

IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA  
Civil Action No. 1:14-CV- 00689

JIANGMEN KINWAI FURNITURE  
DECORATION CO. LTD,  
Plaintiff,

v

IHFC PROPERTIES, LLC and  
ZUO MODERN CONTEMPORARY, INC.,  
Defendants.

**MEMORANDUM OF LAW IN  
SUPPORT OF  
PLAINTIFF’S MOTION TO  
STRIKE AFFIDAVITS AND  
VERIFICATIONS AND  
EXCLUDE TESTIMONY OF  
INTERNATIONAL MARKET  
CENTERS EMPLOYEES**

**FACTS**

In Section 5A of the Joint Rule 26(f) Report (Doc #26), the parties agreed that Plaintiff would have until January 31, 2015 to request leave to join additional parties or amend the pleadings. This Court approved that report on October 10, 2014. (Doc #27). On January 7, 2015, Defendant IHFC Properties, LLC amended its pleadings and filed a counterclaim. (Doc #31). On January 29, 2015, Plaintiff filed a motion for leave to amend the complaint. (Doc #34). Plaintiff sought to amend the allegations and to add as new defendants, International Market Centers LP (“IMC LP”) and International Market Centers Inc. (“IMC Inc,” IMC Inc collectively with IMC LP, “IMC”). Defendant opposed the addition of the new defendants. Specifically, in its brief, the Defendant IHFC represented the following to this Court:

“Ownership of the Property leased to Plaintiff has not changed.” (Docket Entry 36 pp 3-4)

“IHFC was both the owner and “operator” of the property leased to Plaintiff at the time of the Lease and remains both the owner and the operator.” (Id. at 4)

“these entities are remote owners of IHFC” (Id)

Plaintiff’s entire premise in requesting leave to join International Market Centers LP and International Market Centers Inc. as defendants appears to be an attempt to “pierce the corporate veil”, since these entities are remote owners of IHFC, the operating subsidiary that owns the property leased to Plaintiff.” Id. at 7

On March 19, 2015, this Court granted the Defendant IHFC’s opposition specifically demonstrating reliance on Defendant IHFC’s arguments that since IMC was a remote entity that did not operate the property, Plaintiff had to produce evidence to support piercing the corporate veil in order to establish liability. (Doc #41). On March 25, 2015, Plaintiff filed a motion to reconsider the denial of the addition of IMC as defendants explaining that Kinwai was not trying to pierce the corporate veil but wanted IMC liable for its own acts (Doc #46). The Court denied that motion by text order on April 2, 2015 relieving Defendant IHFC of any obligation to reply (Entry #49).

## **ARGUMENT**

### **I. IHFC Is Supporting All of Its Claims and Defenses Through the Use of IMC Employees**

On August 17, 2014, IHFC submitted affidavits of Richard Krapfel and Sharisse Cumberbatch, both IMC employees, in support of its opposition to Plaintiff’s motion for a temporary restraining order. (Docs #6-1 and 6-3). On December 15, 2014, IHFC sent Kinwai its Initial Rule 26 Disclosures. In Section A, where litigants lists individuals with discoverable information that may be used to support its claims, among other names, IHFC listed Richard Krapfel, Sharisse Cumberbatch, Julie Messner, and Thomas Mitchell. Each is or was at all relevant times, employees and/or officers of International

Market Centers. On February 6, 2015, Defendant IHFC submitted to this Court a verified motion for a preliminary injunction against Plaintiff. (Doc #35). That motion was verified by Julie Messner, Vice President of International Market Centers, and not an employee of IHFC. IHFC's Reply had four affidavits, three of which were employees of International Market Centers: the affidavit of Richard Krapfel dated March 11, 2015 (Doc #39-1), the affidavit of Sharisse Cumberbatch dated March 12, 2015 (Doc #39-4), and the affidavit of Kimberly Cox dated March 11, 2015 (Doc #39-5). Each of these documents should be excluded from evidence.

