IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

Corporate Commission of the Mille Lacs Band of Ojibwe Indians, Plaintiff, vs. Money Centers of America, Inc., MCA of Wisconsin, Inc., Christopher Wolfington, Mark Wolfington, Sean Wolfington, Jonathan Ziegler, Baena Advisors, LLC, and Real Estate Empowered, LLC, Defendants.	No. 0:12-cv-01015-RHK-LIB **DEFENDANTS SEAN WOLFINGTON, JOHN K. ZIEGLER, AND BAENA ADVISORS, LLC'S MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO DISMISS THE CORPORATE COMMISSION OF THE MILLE LACS BAND OF OJIBWE INDIANS' SECOND AMENDED COMPLAINT**

Defendants Sean Wolfington, John K. Ziegler, Jr. (improperly designated as Jonathan Ziegler in the Second Amended Complaint, hereinafter "John Ziegler") and Baena Advisors, LLC ("Baena") (where no distinction is necessary, collectively the "Baena Defendants") respectfully submit this memorandum of law in support of their Motion to Dismiss the Second Amended Complaint filed by Plaintiff Corporate Commission of the Mille Lacs Band of Ojibwe Indians (the "Commission") under Federal Rules of Civil Procedure 12(b)(2) and (b)(6).

I. INTRODUCTION

In its Second Amended Complaint, the Commission attempts to transform a simple breach of contract action into a salacious tale of conspiracy, fraud, and deceit, by adding additional claims and defendants. The Commission now alleges that the Baena Defendants, who loaned money to Money Centers of America, Inc. ("MCA") in 2006, are

somehow liable to the Commission for MCA's alleged breach of contract in 2012, despite never having conducted any business with the Commission. These claims are baseless and all must fail as a matter of law.

The Complaint should be dismissed under Rule 12(b)(2) because this Court does not have personal jurisdiction over the Baena Defendants. The Second Amended Complaint does not allege that each of the Baena Defendants individually has any contacts with Minnesota.

Even if the Court were to determine that it has personal jurisdiction over defendants, the Commissions' claims all fail as a matter of law under Rule 12(b)(6). First, the Commission's claims are based on a theory of lender liability. Using only conclusory allegations, the Commission asserts that the Baena Defendants control MCA and are therefore liable for its actions. The Commission, however, does not allege– and cannot show– that the Baena Defendants have actual and total control of MCA. As a result, the Commission's claim of lender liability (and all of its asserted causes of actions that are based on lender liability) fail. Second, the Commission alleges that MCA is the alter ego of the "Wolfington Family", which includes Sean Wolfington and John Ziegler, and that the Court should therefore pierce the corporate veil of MCA, as well as the corporate veil of Baena, to reach the individual Baena Defendants. The Second Amended Complaint fails to establish that MCA and Baena are merely sham entities and that their corporate form should be ignored. The Commission's veil-piercing claim (and all of its asserted causes of actions that are based on veil-piercing) also fail.

Third, as discussed below, the Commission's claims each individually fail as a matter of law.

II. FACTUAL AND PROCEDURAL HISTORY

A. Factual Background

On April 17, 2009, the Commission and MCA entered into the Financial Services/On Switch Agreement, by which MCA agreed to provide check-cashing and cash-access services to patrons of the casinos operated by the Commission. Second Am. Compl. ("SAC") at ¶¶ 18-19. The Commission agreed to pay fees to MCA in exchange for these services. *Id*. at ¶ 20. The Commission also agreed to advance MCA cash from the vaults located on-site at the casinos ("Vault Cash") at a near daily-basis so that MCA can operate the cash-access services. *Id*. at ¶ 22. MCA was then required to return to the Vault Cash to the Commission at a later date. *Id*. at ¶ 23. The Commission now claims that MCA breached its contract by allegedly failing to return Vault Cash to the Commission in 2012.

Sean Wolfington is brother to Christopher Wolfington, MCA's Chief Executive Officer, and cousin to Mark Wolfington, MCA's Chief Operating Officer. *Id*. at ¶ 14. Sean Wolfington does not hold any office or position in MCA. Rather, his company is a creditor of MCA. According to the Second Amended Complaint, Sean Wolfington established Baena in 2006 as a special purpose entity to provide a loan to MCA. *Id*. at ¶ 9. Baena is a Delaware, LLC with a Pennsylvania mailing address. *Id*. John Ziegler, Sean and Christopher Wolfington's brother-in-law, is the manager of Baena and its sole employee. *Id*. at ¶ 73. On December 31, 2006, predating MCA's agreement with the

Commission, Baena loaned MCA $4.75 million (the "Baena Loan"). *Id*. at ¶ 74. Soon after, on February 14, 2007, John Ziegler began serving on the Board of MCA. *Id*. at ¶ 82. MCA made only a few repayments to Baena of $50,000 each between 2008 and 2010, and therefore still owes Baena substantial sums on the loan. *Id*. at ¶ 89.

