UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

CORPORATE COMMISSION OF THE MILLE LACS BAND OF OJIBWE INDIANS, Plaintiff, v. MONEY CENTERS OF AMERICA, INC. MCA OF WISCONSIN, INC., CHRISTOPHER WOLFINGTON, and MARK WOLFINGTON Defendants.	No. 0:12-cv-01015-RHK-LIB **MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT MARK WOLFINGTON'S MOTION FOR SUMMARY JUDGMENT**

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Defendant Mark Wolfington respectfully submits this Memorandum of Law in Support of his Motion for Summary Judgment on all claims asserted by the Plaintiff Corporate Commission of the Mille Lacs Band of Ojibwe Indians (the "Commission").

I. INTRODUCTION AND SUMMARY OF ARGUMENT

Mark Wolfington joined Money Centers of America, Inc. ("MCA") years after it was formed, played no role in structuring the "Baena Loan" that is the principal target of the Commission's Second Amended Complaint, played no role in structuring the "Wolfington Loan" that is the target of the allegations against Christopher Wolfington, was not an employee of MCA when the contract with the Commission was executed, and is otherwise only tangentially related to the Commission's claims. The undisputed facts in this case confirm that judgment should be entered as a matter of law in favor of Mark Wolfington on all of the Commission's claims. Specifically, all claims premised on veil-piercing to obtain Mark Wolfington's assets should be denied, and the remainder of the claims against Mark Wolfington in his individual capacity (for "fraudulent transfers") should also be denied.

The undisputed facts demonstrate that Mark Wolfington did not abuse the corporate form of MCA in creating or working at MCA; indeed, he only began working at MCA as a salaried employee in 2010, a full 12 years after MCA was established. The sum total of funds that he is alleged to have "siphoned" is approximately $100,000, all of which funds have been explained through undisputed facts as legitimate business expenses and payroll disbursements. Nor would fraudulent transfers of $100,000 for a

multi-million dollar corporate enterprise be sufficient to reach a jury on the issue of piercing the veil to obtain Mark Wolfington's assets.

The Court already dismissed the preference claim against Mark Wolfington for failing to allege a basic element of that claim. Dkt. 240. The undisputed facts show that the Commission is barred from obtaining relief on the elements of the fraudulent transfer and veil piercing claims against Mark Wolfington. For those reasons, and for the reasons set forth below, the Court should grant summary judgment for Mark Wolfington on the Commission's remaining claims.

II. STATEMENT OF UNDISPUTED FACTS

Mark Wolfington began working at MCA as a salaried employee (Chief Operating Officer) in 2010, after MCA's prior Chief Financial Officer was terminated and was discovered to have been embezzling money. Mark Wolfington joined MCA long after the events which the Commission bases this suit first took place—*e.g.* (a) after the creation of MCA in 1998; (b) after MCA bid to the Commission for a contract to provide financial services to the Commission's casinos; (c) after the Commission entered into the contract with the Commission; (d) after the Christopher Wolfington Loan in 2008; (e) after the Baena Loan in 2006; and (f) after the Vault Cash settlement schedule was established in 2009.

Mark Wolfington is alleged to have "siphoned" approximately $100,000, from MCA over three years, which company transacts hundreds of thousands of dollars if not millions of dollars on a daily basis. The alleged "siphoned" funds are comprised of just 9 advances (one of which is for the bulk of the total, $63,000), all of the funds were

documented on MCA's books or bank statements, and all of which have demonstrated legitimate business purposes.

The primary allegation in the Second Amended Complaint related to Mark Wolfington allegedly "siphoning" funds regards a one-time payment of $63,000 for payment of taxes. Second Amended Complaint ("SAC") ¶ 53(e). This payment of Mark Wolfington's taxes was specifically caused by a demand by Louisiana's gaming regulatory authority to resolve a tax problem in order for MCA to be licensed. *See* Oct. 23, 2013 Declaration of Luke P. McLoughlin ("McLoughlin Decl."), Ex. A (email request from the Louisiana gaming commission identifying tax issue requiring resolution for MCA license); McLoughlin Decl., Ex. B (letter regarding payment of taxes directed to Mark Wolfington). The demand that a tax problem be resolved before granting a license is a regulatory requirement. Therefore, the advance payment of Mark Wolfington's taxes is a business-related expense.

