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**IN THE UNITED STATES DISTRICT COURT  
DISTRICT OF ALASKA**

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

Plaintiffs,

vs.

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

RAINDANCE HEALTHCARE GROUP, INC.,  
ANDREW L. TURNER, Individually, and  
WILLIAM LASKY, Individually,

Defendants.

**PLAINTIFFS' MOTION AND MEMORANDUM IN SUPPORT OF  
MOTION FOR RECONSIDERATION**

Plaintiffs, Trustees of the Alaska Laborers Health and Security, Retirement, Training and Legal Services Funds, pursuant to Local Rule 59.1, submit a Motion for Reconsideration of the Court's decision to dismiss the Plaintiffs' individual claims against Defendants Turner and Lasky. Plaintiffs also seek reconsideration of the Court's Order denying additional discovery to respond to Turner and Lasky's motion.

Plaintiffs submit that the Court erred and abused its discretion in granting summary judgment to Turner and Lasky at this early stage in the case. The Court also erred by relying on incomplete records and documents produced only in initial disclosures by Defendants. Records

requested of Defendants were produced in a tardy, incomplete, and confused manner so that Plaintiffs did not have access to corporate documents to rebut the affidavits of Defendants and Ray Bower.

Pursuant to Rule 26 initial disclosures, Raindance disclosed approximately 440 documents, including documents purporting to show assets and liabilities as well as sheets detailing financial operations (the "Disclosed Documents"). On February 9, 2010, Plaintiffs requested additional financial documents. Defendants responded on March 15, 2010, but produced no documents to any of the 27 Requests for Production, instead referring Plaintiffs to documents held at an office in Washington State.<sup>1</sup> Plaintiffs finally received copies of the requested documents on April 27, 2010.<sup>2</sup> The documents were produced on a DVD disc containing 30,253 scanned documents, unaccompanied by an index or privilege log.<sup>3</sup> The documents were scattered through twelve file folders in apparent random order.<sup>4</sup> The file folders had general headings, none of which indicated they were specifically responsive to Plaintiffs' Requests for Production.<sup>5</sup> Some of the files contained over 100 sub-files.<sup>6</sup> Because of the volume of documents, the DVD was sent to an outside copy service which did not return the documents in full until May 3, 2010.<sup>7</sup> The documents provided are only minimally responsive to Plaintiffs' Requests for Production, or not responsive at all.<sup>8</sup> The limited review performed by CPA Jacquelyn Briskey shows that more discovery would have yielded relevant evidence

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1 Affidavit of Gabler, ¶ 5.  
 2 Affidavit of Gabler, ¶¶ 6-8.  
 3 Affidavit of Gabler, ¶¶ 7, 11-12, 14.  
 4 Affidavit of Gabler, ¶¶ 12, 14.  
 5 Affidavit of Gabler, ¶¶ 12, 14.  
 6 Affidavit of Gabler, ¶ 12.  
 7 Affidavit of Gabler, ¶ 13.  
 8 See Affidavit of Gabler, ¶¶ 19-29.

bearing on the individual claims against Turner and Lasky.<sup>9</sup> Briskey's review revealed that company assets appear to have been used to make payments on behalf of unrelated third parties,<sup>10</sup> and that the documents provided indicate undercapitalization of the company.<sup>11</sup> Because discovery was cut short, Plaintiffs were unable to make this showing in opposition to Defendant's motion for summary judgment.

In addition to improperly denying Plaintiffs' Rule 56(f) motion, many of the Court's findings are either not supported by the record, or were reached by improperly making inferences in favor of the party moving for summary judgment. The Court found the minutes were executed by unanimous consent of the directors-shareholders. Exhibit H to Plaintiffs' Opposition clearly shows that Turner alone executed those minutes. To support its finding that Turner and Lasky respected the corporate identity, the Court found the Defendants' \$100,000 per year salaries reasonable. The only basis for that finding is that another court had found a similar amount reasonable in 1979 in the context of an engineering firm. This finding would suggest a salary of roughly \$100,000 is reasonable under all circumstances and in all contexts.<sup>12</sup> This is plain error. Whether a salary represents adequate compensation or draining of a corporation's assets should be judged in connection with the financial health of the company. Raindance was not a financially healthy company.<sup>13</sup> Plaintiffs were entitled to the inference that those amounts represented a draining of corporate assets. In addition, the Court states the Plaintiffs "speculates" that stock was not issued for valuable consideration. This may be speculation, but

<sup>9</sup> Affidavit of Briskey, ¶ 3.