The Second Amended Complaint does not allege that Sean Wolfington is involved in MCA's business and/or operations. Nevertheless, based only on their familial relationship with the other defendants, and provisions within the Baena Loan agreement with MCA, the Commission claims that Sean Wolfington and John Ziegler, through Baena, "control MCA". *Id*. at ¶ 77. Moreover, without factual allegations that meet the requirements of Federal Rules of Civil Procedure 8 and 9, the Commission asserts that the Baena Defendants conspired with the other Defendants to defraud the Commission, using MCA as their alter ego. *Id*. at ¶ 51.

B. Procedural History

Not only are the Commission's allegations baseless, they do not comport with the minimal discovery already completed in this case. Despite allegations in the Second Amended Complaint regarding Vault Cash advanced to MCA in 2009-2011, the Commission has already conceded that it was fully reimbursed with Settlement Funds from 2009 through March 9, 2012. *See* Declaration of Grand Casino Hinckley CFO Roxanne Hemming, ¶ 10 (outstanding receivable as of April 2, 2012 "consists of Vault Cash provided to MCA dating back to March 10, 2012, that has not been returned to the Grand Casino Hinckley minus deductions for service fees due each day to MCA."); Dkt. 24, Declaration of Mille Lacs Casino CFO Vernon Robertson, ¶ 10 (outstanding

receivable as of April 2, 2012 "consists of Vault Cash provided to MCA dating back to March 10, 2012, that has not been returned to the Grand Casino Mille Lacs, minus deductions for service fees due each day to MCA."). There is, therefore, no claim for money owed from 2009-2011. The Second Amended Complaint mischaracterizes the basic nature of the case, which arises from a dispute over a receivable created in March 2012. Furthermore, Baena has not been paid by MCA since 2010 on its outstanding loan, preceding the Commission's current claim. SAC at ¶ 89 ("MCA issued payments to Baena of approximately $50,000 per month from 2006 through at least 2010.")

The Commission initially filed a Complaint against MCA in state court on April 4, 2012. Dkt. 1. After removal, and faced with a motion to dismiss, the Commission amended its pleading and filed its First Amended Complaint. Dkt. 48. The Commission subsequently demanded that the Court preliminarily attach MCA's out-of-state bank accounts and enjoin MCA from running its business. Dkt. 90. The Court denied the Commission's motion, holding that the gravamen of the Commission's suit is a breach-of-contract claim for money damages. Dkt. 112.

In its Second Amended Complaint, the Commission has joined the Baena Defendants as parties and asserts the following claims against them:

- Count I - Breach of Contract (Piercing the Corporate Veil/Lender Control)
- Count II - Unjust Enrichment
- Count III - Intentional Interference with Personal Property under 24 MLBS § 255 (Conversion)
- Count V - Declaratory Relief/Constructive Trust
- Count VI - Fraud/Deceit

- Count VII - Fraudulent Transfer/Recovery from MCA – Actual Intent (Baena only)
- Count VIII - Fraudulent Transfer/Recovery from MCA – Constructive Intent (Baena only)
- Count XIV - Breach of Fiduciary Duty (John Ziegler)
- Count XV - Aiding and Abetting Breach of Fiduciary Duty (Sean Wolfington and Baena)

III. THE COMMISSION'S SECOND AMENDED COMPLAINT SHOULD BE DISMISSED UNDER FED. R. CIV. P. 12(B)(2)

A complaint against a defendant will be dismissed where the court lacks jurisdiction over that defendant. Fed. R. Civ. P. 12(b)(2).[1] A federal court sitting in diversity can exercise personal jurisdiction over a defendant only if doing so comports with both the long-arm statute of the state in which the federal court is located and the Due Process Clause of the Fourteenth Amendment. *Wells Dairy, Inc. v. Food Movers Int'l, Inc.*, 607 F.3d 515, 518 (8th Cir. 2010); *Lucachick* v. *NDS Americas, Inc.*, 169 F. Supp. 2d 1103, 1106 (D. Minn. 2001). However, because the Minnesota long-arm statute

[1] Courts may exercise either specific or general jurisdiction over a party. Specific jurisdiction exists where the controversy arises out of or is related to the defendants' contacts with the forum state. *Helicopteros Nacionales*, 466 U.S. 408, 415 n.8 (1984). When the plaintiff's claim is not related to the defendant's contacts with the forum, a court can exercise general jurisdiction based on the defendant's "continuous and systematic" contacts with the forum. *See Reiheart Johnson v. Welsh Equipment, Inc.*, 518 F. Supp. 2d 1080, 1088 (D. Minn. 2007). Here, the Complaint alleges that the Baena Defendants, through MCA, conducted business with the Commission, thus giving rise to their claims. The Second Amended Complaint does not include any allegations consistent with general jurisdiction. Moreover, as set forth in the affidavits of John Ziegler and Sean Wolfington, the Baena Defendants do not have sufficient contacts with Minnesota to establish general jurisdiction. *See* Exs. A & B. Accordingly, this Court does not have general jurisdiction over the Baena Defendants.

