UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Corporate Commission of the Mille Lacs Band of Ojibwe Indians, Plaintiff, vs. Money Centers of America, Inc. and MCA of Wisconsin, Inc., Christopher Wolfington, and Mark Wolfington, Defendants.	Court File No.: 12-cv-01015 (RHK/LIB) **PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO CHRISTOPHER WOLFINGTON AND MARK WOLFINGTON'S MOTION FOR PARTIAL DISMISSAL OF PLAINTIFF'S SECOND AMENDED COMPLAINT**

Defendants Chris Wolfington and Mark Wolfington's ("Wolfingtons") Motion to Dismiss should be denied. (Dkt No. 160, "Wolfingtons' Motion.")

The Wolfingtons ignore the most important aspect of the claims against them: the Wolfingtons siphoned money from an insolvent company to pay, among other things: (1) a personal line of credit; (2) personal taxes; and (3) personal expenses from stores such as Netflix, iTunes, Amazon.com, and Kindle Book. This is precisely the type of situation for which piercing claims exist.

The Corporate Commission of the Mille Lacs Band of Ojibwe ("Commission") states a claim for piercing, as well as unjust enrichment, constructive trust, intentional interference with personal property, fraud, fraudulent transfer, and breach of fiduciary duty.

FACTS[1]

The Commission filed a Second Amended Complaint naming the Wolfingtons as Defendants on January 22, 2013. (Dkt No. 129 ("Second Amended Complaint" or "2nd Am. Compl."))[2] The previous complaint stated a breach of contract claim against Money Centers of America, Inc. and MCA of Wisconsin, Inc. (together, "MCA") for failure to repay $5.6 million advanced by the Commission. (Dkt No. 48-1.) The Second Amended Complaint details how the Wolfingtons operated MCA as a scheme to defraud the Commission and other entities associated with Native American Tribes.

I. The Wolfingtons' Scheme.

Defendant Christopher Wolfington is MCA's Chief Executive Officer, dominant shareholder, and one of two MCA board members. (2nd Am. Compl. at ¶ 11.) Defendant Mark Wolfington is Christopher Wolfington's cousin and MCA's Chief Operating Officer. (*Id*. at ¶ 12.)

MCA enters agreements with casinos affiliated with Native American tribes to provide check-cashing and other cash access services. (2nd Am. Compl. ¶ 50.) In connection with the agreements, MCA tells casino owners that it will require access to cash from the casino's vaults ("Vault Cash") to fund the float. (*Id.* at ¶¶ 51-52.) The "Float" is the "money in transit that exists between the time [MCA] advances funds to

[1] The facts of this case have been the subject of many previous briefs. As such, this section focuses on those facts newly alleged in the Second Amended Complaint.

[2] The Second Amended Complaint initially included Defendants Sean Wolfington, Jonathan Ziegler, Baena Advisors, LLC, and Real Estate Empowered, LLC, all of whom challenged personal jurisdiction in Minnesota. The Commission subsequently voluntarily dismissed those defendants without prejudice. (Dkt. No. 176.)

customers and the time [MCA] is reimbursed." (*Id.* at ¶ 51 *quoting* 2007 Prospectus issued by MCA.) The common understanding in the industry, as MCA acknowledges, is that the Vault Cash advanced is "not working capital but rather money necessary to fund the [F]loat . . ." (*Id*.)

MCA promises to return the Vault Cash in a handful of days -- approximately the time it takes for transactions to clear. (2nd Am. Compl. at ¶¶ 24-27.) But the Wolfingtons and MCA do not return the Vault Cash advanced within the timeframe promised. (*Id.* at ¶¶ 29-42.) Instead, MCA takes longer to return the funds, which increases the receivable due to the casinos. (*Id*.) The delay allows the Wolfingtons to pocket the excess money for their personal use. (*Id.* at ¶¶ 50-68.)

Due to the high volume of cash transactions at casinos, repaying only one or two days "late" allows the Wolfingtons to siphon off hundreds of thousands of dollars of the "Float." (*Id*. at ¶ 37.) For example, in the case of the Commission, in June and July 2010, MCA took, on average, more than seven (7) days to reimburse the funds. (*Id*.) At the end of July 2010, MCA owed the Commission $2.9 million. (*Id*.) By June/July 2011, MCA took approximately twelve (12) days to reimburse Vault Cash advanced, and the amount MCA owed the Commission increased to $4.7 million by the end of July 2011. (*Id.*)

II. The Wolfingtons Use MCA's Funds for Personal Expenses and Disregard the Corporate Form.

The Wolfingtons treat MCA as their alter ego. MCA is insolvent and has been since at least 2006. (*Id.* at ¶ 53(a) & (b).) MCA's financial statements show that its debts far exceed its assets. (*Id*.) MCA continues to lose money. (*Id*.) Yet MCA continues to

operate and seek business from casinos associated with Native American Tribes. (*Id*. at ¶ 99) (MCA is paying a consultant to obtain a contract with a Native American Tribe in Wisconsin.) MCA has only two board members – Christopher Wolfington and his brother-in-law, Jonathan Ziegler. (*Id.* at ¶ 53(c).) MCA does not keep minutes of board meetings. (*Id*. at ¶ 53 (d)). MCA does not issue dividends. (*Id.*).

The Wolfingtons use money received by MCA for personal expenses for themselves and their family members. Evidence that the Wolfingtons used MCA funds for their personal expenses includes:

1. More than $1 million in cash withdrawals from an MCA Operating Account shortly after the Commission entered its Agreement with MCA in June 2009. (2nd Am. Compl. ¶ 62.)

2. Hundreds of thousands of dollars paid by MCA toward an American Express Card held by Christopher Wolfington in January and February 2010. (*Id.* at ¶ 63.)

3. Wires of $1,000 a month from an MCA account to pay off a personal line of credit held by Christopher Wolfington. (*Id*. at ¶ 53(e)(2).)

