

Stephen H. Hutchings, ABA #7705026
Gregory S. Fisher, ABA #9111084
Birch Horton Bittner & Cherot
1127 W. Seventh Avenue
Anchorage, AK 99501
Telephone: 907.276.1550
Facsimile: 907.276.3680

Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

TRUSTEES OF THE ALASKA
LABORERS HEALTH AND SECURITY,
RETIREMENT, TRAINING AND LEGAL
SERVICES TRUST FUNDS,

Plaintiff,

vs.

RAINDANCE HEALTH CARE GROUP,
INC., ANDREW L. TURNER and
WILLIAM LASKY,

Defendants.

Case No.: 3:09-CV-00120-RRB

BIRCH HORTON BITTNER & CHEROT
ATTORNEYS AT LAW
1127 WEST SEVENTH AVENUE
ANCHORAGE, ALASKA 99501-3301
TELEPHONE (907) 276-1550 • FACSIMILE (907) 276-3680

**OPPOSITION TO UNION TRUSTEES' MOTION FOR
A RULE 56(F) DISCOVERY CONTINUANCE**
[Clerk's Docket 27]

I. Introduction

Defendants Andrew L. Turner and William Lasky, through undersigned counsel, respectfully file this Opposition to the Union Trustee's motion for a Rule 56(f) discovery continuance filed at Clerk's Docket 27 (the Union Trustees also filed a memorandum at Clerk's Docket 28). As will be discussed further below, the Union Trustees have completely failed to show that they are entitled to a Rule 56(f)

BIRCH HORTON BITTNER & CHEROT
ATTORNEYS AT LAW
1127 WEST SEVENTH AVENUE
ANCHORAGE, ALASKA 99501-3301
TELEPHONE (907) 276-1550 • FACSIMILE (907) 276-3680

discovery continuance regarding the individual liability claims. The Union Trustees have not filed any form of Rule 56(f) affidavit, they have not explained how or why they need any time to conduct any discovery, they have not explained what specific or particular discovery they need to secure, and they have not addressed any other relevant subject that is required to support a Rule 56(f) discovery continuance. More fundamentally, the Union Trustees never even satisfied the pleading standards set by *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). They want to embark on unspecified and unlimited discovery to support claims that do not even meet basic pleading standards.

The Union Trustees filed baseless claims alleging individual liability in June 2009. The conclusory and superficial allegations do not even come close to satisfying the pleading standards under *Twombly*. Not only do the claims not satisfy minimally-acceptable pleading standards, but the claims themselves are deficient.¹ When pressed as to those same conclusory allegations, the Union Trustees were forced to concede that they had no evidence to support their allegations. The Union Trustees have not sought leave to file an amended complaint.

¹ No actual claim or cause of action for individual liability is recognized under ERISA. See *Peacock v. Thomas*, 516 U.S. 349, 353-54 (1996) ("Thomas' veil-piercing claim does not state a cause of action under ERISA and cannot independently support federal jurisdiction...Piercing the corporate veil is not itself an independent ERISA cause of action, 'but is rather a means of imposing liability on an underlying cause of action.'" [Citations omitted.]) The Ninth Circuit applies these same principles. See *Local 159 v. Nor-Cal Plumbing, Inc.*, 185 F.3d 978, 985 (9th Cir. 1999). The leading commentator is Professor (and Ninth Circuit Judge) William Fletcher. See 1 William Meade Fletcher, *Fletcher Cyclopedia of the Law of Private Corporations* § 41.28 (1999 & Supp. 2003).

BIRCH HORTON BITTNER & CHEROT
ATTORNEYS AT LAW
1127 WEST SEVENTH AVENUE
ANCHORAGE, ALASKA 99501-3301
TELEPHONE (907) 276-1550 • FACSIMILE (907) 276-3680

We now know that there was never any basis in law or fact for imposing individual liability on Turner or Lasky. Indeed, as addressed in the motion for partial summary judgment, the Union Trustees admitted that they never had any actual evidence to support any claim alleging individual liability against Turner or Lasky when they filed suit. Instead, this is a classic "shoot first and ask questions later" lawsuit in which the Union Trustees' entire case theory comes down to character assassination based on sketchy newspaper accounts and rank hearsay.

The Union Trustees do not need a discovery continuance. They have filed an opposition to the motion for partial summary judgment at Clerk's Docket 26, and their own cross-motion for partial summary judgment at Clerk's Docket 29. Moreover, until the past few days, the Union Trustees never undertook any effort to secure evidence from RainDance, Turner or Lasky that was made available in December 2009.²

Furthermore, the precise issue concerns an allegation that will require the Union Trustees to show intentional fraud. The Union Trustees do not explain what discovery they need to take in order to file a response or opposition. The Union Trustees have not filed any form of adequate affidavit as required by Rule 56(f). The Union Trustees do not explain what they expect to find by way of any unspecified discovery. In sum, the Union Trustees are engaged in an improper and punitive fishing expedition for purposes of trying to extort a settlement from Turner and Lasky. The Court should deny the Rule 56(f) motion.