extends jurisdiction to the fullest extent permitted by the Due Process clause, the Court need only decide whether personal jurisdiction is consistent with federal due process. *Id.*

"Due process requires that there be minimum contacts between the nonresident defendant and the forum state such that the assertion of personal jurisdiction is consistent with the traditional notions of fair play and substantial justice." *Wells Dairy, Inc.*, 607 F.3d at 518 (citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291-92, 100 S. Ct. 559, 62 L. Ed. 2d 490 (1980)). "Sufficient contacts exist when the defendant's conduct and connection with the forum state are such that he should reasonably anticipate being haled into court there …." *Coen v. Coen*, 509 F.3d 900, 905 (8th Cir. 2007) (quotation omitted). "It is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws." *Greenbelt Res. Corp. v. Redwood Consultants, LLC*, 627 F. Supp. 2d 1018, 1024 (D. Minn. 2008) (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985)).

Courts in the Eighth Circuit examine five factors to determine whether the exercise of jurisdiction comports with due process: (1) the nature and quality of the contacts with the forum state; (2) the quantity of contacts with the forum; (3) the relation of the cause of action to these contacts; (4) the interest of the forum state in providing a forum for its residents; and (5) the convenience of the parties. *Lucachick.*, 169 F. Supp. 2d at 1106. Courts do not apply these factors mechanically. Although the last two factors are to be considered, they are not determinative. *See id.*

Assertion of personal jurisdiction over the Baena Defendants would not comport with traditional notions of substantial justice and fair play. The Baena Defendants did not purposefully avail themselves of Minnesota law and had no reason to anticipate being haled into court in Minnesota. *See* Ex. A ("Declaration of John K. Ziegler, Jr."), Ex. B ("Declaration of Sean Wolfington"). Sean Wolfington is a resident of Florida. Ex. A. He established Baena, a Delaware LLC with a Pennsylvania mailing address, to provide a loan to MCA, which is also a Delaware LLC with its principal office located in Pennsylvania. SAC at ¶ 70 ("Sean Wolfington established Baena Advisors, LLC in 2006."); SAC at ¶ 72 ("Baena was created for the sole purpose of providing funds to MCA.") John Ziegler, a Pennsylvania resident, is an employee of Baena and is on the Board of MCA. Ex. B. Neither Sean Wolfington, John Ziegler, or Baena conduct any business in Minnesota. *See* Exs. A & B.. None of them have offices in Minnesota and none of them have had any dealings with the Commission. *Id*.

The application of the Eighth Circuit factors confirms that the Court lacks jurisdiction over the Baena Defendants. According to the Second Amended Complaint, the *only* basis for personal jurisdiction over the Baena Defendants is that they allegedly "control" MCA, and that MCA, in turn, conducts business in Minnesota. SAC at ¶ 16. As described in detail in Section IV.B.1 below, the Commission's claims that the Baena Defendants actually control MCA or directed MCA's business in Minnesota fail as a matter of law. Because the Baena Defendants did not conduct business in Minnesota through MCA and the Complaint does not allege any other contact with Minnesota, this Court lacks specific jurisdiction.

Moreover, the Baena Defendants' alleged involvement with MCA is insufficient to establish jurisdiction over the individual defendants. "A corporate officer's 'contacts with a forum state are not to be judged according to the corporation's activities there; rather, each defendant's contacts with the forum state must be assessed individually.'" *Residential Funding Corp. v. Anvil Funding Corp.*, No. 04-4043 (JNE/SRN), 2005 WL 1323940, at *3 (D. Minn. June 3, 2005); *Zhorne v. Swan*, 700 F. Supp. 1037 (D. Minn. 1988) ("It is well established that jurisdiction may not be asserted against the officers of a corporation based upon jurisdiction over the corporation itself."). The Second Amended Complaint is devoid of even a single allegation regarding the Baena Defendants' individual contacts with Minnesota. For instance, the Commission does not allege that the Baena Defendants visited Minnesota on behalf of MCA or that they were in communication with the Commission on behalf of MCA. As set forth in the affidavits of Sean Wolfington and John Ziegler, neither has sufficient contacts with Minnesota to pass constitutional muster. *See* Exs. A & B.

Accordingly, the Second Amended Complaint should be dismissed against the Baena Defendants should be dismissed for lack of personal jurisdiction.