4. $83,000 in advances to Mark Wolfington, including a $63,000 advance to pay his personal taxes on June 8, 2012, after this lawsuit was filed. (*Id.* at ¶ 53(e)(2).)

5. A $15,000 wire to Christopher Wolfington's brother-in-law, who does not provide services to MCA on June 27, 2012. (*Id.* at ¶ 53(e)(3).)

6. More than $70,000 in transfers from MCA to Real Estate Empowered, LLC, an LLC of which Christopher Wolfington is a sole member. (*Id*. at ¶¶ 10, 53(e)(6).) Real Estate Empowered, LLC owns properties that are "associated to Chris Wolfington" according to Christopher Wolfington's website. (*Id*.)

7. MCA paid for a Mercedes Benz and a Jaguar for Christopher Wolfington, and the cell phones of both Mark and Christopher Wolfington. (*Id*. at ¶ 94.)

8. Numerous payments from MCA to entities such as Netflix, iTunes, Kindle Book, and Amazon.com, which are likely payments for personal expenses. (*Id.* at ¶ 53(e)(4).)[3]

In short, MCA is not a viable business, but instead a means by which the Wolfingtons gain access to casinos' cash.

III. The Wolfingtons' Lies to the Commission.

The First Amended Complaint described how MCA committed fraud by making misrepresentations, and failing to disclose material facts, in connection with MCA's application for a license from the Mille Lacs Gaming Regulatory Authority. MCA lied about: (1) the status of MCA's gaming license in the State of Wisconsin and with Wisconsin Tribes; (2) an FBI investigation of Christopher Wolfington based on allegations MCA bribed the Ho-Chunk Tribe; and (3) the nature of the lawsuit brought by the Ho-Chunk Tribe. (2nd Am. Compl. at ¶¶ 45-49.)

The Second Amended Complaint includes additional statements by the Wolfingtons that the Commission learned were lies in the course of discovery.

A. Christopher Wolfington Lied About MCA's Financial Condition.

The Commission issued a bid in 2007, which eventually led to its Agreement with MCA in April 2009. (2nd Am. Compl. at ¶ 83.) In response to the bid, Christopher Wolfington falsely told the Commission that MCA was not currently in default on any loan or financing agreement with any bank, financial institution, or other entity. (*Id.*)

[3] The transactions listed include only those the Commission had discovered by January 10, 2013 when it filed its Second Amended Complaint. The Commission has since identified additional transactions evidencing that the Wolfingtons treated MCA's funds as their own personal bank account.

But, at the time of the representation, and at all times since, MCA has been in default on a loan from Baena Advisors, LLC, an entity owned by Christopher Wolfington's brother. (*Id*. at ¶¶ 69-74.) Baena loaned MCA $4.75 million at an above-market rate of LIBOR plus 13%. (*Id*.) MCA paid $50,000 a month in interest on this loan, and the loan agreements gave Baena the right to seize all cash deposited with MCA, including any funds MCA received in exchange for the Commission's Vault Cash. (*Id*. at ¶¶80-89.) MCA was in default on the loan by failing to maintain sufficient cash reserves, and MCA's default gave Baena control of MCA's cash. (*Id*. at ¶ 79, 85-88.) The Commission would not have entered the Agreement had it known that: (1) MCA would be forwarding money deposited in exchange for the Commission's Vault Cash to Chris Wolfington's brother before repaying the Commission; or that (2) MCA had entered contracts purportedly giving Chris Wolfington's brother the right to seize those funds at any time. (*Id*. at ¶¶ 79-90.)

B. The Wolfingtons Entered into the Agreement Intending to Siphon Money from the Float and Hid How They Used the Float.

The Wolfingtons never intended to repay the Commission in the timeframe promised. (2nd Am. Compl. at ¶¶ 60-65.) Instead, the Wolfingtons intended to treat MCA's short-term access to cash as a long-term personal loan. (*Id*.) From the beginning of its Agreement with the Commission, MCA returned money to the Commission late, and the Wolfingtons siphoned cash from MCA. (*Id.* at ¶¶ 29, 62.)

The Wolfingtons hid the reason MCA delayed the return of funds. MCA gave the Commission the impression that MCA held the funds received in exchange for the Vault

Cash separately. (*Id.* at ¶ 55-56.) MCA established two bank accounts dedicated to each Casino – the "MCA Hinckley Account" and the "MCA Grand Casino Mille Lacs Account." (*Id.* at ¶ 57.) MCA deposited all of the Commission's customers' checks to these accounts, and electronically reimbursed the Commission's casinos from these accounts. (*Id.* at ¶ 59.) Behind the scenes, however, MCA moved money from these accounts to MCA operating accounts, and used the funds to repay other casinos, as well as the Wolfingtons' personal expenses. (*Id*. at 62.)

The Wolfingtons misrepresented the reasons for the delays in an attempt to get even more money from the Commission. In a February 2011 letter, Mark Wolfington stated that MCA's delay in returning the Vault Cash was due to MCA's need "to fund additional working capital needed by the Mille Lacs operation." (2nd Am. Compl., Ex. D.) Mark Wolfington informed the Commission that MCA would return the funds as initially promised if the Commission would agree to pay higher fees. (*Id.* at ¶¶ 33-35.) Unbeknownst to the Commission, this was a lie. (*Id.* at ¶ 35.) The fees paid by the Commission more than covered the legitimate expenses of MCA's operations at its Casinos. (*Id*.) MCA delayed the return of funds because the Wolfingtons drained the company of cash. (*Id.*)

The Commission refused to pay higher fees than agreed, and MCA's "delays" grew longer. The longer delays meant MCA owed more money to the Commission and allowed the Wolfingtons to siphon more cash from the Company. (*Id*. at ¶¶ 36-38.) When the Commission finally terminated the Agreement, it discovered that MCA could

not repay the funds advanced because the Wolfingtons had taken the money for themselves. (*Id*. at ¶ 66.)