Notwithstanding these straightforward facts, the Commission attempts to veil pierce to Mark Wolfington through guilt by association, and based on the different and distinct allegations against his cousin and only other remaining individual defendant, Christopher Wolfington. The Commission has tried to cast the transfers to Mark Wolfington as secret "siphonings" of money, in order to characterize business expenses as part of a fraud. Specifically, Debra Thompson, the expert retained by the Corporate Commission in this matter, identified this $63,000 payment on the bank statements but did not see the payment on the general ledger. McLoughlin Decl., Ex. C, Report of Debra Thompson, at pp. 4, 30-31. Mitch Wolf, who performs the comptroller duties for

MCA, testified at his deposition that the reason the $63,000 payment was not ***yet*** recorded on the general ledger was because both MCA and Mark Wolfington had requested extensions of their 2012 tax returns. McLoughlin Decl., Ex. D, at pp. 73-75. Therefore, a decision had not yet been made on how the payment for this business expense will be recorded (as an advance on payroll or a loan). *Id.* But the Louisiana gaming commission's contemporaneous emails have never been challenged in any deposition, report, or motion; those documents undisputedly explain the transfer, regardless of how it is recorded.

Second, the other eight transfers challenged by the Plaintiff ($38,797.07 in total) have notes that track the business justifications provided for them, as recognized by Plaintiff's own initial report and supplemental report. No genuine dispute can be created by mere assertions that these transfers had no business purpose.

The expert indicated that she did not have sufficient information to know whether the eight payments were legitimate, notwithstanding their notations. McLoughlin Decl., Ex. C, at pp. 10-11. However, these payments were identified as not only listed on the general ledger but as listing legitimate business purposes. These payments are corporate payroll, an executive bonus payment, reimbursement for office supplies, and travel reimbursements for rental car, meals and incidental travel expenses. McLoughlin Decl., Ex. E, Supplemental Report of Debra Thompson, Exhibit D, at p. 18-19. On its very face, this $38,797.07 in payments is for legitimate business purposes and has never been refuted – all that Plaintiff's expert has done has opine that she would like more information.

The Commission's veil piercing and fraudulent transfer allegations against Mark Wolfington, specifically, essentially stop there. Only paragraphs 33-35 and 96-99 directly address the actions alleged to have been taken by Mark Wolfington. These allegations directed specifically against Mark Wolfington concern statements he made related to MCA's delay in settling funds to the Commission.[1] But, notably, all of the alleged "improper" payments to Mark Wolfington took place ***after*** the statements were made, McLoughlin Decl., Ex. C, at pp. 10-11, and all transfers were fully appropriate in any event.

The balance of the claims in the Second Amended Complaint are undifferentiated assertions against the "Wolfington Family," which is defined to include four people: Sean Wolfington, John Ziegler, Christopher Wolfington, and Mark Wolfington.[2] These claims are generalized and do not identify Mark Wolfington specifically. And Plaintiff has focused on Mark Wolfington only incidentally compared to Plaintiff's focus on claims against CEO Christopher Wolfington.

[1] Mark Wolfington is not alleged to have had any involvement in any fraud claims relating to MCA's license. SAC ¶¶ 1-203; *Bank of Montreal v. Avalon Capital Grp., Inc.*, 743 F. Supp. 2d 1021, 1027 (D. Minn. 2010).

[2] Sean Wolfington and John Ziegler were dismissed from this case voluntarily for lack of personal jurisdiction almost 9 months ago. Upon their dismissal, Defendants inquired if the Commission would now amend its third version of its Complaint to conform the allegations to the remaining individuals. It expressly declined to do so and thus has pressed on with undifferentiated pleadings against the "Wolfington Family."

Because the undisputed facts show that Mark Wolfington did not siphon funds from MCA, but rather received funds for unchallenged, contemporaneously justified business purposes, all claims against Mark Wolfington fail as a matter of law.

III. ARGUMENT

A. Legal Standard

Summary judgment is appropriate when the evidence demonstrates that there are no genuine issues of material fact such that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); *Ricci v. DeStefano*, 557 U.S. 557, 586 (2009); *Smutka v. City of Hutchinson*, 451 F.3d 522, 526 (8th Cir. 2006). A disputed fact is "material" if it might affect the outcome of the case, and a factual dispute is "genuine" if the evidence is such that a reasonably jury could return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc*. 477 U.S. 242, 248 (1986). The nonmoving party cannot rest on mere denials or assertions, but must show through the presentation of admissible evidence that specific facts exist creating a genuine issue of material fact. Fed. R. Civ. P. 56(c)(1)(A); *Wood v. SatCom Mktg., LLC*, 705 F.3d 823, 828 (8th Cir. 2013).