On February 24, 2015, IHFC's answers to Kinwai's interrogatories were verified by Sharisse Cumberbatch, Senior Counsel and Director of Lease Administration for IMC. She is not employed by the IHFC. Rule 33(b)(5) requires interrogatories to be signed by the party to whom they were directed under oath. Kinwai directed the interrogatories to IHFC. (See Exhibit A). This verification should be stricken or considered invalid.

Plaintiff incorporates the following documents into this motion in order not to add duplicate exhibits; Doc #40-1, the Thomas Mitchell deposition video excerpt; Doc #40-2, LinkedIn screen shots; Doc #40-6, Richard Krapfel deposition transcript excerpts; Doc #37-8 Kimberly Cox email; Doc #37-9, Sharisse Cumberbatch Letter; Doc #37-10, Julie Messner Linked-in Pages; and Doc #63-2 Photos from High Point Furniture Show. Each of these documents provides the necessary evidence of IMC employment for the affiants in addition to the affidavits themselves.

## **II. The Federal Rules of Evidence Require Personal Knowledge**

The fundamental rule is that a lay witness must have personal knowledge to testify and that rule is found in the Federal Rule of Evidence cited below:

**Rule 602. Need for Personal Knowledge**

A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may consist of the witness's own testimony.

Fed R. Evid. 602. Taken IHFC's claims that were set forth in the background section above as true, employees of the remote owners, International Market Centers cannot have the requisite personal knowledge to provide sworn testimony in favor of IHFC Properties LLC. That conclusion must logically follow IHFC's successful argument that IHFC operates its own properties and IMC is a remote entity that does not operate the properties. It also follows naturally that said IMC employees will not be competent to testify on such matters as the relocation of the Plaintiff, the facts surrounding IHFC's claim of breach of contract or the facts surrounding the alleged breach of a radius clause unless IHFC was being disingenuous in its previous memorandum of law. Thus all of such affidavits and verifications should be stricken and excluded from consideration by this Court. *See e.g. Marshall Durbin Farms, Inc. v. National Farmers Org., Inc.*, 446 F.2d 353, 357 (5th. Cir., 1971) (where the corporate officers and managers who verified the complaint to support motion for preliminary injunction did not have any firsthand knowledge of any of the specific incidents, it becomes nothing more than a massive compilation of hearsay).

**III. Judicial Estoppel Prevents IHFC From Arguing Personal Knowledge of IMC Employees**

Judicial estoppel prevents IHFC from now claiming that IMC employees are competent witnesses that have the requisite personal knowledge to testify. If a litigant “assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him.” *New Hampshire v. Maine*, 532 U.S. 742, 749, 121 S.Ct. 1808, 149 L.Ed.2d 968 (2001) (citation omitted). This doctrine, known as judicial estoppel, “generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase.” *Pegram v. Herdrich*, 530 U.S. 211, 227 n. 8, 120 S.Ct. 2143, 147 L.Ed.2d 164 (2000); *Pennsylvania Nat'l Mut. Cas. Ins. Co. v. Roberts*, 668 F.3d 106, 117 (4th Cir., 2012) (declining to resolve issue of judicial estoppel but noting that defendant's previous position undermined the credibility of her current argument); *In re Double D Dredging Co.*, 467 F.2d 468, 469 (5th Cir.1972) (party who argued that a ship had been in navigable waters was later estopped from arguing that the ship had not been in navigable waters).

The Supreme Court has provided three factors to determine when judicial estoppel should apply: (1) the party's later position must be clearly inconsistent with the earlier position; (2) the party must have succeeded in persuading a court to adopt the earlier position in the earlier proceeding; and (3) whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped. *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001)

The Fourth Circuit has also interpreted judicial estoppel to prevent a party from taking a position in a judicial proceeding that is inconsistent with a stance previously taken in the same case. *Zinkand v. Brown*, 478 F.3d 634, 638 (4th Cir. 2007). Instead of factors, it has a three-part test which must be satisfied before applying judicial estoppel: (1) defendant must seek to adopt a position that is inconsistent with a stance taken previously in litigation; (2) the prior inconsistent position must have been accepted by the court; and (3) defendant must have “intentionally misled the court to gain unfair advantage.” *Id.* The bad faith requirement is the “determinative factor.” *Id.* (internal citation omitted).

