

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

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

Plaintiffs,

vs.

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

Defendants.

Case No. 3:09-cv-0120-RRB

ORDER REGARDING
PENDING MOTIONS

I. INTRODUCTION

Plaintiff Trustees of the Alaska Laborers Health and Security, Retirement, Training and Legal Services Funds ("Plaintiff"), brought this action against Defendant corporation RainDance Healthcare Group, Inc. ("RainDance") and its two sole shareholders, Andrew L. Turner and William Lasky, alleging that RainDance has violated the Employee Retirement Income Security Act of 1974 ("ERISA") because of its refusal to make agreed-upon contributions

as required under the collective bargaining agreement ("CBA") between RainDance and Plaintiff.¹

Cross-motions for summary judgment have been filed, as well as a motion to continue discovery and an untimely motion to dismiss.² For the reasons stated herein, Plaintiff's Motion for Summary Judgment at **Docket 29** is **GRANTED IN PART and DENIED IN PART**, Plaintiff's Motion to Continue Discovery at **Docket 27** is **DENIED**, Defendants' Motion for Summary Judgment at **Docket 20** is **GRANTED**, and Defendant RainDance's Acquiescence to Summary Judgment is **GRANTED**.

II. FACTUAL BACKGROUND

RainDance was a close corporation, owned 70% by Turner and 30% by Lasky, incorporated in Delaware on September 26, 2007.³ Its sole purpose was to run a nursing home. It was financed via a \$560,000 and a \$200,000 capital contribution by Turner, a \$100,000 contribution by Lasky, and a \$2,000,000 revolving line of credit with a financial institute.⁴

¹ Docket 1.

² Dockets 20, 26, 34, 27, 28, 36, 39, 29, 30, 37, 38. This order renders the Motion to Dismiss at Docket 40 moot.

³ Docket 26, Exhibit A.

⁴ Docket 26, Exhibits B, C, D.

The Funds are employee benefit plans within the meaning of section 3(3) of ERISA.⁵ RainDance entered into an agreement with Laborers' International Union of North America, Alaska District Council of Laborers, Laborers' Local 341, effective from February 1, 2008, until October 29, 2009.⁶ Pursuant to the agreement, all signatories were a party to and bound by the terms of the Trust Agreement that established the Funds signed on March 26, 2008.⁷

Pursuant to the Trust Agreement, Defendant corporation RainDance is required to make benefit plan contributions to the Funds on behalf of its employees who are Certified Nursing Assistants.⁸ RainDance soon fell on difficult financial times and failed to make its required contributions.⁹ Plaintiff extended a forbearance on collection and penalties in light of RainDance's difficulties, but RainDance continued to miss payments.¹⁰

⁵ 29 U.S.C. § 1002(3).

⁶ Docket 26, Exhibit N ("CBA").

⁷ *Id.* at 16.

⁸ *Id.*

⁹ Docket 26, Exhibit M; Affidavit of Guillen.

¹⁰ Docket 26, Exhibit M.

Eventually, RainDance and the nursing home had its license revoked and management assumed by the State of Alaska in response to concerns for the safety of its residents.¹¹ The company soon collapsed, with unpaid contributions to Plaintiff outstanding.¹² Plaintiff brought suit for remittance.

III. LEGAL STANDARD AND ANALYSIS

A. Defendant's Failure to Contribute Required Funds, Claim 1

This case involves a straightforward application of controlling legal principles to largely uncontested facts. Plaintiffs contend that Defendant breached the Agreement and violated ERISA by failing to timely submit contributions and the accompanying remittance reports to the Fund as required under the terms of the parties' Agreement. Pursuant to section 515 of ERISA,

[e]very employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement.¹³

In an action by a fiduciary for or on behalf of a plan to enforce section 515, the court shall award the plan:

¹¹ Docket 26, Exhibit K (AK DHSS Notice).

¹² Docket 26, Exhibit L, 8 (Historical Statement of Operations).

¹³ 29 U.S.C. § 1145.

