

**UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA**

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Corporate Commission of the Mille Lacs Band of Ojibwe Indians,	Court File No.: 12-cv-01015 (RHK/LIB)
Plaintiff,	<b>PLAINTIFF’S MEMORANDUM IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT AGAINST DEFENDANTS CHRISTOPHER WOLFINGTON AND MARK WOLFINGTON</b>
vs.	
Money Centers of America, Inc. and MCA of Wisconsin, Inc., Christopher Wolfington and Mark Wolfington,	
Defendants.	<b>[REDACTED]<sup>1</sup></b>

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<sup>1</sup> Defendants designated many of the documents cited in this Memorandum as confidential. The Commission does not consider anything in this Memorandum confidential and does not take any position regarding the propriety of Defendants’ designations. Pursuant to the Protective Order and the Court’s Permission, sentences that cite to documents designated confidential are redacted, and those documents have been filed under seal.

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The Court should grant summary judgment against Christopher Wolfington on Count I (breach of contract/piercing) and against Mark Wolfington on Count X (fraudulent transfer -- constructive intent.)

Christopher Wolfington invoked the Fifth Amendment instead of responding to nearly any question in his deposition, and did the same in his answer to Plaintiff's Second Amended Complaint. (*See* Dkt 253). The invocation of the Fifth Amendment, together with the substantial, and un rebutted, evidence establishing the corporate veil should be pierced as to Christopher Wolfington entitles Plaintiff to summary judgment.

Likewise, there is no genuine issue of material fact regarding MCA's fraudulent transfers of more than \$100,000 to Mark Wolfington. Between August 2011 and today, MCA transferred \$104,521.30 to Mark Wolfington over and above salary and bonuses, receiving no value in exchange. When those transfers were made, MCA was insolvent, its remaining assets were unreasonably small, and MCA could not pay its bills as they became due.

### **BACKGROUND**

As this Court is aware, the Corporate Commission of the Mille Lacs Band of Ojibwe ("Commission") and MCA entered a contract in April 2009 ("Agreement") for MCA to provide cash-access services to the Commission's casinos. (Dkt. 239, p. 2.) The Agreement provided that the Commission would advance MCA cash from its on-site vaults for the purpose of facilitating cash transactions. (*Id.*) MCA agreed to repay the cash advanced within four to six days. (*Id.*) MCA failed to repay the amount within the

agreed-upon timeframe, and the amount MCA owed to the Commission ballooned. (*Id.* at 3.)

The Commission terminated the contract on April 2, 2012. At the time of termination, MCA owed the Commission more than \$5.6 million. (*Id.* at 6.) This Court held that the Commission is entitled to summary judgment of \$5.6 million plus prejudgment interest on its breach of contract claim against MCA. (Dkt. 239).

The Commission added MCA's CEO Christopher Wolfington and COO Mark Wolfington as defendants to its Second Amended Complaint on January 22, 2013. (Dkt. 129.) The Commission added the Wolfingtons after learning that MCA is, and has always been, insolvent and that the Wolfingtons routinely used MCA's funds for their personal expenses.

### **UNDISPUTED FACTS**

Christopher and Mark Wolfington, using MCA, have established a pattern of taking cash from casinos affiliated with Native American tribes and not returning it. Christopher and Mark Wolfington treat money coming into MCA as their own, using it for personal expenses, their other businesses, and transferring cash to themselves over and above their already-exorbitant salaries. MCA is insolvent, has been since at least 2004, and appears to have never turned a profit. The only two members of MCA's Board are Christopher Wolfington and his brother-in-law, Jonathan Ziegler. MCA does not maintain the most basic corporate records or formalities. In short, MCA is a scam to get access to other people's money, which the Wolfingtons never repay.

#### **I. MCA Took and Refused to Repay at Least One Other Tribe's Vault Cash.**

The Commission is neither the first nor the last casino affiliated with a Native American tribe to advance millions to MCA that MCA refused to repay.

On September 9, 2013, the Ho-Chunk Nation obtained a \$4.78 million judgment against MCA in Ho Chunk Tribal Court. (*Declaration of Jane Maschka, dated October 23, 2013* (“Maschka Decl.”) Ex. L.) The Ho-Chunk Nation alleged, in part, that MCA failed to repay more than \$5 million in cash advanced from its casino vaults. (*Id.*, Ex. M at ¶ 21.) REDACTED

Christopher Wolfington invoked the Fifth Amendment when asked if MCA ever repaid the Ho-Chunk Nation (Maschka Decl., Ex. A, *July 18, 2013 deposition of Christopher Wolfington* (“C. Wolfington Depo.”) at 74:14-79:21; 231:3-233:13.)

Currently, the Coushatta Tribe in Louisiana is advancing vault cash to MCA to facilitate check-cashing in its casinos. (Maschka Decl., Ex. B, *September 25, 2013 Deposition of Mitchell Wolf* (“Wolf Depo.”) at 36:9.) MCA’s controller, Mitch Wolf, estimated that MCA currently owes the Coushatta Tribe \$1.5 million. (*Id.* at 37:16-38:9.)

Other MCA witnesses testified that MCA may also have been involved with litigation with the Sandia Tribe, the Sycuan Tribe, and the Campo Band of Mission Indians. (Maschka Decl., Ex. C, *September 25, 2013 Deposition of William Brudecki*

(“Brudecki Depo.”) at 63:16-17; 157:4-6; Ex. D, *September 30, 2013 Deposition of Lauren Anderson* (“Anderson Depo.”) at 205:10-16; Ex. E, *September 26, 2013 Deposition of T. Scott Kruse* (“Kruse Depo.”) at 27:9-28-14.)