The Commission is not the only victim of the Wolfingtons' scheme. The Ho-Chunk Nation likewise alleges that MCA has not repaid more than $5 million advanced from the Nation's vaults. (*Id*. at ¶ 67.)[4] Mark Wolfington admitted that Ho-Chunk's claim "could be true." (*Id*.)

ARGUMENT

The Commission states actionable claims against the Wolfingtons for: (1) Breach of Contract – based on piercing the corporate veil (Count I "Piercing Claim"); (2) Unjust Enrichment (Count II); (3) Intentional Interference With Property/Conversion (Count III); (4) Constructive Trust (Count V); (5) Fraud (Count VI); (6) Fraudulent Transfer – Actual Intent (Count IX); (7) Fraudulent Transfer – Constructive Intent (Count X); and (8) Preference (Count XI). The Commission likewise states an actionable claim of breach of fiduciary duty against Christopher Wolfington (Count XIV).

I. THE COMMISSION STATES A VALID BREACH OF CONTRACT CLAIM BASED ON PIERCING MCA'S CORPORATE VEIL.

The Commission states a more than "plausible" claim that MCA's corporate veil should be pierced, and the Wolfingtons should be jointly liable for the $5.6 million that

[4] Ho-Chunk alleges that it lost more than $9 million to MCA in total, $5 million of which consisted of Vault Cash advanced and not returned when the Ho-Chunk Nation terminated its agreement with MCA. *See Ho-Chunk Nation v. Money Centers of America, Inc. and MCA of Wisconsin, Inc*., 10-CV-54 (Ho-Chunk Nation Trial Court, June 17, 2010.) Compl. at ¶¶ 13, 18, 23.

MCA owes the Commission. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

Delaware law permits a court to pierce the corporate veil when there is fraud or where the corporation is the mere instrumentality of the owner. *Netjets Aviation, Inc. v. LHC Communications, LLC*, 537 F.3d 168, 176 (2d Cir. 2008) (quotations omitted). A corporation is the mere instrumentality or alter ego of its owner when: (1) the corporation and defendant operated as a single economic entity; and (2) an overall element of injustice or unfairness is present. *Quantum Loyalty Systems, Inc. v. TPG Rewards, Inc.*, 2009 WL 5184350 at *7 (D. Del. Dec. 23, 2009.)

A. MCA and The Wolfingtons Operated as a Single Economic Entity.

MCA and the Wolfingtons operate as a single economic entity. Courts examine the following factors to determine whether a single economic entity exists:

(1) undercapitalization;

(2) failure to observe corporate formalities;

(3) nonpayment of dividends;

(4) the insolvency of the debtor corporation at the time;

(5) siphoning of the corporation's funds by the dominant stockholder;

(6) absence of corporate records; and

(7) the fact that the corporation is merely a facade for the dominant stockholder or stockholders' operations.

Blair v. Infineon Technologies AG, 720 F.Supp.2d 462, 470-71 (D.Del. 2010). "While the list of factors is not exhaustive and no single factor is dispositive, some combination []is required.…." (*Id.* at 471)(citations omitted.)

The Commission alleges facts sufficient to establish more than just "some combination" of the applicable factors indicate the Wolfingtons and MCA operated as a single economic entity. The Commission recites facts satisfying *all* of the factors:

> **1. Undercapitalization**: MCA's financial statements show that the company has been insolvent since at least 2006. (2nd Am. Compl. at ¶ 53a.) MCA has been losing money since that time. (*Id.* at ¶ 53b.) MCA's fees do not cover MCA's expenses. (*Id.*) MCA continues to lose money, and yet continues to operate. (*Id.*)
>
> **2. Failure to observe corporate formalities**: MCA has only two board members, Christopher Wolfington and his brother-in-law, Jonathan Zeigler. (2nd Am. Compl., ¶ 53c.) Wolfington and Zeigler do not keep minutes of board meetings. (*Id.*, ¶ 53d.) MCA makes "loans" and advances to Chris and Mark Wolfington, and does not document those loans. (*Id.*, ¶ 95 (Wolfington Loan) ¶ 98 (Mark Wolfington "advances").)
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> **3. Nonpayment of dividends**: MCA pays no dividends. (*Id.*, ¶ 53d.)
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> **4. Insolvency**: MCA has been insolvent since 2006, and has only sunk deeper into debt over time. (*Id.* at ¶ 53a.)
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> **5. Siphoning of the Corporation's funds by the dominant stockholder**: As detailed in the Second Amended Complaint, there are numerous instances of the Wolfingtons siphoning MCA's funds, including: (1) payment of a personal line of credit; (2) excessive payments on credit cards; (3) payments to family members of the Wolfingtons who are not associated with MCA; and (4) payments of personal taxes. (*Id.* at ¶ 53e(1)-(3) and (5).)
>
> **6. Absence of Corporate Records**: MCA keeps no record of board meetings and insider loans are not documented. (*Id.* at ¶¶ 53d, 95, 98.)
>
> **7. Façade for Dominant Shareholder**: The Wolfingtons treated MCA's funds as their own. (2nd Am. Compl. at ¶¶ 53e(1)-(3) and (5), 63, 94, 98.)

Undercapitalization and insolvency are the most relevant factors in determining whether a corporation and its shareholders operate as a single economic entity. *In re Autobacs Strauss, Inc.*, 473 B.R. 525, 552 (Bankr. D. Del. 2012). A debtor is undercapitalized when it cannot "generate enough cash flow to sustain operations" at the time of a transfer or obligation. *Id.* at 552 n.72 (quotation omitted.) Here, the Commission has not just alleged MCA's insolvency, MCA has conceded it. (MCA's Answer, Dkt. No. 151 at ¶¶ 3, 53(a), 144(b), 159(b), 181(b), and 197.)