<sup>10</sup> Affidavit of Briskey, ¶¶ 3-11.

<sup>11</sup> Affidavit of Briskey, ¶¶ 12-22, 25.

<sup>12</sup> Even if the amount cited as reasonable in *Seymour* were an appropriate measure, \$100,000 per year represents a raise of nearly 40% over the adjusted *Seymour* salary of \$72,000 per year.

<sup>13</sup> See e.g. Affidavit of Briskey, ¶ 22.



appropriately so in the context of a Rule 56 motion where Defendants have not provided any records showing that stock was validly issued. Under those circumstances, Plaintiffs were entitled to the inference that stock was not validly issued. Instead, the Court erroneously required Plaintiffs to prove the case without allowing them the discovery necessary to do so.

The findings regarding capitalization exhibit similar problems. The Court found that the balance sheets were prepared in accordance with generally-accepted accounting principles (GAAP). Plaintiff cannot find any evidence for that point in either of Defendants' or Ray Bower's (the Raindance CFO) affidavits or in Defendants' motion for partial summary judgment. Likewise, the Court found the debt-to-equity ratio was not unbalanced, but cites no support for this finding. The materials that are available do not support this assertion and show that Raindance never had positive equity.<sup>14</sup> The amounts the Court notes as "equity contributions" by Turner and Lasky were short-term loans that Raindance was obligated to pay back and cannot be counted as invested capital.<sup>15</sup> The Acid-Test Ratio the Court refers to is not a measure of capitalization, but even if it were, Raindance's own balance sheets show it never had more current assets than current obligations.<sup>16</sup> The Court also erred when it inferred that Raindance was not undercapitalized because it was able to secure a line of credit from CapitalSource Financing, LLC. Rather than drawing inferences in favor of the Plaintiff, the Court made logical leaps on behalf of the Defendants, the moving party. CapitalSource may have been motivated to extend credit due to personal guarantees from Turner or Lasky. The fact is that we simply do not know because the claims were dismissed before discovery and the only capitalization documents in the record are those initially disclosed by Turner and Lasky.

<sup>14</sup> Affidavit of Briskey, ¶¶ 19-20, 23.

<sup>15</sup> Affidavit of Briskey, ¶ 20.

<sup>16</sup> Affidavit of Briskey, ¶ 24.

More fundamentally, the Disclosed Documents are not of the kind that can be relied upon to draw reasonably certain professional conclusions.<sup>17</sup> The Disclosed Documents were not accompanied by any of the underlying financial records from which they were purportedly generated. This Court, as fact-finder, erroneously assigned more reliability to those self-disclosed reports than a financial professional would. To the extent Plaintiffs have been able to review Raindance's financial records, they indicate undercapitalization and commingling of funds.<sup>18</sup>

Based on the forgoing, Plaintiffs respectfully request the Court reconsider its previous Order dismissing the individual claims against Turner and Lasky and denying Plaintiff's Rule 56(f) motion.

DATED this 7<sup>th</sup> day of June, 2010

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<sup>17</sup> See Affidavits of Restad and Briskey attached to Plaintiffs' Opposition.  
<sup>18</sup> Affidavit of Briskey, ¶¶ 11, 25.

Certificate of Service

The undersigned hereby certifies that on the 7<sup>th</sup> day of May, 2010, a true and correct copy of the foregoing was served via electronic mail on the following:

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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,

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INC., ANDREW L. TURNER and  
WILLIAM LASKY,

Defendants.

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

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**OPPOSITION TO MOTION FOR RECONSIDERATION**  
**[CLERK'S DOCKET 43]**

Defendants, Andrew L. Turner and William Lasky, by and through undersigned counsel and pursuant to Federal Rule of Civil Procedure 59.1 and D. Ak. LR 59.1, respectfully file this opposition to the motion for reconsideration filed at Clerk's Docket 43 by the Union Trustees. The Union Trustees seek reconsideration of both rulings, the ruling granting partial summary judgment to Turner and Lasky, and the

ruling denying a Rule 56(f) discovery continuance. The Court correctly resolved both motions and should deny reconsideration.