**II. MCA Was Insolvent and Could Not Pay its Bills When it Contracted With the Commission.**

After executing the contract in April 2009, MCA gained access to the Commission’s vault cash and began transacting business at the Commission’s casinos that June. (Maschka Decl. Ex. N.) Unbeknownst to the Commission, MCA was insolvent and could not pay its bills at the time. REDACTED

■ ■

The following chart shows MCA’s assets, liabilities, and balance sheet insolvency each year from 2004 through 2012:

<b>Year</b>	<b>Assets</b>	<b>Liabilities</b>	<b>Balance Sheet Insolvency</b>	<b>Source</b>
<b>2004</b>	\$5,871,274	\$11,123,695	<b>-\$5,252,421</b>	Ex. P-1, pg. F1
<b>2005</b>	\$6,848,854	\$13,745,282	<b>-\$6,896,428</b>	Ex. P-2, pg. F1
<b>2006</b>	\$8,360,452	\$13,491,533	<b>-\$5,131,081</b>	Ex. P-3, F2
<b>2007</b>	\$5,673,860	\$13,252,841	<b>-\$7,578,981</b>	Ex.P-4, F2
<b>2008</b>	REDACTED			Ex. P-5

<sup>2</sup> In 2004, MCA was acquired by iGames Entertainment, Inc. (“iGames”). The two entities later entered into a transaction by which MCA ultimately became the surviving entity on August 20, 2004. Christopher Wolfington finalized the terms of recapitalization on September 30, 2004. (Maschka Decl., Ex. P1, at p. 1)

<b>2009</b>	REDACTED	REDACTED	REDACTED	Ex. P-5
<b>2010</b>	REDACTED	REDACTED	REDACTED	Ex. P-6
<b>2011</b>	REDACTED	REDACTED	REDACTED	Ex. P-7
<b>April 30, 2012</b>	REDACTED	REDACTED	REDACTED	Ex. P-8

MCA lost money every year. In fact, it appears that MCA never made money in the course of its existence. MCA’s financial statements show the following net loss each year since 2004:

<b>Year</b>	<b>MCA’s Net Loss</b>	<b>Source</b>
2004	<b>-\$11,841,753</b>	Ex. P-1, pg. F3
2005	<b>-\$1,666,167</b>	Ex. P-2, pg F25
2006	<b>-\$4,342,466</b>	Ex. P-3, pg F3
2007	<b>-\$3,580,675</b>	Ex. P-4
2008	REDACTED	Ex. P-9
2009	REDACTED	Ex. P-5
2010	REDACTED	Ex. P-6
2011	REDACTED	Ex. P-7
April 2012	REDACTED	Ex. P-8

<sup>3</sup> REDACTED

(Maschka Decl., Ex. P-9, Notes

Tab).



And Christopher Wolfington invoked the Fifth Amendment in response to the question “Has Money Centers of America ever made money?”. (C. Wolfington Depo. at 38:8-11).

MCA conceded its current insolvency in its Answer to the Second Amended Complaint. (Dkt. 151 at ¶ 3 (“Admitted to the extent that MCA is now insolvent . . .”).) Witness testimony supports MCA’s perpetual insolvency. William Brudecki, MCA’s controller from 2006 through the summer of 2011, could not recall a year when MCA did not suffer a net loss. (Brudecki Depo. at 83:5-24). Brudecki testified that Mark Wolfington “would choose which bills to pay” and that he had the impression that MCA could not pay all of its bills. (*Id.* at 105:23-106:6).

MCA’s correspondence and financial statements support Brudecki’s testimony that MCA could not pay its bills as they became due. REDACTED

(*Id.*, Ex. P6 at Note 8.)

Mitch Wolf, who has functioned as MCA’s controller since the summer of 2011, also testified that MCA’s liabilities have been greater than its assets and that MCA has had trouble paying its bills as they became due since he started. (Wolf Depo. at p. 82:8 –

22.) Wolf estimated that MCA is currently past due on *\$1 million* worth of bills. (*Id.* at 92:19-22.)

**III. The Wolfingtons Knew MCA Was Insolvent and Could Not Pay its Bills.**

When MCA entered the Agreement, MCA was insolvent and could not pay its bills as they became due. Instead of repaying the Commission, MCA needed the Commission's vault cash to keep its other creditors at bay. On May 5, 2009, shortly after MCA signed the contract with the Commission but before MCA gained access to the Commission's vault cash, Jay Walsh, MCA's then-CFO, wrote:

REDACTED

|| | |

(Maschka Decl. Ex. R).

"Bauna" refers to Baena, LLC. (Brudecki Depo. at 192:11-18; Kruse Depo. at 94:15-95:10). REDACTED

In other words, in May 2009, MCA's CFO knew MCA could not pay its bills. REDACTED

(Maschka Decl., Ex. R.)) And that's exactly what MCA did. REDACTED

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<sup>4</sup> Mercantile is a non-casino creditor of MCA.

REDACTED

Wire on 7/6/09, page 4 of 9.))

REDACTED

(Maschka Decl. Ex. S.) REDACTED

Maschka

Decl. Ex. T.) REDACTED

Maschka Decl. Ex. S) REDACTED

(Maschka Decl. Ex. T.) REDACTED

. (*Id.*)

REDACTED

*Id.*) (emphasis added.) No evidence has been provided to suggest that Christopher or Mark Wolfington responded to the email or corrected Walsh

in any manner. (Brudecki Depo. at 264:13 - 267:13; C. Wolfington Depo. at 113:6-114:5.)