B. The Wolfingtons Used MCA to Promote Injustice and Fraud.

Not only did the Wolfingtons and MCA operate as a single economic entity, the Wolfingtons used MCA to promote injustice and fraud. "Under Delaware law, the requisite injustice or unfairness is not that the [defendant] committed an actual fraud or sham but just 'something that is similar in nature to fraud or a sham.'" *Autobacs Strauss, Inc.*, 473 B.R. at 556 (quotation omitted.) *See also Netjets*, 537 F.3d at 176 ("[A] plaintiff need not prove that there was actual fraud but must show a mingling of operations of the entity and its owner plus an 'overall element of injustice or unfairness.'") (quotations omitted.)

The Wolfingtons caused MCA to enter into an Agreement with the Commission so that they could skim money from MCA. (2nd Am. Compl. at ¶ 93.) The Wolfingtons knew or should have known that MCA could not, and would not, repay the money advanced by the Commission. (*Id.*) The Wolfingtons operate MCA similar to a Ponzi or check-kiting scheme. (*Id.* at ¶¶ 54, 64-65.) But instead of seeking investors, MCA enters agreements to give it short-term access to cash. (*Id.* at ¶ 54.) The Wolfingtons, in turn,

siphon the cash, and delay the return of the cash to hide the fact that it is being siphoned off. Meanwhile, MCA, as an entity, continually loses money. (*Id.* at ¶ 54.) Once casinos terminate their agreements with MCA, the money is gone – in the hands of the Wolfingtons and their family members. (*Id.* at ¶ 41, 54, 64-65.))

And the Commission is not the Wolfingtons' only victim. The Wolfingtons have caused more than $10 million in uncompensated losses sustained by two separate Native American Tribal entities. (2nd Am. Compl. at ¶¶ 66, 84, 105 (over $5.6 Million Float owed to Commission); *id.*, ¶¶ 4, 67(over $5 million in losses to Ho-Chunk Nation). At a bare minimum, these facts allege "something that is similar in nature to fraud or a sham." *Autobacs*, 473 B.R. at 556.

C. The Wolfingtons' Arguments Should Be Rejected.

Without once acknowledging the allegation that they siphoned funds from an insolvent company, the Wolfingtons contend that the Commission's Piercing Claim should be rejected because: (1) various factors, standing alone, are not dispositive; (2) it is not plausible that MCA functioned as a sham entity; (3) the Commission's loss did not occur until March 10, 2012; and (4) this Court's January 8, 2013 Order found that all Vault Cash went to casino customers.

Not one of these arguments has merit: (1) the combination of factors alleged by the Commission states a piercing claim; (2) MCA functioned as a sham entity during the course of its relationship with the Commission; (3) the Commission's losses occurred when MCA delayed repayment so the Wolfingtons could siphon funds, which happened throughout the course of the party's relationship in 2009-12; and (4) the distinction

between Vault Cash and other MCA funds is irrelevant to determining whether the Wolfingtons abused the corporate form.

1. The Combination of Factors Establishes A Piercing Claim.

The Wolfingtons separate each factor of the multi-factor "single economic entity" test, and argue that each, standing alone, is not dispositive. (Wolfingtons' Motion at pp. 15-18 ("mere insolvency or undercapitalization is not enough") ("the election not to pay dividends does not mean [MCA's] veil can be pierced,") ("lack of board minutes" does not establish a piercing claim.)) But the Wolfingtons ignore that the Commission's claim is not dependent on any one factor – all relevant factors are present here.

Even more importantly, the Wolfingtons ignore the allegation that they siphoned off money from MCA when it was insolvent. Courts routinely recognize piercing claims where defendants siphon money from an insolvent company. *See, e.g., TradeWinds Airlines, Inc. v. Soros*, 2012 WL 983575, *7 (S.D.N.Y. Mar. 22, 2012) (applying Delaware law, plaintiff "clearly set forth facts that state a claim for the requested relief" where defendants siphoned funds and left company undercapitalized.); *Blair*, 720 F. Supp. 2d at 472 (finding allegations to support piercing sufficient based on misdirected funds, exercise of control, and siphoning funds); *Autobacs*, 473 B.R. at 559 (plaintiffs sufficiently alleged piercing claim by alleging that the corporate parent "misdirected funds, exercised crippling control, and purposely siphoned money" from subsidiary); *Soroof Trading Dev. Co., Ltd. v. GE Microgen, Inc.*, 283 F.R.D. 142, 152 (S.D.N.Y. 2012) (allegations of piercing sufficient where parent solicited funds on behalf of subsidiary with intent to use funds for parent's benefit).

The Wolfingtons behaved similarly to the defendants in *U.S. v. Golden Acres, Inc*., 702 F. Supp. 1097 (D. Del. 1988). After determining "the Delaware test for piercing the corporate veil is altogether compatible with the federal analysis," the court applied the federal analysis and granted summary judgment to the United States on its piercing claim. *Id.* at 1104 and 1108. Defendants' corporation had defaulted on a Housing and Urban Development loan. *Id*. at 1104-05. Like the Wolfingtons, the defendants in *Golden Acres*, would write checks to themselves, family members and companies they controlled despite the corporation's insolvency. *Id.* at 1106. And, like the Wolfingtons, "[defendants] had no concern for [the corporation's] balance sheet, they just wanted to keep the [the corporation] secure enough to continue generating funds." *Id.*

The Wolfingtons do not cite one case in which a court dismissed a piercing claim on the pleadings where the plaintiff alleged the defendants improperly took funds from an insolvent company. *E.g., Brown v. G.E. Capital Corp., et al. (In re Foxmeyer Corp.)*, 290 B.R. 229, 244 (Bankr. D. Del. 2003) ("The Trustee has utterly failed to produce evidence that would even preponderantly demonstrate that Fox Corp., the dominant shareholder of Fox Drug, siphoned off funds of Fox Drug.") Instead, the Wolfingtons string together a series of quotations from cases that are easily distinguished. (*See* Wolfingtons' Motion at p. 11.) For example, in *Wellman vs. Dow Chemical Company*, 2007 WL 842084 (D. Del. March 20, 2007), there was no evidence that the parent corporation was involved in the operations of subsidiary at all. *Id.* at *2. In *Trevino vs. Merscorp, Inc.*, 583 F.Supp. 2d 521 (D. Del. 2008), the plaintiff relied solely on undercapitalization and alleged no siphoning or other injustice or unfairness. *Id.* at 530.

