to get those facts on the record, I will accept Heller's offer.*" (Emphasis in original.) Price concluded: "Heller Ehrman's offer states that I must 'agree to do whatever is necessary to assist Heller in obtaining a good faith determination....'. I do not understand what that might entail; but I am willing to do whatever is consistent with the facts of my case and my sworn testimony. Perhaps it would be helpful if you explained to me what the phrase 'whatever is necessary' might mean in this context."Miller sent Price a fax the same day, telling her he was uncertain what her decision was.

On August 15th, the State Bar filed its decision placing Tehin and Stevens on involuntary inactive status, effective August 18. Also on the 15th, Miller faxed Price, asking her for "clear, unequivocal and unconditional written directions regarding your wishes. You should be aware that if you do not make your wishes known and we are forced to file a motion to withdraw, it is likely that Heller will withdraw the settlement offer."Miller asked for a response by 5:00 p.m.

***3** At 4:30 on the 15th, Price responded as follows: "I honestly do not know how to communicate any better or differently from my previous letters. Your letters have not addressed in any way the conditions that I clearly stated would give me a choice in this matter. You have also given me a deadline that appears to be arbitrary and, without knowing Heller's

deadline, I do not wish to jeopardize their offer. Therefore, under the circumstances as described in my correspondence and yours, I can see no alternative to Heller's offer *and* I will accept Heller's offer. I will cooperate to the extent I can truthfully with Heller's attempt to obtain a good faith determination for this settlement; however, I cannot agree to 'do whatever is necessary' without knowing what that means."(emphasis in original.)

Miller sent Price a fax that same day, informing her he had notified Heller's counsel that she had accepted their settlement offer. He said he would seek a stipulation from the other defendants regarding the good faith of the settlement. Price claims she did not see this fax until August 19. On that day, Clarke (one of the Ropers attorneys) telephoned Price and told her the State Bar had suspended Tehin and Stevens. Price was dismayed, and told Clarke that Miller may have entered into a settlement with Heller Ehrman without her authorization. Price wanted to call Heller Ehrman and tell them she had not authorized Miller to accept the settlement offer. In a declaration filed in connection with the instant summary judgment proceeding, Clarke stated he "strongly urged Ms. Price not to contact opposing counsel or attempt to deal with the issue on her own, but rather, to seek and obtain replacement counsel as soon as possible and let new counsel deal with the matter."Clarke also advised Price not to have any discussions with Miller, who might ultimately be implicated in the State Bar proceedings and who might be continuing to take directions from Tehin and Stevens.

According to Price, on August 19 she also spoke to Alan Konig, the State Bar counsel who was handling the disciplinary proceeding against Tehin and Stevens, and he too advised her not to deal with any legal issues related to her case until she obtained proper representation. Konig told Price that Miller was not authorized to act on her behalf after Tehin's suspension.

On August 28, Miller wrote to counsel for the other defendants in the malpractice action, asking them to stipulate to a good faith settlement determination. He copied Price and Heller's counsel. Failing to obtain a stipulation, Miller filed an application for a good faith determination in Superior Court on September 4.[FN1] Also on September 4, Miller sought an extension of time to file Price's opening brief in this court, on the ground that a settlement had been reached.

> FN1. As Heller Ehrman notes in its opening brief, applying for a determination of good faith settlement was for Heller Ehrman's benefit; such ruling would protect it from claims for contribution or indemnity from the other defendants. It is one of the strange circumstances of this case that Miller took it upon himself to pursue a good faith determination on behalf of his client's opponent. The settlement proposal drafted by Heller Ehrman contemplated merely that Price would "cooperate" in seeking a good faith determination, not that she would take the lead in the effort.
>
> Heller Ehrman professes puzzlement over the Superior Court's failure to act on Miller's application. The suspension of Tehin & Partners by the State Bar is the obvious explanation. We note that nothing prevented Heller Ehrman from promptly seeking a good faith determination on its own behalf.