**IV. The Wolfingtons Knew MCA Could Not Repay the Commission But Kept taking Money from the Commission.**

MCA immediately and repeatedly failed to repay cash advanced by the Commission in the time frame promised. (Maschka Decl., Ex. F, Deposition of Gail Kulick (“Kulick Depo.”) at 32:23 – 34:3). Despite the Commission’s repeated complaints, and MCA’s repeated promises to correct the issue, MCA kept taking longer to return the Commission’s money, and the amount MCA owed to the Commission continued to increase. (*See* Dkt. 169 p. 5-6; *see also* Dkt. 23-1, Roxanne Hemming Decl. Ex. J, filed 7/17/12.)

The Wolfingtons knew MCA was taking cash that it could not repay. REDACTED

Maschka Decl. Ex. U; Brudecki Depo at 85:6 – 93:7). REDACTED

*(Id.)*

The Wolfingtons did not inform the Commission that MCA could not repay cash advanced. Instead, the Wolfingtons blamed the Commission for the late payments and attempted to charge the Commission a higher rate. In February 2011, Mark Wolfington wrote that MCA’s delays in settlement were due to labor costs at the Commission’s casinos and the associated “additional working capital needed by the Mille Lacs

Operation.” (Dkt. No. 129, Amd. Compl. Ex. D.) This was a flat-out lie. REDACTED

(Maschka Decl., Ex. V; C.

Wolfington Depo. at 250:10-253:24; M. Wolfington 146:11 - 152:7.)

When the Commission declined to pay a higher fee, the Wolfingtons and MCA took “longer” to return the Commission’s money, which resulted in MCA effectively taking an additional \$2 million from the Commission the following year. (Dkt. 23-1, Roxanne Hemming Decl. Ex. J, filed 7/17/12, showing outstanding balance in December 2010 as \$3.5 million and December 2011 balance of \$5.5 million.) MCA never returned the money.

**V. Christopher Wolfington Siphoned MCA’s Money.**

REDACTED (M.

Wolfington Depo. at 301:4 – 7; 296:22-24.) He treated MCA’s money as his own, spending MCA’s money extravagantly even though MCA could not pay its own bills.

REDACTED

C. Wolfington Depo at 85:4 –

91:13; Maschka Decl. Ex. W, Ex. H-2 (wire on May 22, 2009).) REDACTED

(Maschka Decl. Ex. R.)

REDACTED

(Maschka Decl. Ex. FF-4 (charges on 8/11/09-8/19/09), Ex. X; C. Wolfington

Depo at 134:13 – 135:6, 137:19 – 139:21).<sup>5</sup> REDACTED

(C. Wolfington Depo 143:2-145:13, 146:14-148:12; Maschka Decl., Ex. FF5 (charges on 9/1/09-9/10/09); Anderson Depo at 212:6 – 214:22).  
REDACTED

And these examples are only the tip of the iceberg. The undisputed facts establish that Christopher Wolfington siphoned money from MCA continuously from 2009 through today, and did so in a variety of different ways.

**a. MCA pays for Christopher Wolfington’s loan and personal residence.**

Mark Wolfington, Billy Brudecki, and Lauren Anderson all testified that MCA pays \$1,000 a month to Citizen’s Bank to repay a personal loan made to Christopher Wolfington. (Anderson Depo at p. 136:5-137:10; Brudecki Depo at 175:8 – 177:15; M. Wolfington Depo at 274:19 – 275:20)). Anderson testified that Christopher Wolfington’s Citizen’s Bank account is used to pay his home mortgage. (Anderson Depo 136:15-19).  
REDACTED

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<sup>5</sup> REDACTED

rudecki Depo at 309:22- 314:7; Maschka Decl., Ex. Y, Ex. J-8 (wire on 11/30/REDACTED

(*Id.*, Ex. J-8 (wire on 11/30/09.)).

Anderson also testified that Barbara Silver was Wolfington's former landlord.  
(Anderson Depo. at 138:1 – 139:7.) REDACTED

(Maschka Decl. Ex. Z; Anderson Depo at 145:22-147:14.)

**b. Christopher Wolfington funneled money from MCA to himself through third parties.**

There are also instances of MCA paying a third party and the third party repaying Christopher Wolfington. REDACTED

(Maschka Decl. ¶18.)

Brudecki and Anderson both testified that Christopher Wolfington attended G & G Holistic for drug and alcohol rehabilitation services. (Anderson Depo. 123:18 – 25; Brudecki Depo. at 165:14- 166:15.) And Christopher Wolfington not only used MCA to pay for his personal rehabilitation, he also used G & G Holistic to funnel money to himself. REDACTED

**c. Christopher Wolfington used employees to funnel money to himself.**

Further, Christopher Wolfington uses employees to funnel money to himself. <sup>REDACTE</sup>

(Anderson Depo at 52:8 – 60:9, 78:25 – 81:21; Maschka Decl. Ex. CC1, CC2.) REDACTED

■(Anderson Depo at 47:18 – 51:2; Ex. CC3, CC4). REDACTED

(Ex. CC5; Anderson Depo 60:15 – 63:23)

Christopher Wolfington, however, has a son named Christopher. (*Id.*)

Anderson, whom MCA characterized as a “low-to mid-level employee[]” in pleadings, drives a brand-new Mercedes Benz paid for by MCA. (Dkt. 213, p. 2; Anderson Depo at 32:22 – 33:6) She received her first brand-new Mercedes from MCA in 2008, even though driving is not required as a part of her daily job duties. (Anderson Depo. at 29:7 – 35:6.) REDACTED

(Maschka Decl. ¶13, Ex. H1-H53.)