In *Crosse vs. BCBSD, Inc.*, 836 A.2d 492 (Del. 2003), the defendant was solvent and had accumulated a surplus in excess of $50 million, and there were no other allegations relevant to piercing. *Id.* at 497. In *Wallace ex. rel. Cencom Cable Income Partners II vs. Wood*, 752 A.2d 1175 (Del. Ch. 1999), plaintiffs merely alleged the purpose of the defendant was to operate the entity that plaintiffs sought to pierce. *Id.* at 1184. None of these cases indicates that the Commission's claim should be dismissed.

2. The Commission States a Plausible Claim.

The Wolfingtons wrongly insist that the Commission's Piercing Claim is not "plausible." (Wolfingtons' Motion at pp. 11-20.) In support, the Wolfingtons recite the Delaware standard for piercing claims. (*Id.*) While Delaware may impose a high standard for piercing claims, Delaware expressly recognizes piercing claims where, as here, numerous facts suggest a defendant and a corporation acted as a single economic entity in a manner that promoted fraud and injustice. *See, e.g., Netjets*, 537 F.3d at176 (applying Delaware Law and holding piercing claim could proceed to trial.)

MCA's "corporate structure" is precisely what caused the Commission's harm. (*Compare* Wolfingtons' Motion at pp. 14-15.) The Commission gave MCA access to its Vault Cash believing that MCA operated as a solvent corporation with corporate officers and directors that acted in its best interest. *See, e.g.*, *Mills Acquisition Co. v. Macmillan, Inc*., 559 A.2d 1261, 1280 (Del.1989) (explaining that fiduciary duties of officers and directors are "basic to [Delaware] law"). Had that been the case, MCA would have been able to repay the cash advanced by the Commission. (*See* 2nd Am. Compl. at ¶ 35 (stating MCA earned a profit on the Commission's operations).) But, instead, the Wolfingtons

treated cash advanced to MCA as a personal loan. As a result, MCA could not repay the Commission, and the Wolfingtons should be held personally liable for returning the money. *See, e.g., Golden Acres*, 702 F. Supp. at 1106 ("Even more significant to the alter ego analysis is the reason why Golden Acres was insolvent and incapable of paying dividends: defendants were siphoning funds out of the corporation at regular intervals.")

Likewise without merit is the Wolfingtons' argument that the Piercing Claim is not plausible because MCA was once a public company, and it has been operating for many years. (Wolfingtons' Motion at pp. 16-17.) The Commission "need not prove that the corporation was created with fraud or unfairness in mind. It is sufficient to prove that it was so used." *See Netjets*, 537 F.3d at 177 (applying Delaware law). The Wolfingtons do not cite one case suggesting that public companies are immune from piercing claims or that the amount of time a company has existed is relevant to a piercing claim. (*Id.*)[5]

3. The Commission's Losses Occurred Throughout the Agreement.

The Wolfingtons wrongly suggest that the Commission's loss occurred only in March 2012 and is therefore unrelated to their treatment of the corporate form. (Wolfingtons' Motion at p. 3.) But the Wolfingtons' actions throughout the contract caused the Commission's loss. When the Commission entered the Agreement with MCA in 2009, MCA promised to return funds advanced by the Commission every 4-6 days. (2nd Am. Compl. at ¶¶ 22-24.) The Schedule, if followed, would have limited what MCA owed the Commission to the amount of money required to cash checks in the Casinos in

[5] Additionally, MCA delisted as a public company prior to entering the Agreement with the Commission.

any 4-6 day period. (*Id*.) The outstanding funds held by MCA should have therefore remained approximately constant after day six of the Agreement.

MCA repaid the funds late, which meant that MCA routinely owed more money than the Commission agreed to advance to MCA. (*Id.* at ¶ 37.) Therefore, the Commission's losses occurred early in the Agreement and increased over time, until the Commission finally terminated the Agreement. (*Id*. at ¶ 36.) When the Commission terminated, MCA was more than three weeks late, and owed the Commission more than $5.6 million. (*Id*. at ¶ 41.) Had the Commission terminated the Agreement earlier, it would have suffered similar losses -- MCA was insolvent and the Wolfingtons had been siphoning funds such that MCA could not fully repay the Commission at any point during the parties' relationship. (*Id*. at ¶ 53 (a)). The Wolfingtons' actions throughout 2009 and 2012 caused MCA to be incapable of repaying the Commission in 2012.

4. The Distinction Between "Vault Cash" and "Settlement Funds" Is Irrelevant to Whether the Wolfingtons Abused the Corporate Form.

Despite the Wolfingtons' insistence, this Court's January 8th *Memorandum Opinion and Order on the Commission's Renewed Motion for Preliminary Attachment and Motion for Temporary Restraining Order* does not compel dismissal of the Commission's Piercing Claim. (Dkt. No. 112 ("January 8th Order.")) The Wolfingtons state that the January 8th Order "definitively established" that all Vault Cash went to casino patrons. (Wolfingtons' Motion., pp. 13,21-22.)