(A) the unpaid contributions,
(B) interest on the unpaid contributions,
(C) an amount equal to the greater of-
(i) interest on the unpaid contributions, or
(ii) liquidated damages provided for under the plan in an amount not in excess of 20 percent (or such higher percentage as may be permitted under Federal or State law) of the amount determined by the court under subparagraph (A),
(D) reasonable attorney's fees and costs of the action, to be paid by the defendant, and
(E) such other legal or equitable relief as the court deems appropriate.¹⁴

As established above, it is undisputed that Defendant was contractually bound by its Agreement with Alaska Trustees to timely submit contributions to the Fund and that Defendant has failed to do so. RainDance has not raised any affirmative defenses, the collective bargaining agreement is not void, and the contributions would not have been illegal.¹⁵ Accordingly, the Court finds that Defendant is liable for failing to timely submit the required contributions and remittance reports in violation of the parties' Agreement and section 515 of ERISA

¹⁴ *Id.* § 1132(g)(2).

¹⁵ See *Agathos v. Starlite Motel*, 997 F.2d 1500, 1505 (3rd Cir. 1992) (citing *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 86-88 (1982); *Rozay's Transfer*, 791 F.2d , 773-75; *Benson v. Brower's Moving & Storage, Inc.*, 907 F.2d 210, 214 (2d. Cir.); *Sheet Metal Workers' Int'l Ass'n, Local 206 v. West Coast Sheet Metal Co.*, 954 F.2d 1506, 1509-10 (9th Cir. 1992)).

Pursuant to Federal Rule of Civil Procedure 56, a party is entitled to summary judgment if the pleadings, the discovery and disclosure materials on file, and any affidavits demonstrate that there is no genuine issue of material fact in dispute and that the moving party is entitled to judgment as a matter of law.¹⁶ Defendant acquiesces to judgment against it in this case. The Court therefore **GRANTS** Plaintiffs' Motion for Summary Judgment as to Defendant corporation RainDance's liability. The monetary amount of damages owed to Alaska Trustees by RainDance corporation is currently not ascertainable and must be determined in future proceedings.

B. Piercing the Corporate Veil, Claims 2 and 3

Plaintiff sues Andrew L. Turner and William Lasky directly as shareholders of RainDance for the acts of the corporation.¹⁷ In claims 2 and 3 of its Complaint, Plaintiff seeks to pierce the corporate veil and argue that Turner and Lasky should be personally responsible for the corporate debt. However, limited liability is the rule, not the exception. There are, though,

¹⁶ See Fed. R. Civ. P. 56(c); *Tao v. Freeh*, 27 F.3d 635, 638 (D.C. Cir. 1994).

¹⁷ Permissible under 29 U.S.C. § 1145.

"occasions when the limited liability sought to be obtained through the corporation will be qualified or denied."¹⁸

Three factors are considered in determining whether the "corporate veil" should be pierced: (1) the amount of respect given to the separate identity of the corporation by its shareholders, (2) the fraudulent intent of the incorporators, and (3) the degree of injustice visited on the litigants by recognition of the corporate entity.¹⁹ Plaintiffs seeking to pierce the veil must prevail on the first threshold factor and on one of the other two.²⁰

This Court finds that RainDance did not disregard corporate formalities; and further, neither the second nor third prongs ("fraud" and "injustice," respectively) can be established. The limited liability of the corporate form will not be pierced, because the first prong of the test cannot be established, and alternatively because neither the "fraud" or "injustice" prongs can be established. Because there is no reason to pierce the corporate veil, liability cannot attach to the shareholders on Plaintiff's

¹⁸ *Anderson v. Abbott*, 321 U.S. 349, 362 (1944).

¹⁹ *Laborers Clean-up Contract Admin. Trust Fund v. Uriarte Clean-up Serv., Inc.*, 736 F.2d 516, 524 (9th Cir. 1984) (citing *Seymour*, 605 F.2d at 1111).

²⁰ *See Board of Trustees v. Valley Cabinet & Mfg. Co.*, 877 F.2d 769, 773 (9th Cir. 1989).

theory of recovery. For this reason, Defendant's Motion for Summary Judgment on claims 2 and 3 will be **GRANTED**.