On October 8, the Superior Court, acting at the request of the State Bar, entered an order that, among other provisions, barred Tehin, Stevens, and their partnership from continuing to represent clients. Miller was permitted to enter into new agreements to represent former Tehin clients on an individual basis. On October 15, this court denied Miller's motion for an extension of time, because Tehin & Partners, Price's attorney of record, had been suspended from practice. We gave Price until October 28 to refile the motion or file an opening brief. On October 18, the Superior Court assumed jurisdiction over the Tehin & Partners law practice, appointed

the State Bar to deal with its client files, and reiterated the earlier ruling that any representation by Miller depended on his negotiation of new agreements with Tehin clients. On October 25, Konig filed in this court a notice of receivership concerning the Tehin practice. In response, on October 29 we granted Price an extension to December 2 to file a substitution of counsel and an opening brief.[FN2]

> FN2. We grant Heller Ehrman's request for judicial notice of our docket in the malpractice appeal.

***4** On November 19, Heller Ehrman's counsel (Suzanne Mellard) wrote to Price, seeking to complete the settlement. She stated: "Obviously, Mr. Tehin's suspension by the State Bar has stalled the settlement process, and the purpose of this letter is to let you know that we are willing to pick up where Mr. Tehin left off in order to get the settlement finalized."Price did not respond. Instead, on November 26, Mellard received a call from Charles Kagay, whom Price had retained as appellate counsel. Kagay requested copies of certain pleadings so he could file the record in this court. Mellard told Kagay the case had settled, and advised him to seek an extension of time to obtain a good faith determination. Kagay replied that he did not believe this court would be amenable to a further extension of time, and said he planned to file an opening brief. According to Mellard, she understood that if a good faith determination were obtained, Price would dismiss her appeal. According to Kagay, he expressed no view on the enforceability of the settlement or Price's position regarding the settlement, which was a matter to be determined by Price and her new trial counsel, whom she was then in the process of retaining.[FN3]

> FN3. We grant Price's request for judicial notice of documents she filed in the malpractice appeal opposing Heller Ehrman's application for a stay of briefing, which include a declaration by Kagay presenting his account of the November conversation with Mellard.

On December 2, Kagay filed a substitution as Price's appellate counsel, an opening brief, and the record on appeal. On December 6, we extended the time for Heller Ehrman to file its respondent's brief until Febuary 28, 2003, pursuant to a stipulation between Mellard and Kagay.

On December 20, Heller Ehrman served its own application for a determination of good faith settlement. On January 7, 2003, the application was filed in Superior Court. Hearing nothing from the nonsettling defendants or from Price, Mellard called Price on January 22nd and informed her that Heller Ehrman would seek an ex parte determination on the application. According to Mellard, Price told Mellard that she "had retained or was in the process of retaining Albert Cohen to represent her in the malpractice action and ... that I should talk to him about the ex parte application ."Mellard left a voicemail message with Cohen on January 28. On January 30, Cohen responded by fax that after reviewing the filings, he and Price did not agree there was a final settlement, and would oppose the application.

On February 21, Heller Ehrman requested a stay of briefing in this court pending enforcement of the settlement, or alternatively an extension of time for filing its reply brief. Price opposed the request for a stay. We denied the stay on March 24, but granted Heller Ehrman an extension of time. Meanwhile, on March 6 the Superior Court granted Heller Ehrman's application for a determination of good faith settlement, ruling that Price lacked standing to object, but specifically refraining from deciding whether the settlement was enforceable. On March 13, Heller Ehrman sent Price a $25,000 check and a stipulation to dismiss the appeal. On March 21, Cohen responded that Price continued to deny the existence of a binding settlement. The appeal proceeded to take its course, and we reversed the judgment against Price in her malpractice action. (*Price v. Heller Ehrman White & McAuliffe* (October 23, 2003, A098688) [nonpub. opn.].)

DISCUSSION

***5** Our review is de novo; we apply the same analysis as the trial court, determining whether the moving papers establish that there was or was not an enforceable settlement, and whether the responses raise any triable issues of material fact. (Code Civ. Proc., § 437c, subd. (p); *Orrick Herrington & Sutcliffe v. Superior Court* (2003) 107 Cal.App.4th 1052, 1056-1057.)

Heller Ehrman contends Price unequivocally accepted its settlement offer, or in the alternative ratified the settlement agreement by failing to promptly notify Heller Ehrman that Miller lacked authority to accept the offer on her behalf.