² Hundreds of pages of documents were disclosed to the Union Trustees in Initial Disclosures. Additional material has also been disclosed relative to the claim against the corporate entity RainDance.

II. Facts

The Union Trustees filed suit on June 11, 2009. See Clerk's Docket 1. The Union Trustees alleged claims of individual liability against Lasky and Turner. See Complaint, ¶¶ 18-35. Although piercing the corporate veil under ERISA requires Trustees to show intentional fraud, the complaint only alleged generalized contentions that Turner or Lasky "siphoned" funds [sic], or "dominated" RainDance, or that they "directed assets" to their own use, or that they used RainDance as a façade for their own personal affairs. *Id.*, ¶¶ 22-25, ¶¶ 30-33. The complaint contained no supporting specific, particularized allegations.

The parties exchanged initial disclosures on December 22, 2009. At that time, RainDance, Lasky and Turner disclosed substantial evidence (close to 450 pages) concerning RainDance's initial capitalization and financial operations. They also specifically advised the Union Trustees that other documents were available for inspection and copying at RainDance's offices in Washington, and invited the Union Trustees to make the necessary arrangements to secure those documents: "All other relevant and non-privileged documents are available for inspection and copying at RainDance's offices in Seattle, Washington upon reasonable advance notice and during normal business hours at a time that is mutually agreed to by the parties." See Exhibit 1, p. 4. Until Friday, March 19, 2010, the Union Trustees never made any attempt to secure copies of those documents or to review them.

RainDance, Lasky and Turner served an initial set of discovery requests on the Union Trustees on December 23, 2009. Among other inquiries, they asked the Union Trustees to admit that they never had any facts to support the claims for

BIRCH HORTON BITTNER & CHEROT
ATTORNEYS AT LAW
1127 WEST SEVENTH AVENUE
ANCHORAGE, ALASKA 99501-3301
TELEPHONE (907) 276-1550 • FACSIMILE (907) 276-3680

BIRCH HORTON BITTNER & CHEROT
ATTORNEYS AT LAW
1127 WEST SEVENTH AVENUE
ANCHORAGE, ALASKA 99501-3301
TELEPHONE (907) 276-1550 • FACSIMILE (907) 276-3680

individual liability at the time suit was filed. See Exhibit 6, pp. 12-13 (filed with underlying motion). The Union Trustees answered on January 23, 2010 by way of a qualified denial. The Union Trustees denied this request for admission by referencing inadmissible hearsay and/or irrelevant, scandalous contentions that had and have no relation to this case. *Id.* In other words, the Union Trustees stated a qualified denial and then responded by relying on newspaper articles and other forms of inadmissible hearsay. In effect, it appears that Plaintiff's entire case theory is based on character assassination. Character evidence is inadmissible, but it is fair to question the Union Trustees' motives when they are basing their entire case theory of individual liability on hazy newspaper accounts of alleged improprieties and bankruptcy filings related to other corporate entities.

After receiving the Union Trustees' responses, Turner and Lasky filed a motion for partial summary on February 10, 2010 regarding the claims alleging individual liability. See Clerk's Docket 20. The Union Trustees still did not attempt to make any arrangements to review the documents located at RainDance's Washington offices. Instead, the Union Trustees filed an opposition to the motion. Finally, on March 19, 2010, an associate working for the Union Trustees' counsel contacted undersigned counsel for purposes of reviewing documents previously made available. Those documents were copied to a disc and produced. However, the documents relate to RainDance (the corporate entity) and (as discussed further below) the fact that general discovery is ongoing is not a basis for granting a Rule 56(f) discovery continuance where no specific or particular reason for granting a continuance is ever explained. Other relevant facts are discussed below.