**d. Christopher Wolfington funneled money to himself through his entity, Real Estate Empowered.**



REDACTED

(Maschka Decl., ¶17.) REDACTED

(Maschka Decl. Ex. DD at p. 17.) REDACTED

(*Id.* Ex. EE.)

Beginning in June 2010, Christopher Wolfington stopped paying his personal rent directly from MCA, and instead transferred money to Real Estate Empowered, which paid his rent. REDACTED

(Maschka Decl. ¶17.) REDACTED

(*Id.*, Ex. Z; Anderson Depo. 138:1-2;) REDACTED

(Maschka

Decl. ¶17 (noting charges on May 6, 2011, June 3, 2011, and July 5, 2011.)) Real Estate Empowered's records for this period were not produced, but Anderson testified that Real Estate Empowered paid, and continues to pay, the rent for Christopher Wolfington's personal residence, which is "around \$2500."<sup>6</sup> (Anderson Depo 138:17-139:16.)

**e. MCA paid for personal charges on Christopher Wolfington's credit card.**

REDACTED

Despite repeated discovery

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<sup>6</sup> According to Anderson, Real Estate Empowered does not make any money. (Anderson Depo 141:2-4.) But for reasons she could not explain, Christopher Wolfington pays his personal rent through the company. (*Id.* at 141:5-22.)

requests, neither Christopher Wolfington nor MCA has provided documentation substantiating the business reason for *any* of these charges. (*Id.*, Ex. JJ, KK.) REDACTED

REDACTED

REDACTED

REDACTED

REDACTED

REDACTED

REDACTED

REDACTED

REDACTED

REDACTED

REDACTED

REDACTED

REDACTED

REDACTED

REDACTED

REDACTED

REDACTED

REDACTED

REDACTED

William Brudecki confirmed that Christopher Wolfington used MCA's money to pay nonbusiness personal expenses. (Brudecki Depo. at 82:1-15). Brudecki stated he did not know whether Wolfington reimbursed MCA for those charges. (*Id.*)

**f. MCA's bank records show payments directly to or for Christopher Wolfington and his family members.**

Christopher Wolfington also made direct payments to himself above his salary and to, or on behalf of, his family members. MCA processes its payroll through a third-party vendor, ADP. Paychecks do not issue from MCA's bank accounts, except in rare instances (such as when an employee starts, etc.). (Wolf Depo. 67:1 – 68:18; Anderson Depo. 122:10-24.) REDACTED

(Maschka Decl. ¶10; Exs. H1-H53.) REDACTED

(*Id.*)

There are other, numerous examples of MCA payments to Christopher and Mark Wolfington's family members or for their expenses. For example:

- REDACTED  
(Maschka Decl., Ex. K- 52.) REDACTED

- REDACTED

**VI. MCA Did Not Maintain Basic Corporate Records, Observe Corporate Formalities or Pay Dividends.**

REDACTED

(Ziegler Depo. at 23:1

– 23.) REDACTED

*(Id.*

at 22:2-15, 24:12-17). REDACTED

(Maschka Decl., Ex. GG1-GG8.) REDACTED

(Ziegler Depo. at 24:21-25:1.) REDACTED

*(Id.* at 25:17-26:17.)

Delaware, the state where MCA is incorporated, currently lists MCA's status as "void," meaning that MCA has not paid its required annual franchise tax for at least one year. (Maschka Decl., Ex. HH.) REDACTED . (Dkt. 94, M. Wolfington Depo at 43:5-9; Ziegler Depo at 122:17-19.)

**VII. Christopher Wolfington Invoked the Fifth Amendment in His Deposition and Answer.**

At his deposition on July 18, 2013, Christopher Wolfington refused to answer nearly every question on the basis that the answer might tend to incriminate him. He invoked the Fifth Amendment in response to questions about:

**MCA's insolvency**, including:

- Has MCA's liabilities always exceeded its assets?
- Has MCA always been insolvent?
- Has MCA always lost money?
- Did MCA lose money every year since its formation?

(C. Wolfington Depo. at 72:18-73:7.)

**His siphoning of MCA's funds**, including:

- You routinely used MCA's funds for personal expenses, didn't you? (*Id.* 92:1-4.)
- [I]s it fair to say that, if I asked you about the legitimate business purpose of any purchase or transfer noted in MCA's bank statements, you would invoke your Fifth Amendment right? (*Id.* 184:15-24.)
- [I]f I asked you about the legitimate business purpose [] for any purchase noted in the American Express statement, you would invoke your Fifth Amendment right? (*Id.* 183:17 – 184:1.)

**MCA's corporate formalities & corporate records, including:**

- Does MCA hold shareholder meetings? (*Id.* 80:21-24.)
- Does MCA keep records of shareholder meetings? (*Id.* 81:1-4.)
- Who is MCA's secretary or treasurer? (*Id.* 81:5-9.)
- Does MCA's board of directors meet on a regular basis? (*Id.* 81:10-13.)
- Does MCA's board of directors keep minutes of its meetings? (*Id.* 81:14-17.)