It is irrelevant to the Piercing Claim whether all of the Commission's "Vault Cash" went to the customers. The Piercing Claim is based on the Wolfingtons' improper

siphoning of MCA's funds generally. It is not dependent upon allegations that the Wolfingtons took the cash from the Commission's vault or that they siphoned any funds specific to the Commission. The Piercing Claim, instead, is that the Wolfingtons disregarded the corporate form and treated MCA's money as their own. *See, e.g., Blair,* 720 F. Supp. 2d at 472; *Autobacs,* 473 B.R. at 557-58 (piercing claims based on general siphoning of corporate funds.) Therefore, whether MCA held the "Vault Cash," or owed a receivable, has nothing to do with whether piercing the corporate veil is appropriate.

And regardless, the Wolfingtons fail to acknowledge the Court's finding was preliminary in nature. *See, e.g., SEC v. Zahareas*, 272 F.3d 1102, 1105 (8th Cir. 2001) (stating the Eighth Circuit "has long held that 'findings of facts and conclusions of law made by a court granting a preliminary injunction are not binding.") Moreover, the January 8th Order addressed allegations in a complaint that the Commission subsequently amended. (*See* Dkt No. 112.)

II. THE COMMISSION STATES VALID EQUITABLE CLAIMS IN THE ALTERNATIVE.

As an alternative to its Piercing Claim, the Commission states viable equitable claims against the Wolfingtons of Unjust Enrichment (Count II) and Constructive Trust (Count V). The Wolfingtons contend that these claims should be dismissed because "it has already been definitively established" that the Wolfingtons did not receive "Vault Cash." (Wolfingtons' Motion at pp. 21-22.)

But the unjust enrichment claim is not dependent upon whether the Wolfingtons received "Vault Cash." To state a claim for unjust enrichment, the Commission need

only plead that the Wolfingtons "knowingly received something of value to which [they were] not entitled and that the circumstances are such that it would be unjust for [Wolfingtons] to retain" those funds. *Anderson v. DeLisle*, 352 N.W.2d 794, 795-96 (Minn. Ct. App. 1984). The Wolfingtons knowingly and improperly took funds from MCA when it was insolvent and when the MCA owed millions to the Commission. As a result of the Wolfingtons' actions, MCA cannot repay the Commission. Therefore, the Wolfingtons received money to which they were not entitled and it would be unjust to allow them to retain those funds.

Having stated a claim for unjust enrichment, the Commission also states a constructive trust claim (Count V). A constructive trust is "a tool of equity to prevent unjust enrichment." *Capital Investors Co. v. Executors of Estate of Morrison*, 800 F.2d 424, 427 (4th Cir. 1986); *see also* Dobbs, Law of Remedies § 2.6(3), at 157 (2d ed.1993) (Constructive trust is equitable remedy, "even though it might ultimately reach" money.)

III. THE COMMISSION STATES A CLAIM FOR INTENTIONAL INTERFERENCE WITH PERSONAL PROPERTY.

The Commission likewise states a claim for Intentional Interference with Property. Mille Lacs statutes provide:

> "A trespass to a personal property may be committed by intentionally and unlawfully:
>
> (1) Dispossessing another of the personal property; or
>
> (2) Using or interfering with the use of personal property in the possession of another, where:
>
> (A) the personal property is impaired as to its condition, quality or value; or

> (B) the possessor is deprived of the use of the personal property for a substantial time; or
> (C) bodily harm is caused to the possessor, or harm is caused to some person or thing in which the possessor has a legally protected interest.

(3) Disposing of personal property entrusted to the person.

(4) Mis-delivering personal property.

(5) Refusing to surrender personal property to the person entitled thereto."

24 MLBS § 255.

The Wolfingtons induced the Commission to enter an Agreement that gave MCA access to the Commission's funds on the pretext that MCA would use the funds to finance the Float. (2nd Am. Compl. at ¶ 51.) The Wolfingtons used the money advanced to MCA for their own personal expenses. (*Id.*) The Wolfingtons therefore dispossessed the Commission of its funds intentionally and unlawfully.

IV. CHRISTOPHER AND MARK WOLFINGTON COMMITTED FRAUD.

The Wolfingtons do not challenge that the Commission adequately states a claim for fraud. Instead, the Wolfingtons contend that the fraud claims "fail on their face" because they acted on MCA's behalf, not in their individual capacity. (Wolfingtons' Motion at p. 27.) The Wolfingtons likewise state "there is no basis for piercing the corporate veil" to hold them liable for fraud. (*Id.*)

But "piercing the corporate veil" is not necessary to hold the Wolfingtons liable for fraud. Corporate officials are liable where they "actually participated in the misdeeds of the corporation." *See, e.g., Ransom v. VFS, Inc.*, 2013 WL 147268, at *2-3 (D. Minn. Jan. 14, 2013) (director and employee could be personally liable for their own tortious

conduct.); *see also, State by Humphrey v. Alpine Air Products, Inc*., 490 N.W.2d 888, 897-98 (Minn. App. 1992) (citing cases imposing individual liability on officers for deceptive sales practices, unfair competition, and conversion); *Universal Lending Corp. v. Wirth Co., Inc.*, 392 N.W.2d 322, 326 (Minn. Ct. App. 1986) (affirming damages against partner personally for conversion.)

Christopher Wolfington actively participated in MCA's "misdeeds." He falsely told the Commission that MCA was not in default on any loan. (2nd Am. Compl. at ¶ 83.) He made false representations to the Commission's Regulatory Authority regarding the status of MCA's license, an FBI investigation into his conduct, and the allegations of the Ho-Chunk Nation. (*Id*., ¶¶ 42-49.) He negotiated and signed the Agreement – promising to return funds advanced by the Commission in 4-6 days while intending to disregard the corporate form, use Float Funds for personal expenses, and fraudulently transfer money out of the company. (*Id*., ¶¶ 92-93.) Christopher Wolfington represented to the Commission on multiple occasions that MCA could not repay the Vault Cash in the promised timeframe because of labor costs associated with the Commission's operations, while he and his family had spent the Float on personal expenses. (*Id*., ¶ 93.)