BIRCH HORTON BITTNER & CHEROT
ATTORNEYS AT LAW
1127 WEST SEVENTH AVENUE
ANCHORAGE, ALASKA 99501-3301
TELEPHONE (907) 276-1550 • FACSIMILE (907) 276-3680

III. Standard of Review

Federal Rule of Civil Procedure 56(f) authorizes a discovery continuance under certain specified conditions. The party seeking a discovery continuance carries the burden to set forth particular facts that are expected to be discovered. See *Brae Transp., Inc. v. Coopers & Lybrand*, 790 F.2d 1439, 1443 (9th Cir. 1986). The party must submit affidavits setting forth particular facts which additional discovery will develop, establish why the additional discovery would preclude summary judgment, and explain why the party cannot immediately provide the necessary information to preclude summary judgment. See *Employers Teamsters Local Nos. 175 and 505 Pension Trust Fund v. The Clorox Company*, 353 F.3d 1125, 1129-30 (9th Cir. 2004).³

There must be some basis for believing that the information being sought actually exists. See *VISA Intl' Serv. Ass'n v. Bankcard Holders of America*, 784 F.2d 1472, 1475 (9th Cir. 1986). Furthermore, the information being sought must relate to the motion for summary judgment that was filed; that is, if the evidence being sought will not preclude summary judgment then there is no need for a discovery continuance. See *Family Home and Finance Center, Inc. v. Federal Home Loan Mortgage Corp.*, 525 F.3d 827 (9th Cir. 2008); *Maljack Productions, Inc. v. Goodtimes Home Video Corp.*, 81 F.3d 881, 888 (9th Cir. 1996). Failure to comply

³ These principles are long-settled and entrenched in Ninth Circuit case law. See *Maljack Productions, Inc. v. Goodtimes Home Video Corp.*, 81 F.3d 881, 888 (9th Cir. 1996); *United States v. One*, 917 F.2d 415, 418 (9th Cir. 1990); *Mackey v. Pioneer Nat'l Bank*, 867 F.2d 520, 523-24 (9th Cir. 1989); *Hancock v. Montgomery Ward Long Term Disability Trust*, 787 F.2d 1302, 1306 n.1 (9th Cir. 1986).

with the rule's requirements is grounds to deny relief. See *Brae*, 790 F.2d at 1443. Failure to properly support a motion is also grounds for denying relief. See D. Ak. LR 7.1(d).

IV. Argument

This Court (the District of Alaska) has consistently applied Rule 56(f) in light of its terms and policy goals as set forth by governing Ninth Circuit precedent. For example, in *CNA Insurance Co. v. Lightle*, 364 F.Supp.2d 1068, 1070-71 (D. Alaska 2005), this Court denied a Rule 56(f) discovery continuance because it was not supported by an affidavit and there was "no specific identification of relevant evidence which, when available, would foreclose summary judgment requirements established by controlling precedent." *Id.* at 1072.

In *Nautilus Marine, Inc. v. Niemela*, 989 F. Supp. 1229 (D. Alaska 1996), this Court denied a Rule 56(f) discovery continuance because plaintiffs failed to address how they were going to secure evidence to show intentional interference with a contract. *Id.* at 1234.

In *Anderson v. Primera Blue Cross Blue Shield of Alaska*, 2004 WL 2958621 (D. Alaska 2004), this Court denied a Rule 56(f) request where the supporting affidavit failed to address "why the allegedly inadequate discovery is essential." *Id.* at *3. The Court explained, "[t]here is no suggestion that the requested discovery would show that there was, in fact, any late payment on a claim relating to the Andersons." *Id.* The Court concluded that the affidavit "does not specifically identify relevant information necessary to defeat this aspect of the summary judgment motion and provide some basis for believing that such information exists." *Id.*

BIRCH HORTON BITTNER & CHEROT
ATTORNEYS AT LAW
1127 WEST SEVENTH AVENUE
ANCHORAGE, ALASKA 99501-3301
TELEPHONE (907) 276-1550 • FACSIMILE (907) 276-3680

BIRCH HORTON BITTNER & CHEROT
ATTORNEYS AT LAW
1127 WEST SEVENTH AVENUE
ANCHORAGE, ALASKA 99501-3301
TELEPHONE (907) 276-1550 • FACSIMILE (907) 276-3680

Finally, in *Federal Deposit Insurance Corporation v. F.S.S.S.*, 829 F. Supp. 317 (D. Alaska 1993), this Court denied a Rule 56(f) discovery request where the defendants never "presented any reason why resolution of this case should be further delayed, nor have they made a sufficient showing that further discovery would raise a triable issue of fact." *Id.* at 324.

Here, the Union Trustees have completely failed to satisfy the requirements of Rule 56(f). To begin with, the sum total of the Union Trustees' request for a discovery continuance is a generalized assertion that mirrors the deficiencies of their underlying complaint:

Further discovery will reveal facts relating to Turner and Lasky's governance of RainDance, as well as their financial relationship with RainDance. Such facts will permit the Plaintiff funds to demonstrate genuine issues of material fact the abuse or respect of the corporate form, the undercapitalization of RainDance, any fraudulent intent, and the injustice to the Plaintiffs stemming therefrom. This Court must postpone ruling on Defendants' Motion for Partial Summary Judgment until adequate discovery has been had and the Trust funds have had time to review the information it obtains through discovery.