**His fraud on the Commission, including:**

- At the time you entered the contract, did you intend to use MCA's access to the Commission's Vault Cash as a means of financing your personal activities? (*Id.* 213:20-214:1.)
- Did you purposefully mislead the Commission to gain access to the Commission's Vault Cash and customer funds? (*Id.* 216:4-15.)

On October 17, 2013, Christopher Wolfington filed an Answer in which he declined to respond to any allegation in the Second Amended Complaint pursuant to the Fifth Amendment. (Dkt. 253.)

**VIII. Mark Wolfington Also Took Money From MCA When It Was Insolvent.**

Mark Wolfington made several transfers to himself over and above his salary from MCA, all the while knowing that MCA was insolvent. REDACTED

(Maschka Decl., Exs. I-1 – I-6 and K-39.)

REDACTED

(*Id.*, Ex. K-39; M.

Wolfington Depo. at 247:15 – 248:20.) REDACTED (M.

Wolfington Depo. at 249:14 – 17; Wolf Depo. at 72:21 – 75:2.) REDACTED

(Ziegler Depo. at 57:19-22.) REDACTED

(*Id.* at 58:25 – 59:1.)

MCA was applying for licensing related to the Coushatta tribe that required Mark Wolfington to be current on his taxes. (Wolf Depo. at 72:21 – 75:2.) MCA did not produce documentation substantiating this advance, or any of the other roughly \$40,000 in “advances” to Mark Wolfington over and above his salary. MCA did not charge Mark Wolfington any interest on the \$63,000 and, as of September 2013, MCA had not yet resolved the issue as to whether the transfer would be characterized as an “additional payroll” or a loan for purposes of tax returns. (*Id.* at 73:1 – 75:2.)

### **ARGUMENT**

Summary judgment is appropriate. Abundant evidence supports the piercing and fraudulent transfer claims, and Defendants cannot produce any to rebut it. *See* Fed. R. Civ. P. 56(c)(1)(A); *Wood v. SatCom Mktg., LLC*, 705 F.3d 823, 828 (8th Cir. 2013) (nonmoving party may not rest on mere allegations or denials, but must show through the presentation of admissible evidence that specific facts exist creating a genuine issue of material fact for trial.) Undisputed facts support each element of the piercing claim and the fraudulent transfer and preference claim against Christopher Wolfington. Christopher Wolfington acknowledges that, if he tells the truth about these facts, the answers will likely incriminate him.

Mark Wolfington's attempt to justify MCA's payment of his personal taxes cannot preclude summary judgment against him. MCA was insolvent and did not receive any value, much less reasonably equivalent value, in exchange for its payment of his personal liability. Moreover, Mark Wolfington has not explained the other nearly \$40,000 in transfers to him when MCA was insolvent.

**I. Summary Judgment Should Be Entered Against Christopher Wolfington on the Piercing Claim.**

There are no disputed facts that "might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Undisputed facts establish that: (1) MCA and Christopher Wolfington operated as a "single economic entity;" and (2) Christopher Wolfington used MCA's corporate form to perpetrate fraud or similar injustice. *NetJets Aviation, Inc. v. LHC Commc'ns, LLC*, 537 F.3d 168, 176 (2d. 2008) (stating the Delaware standard for piercing/alter ego claims.)

Christopher Wolfington used MCA, which was perpetually insolvent and losing money, to gain access to other people's money and then spent it as his own. *See, e.g. Soroof Trading Dev. Co. v. GE Fuel Cell Sys. LLC*, 842 F. Supp. 2d 502, 522 (S.D.N.Y. 2012) (piercing the corporate veil on summary judgment where plaintiff's "uncontroverted proffers demonstrate an extensive 'mingling of the operations' of [defendant company] and its owners . . . as well as an overall element of unfairness to [plaintiff].") The Court may make an adverse inference based on Christopher Wolfington's invocation of the Fifth Amendment. And that "inference" is only supplementary in light of the overwhelming evidence against him.



**a. Christopher Wolfington's Fifth Amendment Refusal to Respond to Discovery or Answer the Complaint Creates an Adverse Inference.**

Christopher Wolfington's repeated invocation of the Fifth Amendment has consequences. In a civil case, the Court may draw an adverse inference against a defendant who asserts the Fifth Amendment privilege against self-incrimination. *Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976); *Pagel, Inc. v. S.E.C.*, 803 F.2d 942, 946-47 (8th Cir. 1986). While a direct inference of liability based solely on a party's silence is impermissible, courts do not hesitate to impose liability where, as here, the plaintiff produces corroborative evidence of wrongdoing. *See, e.g., United States v. Nagelberg*, 772 F. Supp. 120, 123 (E.D.N.Y. 1991) (granting summary judgment on unjust enrichment and veil-piercing claims when corroborative evidence permitted the court to draw adverse inferences from the defendants' persistent invocation of the Fifth Amendment); *RBS Citizens v. M-59 Telegraph Petroleum LLC*, 2013 WL 4496248, \*4-6 (E.D. Mich. Aug. 21, 2013) (granting summary judgment to the plaintiff on all but one issue after the defendant invoked the Fifth Amendment because evidence supported plaintiff's claims for breach-of-contract, fraud, civil conspiracy, and piercing the corporate veil).