"[A]s a question of judicial efficiency, motions for reconsideration should only be sought or granted if the court has overlooked a material fact, misconceived a principle of law directly bearing upon the litigated issue, or if the court's initial decision was clearly erroneous or presents the risk of committing a manifest injustice." See *Alexie v. Hageland Aviation*, 2008 WL 6984137 (D. Alaska 2008). The Union Trustees identify no grounds for reconsideration.

On the merits, the Union Trustees offer nothing to disturb the Court's analysis. The latest affidavit from Jacquelyn Briskey (her second) does not rebut, refute or address any of the affidavits or evidence that Turner and Lasky submitted with their motion for partial summary judgment. The most that Briskey says is that -- after having had unfettered access to all of RainDance's entire business files -- she thinks that there might be some indication of "possible undercapitalization." She does not contend that RainDance actually was undercapitalized. Indeed, she makes no firm conclusions of any sort. Briskey does not rebut Ray Bower's affidavit or the other affidavits or evidence that Turner and Lasky submitted. Moreover, Briskey ignores the fact that RainDance secured a \$2 million revolving line of credit from an independent third-party lender. Briskey's affidavit is the very definition of speculation.

Briskey bases most of her conclusions on a draft audit that was prominently stamped "DRAFT" even though she had ready access to the final audit. See Third Affidavit of Ray Bower, ¶¶ 3-4 and ¶¶ 5-15. In other instances, Briskey implies facts that are simply not correct and the Union Trustees know that the facts are not correct.

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For example, she implies that the promissory notes were not signed. However, the notes were executed and those were previously disclosed in December 2009 (and also filed as exhibits with the motion for partial summary judgment). See Third Affidavit of Ray Bower, ¶ 14. In still other instances, Briskey makes unfounded assumptions. For example, Briskey assumes that a loan can never be a form of capital investment. However, that makes no sense from either an accounting or a practical business sense. See Third Affidavit of Ray Bower, ¶ 13. Any business owner is looking for a return on his or her investment. *Id.* It does not matter what form it takes. Furthermore, Briskey neglects to consider that the loans were never repaid. Turner and Lasky lost everything. *Id.* Even setting aside Turner's and Lasky's respective contributions, Briskey never addresses the \$2 million revolving line of credit that Capital Source (an independent third party) extended. *Id.* Briskey also fails to consider RainDance's business operations. RainDance generally paid its debts and obligations, its solvency trend was favorable, and its overall financial posture was acceptable, especially for a first year enterprise. *Id.*, ¶ 17. All of this, as the Court correctly concluded, establishes that RainDance was adequately capitalized.

The only thing the Union Trustees have ever been able to do is to show that RainDance's records were not and are not perfect. This is fair criticism. However, it is not a basis for imposing individual liability. No business or organization is perfect. 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.

In sum, the core facts remain the same.<sup>1</sup> RainDance was capitalized in the amount of \$2.8 million. Its solvency trend was favorable. It generally paid its debts and obligations. Turner and Lasky respected the corporate identity. All corporate papers were executed and filed. No assets were ever commingled. There was never any fraudulent intent or act with respect to RainDance's formation, organization or operation, nor is there any remote evidence to support any such contention. RainDance was managed by a manager in Anchorage. Ray Bower, its CFO, handled the finances. Turner and Lasky never invaded corporate assets and never used corporate assets for their own purposes. The Court correctly concluded that Turner and Lasky should not be individually liable.

On the Rule 56(f) ruling, the Union Trustees do not explain what additional discovery they need, or how it relates to the claims at issue in this case, or when any such discovery will occur, or why the discovery is necessary to oppose the motion for partial summary judgment. Briskey's affidavit does not address these subjects. The fact of the matter is that the Union Trustees have been given unrestricted access to RainDance's complete business and financial records. See Third Affidavit of Ray

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<sup>1</sup> These facts were cited in the underlying motion and reply. Citations are omitted here for convenience's sake.