See Union Trustees' motion, p. 9.

This is nothing more than the same generalized conclusions that the Union Trustees allege in their deficient complaint. "References in memoranda and declarations to a need for discovery do not qualify as motions under Rule 56(f)," *State of California v. Campbell*, 138 F.3d 772, 779 (9th Cir. 1998). "Rather, Rule 56(f) requires litigants to submit affidavits setting forth **particular facts** expected from further discovery." *Id.* (emphasis added). The Union Trustees do not explain what facts are at issue or how they will be discovered (or where for that matter). The Union Trustees do not address what form of discovery they need to undertake. The

Union Trustees do not address whether any such information exists or how its presence or absence would relate to the claims for individual liability.

The only thing that the Union Trustees have done is to generally state that additional discovery will uncover facts. This, of course, speaks for itself -- it says everything and nothing and comes nowhere close to the standard necessary for a Rule 56(f) discovery continuance. Identifying generically relevant information or potential evidence of a generalized nature is not a sufficient basis for a Rule 56(f) discovery continuance. See *Family Home and Finance Center, Inc. v. Federal Home Loan Mortgage Corp.*, 525 F.3d 822, 827 (9th Cir. 2008).

In addition, it is not sufficient to rely on the fact that discovery is pending. See *Tatum v. City and County of San Francisco*, 441 F.3d 1090, 1100-01 (9th Cir. 2006). Instead, the Union Trustees are required to point to specific or particular facts that are forthcoming that are essential to opposing the motion for summary judgment. See *Tatum*, 441 F.3d at 1100. The Union Trustees have not done so. They have not done so because no such specific or particular facts exist. The Union Trustees unhelpfully contend that "the discovery requests propounded by the Plaintiffs will (1) reveal facts showing Turner and Lasky abused RainDance's corporate form; (2) show whether RainDance was undercapitalized; and (3) reveal whether Turner and Lasky converted corporate assets to personal use." See Motion, p. 14. This is preposterous -- as preposterous as the impossibly vague and overbroad allegations in the Union Trustees' complaint. Tellingly, the Union Trustees do not cite any actual discovery requests that the Union Trustees somehow think are going to shed additional light on the individual liability claims. The Court should know that there is

BIRCH HORTON BITTNER & CHEROT
ATTORNEYS AT LAW
1127 WEST SEVENTH AVENUE
ANCHORAGE, ALASKA 99501-3301
TELEPHONE (907) 276-1550 • FACSIMILE (907) 276-3680

BIRCH HORTON BITTNER & CHEROT
ATTORNEYS AT LAW
1127 WEST SEVENTH AVENUE
ANCHORAGE, ALASKA 99501-3301
TELEPHONE (907) 276-1550 • FACSIMILE (907) 276-3680

nothing in the pending discovery requests or responses (which responses have been served) that will affect Turner's and Lasky's motion for partial summary judgment. The Union Trustees served requests for admission asking Turner and Lasky to admit that they "siphoned" funds [sic], or "dominated" RainDance, or that they "directed assets" to their own use, or that they used RainDance as a façade for their own personal affairs. Turner and Lasky of course have categorically denied all such allegations, and they served responses emphatically denying same.

Although they do not specifically reference a Rule 56(f) affidavit as such, it appears that the Union Trustees are relying on two separate affidavits, one from Bruce Restad and one from Jacquelyn Briskey -- although in truth it is not clear. These affidavits were actually filed with the response to the motion for partial summary judgment that was filed at Clerk's Docket 26. The Union Trustees have not filed any affidavit with the Rule 56(f) motion papers at Clerk's Dockets 27 and 28.

Regardless, assuming that the Union Trustees intended to rely on these two affidavits to support their Rule 56(f) motion, the affidavits do not come anywhere close to supplying adequate grounds for a discovery continuance. The two affidavits simply point to the absence of evidence. Briskey addresses evidence that she would like to see for purposes of analyzing whether or not an entity (generic) is or was adequately capitalized. However, she does not address RainDance itself and does not contend that RainDance was not adequately capitalized. Briskey does not rebut, refute or address any of the affidavits or evidence that Turner and Lasky submitted with their motion for partial summary judgment. Briskey does not contend that additional discovery is necessary or even necessarily useful.