Mark Wolfington also participated in the MCA fraud. He, like Christopher, failed to disclose to the Commission's Gaming Commission MCA's status in Wisconsin, the FBI investigation, and the nature of the Ho-Chunk allegations. (*Id*. ¶¶ 42-49.) He, like Christopher, affirmatively represented to the Commission, both orally and in writing, that MCA could not repay the Vault Cash in the promised timeframe because of labor costs. (*Id.* at ¶ 97.) Mark Wolfington purposefully misled the Commission to conceal the fact

that the Wolfingtons fraudulently transferred money out of MCA. (*Id*.) He transferred at least $83,000 to himself from MCA, including $63,000 to pay his individual taxes after the Commission filed this lawsuit. (*Id.*, ¶ 98.)

Both Wolfingtons made these representations and transactions knowing that MCA was insolvent, losing money, and owed the Commission millions. The Wolfingtons may not dismiss fraud claims simply because they committed the fraud as officers of MCA.

V. THE COMMISSION STATES FRAUDULENT TRANSFER AND PREFERENCE CLAIMS.

The Commission states three transfer claims against the Wolfingtons: (1) fraudulent transfer – actual intent (Count IX); (2) fraudulent transfer – constructive intent (Count X); and (3) preference (Count XI). (*See* 2nd Am. Compl. at ¶¶ 153-172.)

A. The Wolfingtons Transferred MCA's Assets With Actual Intent To Defraud Creditors.

The Commission states a claim of fraudulent transfer, actual intent, under Del. Code. Ann. Tit. 6 § 1304(a)(1). That statute specifies:

> A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:
>
> (1) With actual intent to hinder, delay or defraud any creditor of the debtor.

Del. Code. Ann. Tit. 6 § 1304(a)(1). In determining whether a transfer was made with actual intent to defraud, consideration may be given, among other factors, to the following badges of fraud:

(1) The transfer or obligation was to an insider;

(3) The transfer or obligation was disclosed or concealed;

> (4) Before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit;
>
> (7) The debtor removed or concealed assets;
>
> (9) The debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred.

Del. Code. Ann. Tit. 6 § 1304(b).

The Commission alleges that MCA made numerous transfers to Christopher and Mark Wolfington who were both insiders, and who hid the transfers by giving false reasons for MCA's delayed return of cash. (2nd Am. Compl. at ¶¶153-161.) MCA made transfers to the Wolfingtons while the Ho-Chunk Nation had a suit pending against MCA, and during the course of this lawsuit. (*Id.*) And MCA was insolvent when making the transfers. (*Id.*) The Commission states a claim for fraudulent transfer, actual intent, pursuant to Del. Code. Ann. Tit. 6 § 1304(a)(1).

i. The Commission States A Claim for Constructive Fraudulent Intent.

The Commission likewise states a claim of fraudulent transfer, constructive intent, because MCA did not receive reasonably equivalent value for its transfers to the Wolfingtons. The Delaware Code allows creditors to challenge transfers from an entity where the entity: (1) did not receive reasonably equivalent value in exchange; and (2) was engaged in or about to engage in business for which the remaining assets of the debtor were unreasonably small. 13 Del. Code. Ann. Tit. 6 § 1304(a)(2). Here, transfers to Mark Wolfington and Christopher Wolfington were in addition to salary and bonuses, and not in exchange for services. (2nd Am. Compl. at ¶ 163 (a)-(c)). MCA therefore did not receive any value, much less reasonably equivalent value, for the transfers. MCA

was insolvent, and therefore its remaining assets "were unreasonably small." 13 Del. Code. Ann. Tit. 6 § 1304(a)(2); (2nd Am. Compl. at ¶ 53(a) & (b).)

ii. The Commission States the Transfer Claims With Specificity.

The Wolfingtons do not contend that the Commission's fraudulent transfer claims fail to satisfy the elements in 13 Del. Code. Ann. Tit. 6 § 1304(a)(1) or § 1304(a)(2). Instead, the Wolfingtons argue that the Commission does not state these claims with specificity. (Wolfingtons' Motion at 26.) The Wolfingtons wrongly state "there are no allegations as to how many much[sic] transfers are at issue, and there are no allegations as to when any such transfers occurred." (*Id*.)

But the Commission specifically alleges, among other things: (1) a $63,000 transfer from MCA to Mark Wolfington to pay his personal taxes on June 8, 2012 (2nd Am. Compl. at ¶ 53(e)(1); (2) transfers to pay Christopher Wolfington's personal line of credit on, among other dates, January 15, 2010, April 10, 2010, August 4, 2010, November 16, 2010, January 5, 2011, March 8, 2011, July 7, 2011, November 16, 2011, January 31, 2012, February 24, 2012, May 4, 2012, June 29, 2012, and July 31, 2012 (*Id.* at ¶ 53(e)(2)); (3) $1.2 million in cash withdrawals from MCA's operating accounts in June of 2009 (*Id*. at ¶ 62); (4) more than $850,000 in transfers to pay Christopher Wolfington's American Express Card in January and February 2010; and (5) tens of thousands of dollars transferred to Real Estate Empowered, LLC, owned by Christopher Wolfington. (*Id*. at¶ 53(e)(6).) In addition, the Commission alleges transfers to Netflix, Amazon.com, Kindle Book, and iTunes for personal expenses of the Wolfingtons, as well

as transfers to Christopher Wolfington on a loan he charged MCA LIBOR +13%. (*Id.* at ¶ 53 (e)(4) and ¶ 95.)

The Commission's allegations more than satisfy Rule 9(b)'s requirement that a claim be stated with particularity. *See, e.g., Kranz v. Koenig*, 484 F. Supp. 2d 997 (D. Minn. 2007) (rejecting motion to dismiss where amended complaint alleged timeframe, value of the transfers, and resulting damage to plaintiff.)

iii. The Commission States a Preference Claim.