This case is similar to *JSC Foreign Econ. Ass'n Technostroyexport v. Int'l Dev. and Trade Servs., Inc.* There, the Southern District of New York granted summary judgment to the plaintiff on its piercing claim. 386 F. Supp. 2d 461 (S.D.N.Y. 2005). The court applied New York law, which is similar to Delaware piercing law. *Id.* at 464-65 (discussing factors relevant to New York piercing law). Plaintiff, as the Commission

has here, demonstrated sufficient evidence to shift the burden to the individual defendants to offer “specific facts showing that there is a genuine issue for trial.” *Id.* at 475 *citing* Fed. R. Civ. P. 56(e). The defendants had invoked their Fifth Amendment privilege in response to all deposition questions. (*Id.*) The court rejected the defendants’ argument that their assertion of the Fifth Amendment created an issue of disputed fact, stating “a party who asserts the privilege against self-incrimination must bear the consequence of lack of evidence.” *Id.* at 475 (quotation omitted).

As in *JSC Foreign*, the Commission has demonstrated sufficient evidence to shift the burden to Christopher Wolfington to offer specific facts showing there is an issue for trial. Because there is no such evidence, and because Christopher Wolfington invoked the Fifth Amendment in response to all deposition questions and all allegations, he cannot meet his burden.

**b. Undisputed Facts Establish that Christopher Wolfington and MCA Operated as a Single Economic Entity.**

To determine whether a “single economic entity exists,” Delaware law considers whether: (1) MCA was undercapitalized and/or insolvent; (2) Christopher Wolfington siphoned money from MCA; (3) MCA observed corporate formalities; (4) MCA kept appropriate corporate records; and (5) MCA paid dividends. *See, e.g., Blair v. Infineon Techs., AG*, 720 F. Supp. 2d 462, 470-71 (D. Del. 2010.) Delaware courts merely require “some combination” of these factors. (Dkt. 240 at p. 15-16 (Order on Motion to Dismiss).) Here, the Commission has produced substantial, and un rebutted, evidence establishing *each* factor.

**i. Undisputed facts establish MCA’s insolvency and undercapitalization.**

The Court need not employ an “adverse inference” to conclude that MCA was perpetually insolvent and undercapitalized – the fact is undisputed. Delaware law states that an entity is insolvent “if the sum of the debtor's debts is greater than all of the debtor's assets, at a fair valuation.” 6 Del. Stat. § 1304. An entity that “is generally not paying debts as they become due is presumed to be insolvent.” *Id.*

MCA was not paying debts as they became due and is presumed insolvent. 6 Del. Stat. § 1304. (*See generally supra* Undisputed Fact Section II - IV.) In addition to failing to pay the Commission, MCA’s two controllers from 2006 to the present both testified that MCA did not pay its debts as they became due. (Brudecki Depo. at 83:5-24; Wolf Depo. at 82:8-22, 92:19-22.) REDACTED

(Maschka Decl. Ex. Q, P6 at note 8.)

MCA cannot overcome this presumption of insolvency. From at least 2004 through the present, MCA’s balance sheets reflected that its liabilities greatly exceeded its assets, indicating that MCA was insolvent this entire period.<sup>7</sup> And MCA is admittedly insolvent today. (Dkt 151 at ¶ 3.)

**ii. Undisputed facts establish Christopher Wolfington siphoned funds from MCA.**

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<sup>7</sup> MCA’s balance sheets reflect the “cost” basis of MCA’s assets and liabilities, what MCA paid for the assets or owed on its liabilities, as opposed to the “fair value” of those assets and liabilities. But there is absolutely no evidence to suggest that MCA’s assets were worth more than what MCA paid for those assets or that MCA’s liabilities were less than the “cost” represented on the balance sheets.

Similarly, there is no question that Christopher Wolfington siphoned funds from MCA. Christopher Wolfington invoked his Fifth Amendment right against self-incrimination in response to all questions regarding any legitimate business reason for his various expenses paid by MCA. (*See, generally*, C. Wolfington Depo. at 120:17 – 208:13.) And, again, while an “adverse inference” is appropriate, it merely augments the Commission’s entitlement to summary judgment.

The evidence that Christopher Wolfington siphoned from MCA is overwhelming and undisputed. (*See generally supra*, Undisputed Fact Section V.) Three MCA witnesses testified that MCA’s transfers \$1,000 to Citizen’s Bank each month were to repay Christopher Wolfington’s personal loan. (Anderson Depo. at 136:5-137:10; Brudecki Depo. at 175:8 – 177:15; M. Wolfington Depo. at 274:19 – 275:20.) REDACTED

(Maschka Decl. Exs. I-7 – I-11, Z; Anderson Depo. at 145:22-147:14.) REDACTED

(Maschka Decl., Exs. AA1-AA4 (checks from G & G Holistic to Christopher Wolfington.) REDACTED

(Maschka Decl., ¶17 Ex. H3-H28, J1, J2, & J8 (Real Estate Empowered Transfers.) Real Estate Empowered has paid, and continues to pay, Christopher Wolfington’s personal rent. (Anderson Depo. 138:17-139:16.))