BIRCH HORTON BITTNER & CHEROT
ATTORNEYS AT LAW
1127 WEST SEVENTH AVENUE
ANCHORAGE, ALASKA 99501-3301
TELEPHONE (907) 276-1550 • FACSIMILE (907) 276-3680

Restad's unexecuted affidavit is similar to Briskey's. Restad does not contend that RainDance was not adequately capitalized or that any additional information is necessary to address that fact. Restad does not contend that additional discovery is necessary or even necessarily useful. Instead, he merely advises that he cannot verify whether or not RainDance made any profits during 2008 (as testified to by RainDance's CFO Ray Bower in his affidavit dated February 10, 2010 at Clerk's Docket 21, filed in support of the motion for partial summary judgment). However, this would not supply any basis for a discovery continuance to address the claims of individual liability. Restad does not rebut, refute or address any of the affidavits or evidence that Turner and Lasky submitted with their motion for partial summary judgment.

As noted, the affidavits actually seem to be for purposes of supporting the Union Trustees' opposition to the motion for partial summary judgment filed at Clerk's Docket 26, and not for purposes of supporting a discovery continuance. Pointing to the absence of evidence is not a sufficient basis for granting a Rule 56(f) discovery continuance. See *Lightle*, 3664 F. Supp.2d at 1072 ("*Lightle's* lawyer merely muses that the facts upon which CNA relies are not adequately established. If so, the remedy is to deny CNA's motion for summary judgment, not to postpone consideration of the motion while *Lightle* pursues discovery").⁴ The absence of

⁴ Turner and Lasky submit (as they have set forth in their motion for partial summary judgment) that the undisputed facts and relevant legal principles entitle them to relief now without further delay. But, regardless, the mere absence of evidence is not a sufficient basis for a Rule 56(f) continuance.

BIRCH HORTON BITTNER & CHEROT
ATTORNEYS AT LAW
1127 WEST SEVENTH AVENUE
ANCHORAGE, ALASKA 99501-3301
TELEPHONE (907) 276-1550 • FACSIMILE (907) 276-3680

evidence is not a sufficient basis for a Rule 56(f) discovery continuance because it is always true in all cases that additional facts could come to light through more discovery. The question is not whether additional facts may come to light. The questions instead are: (1) what are the particular facts that the party seeking a Rule 56(f) discovery continuance is seeking; (2) do those facts exist; and (3) how do those facts actually relate to the claim(s) at issue (are the facts necessary in other words to oppose the motion for partial summary judgment)? See *Maljack Productions*, 81 F.3d at 888.

The affidavits do not come anywhere close to satisfying Rule 56(f). Neither the affidavits nor the Union Trustees' motion make any attempt to specify what particular facts or evidence they need to oppose the motion for partial summary judgment. They have not made any attempt to explain that the evidence may actually exist. They have not explained how, even if one suspends disbelief and believes that some sort of evidence may exist, that evidence will bear any connection to an opposition to the motion for partial summary judgment.

The Union Trustees' motion must be analyzed by reference to the underlying substantive law. Under federal common law, it is prohibitively difficult to pierce the corporate veil and impose individual liability. See *Seymour v. Hull & Moreland Engineering*, 605 F.2d 1105, 1111 (9th Cir. 1979); *Board of Trustees v. Valley Cabinet & Mfg. Co.*, 877 F.2d 769, 772 (9th Cir. 1989).

The Ninth Circuit applies a three-part test derived from *Seymour*. (1) the degree to which the individuals in question respected the separate identity of the corporation; (2) the degree to which injustice to litigants would result if the corporate

BIRCH HORTON BITTNER & CHEROT
ATTORNEYS AT LAW
1127 WEST SEVENTH AVENUE
ANCHORAGE, ALASKA 99501-3301
TELEPHONE (907) 276-1550 • FACSIMILE (907) 276-3680

identity was recognized; and (3) whether there is evidence of any fraudulent intent to evade debts. A trust fund seeking to pierce the corporate veil must, at a minimum, establish the first factor and at least one of the other two. See *UA Local 343 United Association of Journeymen & Apprentices v. Nor-Cal Plumbing, Inc.*, 48 F.3d 1465, 1475 (9th Cir. 1995).

Neither the affidavits nor the Union Trustees' generalized motion address the first factor. They do not explain what facts or evidence exist that will be used to oppose Turner and Lasky's motion for partial summary judgment. Instead, they point to the absence of evidence on capitalization issues. But, as noted, this is not sufficient for a discovery continuance. Moreover, contrary to the Union Trustees' false statement, all relevant non-privileged evidence has been available since December 2009.

When asked to describe the factual basis or bases for any allegation that RainDance was undercapitalized, the Union Trustees offered no form of relevant or admissible evidence to support any such allegation except to reference some vaguely-constituted panel of union auditors whose identities and reports have never been disclosed. See Exhibit 6, pp. 12-13 (filed with underlying motion). Vague references to undisclosed studies completed by undefined auditors are not a sufficient basis to support any conclusion, let alone one alleging a species of fraud.