In another decision of the Fourth Circuit, the court noted that “the judicial process is not some kind of game.” *Pa. Nat. Mut. Cas. Ins. Co. v. Roberts*, 668 F.3d 106, 117 (4th Cir. 2012). Judicial estoppel additionally protects the “essential integrity of the judicial process” and prevents parties from “playing fast and loose” with the courts. *Allen v. Zurich Ins. Co.*, 667 F.2d 1162, 1166 (4th Cir. 1982).

All of the elements of judicial estoppel are met in this case. In this case, the Defendant IHFC previously insisted that IMC was not the operator of the IHFC building or the High Point properties in order to lead this court into denying Plaintiff’s motion to amend the complaint to add the IMC entities. Defendant IHFC was successful in that this Court granted its request and denied Plaintiff’s motion with regard to adding the IMC Entities. It is an inconsistent position to then use IMC employees as witnesses and affiants in support of IHFC’s claims and defenses on the foundation that they have personal knowledge because IMC operates or manages the IHFC building. IHFC cannot

reasonably argue that it did not know the truth or was confused as to the employer of these witnesses because before the Honorable Thomas D. Schroeder during trial on October 7, 2013, IHFC Properties presented Mr. Thomas Mitchell as a witness against the defendant Whalen Furniture Manufacturing in case 1:10cv568.

MR. LASINE: Your Honor, we call Tom Mitchell.

TOM MITCHELL, PLAINTIFF'S WITNESS, at 3:18 p.m., being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. LASINE

Q State your name, please.

A Tom Mitchell.

**Q How are you employed, Mr. Mitchell?**

**A International Market Centers.**

. . . .

**Q Would you tell the Court what IHFC Properties is?**

**A I believe that was the entity that owns the real estate that the IHFC group controlled.**

(NCMD case 1:10cv568, October 7, 2013 trial transcript pp 182-3, Exhibit B). Despite Mr. Mitchell testifying that IMC was his employer, IHFC in its initial disclosures provides the following information for Mr. Mitchell to Plaintiff.

**Thomas Mitchel [sic]  
President, Home Furnishings  
IHFC Properties, LLC  
209 South Main Street  
High Point, North Carolina 27260  
Telephone: (336) 888-3795**

Without limitation, Mr. Mitchell has knowledge of the basis for IHFC's decision to relocate Plaintiff's showroom in accordance with the terms of Plaintiff's Lease.

IHFC Properties Initial Rule 26 Disclosures Section A, 12/15/14, Exhibit C, p.1.

Under the name for Ms. Cumberbatch, the initial disclosures list her address as at IHFC Properties LLC, the same as for Mr. Mitchell and also provide the following:

Without limitation, Ms. Cumberbatch has knowledge of the lease terms and economic return from the leases for the tenants associated with IHFC's decision to relocate Plaintiff's showroom in accordance with the terms of Plaintiff's Lease, as stated more fully in her Affidavit filed with the Court on August 17, 2014. Additionally Ms. Cumberbatch has knowledge of Plaintiff's defaults under its Lease and the exercise of IHFC's remedies for default.

IHFC Properties Initial Rule 26 Disclosures Section A, 12/15/14, Exhibit C, p.2.

