

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

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

REPLY IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT
(REGARDING INDIVIDUAL LIABILITY OF TURNER AND LASKY)
[Clerk's Docket 20]

I. Introduction

Defendants Andrew Turner and William Lasky, through undersigned counsel, respectfully file the following reply in support of their motion for partial summary judgment on the claims alleging individual liability (filed at Clerk's Docket 20). The Union Trustees filed their response at Clerk's Docket 26. The Union Trustees do a competent job of leveling criticism at RainDance and its business operations. It is fair

criticism. At the end of the day, RainDance had to close its doors. However, the Union Trustees have completely failed to show how or why Turner or Lasky should be individually liable. The Union Trustees have failed to make any showing on the law or facts to preclude partial summary judgment for Turner and Lasky. Indeed, the Union Trustees never even satisfied the pleading standards set by *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). There is simply no factual or legal basis for imposing individual liability on Turner or Lasky. There never was. Turner and Lasky are entitled to partial summary judgment dismissing the claims alleging individual liability without further delay.

II. Discussion

The basic facts are undisputed and confirmed by admissible evidence. The basic facts are established by the affidavits of Ray Bower, Andrew Turner and William Lasky that were filed with the motion for partial summary judgment, along with other relevant evidence filed with the underlying. The affidavits and evidence may be summarized as follows.¹ RainDance's initial capitalization was in the amount of \$2.8 million and covered operations for 90 days. All necessary and proper corporate filings were made for purposes of setting up and operating RainDance as a legitimate business enterprise. Its solvency trend was favorable. RainDance generally paid its debts and honored its obligations. Turner and Lasky respected the corporate identity. No assets were ever commingled. There was never any

¹ Each of these propositions was cited to a specific affidavit or other form of evidence in the underlying motion. The citations are omitted here for the sake of convenience.

fraudulent intent or act with respect to RainDance's formation, organization or operation, nor is there any remote evidence to support any such contention. Turner and Lasky incorporated RainDance to serve an important medical need in the community. Turner and Lasky never invaded corporate assets and never used corporate assets for their own purposes. Unfortunately, RainDance could not survive management decisions made by the State of Alaska after the State assumed control of the Mary Conrad Center. The fact that a business model fails, however, is simply not an adequate legal basis for imposing individual liability.

The Union Trustees do not contend or argue that RainDance was undercapitalized. Turner and Lasky previously served discovery requests on the Union Trustees asking them to explain how or why they thought that RainDance was not adequately capitalized. See Motion for Partial Summary Judgment, Exhibit 6 (Answer to Interrogatory No. 1); see *also* Affidavit of R. Bower dated February 10, 2010 at Clerk's Docket 21, ¶¶ 14-18. In their responses, the Union Trustees referenced vague opinions and reports of unknown auditors -- all of which have never been disclosed -- but otherwise came forward with no evidence. The Union Trustees have still not come forward with any evidence to rebut Turner and Lasky's sworn proof. 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.

Bower, Turner and Lasky submitted affidavits showing that RainDance was initially capitalized in an amount of \$2.8 million. They further showed that this was an amount equal to what would be necessary to fund operations for 90 days -- an entire

quarter. Significantly, the Union Trustees do not contend or argue that \$2.8 million would not represent adequate capitalization.

The Union Trustees have now submitted two affidavits, one from Bruce Restad and one from Jacquelyn Briskey. 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 only states that she cannot say for sure one way or the other. This is not controverting evidence. 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.

Restad's 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 address the subject. 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). Restad also makes generalized contentions concerning revenue payments identified in RainDance's records, but these issues have already been explained by Mr. Bower. See Affidavit of R. Bower, dated February 10, 2010 at Clerk's Docket 21, ¶¶ 16-19. Restad does not rebut, refute or contend the points established by Bower, Turner and Lasky.

Briskey and Restad do not dispute the evidence submitted by Turner and Lasky. Moreover, it cannot escape notice that the affidavits from Restad and Briskey

offer no foundation as to their background or experiences in actually running any business, let alone a nursing facility.