B. There Are Only Two Types Of Allegations That Remain Against Mark Wolfington And Summary Judgment Should Be Granted On Both

Following the dismissal on the pleadings of the preference claim against Mark Wolfington, Dkt. 240, there are only two types of claims that remain in the case against him. First, there remain claims premised on veil piercing, and, second, there remain claims of fraudulent transfer. Neither of these claims has merit, and both fail as a matter of law on the undisputed facts.

1. Judgment as a Matter of Law Should be Granted on The Veil Piercing Claims

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) (emphasis added). 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 v. Wood*, 752 A.2d 1175, 183 (Del. Ch. 1999). Courts applying Delaware law – as this Court does in this case, *see* Dkt. 239-40 – frequently grant defendants summary judgment on veil-piercing claims. *See, e.g.*, *Alberto v. Diversified Group, Inc.*, 55 F.3d 201 (5th Cir. 1995) (applying Delaware law and affirming district court's grant of summary judgment for defendant on alter ego/veil-piercing claim); *Fletcher v. Atex, Inc.*, 68 F.3d 1451 (2d Cir. 1995) (same); *Charter Servs. Inc. v. DL Air, LLC*, 711 F. Supp. 2d 1298 (S.D. Ala. 2010) (applying Delaware law and granting summary judgment in favor of defendants on an alter ego/veil-piercing claim); *Old Colony Venture I, Inc. v. SMWNPF Holdings, Inc.*, 1996 WL 707025, at *3-4 (D. Kan. Oct. 2, 1996) (same). The same result should obtain here.

The Achilles heel for all of Plaintiff's veil-piercing allegations against Mark Wolfington is the undisputed fact that Mark Wolfington did not form MCA nor has he been shown to have abused its corporate forum. *See Trevino v. Merscorp, Inc.*, 583 F. Supp. 2d 528, 530 (D. Del. 2008) (identifying basic elements of veil piercing claim). All

of the specific allegations regarding abuse of corporate form are directed to Chris Wolfington.

Mark Wolfington, by contrast, is barely discussed in the Commission's third Complaint[3] or in the Commission's expert report, and he is simply lumped in with the overall "Wolfington Family," a group defined at the time the third Complaint was signed to include Sean Wolfington, Chris Wolfington, John Ziegler and Mark Wolfington. This omnibus pleading style – and the absence of facts in support of that pleading – is insufficient to pierce the veil to Mark Wolfington's personal assets, particularly on theory of fraud. *Cf. Tatone v. Suntrust Mortg., Inc.*, 857 F. Supp. 2d 821, 831 (D. Minn. 2012) ("A complaint which lumps all defendants together and does not sufficiently allege who did what to whom, 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 also See Bank of Montreal v. Avalon Capital Grp., Inc.*, 743 F. Supp. 2d 1021(D. Minn. 2010) (dismissing alter ego/veil-piercing claims as to some, but not all, defendants).

Nothing has been specifically alleged about Mark Wolfington, nor any material facts adduced, that would show that he caused the corporate form to be disregarded in order to enrich himself. Plaintiff's attempt to simply lump Mark Wolfington in with Christopher Wolfington in an attempt to obtain the unusual and extraordinary relief of veil-piercing should be rejected.

[3] The portions of the Second Amended Complaint presenting direct assertions against Mark Wolfington, *see* Compl. ¶¶ 33-35, 96-99 contains no facts that demonstrate with veil piercing.

2. Judgment as a Matter of Law Should Be Granted on the Fraudulent Transfer Claims

Under Del. Code Ann. tit. 6 § 1304(a)(1), "A transfer made or obligation incurred by a debtor is fraudulent as to a creditor . . . if the debtor made the transfer or incurred the obligation . . . with actual intent to hinder, delay or defraud any creditor of the debtor." To determine whether a transfer was made with actual intent to defraud, a court considers whether the following "badges of fraud," among others, were present: the transfer was to an insider; the transfer was concealed; before the transfer was made, the debtor had been sued or threatened with suit; the debtor removed or concealed assets; and the debtor was insolvent shortly after the transfer was made. § 1304(b)(1).

A brief perusal of the expert report filed by the Corporate Commission shows that the true focus of the Commission's suit is Christopher Wolfington, one of the founders of MCA, not his cousin, Mark Wolfington. Mark Wolfington did not even join the company as a salaried employee until 2010.[4] He is nowhere alleged to have done any of

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[4] This fact did not appear to affect the analysis by Ms. Thompson, who opined that Mark Wolfington was somehow siphoning money in 2009, before he became COO of MCA. McLouglin Decl., Ex.6, at pp. 45-46.