IV. THE COMMISSION'S CLAIMS ALL FAIL UNDER FED. R. CIV. P. 12(b)(6)

A. Motion to Dismiss Standard

To "survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 1949 (2009) (quoting *Bell Atlantic Corp. v.*

Twombly, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id* (quoting *Twombly*, 550 U.S. at 556). Thus, a pleading that offers only "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do." *Id*.

"[T]he plausibility standard, which requires a federal court complaint to state a claim for relief that is plausible on its face, ... asks for more than a sheer possibility that a defendant has acted unlawfully." *Ritchie v. St. Louis Jewish Light*, 630 F.3d 713, 717 (8th Cir. 2011) (internal quotation and citation omitted). Rather, the complaint must set forth sufficient facts to "nudge[] the[] claim[] across the line from conceivable to plausible." *Twombly*, 550 U.S. at 570. Stated differently, the plaintiff must "assert facts that affirmatively and plausibly suggest that [he] has the right he claims ..., rather than facts that are merely consistent with such a right." *Stalley v. Catholic Health Initiatives*, 509 F.3d 517, 521 (8th Cir. 2007) (citing *Twombly*, 550 U.S. at 554-57). "Determining whether a complaint states a plausible claim for relief will, . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Iqbal*, 129 S. Ct. at 1950.

Under Rule 8(a)(2), a pleading must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." A complaint which lumps all defendants together and does not sufficiently allege who did what to whom, therefore fails to state a claim for relief because it does not provide fair notice of the grounds for the claims made against a particular defendant. *See Tully v. Bank of America*, N.A., No.

10-4734 (DWF/JSM), 2011 WL 1882665, at *6 (D. Minn. May 17, 2011) (citing *Liggins v. Morris*, 749 F. Supp. 967, 971 (D. Minn. 1990)). Moreover, under Rule 9(b), the circumstances constituting fraud shall be stated with particularity. In order to meet the particularity requirements of Rule 9(b), a plaintiff "must typically identify the 'who, what, where, when, and how' of the alleged fraud." *BJC Health Sys. v. Columbia Cas. Co.*, 478 F.3d 908, 917 (8th Cir. 2007).

B. The Commission Has Not Pled Facts Necessary to Establish Lender Liability or to Pierce the Corporate Veil

1. The Second Amended Complaint Does Not Establish a Claim for Lender Liability

Throughout its Second Amended Complaint, the Commission alleges that "[t]he effect of the Baena Loan was that MCA was ultimately controlled by Baena, Sean Wolfington, and John Ziegler." SAC at ¶ 84. The Commission fails, however, to allege a claim of lender liability under Delaware law.

As an initial matter, Delaware law applies because Minnesota courts apply the internal affairs doctrine, that "the law of the state of incorporation normally determines issues relating to the internal affairs of a corporation." *Rupp v. Thompson*, No. C5-03-347, 2004 WL 3563775, at *3 (Minn. Dist. Ct. Mar. 17, 2004); *see also Edgar v. MITE Corp.*, 457 U.S. 624, 645 (1982) ("[O]nly one State should have the authority to regulate a corporation's internal affairs- matters peculiar to the relationships among or between the corporation and its current officers, directors, and shareholders-because otherwise a corporation could be faced with conflicting demands.")

> Courts have consistently applied the internal affairs doctrine to piercing the corporate veil issues, reasoning that 'the issue of piercing the corporate veil is collateral to and not part of the parties' negotiations or expectations with respect to the contract.' The Restatement (Second) of Conflict of Laws states that 'The local law of the state of incorporation will be applied to determine the existence and extent of a shareholder's liability to the corporation for assessments or contributions and to its creditors for corporate debts.' Most courts have adopted this position and applied the internal affairs doctrine as their choice of law for piercing the corporate veil.

Matson Logistics, LLC v. Smiens, No. 12-400 (ADM/JJK), 2012 WL 2005607, at *6 (D. Minn. June 5, 2012) (internal citations omitted). The lender- liability theory falls within veil-piercing jurisprudence. *See Pearson* v. *Component Tech. Corp.,* 80 F. Supp. 2d 510, 521 (W.D. Pa. 1999) ("We are well aware, however, that a small number of courts have applied piercing the veil jurisprudence to the relationship between a borrower and a lender, in a context other than that of a parent corporation and its subsidiary.") Delaware law therefore applies to this claim.

The Commission does not allege that the Baena Defendants took actual and total control of MCA as a result of the Baena Loan. In the Second Amended Complaint, the Commission recites some of the provisions within the Baena Loan Agreements, which provide Baena with certain rights in event of default. SAC at ¶ 79 (allowing Baena to "restrict" MCA's cash), ¶ 80 (requiring written consent by Baena before MCA engaged in certain activities), ¶¶ 86-88 (providing Baena with rights in the event of default). The Commission now relies on the terms of the Loan Agreement to establish that the Baena Defendants have control of MCA. It is worth noting that the Commission does not even

allege that the Baena Defendants actually exercised all of the rights provided under the Loan Agreement.