Filed with this reply is the Second Affidavit of Ray Bower. Bower addresses the affidavits filed by the Union Trustees, demonstrates that there is no genuine issue of material fact on any issue, and supplies additional clarifying information to confirm that RainDance's initial capitalization was more than adequate. See Second Affidavit of R. Bower, ¶¶ 3-9, filed contemporaneously with this reply.

The Union Trustees do not address the fact that RainDance was organized and capitalized by a process involving independent, third-party oversight. The initial capitalization was structured through financing with Capital Source Finance, an independent third party and a leading national health care lender. See Second Affidavit of R. Bower, ¶ 4. Capital Source Finance is a public company subject to federal underwriting standards. Presumably, Capital Source Finance would never have agreed to a transaction if it had not concluded that it was financially sound and adequately capitalized. This was not, in other words, an instance where two individuals pooled resources and then began operations with no independent market influence.

The Union Trustees do not contend or argue that Turner or Lasky engaged in any fraudulent activity. They have alleged as much in their complaint, but when pressed on this subject the Union Trustees supplied no evidence or proof to support their baseless allegations. Restad's affidavit unhelpfully offers that large lump-sum payments can be used as a vehicle for fraudulent transfers. But he does not contend that any such fraudulent transfers actually occurred in this case. Bower explained all

revenue entries in his original affidavit (see Affidavit of R. Bower dated February 10, 2010 at Clerk's Docket 21, ¶¶ 16-19.) Bower's Second Affidavit supplies additional information (see ¶¶ 3-9). Restad does not rebut, refute or contend the points established by Bower.

Lacking any actual legal or factual basis to support their claims for individual liability, the Union Trustees snipe along the margins of the case by criticizing the manner by which Turner and Lasky conducted meetings. There is no business or organization anywhere that could not be similarly criticized for some imagined fault or shortcoming. In fact, one could certainly find ample fault in the manner by which the Union Trustees have managed their fiduciary responsibilities.

More importantly, the Union Trustees' sniping does not mean that individual liability should be imposed on Turner and Lasky. Case law addresses facts where shareholders commingled funds (which did not happen here), squandered assets (which did not happen here), filed no corporate reports (which did not happen here), or even took unsecured loans from the company (which did not happen here), yet individual liability was not imposed. 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); *Audit Services, Inc. v. Rolfson*, 641 F.2d 757 (9th Cir. 1981). If individual liability was not imposed in these cases, there should be no basis or bases for doing so here.

The fact that one may manufacture some reason to criticize Turner or Lasky is unremarkable and does not supply grounds for imposing individual liability. If the law were otherwise, then individual liability would always be imposed because it is always

possible to go back, subject a business to hyper-technical scrutiny, and find some imagined fault or blame to ascribe to shareholders. Thankfully, this is not now and never has been the law.

The Union Trustees do not contend or argue that piercing the corporate veil is necessary to avoid an injustice. Indeed, they cannot do so.

The Union Trustees do not contend or argue that a different set of legal principles apply, and they do not dispute that the cases cited and relied upon by Turner and Lasky should control the outcome here. The Union Trustees offer no contrary authority. The Union Trustees cite no authority to support their claims.

The Union Trustees do not dispute that the fundamental essence of their claims is subject to doubt.² The Union Trustees do not dispute that their claims fail to state a claim for relief under the standards set by *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). 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*. This is an independent basis for dismissing the claims.

² 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

It is time to put an end to this capricious trip engineered by the Union Trustees. The Union Trustees never had any facts or evidence that would remotely support any claim for individual liability. Instead, the Union Trustees alleged the individual liability claims based on speculation, conjecture, inadmissible hearsay and irrelevant, scandalous contentions.

Everyone concerned regrets the fact that RainDance's business operations failed. It is, however, a fact of life 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.

III. Conclusion

The Court should grant Andrew Turner and William Lasky's motion for partial summary judgment.

DATED this ____ day of March, 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
A

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 30th day of March, 2010, a true and correct copy of the foregoing was served via electronic mail on the following:

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

BIRCH HORTON BITTNER & CHEROT

By: /s/ Gregory S. Fisher