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Bower, ¶ 16. All of RainDance's financial records have been disclosed (monthly financial statements, audited financial statements, all payroll records including payroll tax returns, all paid and unpaid invoices, bank statements, internal memoranda, draft copies of reports, general ledger journal entries, accounts receivable detailed agings, federal tax returns, Medicaid and Medicare Cost Reports, and other financial files). *Id.* The Union Trustees had no evidence to support the claims for individual liability when they filed suit, and they never undertook any reasonable efforts to review the evidence that Turner and Lasky made available to them after suit was filed. *Id.* RainDance's business and financial records were disclosed in a user-friendly searchable disk on April 2, 2010. *Id.*; see also Affidavit of Lori Haacke. By their own concession, the Union Trustees never reviewed the disk until April 21, 2010. The Union Trustees never gave Briskey the disk until May 25, 2010, and she never reviewed it until June 3, 2010. And, even now -- after having had a chance to review the disk -- Briskey found nothing to discredit or disturb this Court's rulings.

The only other relevant fact that the Court is not already aware of is that defense counsel wrote the Union Trustees' counsel on October 20, 2009 (over 90 days before the motion for partial summary judgment was filed), and laid out the legal and factual grounds that supported dismissal of the claims alleging individual liability. Defense counsel invited dismissal of the claims alleging individual liability. The Union Trustees refused. The Union Trustees knew that Turner and Lasky would be filing a motion for partial summary judgment, and what facts and law they would rely upon. There were never any surprises here.

The Court should deny the Union Trustees' motion for reconsideration.

DATED this 17<sup>th</sup> day of June, 2010.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 17<sup>th</sup> day of June, 2010, a true and correct copy of the foregoing was served via electronic mail on the following:

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LASKY, Individually,

Defendants.

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

**ORDER DENYING MOTION FOR  
RECONSIDERATION AT DOCKET 43**

At Docket 43, Trustees of the Alaska Laborers Health and Security, Retirement, Training and Legal Services Funds ("Plaintiff") moves for reconsideration of the Court's order at Docket 42. Turner and Lasky ("Defendants") oppose the motion.<sup>1</sup> For the reasons outlined below, the Court denies Plaintiff's request.

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<sup>1</sup> Docket 24.

Under Rule 59(e) a district court may reconsider and amend a previous order where the court "(1) is presented with newly discovered evidence, (2) committed clear error or the initial decision was manifestly unjust, or (3) if there is an intervening change in controlling law."<sup>2</sup> Granting a motion for reconsideration is "an extraordinary remedy, to be used sparingly in the interests of finality and conservation of judicial resources,"<sup>3</sup> and should not be granted "absent highly unusual circumstances, unless the district court is presented with newly discovered evidence, committed clear error, or if there is an intervening change in the controlling law."<sup>4</sup>

In moving for reconsideration, Plaintiff argues that the Court erred and abused its discretion in granting the order for summary judgment, and that the Court erred by relying on incomplete records.<sup>5</sup> Plaintiff also alleges that the documents provided by Defendant corporation were minimally responsive and overly

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<sup>2</sup> *School Dist. No. 1J, Multnomah County, Or. v. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993).

<sup>3</sup> *Kona Enterprises, Inc. v. Estate of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000).

<sup>4</sup> *389 Orange Street Partners v. Arnold*, 179 F.3d 656, 665 (9th Cir. 1999).

<sup>5</sup> There has been no intervening change in the law.

voluminous, and the Court therefore erred by denying the Rule 56(f) motion to allow for further discovery.<sup>6</sup>

The Court directed summary judgment against Defendant RainDance corporation, but granted the motion for summary judgment by individuals Andrew Turner and William Lasky. Plaintiff argues that the Court relied on an incomplete record because there was insufficient time between the disclosures pursuant to discovery and the motion for summary judgment. However, the Court based its order on the relevant information presented by both parties, each of which sought summary judgment. Plaintiff had adequate time to review the disclosed financial information and to attach the affidavits of reviewing accountants. Plaintiff also alleges that the Court speculated in favor of Defendants, but this is emphatically not the case. It is simply that the uncontested facts cannot be construed in any way to meet the threshold for piercing the veil of limited corporate liability.

The order denying the motion to continue for further discovery was properly decided. Plaintiff had been provided with RainDance's business and financial records and, as previously stated, no target of discovery has been identified that would allow the Plaintiffs to attach liability to the individual Defendants.

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<sup>6</sup> Docket 22 at 2.

In light of the foregoing, Plaintiff's Motion for Reconsideration at **Docket 43** is **DENIED**.

**IT IS SO ORDERED.**

ENTERED this 29th day of June, 2010.

s/RALPH R. BEISTLINE  
UNITED STATES DISTRICT JUDGE