Similarly, neither the affidavits nor the Union Trustees' generalized motion address the second or third factors. Regarding relative injustice to the litigants, such injustice on its own is not sufficient to pierce the corporate veil without either of the other two factors being established. See *Valley Cabinet*, 877 F.2d at 774. Moreover,

inability to collect is not a sufficient basis for concluding that a result is inequitable. See *Seymour*, 605 F.2d at 1113. With respect to the existence of fraudulent intent, this requires evidence of deliberate abuse or misuse of the corporate form in an actual attempt to defraud creditors. Garden variety fraud is not enough. See *Valley Cabinet*, 877 F.2d at 773.

The fact that a claim is inherently suspect provides an additional basis for denying a Rule 56(f) discovery continuance. See *Hancock v. Montgomery Ward Long Term Disability Trust*, 787 F.2d 1302, 1306 (9th Cir. 1986) (discovery continuance properly denied, in part, where intervening U.S. Supreme Court precedent questioned validity of ERISA claim at issue).⁵ In this respect, the complaint's conclusory and superficial allegations fail to satisfy Federal Rule of Civil Procedure 9(b)'s requirement for pleading fraud with particularity, and come nowhere near to meeting the standard set by *Twombly*, *supra*. The Union Trustees had and have no actual evidence of fraud beyond conjecture and speculation. Instead, all the Union Trustees have done is to make unfounded accusations that Turner or Lasky "siphoned" funds [sic], or "dominated" RainDance, or that they "directed assets" to their own use, or that they used RainDance as a façade for their own personal affairs,

⁵ No actual claim or cause of action for individual liability is recognized under ERISA. See *Peacock v. Thomas*, 516 U.S. 349, 353-54 (1996) ("Thomas' veil-piercing claim does not state a cause of action under ERISA and cannot independently support federal jurisdiction...Piercing the corporate veil is not itself an independent ERISA cause of action, 'but is rather a means of imposing liability on an underlying cause of action'" [Citations omitted]). The Ninth Circuit applies these same principles. See *Local 159 v. Nor-Cal Plumbing, Inc.*, 185 F.3d 978, 985 (9th Cir. 1999). The leading commentator is Professor (and Ninth Circuit Judge) William Fletcher. See 1 William Meade Fletcher, *Fletcher Cyclopedia of the Law of Private Corporations* § 41.28 (1999 & Supp. 2003).

BIRCH HORTON BITTNER & CHEROT
ATTORNEYS AT LAW
1127 WEST SEVENTH AVENUE
ANCHORAGE, ALASKA 99501-3301
TELEPHONE (907) 276-1550 • FACSIMILE (907) 276-3680

but the complaint makes these generalized contentions without any supporting specific, particularized allegations. The Union Trustees alleged their individual liability claims based on speculation, conjecture, inadmissible hearsay and irrelevant, scandalous contentions. See Exhibit 6, pp. 12-13 (referencing inadmissible hearsay as basis for supporting individual liability claims).

Finally, it may be assumed that the Union Trustees will reply by noting that discovery is ongoing. This is correct. The claims against the individual corporate entity RainDance still needs to be litigated. The Union Trustees never undertook any steps to review RainDance's records even though all records were made available for inspection and copying in December 2009. Finally, after months of inexplicable delay, RainDance took it upon itself to have its records copied onto discs for production to the Union Trustees. However, those documents do not relate to the claims for individual liability. Moreover, as noted above, the fact that discovery is ongoing is not sufficient to support a Rule 56(f) discovery continuance. See *Tatum*, 441 F.3d at 1100-01. Rather, the Union Trustees are required to point to specific or particular facts that are forthcoming that are essential to opposing the motion for summary judgment. *Id.* at 1100; see also *Campbell*, 138 F.3d at 779. There simply are none. There are none in significant part because the claims themselves lack any valid legal or factual basis. The "gate pass" for conducting discovery is an adequate and well-pled claim. Parties cannot allege deficient claims that fail to satisfy *Twombly* and then try to invoke legitimate discovery processes.

No one is happy that RainDance's local operations failed, least of all Turner or Lasky. However, the unfortunate fact of the matter is that businesses and

corporations will fail from time to time. But such business failures are not now and never have been an adequate basis for imposing individual liability on the corporation's shareholders.

V. Conclusion

The Court should deny the Union Trustees' Rule 56(f) motion.

DATED this 6th day of April, 2010.