The Commission also states a preference claim. The Delaware Code allows creditors, such as the Commission, to challenge payments to insider creditors, such as Christopher Wolfington, who knew the debtor was insolvent. 13 Del. Code. Ann. Tit. 6 § 1305(b).

Again, the Wolfingtons do not challenge that the Commission pleaded facts satisfying the basic elements of such a claim. The Wolfingtons argue, instead, that Pennsylvania law should apply, and Pennsylvania does not recognize a cause of action for preference. (Wolfingtons' Motion at p. 24-25.)

But, as MCA acknowledges, Minnesota applies the internal affairs doctrine, that "the law of the state of incorporation normally determines issues relating to the internal affairs of the corporation." (Motion to Dismiss at p. 11, n. 6 *citing Rupp v. Thompson*, 2004 WL 3563775 at *3 (D. Minn. Mar. 17, 2004)). MCA is a Delaware corporation and these claims involve improper transfers to its officers and directors. As such, Delaware law applies. *See, e.g., id. citing Edgar v. MITE Corp.*, 457 U.S. 624, 645 ("[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."); *see also PHP Liquidating LLC v. Robbins, et al. (In re PHP Healthcare Corp.)*, 128 Fed. Appx. 839, at *2 (Internal affairs include "loans by the corporation to directors, officers and shareholders." (citing Restatement (Second) of Conflict of Laws § 302 cmt. a (1971)). Christopher Wolfington received payments on loans he allegedly made to MCA. (2nd Am. Compl. at ¶ 95.) Any transfers made on account of this alleged "antecedent debt," can be avoided under Delaware's preference statute. 13 Del. Code. Ann. Tit. 6 § 1305(b).

VI. THE COMMISSION HAS STANDING TO ASSERT A DERIVATIVE CLAIM AGAINST CHRISTOPHER WOLFINGTON.

The Commission has standing to assert a derivative claim against Christopher Wolfington for breach of fiduciary duty. (*Compare* Wolfingtons' Motion, p. 28; SAC, ¶¶ 197-98.) The Delaware Supreme Court has expressly stated "equitable considerations give creditors standing to pursue derivative claims against the directors of an insolvent corporation." *NACEPF v. Gheewala*, 930 A.2d 92, 102 (Del. 2007.) The Wolfingtons characterize this statement as "pure dicta," but it is an accurate summary of Delaware law, and the Wolfingtons cannot cite any case to the contrary. (Wolfingtons' Motion at p. 28-29.) *See, e.g. In re Scott Acquisition Corp.*, 344 B.R. 283, 286 (Bankr.D.Del.2006) (holding that the fiduciary duties of directors of an insolvent wholly owned subsidiary inure to the benefit of the subsidiary's creditors.)

As MCA has repeatedly stated, the Commission is "an unsecured creditor" of MCA. (*See, e.g.*, Dkt No. 102 ("Plaintiff is clearly frustrated with its status as an unsecured creditor.").) MCA concedes that it is insolvent. (MCA's Answer, Dock. No. 151 at ¶¶ 3, 53(a), 144(b), 159(b), 181(b), and 197.)) The Commission therefore has standing to allege a breach of fiduciary duty claim against MCA's officers and directors.

The Commission adequately pleaded a derivative claim, including demand futility. (*Compare* Wolfingtons' Motion at p. 29.) To show demand futility, a plaintiff in a derivate suit must allege with particularity why it did not seek board action before filing suit. *King v. Verifone Holdings, Inc.*, 12 A.3d 1140, 1145 (Del. 2011). Grounds for futility include: (1) a majority of the board has a material financial or familial interest; (2) a majority of the board is incapable of acting independently because of domination or control; or (3) the underlying transaction is not the product of a valid exercise of business judgment. *Id.* at 1146 n.24. Here, Christopher Wolfington is the dominant shareholder and Chief Executive Officer. (2nd Am. Compl. at ¶ 11.) He and his brother in-law are MCA's only two board members. (*Id.* at ¶ 53(c).) The Commission therefore pleaded with particularity why it was reasonable to expect that any demand made upon MCA's Board to pursue Christopher Wolfington would be futile. (*Id.*, ¶ 198; *see also King*, 12 A.3d at 1146 n.24.)

And the Commission states a claim that Christopher Wolfington breached his fiduciary duty to MCA. As a board member, dominant shareholder, and officer, Christopher Wolfington had a duty to act in MCA's best interests, not to enrich himself at the company's expense. *See, e.g., Mills Acquisition Co.*, 559 A. 2d at 1280 (fiduciary

duties owed by corporate directors and officers to corporations are basic and long-standing.) Christopher Wolfington breached these duties by, among other things: (1) causing MCA to enter loans at usurious rates with both him and his brother; (2) causing MCA to pay for his personal expenses; (3) causing MCA to pay his personal line of credit (2nd Am. Compl., ¶¶ 192-194.)

Under Delaware law, a corporation's directors engaged in self-dealing transactions must "demonstrate their utmost good faith and the most scrupulous inherent fairness of the bargain." *Summit Metals, Inc. v. Gray*, 2002 WL 1941118, at *5 (D. Del. Aug. 20, 2002). "The requirement of fairness is unflinching in its demand that where one stands on both sides of a transaction, **he has the burden of establishing its entire fairness**, sufficient to pass the test of careful scrutiny by the courts." *In re Broadstripe, LLC*, 444 B.R. 51, 106 (Bankr. D. Del. 2010) (emphasis added). Christopher Wolfington does not attempt to, and cannot, meet this burden.

CONCLUSION

For the foregoing reasons, the Wolfingtons' Motion should be denied. The Commission alleges facts sufficient to support all of its claims, and The Commission should be allowed to proceed against the Wolfingtons.

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Respectfully Submitted,

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