And there are *numerous* examples of expenses in MCA's bank records and on its American Express statements that indicate Christopher Wolfington used company funds for personal expenses. (*See, generally*, Undisputed Facts Section V(e)-(f).) Billy Brudecki, MCA's former controller, confirmed that Christopher Wolfington used company funds for personal expenses. (Brudecki Depo at 82:1-15.)<sup>8</sup>

In light of such undisputed evidence of siphoning, summary judgment is warranted. *See, e.g., JSC Foreign*, 386 F. Supp.2d at 473-74 (granting summary judgment on piercing claim, in part, because of uncontradicted evidence company funds were used to pay individual defendants' personal expenses.); *see also In re ClassicStar Mare Lease Litig.*, 823 F. Supp. 2d 599, 641, 644 (E.D. Ky. 2011) (under Delaware, Utah or Kentucky law, plaintiff was entitled to summary judgment on piercing claim where individual defendants "used [the parent company] to loot [subsidiary] to the detriment of plaintiffs and for their own gain of millions of dollars"); *United States v. Golden Acres*, 702 F. Supp. 1097, 1106 (D. Del. 1988) (piercing appropriate after bench trial where

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<sup>8</sup> For some time, Brudecki, at the request of Jonathan Ziegler and Mark Wolfington, would go through Christopher Wolfington's American Express statement. (Brudecki Depo. at 290:13 – 294:24). Brudecki would try to determine which purchases were for personal expenses and record personal charges as payments on a "loan" made by Christopher Wolfington to MCA. (*Id.* Depo. at 290:13 – 294:24.) But even if Christopher Wolfington actually made a loan to MCA, and even if MCA treated every single personal purchase as its "repayment" of that loan, it only further demonstrates how Christopher Wolfington and MCA operated as a "single economic entity," with Christopher Wolfington commingling his money with MCA's and spending it on personal items. *See, e.g., David v. Mast*, 1999 WL 135244 at \*4 ("One factor that Delaware courts consider is whether the corporation and the alleged alter ego commingled funds."). Moreover, after Brudecki left in the summer of 2011, it appears no one continued this practice. (Wolf Depo at 20:1 – 23:8)

“defendants were siphoning funds out of the corporation at regular intervals... [Defendants] effectively used the corporation as an ‘incorporated pocketbook.’”).

**iii. Undisputed Facts Establish that MCA did not Maintain Corporate Formalities or Corporate Records.**

MCA disregarded the most rudimentary corporate formalities and failed to keep the most basic corporate documents. To determine whether a corporation properly observed corporate formalities, Delaware courts consider “whether corporate records were kept, officers and directors functioned properly, and other corporate formalities were observed.” *Golden Acres*, 702 F. Supp. at 1104. Delaware courts have long stressed that

[o]bservation of appropriate formalities by those controlling a corporation is . . . an important consideration because it demonstrates that those in control of a corporation treated the corporation as a distinct entity and had a reasonable expectation that the conventional attributes of corporateness, including limited liability, would be accorded to it.

*Irwin & Leighton, Inc. v. W.M. Anderson Co.*, 532 A.2d 983, 989 (Del. Ch. 1987); *see also Midland Interiors v. Burleigh*, 2006 WL 3783476 (Del. Ch. Dec. 19, 2006), at\*4 (piercing corporate veil in part because corporation failed to observe the formalities imposed by Delaware law).

REDACTED

(Ziegler Depo. at 23:24-24:20;

M. Wolfington Depo. at 42:23-43:4.) REDACTED

. (See M. Wolfington Depo. at 249:5-

250:8); *See also, e.g., JSC Foreign*, 386 F. Supp. 2d at 473. (holding that inadequate bookkeeping for transactions to corporate insiders supported piercing corporate veil).

Beyond its inadequate recordkeeping, MCA also failed to comply with several of the most straightforward corporate obligations under Delaware law. For example, Delaware corporations must hold an annual shareholders' meeting. Del. Code Ann. tit. 8, § 211(b) (requiring a corporation to hold a shareholders' meeting REDACTED

(Ziegler Depo. at 25:17-26:17) REDACTED

Del. Code Ann. tit. 8, § 142(a) (2012) (imposing an affirmative duty on one of a corporation's officers "to record the proceedings of the meetings of the stockholders and directors in a book to be kept for that purpose").

MCA has not even complied with its most basic obligation: paying taxes. *See* Del. Code Ann. tit. 8, §§ 501(a), 502(a) (requiring every corporation that is incorporated in Delaware to file an annual franchise tax report and to pay an annual franchise tax). Delaware rendered MCA's corporate status as "void" because MCA has not filed an annual franchise tax report or paid its annual franchise tax for over three years. (Maschka Decl. Ex. HH, showing last MCA's last annual filing as March 1, 2010.) *See also* Del. Code. Ann. tit. 8, § 510 (stating that the charter of a corporation becomes void if it "neglects or refuses for 1 year to pay the State any franchise tax or taxes" or fails "to file a complete annual franchise tax report").

MCA's consistent failure to observe the corporate formalities imposed by Delaware law means the Wolfingtons cannot now invoke the protections of Delaware's corporate law to shield themselves from personal liability. "Corporations, like any other business incorporated in [Delaware], are required to conform to the requirements of the law in order to invoke fully its protections." *Midland Interiors, Inc.*, 2006 WL 3783476 at \*4.

**c. Undisputed Facts Establish Christopher Wolfington Used MCA to Commit Fraud or Injustice.**

REDACTED

*(See, generally*

Undisputed Facts, Section IV & V; Maschka Decl., Exs. R, S, T.) MCA failed to return the vault cash as promised, instead using it as a line of credit. REDACTED

(Maschka Decl., Ex. H-4, H-5, H-6) REDACTED

*(Id.*, Exs. AA-1 – AA4.) During MCA's relationship with the Commission, MCA continued to lose money, the amount it owed to the Commission continued to increase, and Christopher Wolfington continued to spend money that came into MCA as his own. REDACTED



REDACTED

(*Id.*, Ex. I-1, K-52 (charge

on July 19, 2013.)