BIRCH HORTON BITTNER & CHEROT
Attorneys for Defendants

By: /s/ Gregory S. Fisher
Stephen H. Hutchings, ABA #7705026
Gregory S. Fisher, ABA #9111084,
1127 West Seventh Avenue
Anchorage, AK 99501
Telephone: 907.276.1550
Facsimile: 907.276.3680
Email: shutchings@bhb.com
gfisher@bhb.com

BIRCH HORTON BITTNER & CHEROT
ATTORNEYS AT LAW
1127 WEST SEVENTH AVENUE
ANCHORAGE, ALASKA 99501-3301
TELEPHONE (907) 276-1550 • FACSIMILE (907) 276-3680

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 6th day of April, 2010, a true and correct copy of the foregoing was served via electronic mail on the following:

Mr. Randall G. Simpson
Mr. Raymond Goad
Jermain, Dunnagan & Owens
rsimpson@jdolaw.com
rgoad@jdolaw.com

BIRCH HORTON BITTNER & CHEROT

By: /s/ Gregory S. Fisher

Stephen H. Hutchings, ABA #7705026
Gregory S. Fisher, ABA #9111084
Birch Horton Bittner & Cherot
1127 W. Seventh Avenue
Anchorage, AK 99501
Telephone: 907.276.1550
Facsimile: 907.276.3680

Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

TRUSTEES OF THE ALASKA
LABORERS HEALTH AND SECURITY,
RETIREMENT, TRAINING AND LEGAL
SERVICES TRUST FUNDS,

Plaintiff,

vs.

RAINDANCE HEALTH CARE GROUP,
INC., ANDREW L. TURNER and
WILLIAM LASKY,

Defendants.

Case No.: 3:09-CV-00120-RRB

BIRCH HORTON BITTNER & CHEROT
ATTORNEYS AT LAW
1127 WEST SEVENTH AVENUE
ANCHORAGE, ALASKA 99501-3301
TELEPHONE (907) 276-1550 • FACSIMILE (907) 276-3680

DEFENDANTS' INITIAL DISCLOSURES

COME NOW Defendants, by and through undersigned counsel, and hereby make their initial disclosures pursuant to Fed. R. Civ. P. 26(a)(1)(2). These disclosures are based on the information currently known to Defendants, and Defendants reserve the right to amend and supplement these disclosures throughout the course of discovery in this action.

Exhibit 1
Page 1 of 5

BIRCH HORTON BITTNER & CHEROT
ATTORNEYS AT LAW
1127 WEST SEVENTH AVENUE
ANCHORAGE, ALASKA 99501-3301
TELEPHONE (907) 276-1550 • FACSIMILE (907) 276-3680

I. FRCP 26(a)(1)(A)(i): Individuals Likely To Have Discoverable Information Relevant To Disputed Facts

- 1. Andrew L. Turner **ATTORNEY-CLIENT PRIVILEGE**
c/o Birch Horton Bittner and Cherot
1127 W. Seventh Avenue
Anchorage, AK 99501
(907) 276-1550

Mr. Turner is a shareholder of RainDance Health Care Group, Inc. Mr. Turner will testify concerning RainDance's formation, capitalization, management, finances and general operations. His testimony will confirm that RainDance was adequately capitalized, that the corporate formalities were observed, that personal and corporate assets were not commingled, and that RainDance was a legitimate corporate entity set up for a legitimate purpose. Mr. Turner will also testify concerning other related subjects establishing that no individual liability may be imposed.

- 2. William Lasky **ATTORNEY-CLIENT PRIVILEGE**
c/o Birch Horton Bittner and Cherot
1127 W. Seventh Avenue
Anchorage, AK 99501
(907) 276-1550

Mr. Lasky is a shareholder of RainDance Health Care Group, Inc. Mr. Lasky will testify concerning RainDance's formation, capitalization, management, finances and general operations. His testimony will confirm that RainDance was adequately capitalized, that the corporate formalities were observed, that personal and corporate assets were not commingled, and that RainDance was a legitimate corporate entity set up for a legitimate purpose. Mr. Lasky will also testify concerning other related subjects establishing that no individual liability may be imposed.

- 3. Ray Bower **ATTORNEY-CLIENT PRIVILEGE**
c/o Birch Horton Bittner and Cherot
1127 W. Seventh Avenue
Anchorage, AK 99501
(907) 276-1550

Mr. Bower is the Chief Financial Officer for RainDance Health Care Group, Inc. As CFO, Mr. Bower will testify concerning RainDance's formation, capitalization, management, finances and general operations. His testimony will confirm that RainDance was adequately capitalized, that the corporate formalities were observed, that personal and corporate assets were not commingled, and that RainDance was a legitimate corporate entity set up for a legitimate purpose. Mr. Bower will also testify concerning other related subjects establishing that no individual liability may be imposed.