Q. And you write, "Based on my analysis of corporate
22 records, particularly MCA's general ledgers, bank
23 statements and American Express statements, Christopher
24 Wolfington and Mark Wolfington were engaged in siphoning
1 funds from MCA at least as early as 2009." Is that your
2 opinion?
3 A. Yes.
4 Q. And that's for Christopher Wolfington and Mark
5 Wolfington?
6 A. Correct.

the acts alleged to have been done by Christopher Wolfington with respect to forming MCA, using its balance sheet for the benefit of other companies,[5] or engaging in unrelated real estate transactions. Instead, and stripped of the outdated and undifferentiated attacks on the "Wolfington Family," the sum total of specific factual allegations against Mark Wolfington is in a single table in Plaintiff's expert report, wherein eight transfers are identified (a ninth transfer of the same variety was identified in a supplemental report).

These transfers are shown in the Commission's own expert report to be openly recorded as legitimate payroll and business reimbursements. The expert's methodology

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[5] *See* Dep. of Debra Thompson, at 95-96

Q. ….. You have a section here on "Unexplained and Unsubstantiated Payments and Charges," romanette iii. Am I right?
A. That's -- that's correct, yes.
Q. Are these two just to Christopher Wolfington or to -- excuse me, are these just for Christopher Wolfington's benefit **or are they also for Mark Wolfington?**
A. These specifically, let me look, appear to be for the benefit of -- I believe all of them are for the benefit of Christopher Wolfington --
Q. Okay.
A. -- as it says in that first sentence.
Q. **And you didn't reach an opinion about any of these being for Mark Wolfington's benefit**. **Am I correct?** If you need to take a moment to review this section, please do.
A. I've been looking at it, and I believe that that's -- on this particular romanette iii section is correct.

(emphasis added).

lacks scientific methodology, *see* McLoughlin Decl., Ex. G, Expert Report of Jeff Johnson (demonstrating that the Commission's expert's report has significant defects in its methodology), but, regardless, the Commission's own expert acknowledges the very fact that MCA has recorded these Mark Wolfington transfers with notations for reasons given for them. *See* McLoughlin Decl., Ex. F, at p. 194:

> Q. Okay. And the same as Mark Wolfington, 38,000 [in transfers] on page 13 [of the report] towards the top?
> A. Correct.
> Q. And is it your opinion that these are fraudulent payments?
> MR. KRAUSS: Objection.
> A. I have not said that they were fraudulent. I said that they were indications of siphoning. And I have also said that they're not -- do not appear to be recorded in the correct accounts.
> BY MR. McLOUGHLIN:
> Q. They're not recorded in the correct accounts, but they are recorded on the company's books. Am I right?
> A. Yes.

No facts have been adduced to gainsay the justifications for these transfers.

At the dismissal stage, the Court – faithfully applying the liberal standard for pleadings – found that the Commission had adequately pled that "transfers to the Wolfingtons were in addition to the Wolfingtons' salaries and bonuses, and thus not in exchange for their services, so MCA did not receive reasonably equivalent (or any) value for them." Dkt. 239, at 19. On the undisputed facts, however, and applying the more stringent summary standard under Rule 56, none of the facts that the Commission has adduced in this table (or elsewhere) about these transfers in any way shows that the Commission can withstand Mark Wolfington's summary judgment motion. *Cf.*

I-Systems, Inc. v. Softwares, Inc., 2004 U.S. Dist. LEXIS 6001 (D. Minn. Mar. 29, 2004) (granting fraudulent transfer defendant summary judgment) (applying Minnesota law). Each of the transfers was recorded on Money Centers' books, the largest of which, $63,000, has already been explained (without refutation) as a business expense in order to obtain regulatory approval from the Louisiana Gaming Commission. The others all have justifications that have not been refuted by any witness. The fact that the Plaintiff's expert might like more documentation, or thinks that the listed transactions were in the wrong accounts, *see* nn. 4-5 *supra*, is irrelevant.

In sum, like the veil piercing claims, Plaintiff has failed to present material disputes of fact as to any of the elements of fraudulent transfer claims. A single table of fully explained transfers and a host of allegations against the "Wolfington Family" is insufficient to reach a jury on the claims that remain against Mark Wolfington.

IV. CONCLUSION

For the foregoing reasons, Mark Wolfington respectfully submits that summary judgment should be granted in his favor on all claims brought by the Plaintiff, and that he should be dismissed with prejudice from this lawsuit.

Respectfully submitted,

DUANE MORRIS LLP

s/Luke P. McLoughlin

Date: October 23, 2013

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