1. *Acceptance*

"Unlike the steps an attorney may take on behalf of the client that are incidental to the management of a lawsuit, such as making or opposing motions, seeking continuances, or conducting discovery, the settlement of a lawsuit is not incidental to the management of the lawsuit; it ends the lawsuit. Accordingly, settlement is such a serious step that it requires the client's knowledge and express consent. (1 Witkin, Cal. Procedure ([4th ed. 1996) Attorneys, § 272, pp. 336-338].) As we stated in *Blanton v. Womancare, Inc.* (1985) 38 Cal.3d 396[ ]:' "[T]he law is well settled that an attorney must be specifically authorized to settle and compromise a claim, that merely on the basis of his employment he has no implied or ostensible authority to bind his client to a compromise settlement of pending litigation...." '(*Id.* at p. 404, quoting *Whittier Union High Sch. Dist. v. Superior Court* (1977) 66 Cal.App.3d 504, 508[ ].)" (*Levy v. Superior Court* (1995) 10 Cal.4th 578, 583.)

Heller Ehrman argues that under principles of agency law, Miller's acceptance was binding if he reasonably believed Price had authorized him to settle. However, our Supreme Court has made it clear that any such reasonable belief must have pertained to *specific authorization* from Price to settle the case. Miller's own deposition testimony established he could have had no such belief. He testified he did not believe Price had authorized him to settle on August 13, when she wrote "*unless you can state one such fact* [establishing a March 1997 injury] *that is in the trial court record or can think of some way to get those facts on the record, I will accept Heller's offer.*" (Emphasis in original .) Heller Ehrman claims authorization was conferred on August 15, when Price wrote to Miller: "... under the circumstances as described in my correspondence and yours, I can see no alternative to Heller's offer *and* I will accept Heller's offer." (Emphasis in original.) The circumstances to which Price referred included, obviously, the conditions she had previously attached to her decision. In the August 15 letter (which was erroneously dated the 14th), she told Miller in no uncertain terms that he had failed to "address [ ] in any way the conditions that I clearly stated would give me a choice in this matter."Given this sequence of communications, no attorney could reasonably believe the August 15 letter specifically authorized a settlement. Price's responses to Miller were quintessentially equivocal.

***6** Furthermore, Price concluded her letter on August 15 by reiterating yet another unmet condition for accepting the settlement offer: "I will cooperate to the extent I can truthfully with Heller's attempt to obtain a good faith determination for this settlement; however, I cannot agree to 'do whatever is necessary' without knowing what that means."Heller Erhman contends the requirement that Price cooperate in obtaining a good faith determination was merely a procedural matter within the scope of Miller's implied authority. Not so. It was a mandatory term of the offer requiring Price's personal agreement and participation. " '[T]erms proposed in an offer must be met exactly, precisely and unequivocally for its acceptance to result in the formation of a binding contract [citations]; and a qualified acceptance amounts to a new proposal or counteroffer putting an end to the original offer....' (*Apablasa v. Merritt & Co.* (1959) 176 Cal.App.2d

719, 726[ ].)" (*Panagotacos v. Bank of America* (1998) 60 Cal.App.4th 851, 855-856.)Price's response to Miller amounted to a new proposal omitting the good faith determination requirement.

Finally, Miller conceded he had considered Price's equivocation on the good faith determination requirement to be "just more wheezling [*sic*]." An attorney who believes his client is weaseling about a mandatory term in a settlement offer cannot also reasonably believe he has specific authority to accept the offer.

These undisputed facts establish there was no triable issue regarding Price's failure to accept Heller Ehrman's settlement offer.

2. *Ratification*

"It is well settled that a client may ratify the unauthorized actions of his attorney [citations]." (*Navrides v. Zurich Ins. Co* . (1971) 5 Cal.3d 698, 703; see also *Blanton v. Womancare, Inc., supra,* 38 Cal.3d at p. 408.)

"A principal is liable 'when the principal knows the agent holds himself or herself out as clothed with certain authority and remains silent.' (*Jacoves v. United Merchandising Corp.* (1992) 9 Cal.App.4th 88, 103[ ];*Preis v. American Indemnity Co.* (1990) 220 Cal.App.3d 752, 761[ ]; see *Gates v. Bank of America* (1953) 120 Cal.App.2d 571, 576-577[ ] ['where the rights of third persons depend on his election, the rule is a principal must disaffirm an unauthorized act of his agent within a reasonable time after acquiring knowledge thereof, else his silence may be deemed ratification or acquiescence in order to protect an unsuspecting third party'].) A principal's failure to promptly disaffirm an agent's conduct on her behalf constitutes a ratification. (*Gaine v.. Austin* (1943) 58 Cal.App.2d 250, 259[ ] [four-month delay before repudiation constituted ratification]; *Hale v. Farmers Ins. Exch.* (1974) 42 Cal.App.3d 681, 692[ ],disapproved on other grounds in *Egan v. Mutual of Omaha Ins. Co.* (1979) 24 Cal.3d 809, 822, fn. 5[ ] [' " '... where an agent is authorized to do an act, and he transcends his authority, it is the duty of the principal to repudiate the act as soon as he is fully informed of what has been thus done in his name, ... else he will be bound by the act as having ratified it by implication.' " '].)" (*NORCAL Mutual Ins. Co. v. Newton* (2000) 84 Cal.App.4th 64, 78-79.)