Under clear and well established Delaware law, a creditor that exercises its rights, like those provided by the Baena Loan Agreement, does not take total and actual control of the debtor so as to be liable for the debtor's actions. In *Irwin & Leighton, Inc. v. W.M. Anderson Co.*, 532 A.2d 983 (Del. Ch. 1987), the Delaware Court of Chancery discussed the legal standard

> to be applied when a creditor of a corporation seeks to hold another creditor of the corporation liable on the theory that the second creditor dominated and controlled the corporation to such an extent that it could be said to have used it as an instrumentality of its own:
>
> Two elements are essential for liability under the 'instrumentality' doctrine. First the dominant corporation must have controlled the subservient corporation and second, the dominant corporation must have proximately caused plaintiff harm through misuse of this control.

532 A.2d at 987-88 (quoting *Krivo Industrial Supply Co. v. National Distillers and Chemical Corp.*, 483 F.2d 1098 (5th Cir. 1973), modified, 490 F.2d 916 (5th Cir. 1974)). To determine that a creditor controls its debtor, "courts require a strong showing that the creditor assumed actual, participatory, total control of the debtor. Merely taking an active part in the management of the debtor corporation does not constitute [such] control." *Id.* at 899.

A court will not find that a creditor has taken actual and total control even where the creditor "involve[ed] itself very substantially in the day-to-day operations" of the debtor if that control reflected "nothing more than [the creditor's] ability to decide

whether to continue extending the loan and when to demand its repayment." *Irwin & Leighton, Inc.*, 532 A.2d at 988-89. Indeed, "[t]he control necessary to invoke what is sometimes called the 'instrumentality rule' is not mere majority or complete stock control but such domination of finances, policies and practices that the controlled corporation has, so to speak, no separate mind, will or existence of its own and is but a business conduit for its principal." *Krivo*, 483 F.2d at 1106 (quoting 1 W. Fletcher, Cyclopedia of the Law of Private Corporations § 4, 204-205 (perm. ed. rev. 1963)). As the Delaware Chancery Court in *Irwin & Leighton, Inc.* noted,

> When the cases extending liability to a creditor in control of a corporation are reviewed, two generalizations emerge. First, in most of those cases, the creditor or its affiliate was active in the formation of the debtor corporation and was not simply an arms-length extender of credit. Second, in each of those instances, I have found, the corporation was from the outset operated as an arm of the creditor's (or an affiliate's) business. Where, as here, the third party creditor became involved with the corporation as the result of an arms-length extension of credit or other arms-lengths transactions and thereafter comes to exercise control over the debtor by reason of a default or threatened default, such a creditor has not been held to thereby assume liability for its debtor's obligations.

532 A.2d at 989.

In the Second Amended Complaint, the only allegation of the Baena Defendants' alleged influence over MCA is that MCA issued a few payments to Baena of approximately $50,000 per month from 2006 to 2010. SAC at ¶ 89. Those payments were due and owing to Baena under the Baena Loan, and do not in any way support a claim that Baena had control over MCA. Moreover, the Commission glosses over the

fact that despite the alleged control over MCA, Baena has not received any payments since 2010 and is still owed a substantial amount of money on the loan. *See* Ex. B.

Under Delaware law, actions taken by Baena pursuant to the loan agreement in order to secure payment owed to it by MCA does not constitute total and actual control. The Commission does not–and cannot– allege that the Baena Defendants took control of MCA's finances, policies and practices so that MCA "has, so to speak, no separate mind, will or existence of its own and is but a business conduit for" Baena. *See Krivo*, 483 F.2d at 1106. The Commission has failed to assert a claim of lender liability against the Baena Defendants and the Commission's claims must be dismissed.

2. The Commission Has Not Pled Facts Necessary to Pierce the Corporate Veil of MCA

In its Second Amended Complaint, the Commission improperly seeks to bring in additional individuals and entities in order to secure its position, going so far as to now claim that MCA itself is a legal fiction created in 2005 to ultimately defraud the Commission in 2012. The Commission grasps at straws in an attempt to improve its likelihood of recovery by asserting claims against anyone and everyone associated with MCA.

Under Delaware law, the corporate entity is only disregarded in "exceptional circumstances," as "[p]ersuading a Delaware court to disregard the corporate entity is a difficult task." *Mobil Oil Corp.* v. *Linear Films, Inc.*, 718 F. Supp. 260, 270 (D. Del. 1989); *Wallace* v. *Wood*, 752 A.2d 1175, 1184 (Del. Ch. 1999). Delaware public policy is fundamentally against disregarding the corporate form, *see id.*, because corporations

allow investors to contain their risk and therefore encourages the investment of capital in new enterprises.