1. Respect for Separate Identity of Corporate Entity

A court may pierce the veil only if corporate formalities were disregarded.²¹ Corporate formalities include keeping separate corporate records, issuing stock, avoiding commingling of funds, and maintaining the formal roles of corporate officials.²² Maintaining these formalities is an indispensable requirement for attaching liability to shareholders because corporate formalities distinguish the rights and obligations of the various corporate roles that its owner-shareholders will play,²³ and reinforce the legal concept that a corporation is a separate entity from its owners.²⁴

RainDance issued stock to its shareholders for valuable consideration in a transaction that was recorded in the company

²¹ *Audit Services v. Rolfson*, 641 F.2d 757, 764 (9th Cir. 1981).

²² *See Valley Cabinet*, 887 F.2d 769, 772-73 (9th Cir. 1989).

²³ A unity of interest usually exists between the closely held corporation and its shareholder-owners.

²⁴ Barber, David H., *Piercing the Corporate Veil*, 17 Willamette L. Rev. 371 (1980-1981).

minutes.²⁵ The officers drew reasonable salaries of \$100,000 per year.²⁶ The balance sheets presented to the court were prepared in accordance with generally accepted accounting principles.²⁷ The fact that the company failed is not probative evidence that corporate formalities were not observed.²⁸

No formal meetings appear to have been held, which shows a level of informality, but the minutes were executed by unanimous consent of the two director-owners of the corporation.²⁹ Plaintiff speculates that some transactions lack adequate records proving the company maintained arms-length dealing with its close owners.³⁰

As will be discussed below, the company was adequately capitalized on start-up, and excessive capital was not drained from the company during its brief life. There is no evidence of commingling of funds. Plaintiff's accusation that stock was not

²⁵ Docket 26, Exhibit H, 1-2; Exhibit I, 3.

²⁶ See *Seymour*, 605 F.2d 1105, 1112 (\$24,000 per annum [comparable to approximately \$72,000 per annum in present-day value] deemed reasonable salary).

²⁷ *Clean-Up*, 736 F.2d 516, 524 n.11 (failure to discount future earnings or make allowance for bad debt, which is not in accordance with GAAP, cited as factor of inadequate records).

²⁸ *Laborers*, 605 F.2d at 1112.

²⁹ Docket 26, Exhibit H.

³⁰ Docket 26, Exhibits J, L; Plaintiff's Brief at 4.

issued in exchange for valuable consideration is speculative and implausible.³¹ The corporate formalities were respected, upholding the barrier between the shareholder's interest and the corporation's interest. Because the corporate formalities were respected, liability cannot directly attach to the shareholders. Further, neither of the other two prongs of the test can be met.

2. Fraud

"Garden variety fraud should be insufficient to pierce the corporate veil in the absence of evidence of shareholder abuse of the corporate form to defraud creditors."³² Plaintiffs must show that the owner-shareholder misused the corporate form itself to perpetrate the fraud, or perpetrated fraud in the formation of the corporation.³³

Some of the evidence presented (or sought) by the plaintiff is inapplicable. Carelessly failing to observe corporate formalities does not prove fraud with the corporate form.³⁴ Bad financials do

³¹ Even if one of these could be *proven*, the overwhelming weight of the evidence supports a finding that the corporate form was respected, and the result would not be affected.

³² *Valley Cabinet*, 877 F.2d at 773.

³³ *Id.* at 773 (citing *Audit Services*, 641 F.2d at 764; *Seymour*, 605 F.2d at 1113).

³⁴ *Audit Services*, 641 F.2d at 764.

not create a presumption of fraudulently drained corporate assets.³⁵ And although bad faith may be inferred from disregard of corporate debt obligations, this does not factor into the "fraud" prong.³⁶ It is undisputed that RainDance failed to properly fund its liabilities to the plaintiff trust, but there is no indication that this was done in bad faith, e.g. fraud on the corporate form itself.