Notably, the Commission is not the only victim. The Ho-Chunk Nation obtained a nearly \$5,000,000 judgment in Ho-Chunk Tribal Court for vault cash MCA failed to repay when the Nation terminated its contract in 2009. (*Id.*, Ex. L, M.) And the Coshatta Tribe continues to advance vault cash to MCA. MCA owes that Tribe roughly \$ 1.5 million that it cannot repay, while Christopher Wolfington continues to spend that money. (Wolf Depo at 37:16-38:9.)

The Wolfingtons' scheme is just the type of fraud and injustice that permits piercing. *See, e.g., JSC Foreign*, 386 F. Supp. 2d at 475-76 (piercing appropriate under New York law where individual defendants diverting funds prevented company from honoring contractual obligations); *Trs. Of the Nat'l Elevator Indus. Pension v. Lutyk*, 140 F. Supp. 2d 447 (E.D. Pa. 2001) (piercing appropriate under federal law in part because of the injury other creditors suffered because of siphoning of corporate funds); *David v. Mast*, 1999 WL 135244 (Del. Ch. Mar. 2, 1999) (defendant misused corporate form when he advertised that massively indebted corporation could guarantee work for up to 10 years).

## **II. Summary Judgment Should Be Granted Against Mark Wolfington on the Fraudulent Transfer Claim.**

Summary judgment should be granted against Mark Wolfington on Count X for fraudulent transfer-constructive intent. Delaware law states that:

(a) A transfer made is fraudulent to a creditor if the debtor made the transfer or incurred the obligation:

(2) Without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor:

(a) Was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small; or

(b) Intended to incur, or believed or reasonably should have believed that the debtor would incur, debts beyond the debtor's ability to pay as they became due.

6 Del. Code § 1304 (a)(2).

As discussed above, MCA has been insolvent for years and routinely engaged in transactions for which the remaining assets of MCA were unreasonably small. REDACTED

<b>Date</b>	<b>Amount</b>	<b>Exhibit</b>
8/24/2011	REDACTED	I-2
9/28/2011	REDACTED	I-3
10/11/2011	REDACTED	I-4
10/27/2011	REDACTED	I-5
1/12/2012	REDACTED	I-6
6/12/12	REDACTED	K-39
8/28/12	REDACTED	K-41
2/6/13	REDACTED	H-47

<b>TOTAL</b>	REDACTED	
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The Third Circuit employs a two-step process to determine if an entity received “reasonably equivalent value” for a transfer. First, courts make an “express factual determination as to whether the debtor received any value at all.” *See, e.g., In re R.M.L., Inc.*, 92 F.3d 139, 149 (3d Cir. 1996) (commitment fees paid to lender were not reasonably equivalent value because the loan had only a remote chance of closing). Then, courts engage in a “totality of circumstances” test to determine if the value given was “reasonably equivalent. *Id.* The test evaluates several factors, including whether the exchange resulted from an arm’s-length transaction, the fair market value of the item received or services performed, and the good faith of the transferee. *Id.* at 148.

MCA did not receive any value at all for the transfers, much less reasonably equivalent value. Delaware law states that “[v]alue is given for a transfer or an obligation if, in exchange for the transfer or obligation, property is transferred or an antecedent debt is secured or satisfied, but value does not include an unperformed promise made otherwise than in the ordinary course of the promisor’s business to furnish support to the debtor or another person.” 6 Del. Code § 1303(a).

The transfers were over and above the salary paid to Mark Wolfington for his services. *See, e.g., In re TSIC, Inc.*, 428 B.R. 103, 113-15 (Bankr. D. Del. 2010) (severance payment to CEO was not reasonably equivalent value because CEO already received compensation for his services and had a “preexisting duty to serve as CEO”). The most substantial of these transfers, the June 12, 2013 transfer of \$63,000 was

admittedly used to pay Mark Wolfington's **personal** taxes. Defendants have attempted to justify this payment as necessary for licensing purposes. (*See* Dkt. 252 at, *e.g.*, ¶ 107; and Dkt 254 at p. 19 (“Mark Wolfington was advanced monies for taxes precisely because the Louisiana Gaming Commission made that a business requirement.”).) But Mark Wolfington's failure to pay his own taxes does not mean that MCA received any “value” by paying his personal obligation. Mark Wolfington had a pre-existing duty to pay his own taxes, and had already received compensation for his services as COO. MCA did not receive property in exchange for the \$63,000, nor did it satisfy or secure a debt owed to Mark Wolfington. 6 Del. Code § 1303. **REDACTED**

(Ziegler Depo. at 58:25 – 59:1.) And the transaction had still not been documented more than a year after it occurred. (Wolf Depo. 73:21 – 74:8.)

None of the remaining \$40,000 in transfers to Mark Wolfington are documented. There is no explanation or justification for these transfers apparent from MCA's documents. The Commission is thus entitled to summary judgment on the transfers to Mark Wolfington.

### **CONCLUSION**

For all the foregoing reasons, the Court should grant summary judgment against Christopher Wolfington on Count I, and find him jointly and severally liable for the breach of contract claim in the amount of \$5,623,690.83 plus prejudgment interest at a rate of 10%. The Court should also grant summary judgment on Count X against Mark Wolfington in the amount of \$104,521.31.

Respectfully submitted,

Dated: October 23, 2013

FAEGRE BAKER DANIELS LLP

By: /s/ Jane E. Maschka

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