To state a veil-piercing claim in Delaware, "the plaintiff must plead facts supporting an inference that the corporation, through its alter-ego, has created a sham entity designed to defraud investors and creditors." *Crosse* v. *BCBSD, Inc.*, 836 A.2d 492 (Del. 2003); *Wallace*, 752 A.2d at 1183-85. In order to succeed on an alter ego theory of liability, plaintiffs must essentially demonstrate that, in all aspects of the business, the corporation and its shareholders actually functioned as a single entity and should be treated as such. *Pearson* v. *Component Tech. Corp.*, 247 F.3d 471,485 (3d Cir. 2001). The degree of control required to pierce the veil is "exclusive domination and control" to the extent that the company has no "legal or independent significance of [its] own." *Wallace*, 752 A.2d at 1183.

As a preliminary matter, the Commission does not allege that Sean Wolfington or John Ziegler were individually involved in establishing MCA as a sham entity or that they each "exercise 'exclusive domination and control'" over MCA. Instead, the Second Amended Complaint improperly lumps them with Christopher and Mark Wolfington as the "Wolfington Family" and then alleges that the "Wolfington Family" is the alter ego of MCA. SAC at ¶ 99 ("The Wolfington Family's disregard of the corporate form and use of the corporate form to commit fraud continues."). Moreover, the Commission has not pled that MCA was established as a sham entity or that defendants committed a fraud in the use of MCA's corporate form.

a. MCA was Not Established as a "Sham Entity" And Therefore the Commission Cannot Disregard MCA's Corporate Form

The Commission has not pled facts to support an inference that MCA is "a sham entity designed to defraud investors and creditors." *Crosse*, 836 A.2d at 497. In fact, MCA is not a "sham entity" or a "shell corporation," without its own assets and created only to perpetrate a fraud; it is merely a failing business. *See Mason* v. *Network of Wilmington, Inc.*, No. 19434-NC, 2005 WL 1653954, at *4 (Del. Ch. 2005) ("If creditors could enter judgments against shareholders every time that a corporation becomes unable to pay its debts as they become due, the limited liability characteristic of the corporate form would be meaningless.").

MCA was incorporated in October 1997, and was a publicly traded small business registered with the SEC from January 12, 2004 through November 24, 2008. *See* January 12, 2004 SB-2; December 31, 2007 10-KSB.[2] MCA filed independently-audited financial statements for the time it was registered with the SEC. At that time, MCA listed 47 full time employees, and over $800,000 in property and equipment owned by MCA less accumulated depreciation. However, after nearly 10 years in the business, independent auditors noted that MCA had a working capital deficit, and "substantial doubt about the Company's ability to continue as a going concern." December 31, 2007 10-KSB. Accordingly, MCA made the prudent financial decision not to issue dividends,

[2] MCA's SEC filings are publicly available at http://www.sec.gov/cgi-bin/browse-edgar?company=Money+Centers+of+America&match=&CIK=&filenum=&State=&Country=&SIC=&owner=exclude&Find=Find+Companies&action=getcompany

but instead to put the funds into financing the business. December 31, 2007 10-KSB ("The future payment of dividends ... will depend on our future earnings, financial requirements and other similarly unpredictable factors. For the foreseeable future, we anticipate that any earnings that may be generated from our operations will be retained by us to finance and develop our business and that dividends will not be paid to stockholders.").

In attempting to show that the MCA's corporate form is a "sham," the Commission points only to MCA's current insolvency and makes veiled inferences to its alleged undercapitalization. SAC at ¶ 53. However, under Delaware law, mere insolvency or undercapitalization is not enough to allow piercing of the corporate veil. *Mason,* 2005 WL 1653954, at *4; *see also In re BHS& B Holdings LLC,* 420 B.R. 112, 52 Bankr. Ct. Dec. (CKR) 125 (Bankr. S.D. N.Y. 2009) (applying Delaware law) (undercapitalization is rarely sufficient to pierce the corporate veil, because otherwise the veil of every insolvent subsidiary or failed start-up corporation could be pierced). Instead, the inquiry "is most relevant for the inference it provides into whether the corporation *was established* to defraud its creditors or other improper purpose such as avoiding the risks known to be attendant to a type of business." *Trevino v. Merscorp,* 583 F. Supp. 2d 521, 530 (D. Del. 2008) (finding no alter-ego liability where plaintiff conceded subsidiary established for legitimate business purpose). When determining whether a subsidiary was adequately capitalized, courts focus on the initial capitalization: "whether a corporate entity was or was not set up for financial failure" *George Hyman Constr. Co.* v. *Gateman,* 16 F. Supp. 2d 129, 152-53 (D.Mass. 1998). Not only did MCA

have a legitimate business purpose, but has been a functioning small business for almost 15 years, and was publicly traded, registered with the SEC, and has employees, assets, and customers.