***7** Heller Ehrman argues that if Miller's acceptance was unauthorized, as we have concluded, Price ratified Miller's act by failing to promptly disavow the settlement. We disagree. "A ratification can be made only in the manner that would have been necessary to confer an original authority for the act ratified, or where an oral authorization would suffice, by accepting or retaining a benefit of the act, with notice thereof."(Civ.Code, § 2310; see *Estate of Huston* (1997) 51 Cal.App.4th 1721, 1727.)It would require extraordinary circumstances for mere silence from a client to confer the "express consent" required to authorize an attorney to accept a settlement offer. (*Levy v. Superior Court, supra,* 10 Cal.4th at p. 583.)Thus, it would also require extraordinary circumstances, not present in this case, for a client to ratify an unauthorized settlement simply by remaining silent.

Heller Ehrman has referred us to no case in which ratification was found based on silence alone, without acceptance of some benefit by the principal (as in *NORCAL Mutual Ins. Co. v. Newton, supra,* 84 Cal.App.4th at p. 81, where the principal accepted a defense from an insurer and agreed to a settlement resulting from the defense) or some detrimental reliance by a third party that would estop the principal from disavowing the agent's unauthorized act (as in *Preis v. American Indemnity Co., supra,* 220 Cal.App.3d at p. 763, where a triable issue was found regarding the plaintiff's reliance on the agent's issuance of a certificate of insurance).

Heller Ehrman contends Price enjoyed a benefit conferred by the terms of the purported settlement by gaining time to pursue her efforts to maintain the appeal. However, a delay in the appellate pro-

ceedings was not a term of the settlement offer. (Compare *City of Orange v. San Diego County Employees Retirement Assn.* (2002) 103 Cal.App.4th 45, 50 [“litigation standstill” negotiated as term of agreement to keep settlement offer open].) Price did not obtain extensions of time for her briefing because of the alleged settlement. This court granted her extra time because she needed to find new counsel after Tehin & Partners' suspension from practice. Price never sought to recover the $25,000 offered by Heller Ehrman or to enforce its offer to waive costs. In no sense can she be said to have accepted any benefit of the settlement agreement.

Heller Ehrman does not claim it changed its position in any detrimental way based on Miller's unauthorized acceptance. Price's delay unquestionably permitted her to keep open the options of ratifying the settlement or pursuing her appeal. But just as equivocal statements cannot authorize counsel to accept a settlement offer, ambiguous conduct cannot amount to ratification of an unauthorized settlement, without acceptance of a settlement benefit by the offeree or detrimental reliance by the offeror. (See *Gates v. Bank of America, supra,* 120 Cal.App.2d at p. 576 [ratification may not be based on “ambiguous, inconclusive or independent acts”]; *Preis v. American Indemnity Co., supra,* 220 Cal.App.3d at p. 761 [estoppel to deny authority of agent requires detrimental reliance].)

***8** Moreover, the delay in this case was not entirely attributable to Price or her problems with Tehin & Partners. It was always in Heller Ehrman's power to test Price's intentions by promptly seeking a determination of good faith settlement.

Under the undisputed circumstances of this case, where Price's attorney was suspended from practice shortly after one of his associates accepted a settlement offer without Price's unconditional consent, Price was advised by other counsel not to deal with Heller Ehrman until she obtained new representation, Price never affirmatively endorsed the settlement or attempted to accept any of its benefits, and Heller Ehrman never relied on Miller's acceptance to its detriment, we conclude as a matter of law there was no ratification.

DISPOSITION

The judgment is affirmed. Price shall recover her costs on appeal.

We concur: McGUINESS, P.J., and CORRIGAN, J.
Cal.App. 1 Dist.,2005.
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Not Reported in Cal.Rptr.3d, 2005 WL 2293512 (Cal.App. 1 Dist.)

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