The only posited factor that may implicate fraud is the plaintiff's allegation of inadequate capitalization, and as outlined below, the corporation was not inadequately capitalized. Courts find evidence of fraudulent intent in the failure of incorporators to adequately capitalize the corporation at inception.³⁷ Adequate capitalization means "capital reasonably regarded as adequate to enable [the corporation] to operate its business and pay its debts as they mature."³⁸

³⁵ *Seymour*, 605 F.2d at 1113.

³⁶ *Id.*

³⁷ *Laborers*, 736 F.2d at 769.

³⁸ N. Lattin, *Lattin on Corporations* § 15(a) at 77 (2d ed. 1971) (quoting *Ohio Edison Co. v. Warner Coal Corp.*, 79 Ohio App. 437, 72 N.E.2d 487 (Ct. App. 1946)). Start-up costs, near-term cash flow needs, and long-range financing are all debts that may reasonably be expected, and the expected cash-flow or other factors that an informed investor or bank considering a loan would consider, are all parts of the business methodology upon which a court, while presuming no financial expertise, may examine when finding adequacy of capital.

Plaintiff cites RainDance's razor-thin profit margins during its few profitable months as a sign of inadequate initial capitalization, but that does not logically follow. Running profits and losses do not touch upon the adequacy of start-up capital. And there were no transactions during the operation of the company that drained it of capital to the point where it could not operate. That the corporation survived large losses in its initial months is actually indicative of adequate capitalization. The company's accounts receivable and cash equaled or exceeded its current obligations for about half the months of operation.³⁹ The debt to equity ratio was also not apparently unbalanced. This Court notes as especially relevant the large equity contributions made by both founders before the company began to take on debt.⁴⁰ Because no indicia of fraud are present, this Court concludes that Plaintiffs are unable to satisfy the fraud prong.

³⁹ This is the Acid-Test Ratio, a fairly stringent test of financial integrity.

⁴⁰ Turner contributed \$560,000 and then contributed \$200,000. Lasky contributed \$100,000. The corporation then obtained a revolving line of credit from CapitalSource Financing, LLC. An independent financial institution, in an arms' length transaction, extended a two million dollar revolving line-of-credit to the fledgling company. This court presumes no financial expertise, but a lending institution relies on its own financial expertise when determining whether to extend credit to a new venture.

3. Injustice

The third prong of the test is whether failure to pierce the corporate veil would produce an inequitable result. The fact that a corporation becomes insolvent or that plaintiffs may be unable to collect the judgment issued against RainDance corporation would not itself constitute an unjust result.⁴¹

Courts have found this prong satisfied when "a corporation is so undercapitalized that it is unable to meet debts that may reasonably be expected to arise in the normal course of business."⁴² Because the corporation was not undercapitalized, as explained above, and there is no other possible injustice to consider, this prong is not met.

C. Further Discovery is Unwarranted

Plaintiff filed a motion for summary judgment after filing a motion for further discovery pursuant to Fed. R. Civ. P. 56(f).⁴³ A party seeking a Rule 56(f) continuance must show how additional

⁴¹ *Seymour*, 605 F.2d at 1113.

⁴² Note, Piercing the Corporate Law Veil: The Alter Ego Doctrine Under Federal Common Law, 95 Harv. L. Rev. 853, 855 (1982).

⁴³ Docket 29, 30.

discovery would preclude summary judgment.⁴⁴ This Court **DENIES** Plaintiff's motion because it is procedurally deficient and there is no reason to believe further discovery would provide evidence essential to preclusion of summary judgment.

A party requesting a continuance pursuant to Rule 56(f) must identify by affidavit the specific facts that further discovery would reveal, and explain why those facts would preclude summary judgment.⁴⁵ Rule 56(f) requires litigants to submit affidavits setting forth the particular facts expected from further discovery.⁴⁶ "Failure to comply with the requirements of Rule 56(f) is a proper ground for denying discovery and proceeding to summary judgment."⁴⁷ Although the court facially has "discretion" to deny a Rule 56(f) motion, it must permit further discovery "where the

⁴⁴ *Mackey v. Pioneer Nat'l Bank*, 867 F.2d 520, 524 (9th Cir.1989).