b. The Commission Has Not Alleged Fraud in the Corporate Form Itself, but Merely Bad Acts by Individuals in the Corporation

The Commission only points to alleged wrongs by some individuals in the corporation, not the corporate structure itself, as being the basis for piercing the veil. This is insufficient under Delaware law. *Medi-Tec of Egypt Corp. v. Bausch & Lomb Surgical*, No. 19760-NC, 2004 WL 5366102, at *3-4 (Del. Ch. Nov. 21, 2003) (holding that plaintiffs alter ego argument fails because plaintiff has not alleged that the corporate form in and of itself operates to serve some fraud or injustice, distinct from the alleged wrongs of the underlying corporation). "[T]he fraud or similar injustice that must be demonstrated in order to pierce a corporate veil under Delaware law must, in particular, 'be found in the defendants' use of the corporate form.'" *Brown v GE Capital Corp. (In re Foxmeyer Corp.)*, 290 B.R. 229, 236-37 (Bankr. D. Del. 2003) (*citing Mobil Oil Corp. v. Linear Films, Inc.*, 718 F. Supp. 260, 269 (D. Del. 1989)); *see also Wallace,* 752 A.2d at 1184 ("Piercing the corporate veil... 'requires that the corporate structure cause fraud or similar injustice'"); *Medi-Tec of Egypt Corp.,* 2004 WL 5366102, at *3-4 (under Delaware law, to pierce the corporate veil or hold that a corporation is the alter ego of another, plaintiff "must prove that some 'fraud or injustice' would be perpetrated through misuse of the corporate form."). "[T]he underlying cause of action [, at least by itself,] does not supply the necessary fraud or injustice. To hold otherwise would render the

fraud or injustice element meaningless, and would sanction bootstrapping." *Mobil Oil*, 718 F. Supp. at 268; *see also Outokumpu Eng'g Enters. v. Kvaerner Enviropower*, 685 A.2d 724, 729 (Sup. Ct. Del. 1996) ("The 'injustice' must be more than the breach of contract alleged in the complaint").

3. Baena Was Not Established as a "Sham Entity" and Therefore The Commission Cannot Disregard MCA's Corporate Form

The analysis in subsections 2(a) and (b) above also applies to the allegations regarding Baena. The Second Amended Complaint alleges that "Baena is a sham entity formed for the sole purpose of protecting Sean Wolfington and John Ziegler from liability for MCA…." SAC at ¶ 9. In short, protecting personal assets is a legitimate reason to form a corporation. *See Wallace*, 752 A.2d at 1183-84 (noting that "[p]ersuading a Delaware court to disregard the corporate entity is a difficult task" because plaintiff must demonstrate that the corporation is a sham that exists "for no other purpose than as a vehicle for fraud."). The Second Amended Complaint is simply devoid of allegations necessary to establish a claim for piercing the corporate veil against Baena.

C. Counts I, II, III, V, and VI Fail as a Matter of Law

For the reasons discussed above regarding lack of lender liability and inability of the Commission to pierce the corporate veil of MCA and Baena, Count I (Breach of Contract), Count II (Unjust Enrichment), Count III (Intentional Interference with Personal Property/Conversion), Count V (Constructive Trust), and Count VI (Fraud) fail as a matter of law. As was discussed in detail above, the lender liability and veil piercing theories do not support the causes of action the Commission attempts to assert.

D. The Commission's Claims Fail Because They Do Not State a Claim under Fed. R. Civ. P. 12(b)(6)

1. None of the Baena Defendants Obtained "Vault Cash" From the Commission, Therefore the Commission's Unjust Enrichment, Conversion, and Constructive Trust Claims Fail as a Matter of Law

The Commission makes a claim against the Baena Defendants for Unjust Enrichment (Count II), Intentional Interference with Personal Property/Conversion (Count III), and Constructive Trust (Count V) based entirely upon the alleged retention of "Vault Cash" by MCA. SAC at ¶¶ 109-123, 129-130. However, it has already been established that all Vault Cash was either provided to casino patrons or obtained by the Commission during its eviction of MCA in April 2012, Dkt. 122, and the Second Amended Complaint does not plead a single fact alleging that the Baena Defendants received any Vault Cash from the Commission.

Because the Commission has not pled even the most basic allegations that the Baena Defendants obtained any property from the Commission (as opposed to MCA), these claims must be dismissed.

2. The Commission Has Not Pled Facts that the Baena Defendants Committed Fraud in Any Individual Capacity

To the extent the Commission's allegations of fraud are against the Baena Defendants in their individual capacity, those claims fail on their face. The Commission has not alleged that the Baena Defendants made any statement or representation to the Commission. Therefore, any fraud claim against the Baena Defendants fails as a matter of law.