BIRCH HORTON BITTNER & CHEROT
ATTORNEYS AT LAW
1127 WEST SEVENTH AVENUE
ANCHORAGE, ALASKA 99501-3301
TELEPHONE (907) 276-1550 • FACSIMILE (907) 276-3680

4. Expert witnesses as they are determined to be necessary and identified during the course of this case and discovery.
5. All witnesses necessary to authenticate documents to whose admissibility other parties are unwilling to stipulate.
6. All witnesses listed by other parties.
7. All witnesses identified in the course of subsequent discovery or investigation.
8. All witnesses whose depositions are taken in this case.
9. All witnesses necessary for rebuttal purposes.

Defendants reserve the right to name further potential witnesses at a later date as such responsible persons are identified.

II. FRCP 26(a)(1)(A)(ii): Documents Relevant to Claims or Defenses

Defendants object to the disclosure of any documents that are privileged and protected under the attorney-client privilege and/or that are protected under the attorney work product doctrine. Without waiving any objections, the following is a list of relevant documents in defendants' possession or custody and control:

1. Certificate of Incorporation filed with the State of Delaware [Bates No. RD0001-RD0003].
2. Bylaws for RainDance Health Care Group, Inc. [Bates No. RD0004-RD0018].
3. Corporate formation documents [Bates No. RD0019-RD0054].
4. Initial capitalization documents [Bates No. RD0055-RD0084].
5. Financial data for Mary Conrad Center covering period from February 2008 through June 2009 [Bates No. RD0085-RD0441].

BIRCH HORTON BITTNER & CHEROT
ATTORNEYS AT LAW
1127 WEST SEVENTH AVENUE
ANCHORAGE, ALASKA 99501-3301
TELEPHONE (907) 276-1550 • FACSIMILE (907) 276-3680

- 6. 2008 and 2009 paid invoices and unpaid invoices (5 boxes total) are located at the Seattle offices of RainDance.
- 7. Monthly financial statements (1 box total) are located at the Seattle office of RainDance.
- 8. Payroll reports and tax filings (2 boxes total) are located at the Seattle office of RainDance.
- 9. Bank reconciliations (1 box total) are located at the Seattle office of RainDance.
- 10. Agreements related to capitalization and formation (loan agreement, lease, working capital borrowing and repayment, and related documents) (1 box total) are located at the Seattle office of RainDance.
- 11. Miscellaneous corporate documents (incorporation documents, survey, federal income tax returns, Medicare and Medicaid files, and other related documents) (2 boxes total) are located at the Seattle office of RainDance.

All relevant and non-privileged documents Bates-stamped RD0001-RD0441 are served with this Initial Disclosure statement. All other relevant and non-privileged documents are available for inspection and copying at RainDance's offices in Seattle, Washington upon reasonable advance notice and during normal business hours at a time that is mutually agreed to by the parties.

III. FRCP 26(a)(1)(iii): Computation of Damages

Defendants are not seeking damages by way of any claims, cross claims, or counter claims. However, Defendants will seek an award of attorneys' fees and costs for the claims alleging individual liability.

IV. FRCP 26(a)(1)(iv): Insurance Agreements

No relevant insurance agreements exist.

BIRCH HORTON BITTNER & CHEROT
ATTORNEYS AT LAW
1127 WEST SEVENTH AVENUE
ANCHORAGE, ALASKA 99501-3301
TELEPHONE (907) 276-1550 • FACSIMILE (907) 276-3680

V. FRCP 26(a)(2): Expert Witnesses

Defendants have not retained any expert witnesses at this date. Defendants reserve the right to serve supplemental disclosures should expert witnesses be retained at a later date.

VI. FRCP 26(e): Future Supplementation

These disclosures are based on the information currently known to Defendants, and Defendants reserve the right to amend and supplement these disclosures throughout the course of discovery in this action.

DATED this 21st day of December, 2009.

BIRCH HORTON BITTNER & CHEROT
Attorneys for Defendants

By: /s/ Gregory S. Fisher
Stephen H. Hutchings, ABA #7705026
Gregory S. Fisher, ABA #9111084
1127 W. Seventh Avenue
Anchorage, AK 99501
Telephone: 907.276.1550
Facsimile: 907.276.3680
Email: shutchings@bhb.com
gfisher@bhb.com

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 21st day of December, 2009, a true and correct copy of the foregoing was served via hand delivery on the following:

Mr. Randall G. Simpson
Jermain, Dunnagan & Owens
3000 A Street, #300
Anchorage, AK 99503-4097

BIRCH HORTON BITTNER & CHEROT

By: /s/ Gregory S. Fisher

ALASKA LABORERS V. RAINDANCE, ET AL.
DEFENDANTS' INITIAL DISCLOSURES
F:\506683\6\00093789.DOC

CASE NO. 3:09-CV-00120-RRB
PAGE 5 OF 5

Exhibit 1
Page 5 of 5