⁴⁵ See Fed. R. Civ. P. 56(f); *California v. Campbell*, 138 F.3d 772, 779 (9th Cir. 1998); see also Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2740 (3d ed. 998) ("when the movant has met the initial burden required for the granting of a summary judgment, the opposing party either must establish a genuine issue for trial under Rule 56(e) or explain why he cannot yet do so under Rule 56(f)"); *Tatum v. City and County of San Francisco*, 441 F.3d 1090, 1100 (9th Cir. 2006).

⁴⁶ *State of Cal., on Behalf of Cal. Dept. Of Toxic Substances Control v. Campbell*, 138 F.3d 772, 779 (9th Cir.1998).

⁴⁷ *Brae Transp, Inc. v. Coopers & Lybrand*, 790 F.2d 1439, 1443 (9th Cir. 1986).

nonmoving party has not had the opportunity to discover information that is essential to its opposition."⁴⁸ If, however, the information sought is only "generally relevant," the Court may rule against allowing further discovery.⁴⁹

CPA Bruce Restad, via affidavit, identifies specific transactions to investigate that he speculates might be linked to fraudulent transfers out of the company. Allegations of fraud and conversion of funds for personal use are based on financial records showing transactions that "could have been used to funnel assets," but even the CPA's affidavit is equivocal, and the transfers themselves, already in the record, are not inherently suspicious.⁵⁰ In any case, there is no reason to believe that evidence showing that these were fraudulent transfers is likely to exist.⁵¹ Even if they did, because the corporate form was respected, this evidence would not permit the court to pierce the corporate veil. Rule 56(f) requires that the evidence sought be "essential" to

⁴⁸ *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 n. 5, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).

⁴⁹ *Family Home and Finance Center, Inc. v. Federal Home Loan Mortg. Corp.*, 525 F.3d 822, 827 (9th Cir. 2008).

⁵⁰ Plaintiff's Brief at 17-18; Affidavit of Guillen; Docket 26, Exhibits J & H (Financial Transcripts).

⁵¹ *Visa*, 784 F.2d at 1475.

preclusion of summary judgment. The evidence sought is not essential to preclude summary judgment.

The affidavit of CPA Jacquelyn Briskey states in general terms that more data would be useful to assess the issue of adequate capitalization. This is no specification as to what types of further records would be needed.⁵² The financial records before the court are sufficient to determine that the company was adequately capitalized at all times, and the affidavit lacks sufficient particularity to satisfy the requirements of Fed. R. Civ. P. 56(f). It is not the intent of Rule 56 to preserve purely speculative issues of fact for trial, such as those raised in this case.⁵³ Summary adjudication "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine

⁵² Plaintiff incorrectly cites *Gould* for the proposition that undercapitalization alone is sufficient to demonstrate fraudulent intent. Plaintiff argues that whether RainDance "actually turned a profit at all is not itself objectively verifiable," but, as explained in this opinion, RainDance's profits are distinct from the issue of undercapitalization. Plaintiff's Brief at 16.

⁵³ *Exxon Corp. v. F.T.C.*, 663 F.2d 120, 128 (D.C. Cir. 1980).

issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."⁵⁴

Plaintiff has access to defendant corporation's financial records, which are sufficient to dispose of all claims. Thus, this case does not present the circumstance where "a party's access to ... material is of crucial importance ... is likely to be in the sole possession of the opposing party."⁵⁵

IV. CONCLUSION

This order disposes of all parties' pending motions and **GRANTS** Plaintiff's Motion for Summary Judgment against Defendant corporation RainDance, while the claims against individual Defendants Andrew W. Turner and William Lasky are **DISMISSED**. The only remaining issue in this case is the amount of damages to be assessed against RainDance. The parties shall submit a proposed scheduling order regarding further proceedings to calculate damages.

IT IS SO ORDERED.

ENTERED this 24th day of May, 2010.

S/RALPH R. BEISTLINE
UNITED STATES DISTRICT JUDGE

⁵⁴ Fed. R. Civ. P. 56(c).

⁵⁵ *Patty Precision v. Brown & Sharpe Mfg. Co.*, 742 F.2d 1260, 1264 (10th Cir. 1984).