3. The Commission Has Not Pled Facts Establishing that Baena Received a Fraudulent Transfer (Counts VII and VIII)

a. The Commission Cannot Allege Fraudulent Transfers to Baena as any Alleged Transfer was Prior to any Alleged "Claim" by the Commission

The Commission's allegations of fraudulent transfer by MCA to Baena under Delaware's Fraudulent Transfer Act, Del. Code ANN. tit. 6, §1301 et seq., bear no relationship to its allegations of being owed $5.6 million in Settlement Funds for Vault Cash advances made between March 10, 2012 and April 2, 2012.

As set forth in the Second Amended Complaint, Baena loaned MCA $4.75 million in 2006. The transfers made to Baena, about which the Commission now complains, were repayments owed to Baena under the Loan Agreement. According to the Second Amended Complaint, these transfers occurred between 2008 and 2010. SAC at ¶ 174. The Commission's alleged "claim," however, did not even exist until March of 2012. Therefore, payments to Baena could not have been made with any intent to hinder, delay or defraud the Commission as a creditor because the Commission was not a creditor at the time the transfers were made. Similarly, the Commission's claim that MCA did not receive reasonable value for the payments is also without merit. SAC at ¶ 148. The reasonable value was the $4.75 million loan, which MCA is obligated to pay back to Baena.

The Commission's allegations that money had been transferred to Baena two years prior to the Commission's alleged "claim" do not state a claim for fraudulent transfer, and Counts VII and VIII must be dismissed.

4. The Commission's Breach of Fiduciary Duty Claims Must be Dismissed Because the Commission Lacks Standing

The Commission's breach of fiduciary duty claim in Count XIV is based entirely upon John Ziegler's role as board member of MCA and his fiduciary duty to MCA and its shareholders. SAC at ¶¶ 190-196. The Commission has not alleged a proper direct action nor a derivative action for breach of fiduciary duty.[3] *See Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031, 1039 (Del. 2004) ("In this case it cannot be concluded that the complaint alleges a derivative claim. But, it does not necessarily follow that the complaint states a direct, individual claim. While the complaint purports to set forth a direct claim, in reality, it states no claim at all.").

It is black letter law that a creditor cannot bring a direct claim against an insolvent corporation for the breach of fiduciary duty; that such a claim is improper was established in the very case law cited by Plaintiff in the Second Amended Complaint. *See NACEPF* v. *Gheewalla*, 930 A.2d 92, 94 (Del. 2007) ("we hold that the creditors of a Delaware corporation that is either insolvent or in the zone of insolvency have no right, as a matter of law, to assert direct claims for breach of fiduciary duty against the corporation's directors"). Trying to twist this action into a derivative claim filed by the Commission on behalf of MCA, the Commission cites to case law relating to derivative claims by creditors. SAC at ¶ 197. This case law is pure dicta and inapplicable here. *See NACEPF*, 930 A.2d at 97. The Commission is not a secured creditor of MCA, nor a continuous

[3] Under the "internal affairs" doctrine, fiduciary-duty claims are also governed by the law of the state of incorporation. *See Calleros v. FSI Int'l, Inc.*, No. 12-2120 (RHK/AJB), 2012 WL 4097832, at *3 n.7 (D. Minn. Sept. 18, 2012).

stockholder of MCA, but merely a litigant seeking a judgment. Dkt. 112, at 10. Moreover, the Commission has not only failed to plead facts necessary to pursue a derivative claim, they have not even pled the bare elements of a derivative claim, such as a demand on the board of directors or futility. *Rales* v. *Blasband*, 634 A.2d 927, 932 (Del. 1993). Delaware courts, as well as federal courts, require that a party plead with particularity why a demand was not made. *See e.g.*, Delaware Court of Chancery Rule 23.1; Fed. R. Civ. P. 23.1. Furthermore, the Commission does not, in its Second Amended Complaint, purport to sue on behalf of MCA for MCA's recovery, but is instead suing in its own individual capacity.

Similarly, the Commission has not properly alleged that John Ziegler actually breached any fiduciary duty. SAC at ¶¶ 192, 195. *See Twombly*, 550 U.S. at 555. The Commission has not pled particularized facts that John Ziegler was not disinterested and independent, or that the challenged transactions were not the product of a valid exercise of business judgment. *Aronson v. Lewis,* 473 A.2d 805, 814 (Del. 1984), overruled on other grounds by *Brehm* v. *Eisner, 146* A.2d 244 (Del. 2000).

Because the Commission has no standing to assert a breach of fiduciary duty claim against John Ziegler, it is barred from asserting a claim that Sean Wolfington and Baena aided and abetted John Ziegler's alleged breach of fiduciary duty. Count XV of the Second Amended Complaint must also be dismissed.

V. CONCLUSION

For the reasons set forth above, the Commission's Second Amended Complaint should be dismissed in its entirety and with prejudice.

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Respectfully submitted,

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