IMC employees could not have such personal knowledge of IHFC's relocation of the Plaintiff or Plaintiff's alleged defaults unless IMC and its employees were actually involved in the management or operation of IHFC. The same is true for the other IMC employees listed in IHFC's initial disclosures.<sup>1</sup> (See Exhibit C, pp.1-3) In IHFC's brief in reply to its motion for consideration for a preliminary injunction, IHFC argued "as Plaintiff has pointed out repeatedly in connection with its Motion for Leave to Amend in this case, ownership of IHFC changed in 2011. . . Plaintiff fails to offer any rationale as to why the current owner of IHFC is bound by the actions of prior management in a matter occurring in 2009." (Doc #58 p 7). By calling IHFC's previous owners "prior management, IHFC is in essence making an admission that IMC is the "new management." (Document 58 at 7) In the motion for preliminary injunction, IHFC used the change in management to put forth an explanation as to why it previously testified that the radius clause had been waived since 2001 when it was now claiming that breaching the same clause would cause it irreparable injury. It didn't suit IHFC's

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<sup>1</sup> Each Employee is listed as having an address at IHFC Properties LLC giving the impression that they are employed by that entity.

argument at that point to argue that the new owner was a remote entity not involved in the management.

It is bad faith for IHFC to put forth a position that is clearly not accurate in order to avoid the addition of the IMC entities as defendants in litigation detrimentally affecting Plaintiff's rights and position while at the same time taking advantage of IMC employees to testify and present evidence on its behalf. That is exactly what is meant by playing fast and loose with the courts. *Lowery v. Stovall*, 92 F.3d 219, 223, 225 (4th Cir. 1996) (the "tactical inconsistency was too much to take" where, as to the bad faith element, the plaintiff was trying to take the benefit of pleading guilty in the earlier proceeding — receiving "a drastically reduced sentence" — while attempting to win a civil rights claim in a later proceeding.); *See eg. Via Design Architects, PC v. U.S. Dev. Co. No. 2:2013cv00555* - (E.D. Va. 2014) (rules of equity may separately dictate that USD should not be permitted to "have its cake and eat it too" by acknowledging that it is a party to the contract to both secure a stay and seek damages under such contract, only to later argue that it is not now, nor was it ever, a party to such written contract); *Korangy v. U.S. F.D.A.*, 498 F.3d 272 (4th Cir. 2007) (judicial estoppel applied to appellant that claimed that it was actually a facility as opposed to the owner or operator of a facility after it took a different position previously); *Brown v. Sikora & Assocs., Inc.*, 311 Fed. Appx. 568, 571, 2008, U.S. App. LEXIS 8197, \*8 (4th Cir. 2008) (employer barred from alleging it was an ERISA fiduciary based on inconsistent statements in pleadings); *Bos. Gas Co. v. Century Indem. Co.*, 708 F.3d 254, 262 (1st Cir. 2013) (finding judicial estoppel without bad faith); *Johnson v. Lindon City Corp*, 405 F.3d 1065, 1069 (10th

Cir.2005) (holding judicial estoppel applies when party took a prior inconsistent position, persuaded the court to accept that position, and then would obtain an unfair advantage or impose an unfair detriment to the other party by switching courses midstream). In this case IHFC's position amounted to an inaccurate representation or concealment of material facts intentionally calculated to convey the impression that the facts were not what IHFC now asserts they are through its reliance on IMC affidavits and verifications.

### **CONCLUSION**

Certain facts should not change from case to case. A company's policy on a given subject on a specified date does not change. A company's ownership on a particular date does not change. The control of a company on a given date does not change. If a person testifies that the sky was sunny at 10:00 am on October 7, 2013 in one case. The same party cannot argue that it was cloudy on that same day, at the same time in this case. For the foregoing reasons, Plaintiff Kinwai respectfully requests that this Court 1) strike any affidavits, sworn oaths or testimony of IMC Employees presented by IHFC on its own behalf, 2) preclude the Defendant IHFC from supporting any motions, interrogatories or anything requiring verifications with affidavits of any IMC employees, and 2) prevent IHFC from calling IMC employees as witnesses at any evidentiary hearings in this case on the basis of judicial estoppel and Rule 602 of the Federal Rules of Evidence.

Respectfully Submitted, this the 29th day of April, 2015.

/s/ Venus Y. Springs  
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### **CERTIFICATE OF SERVICE**

I hereby certify that the foregoing document was electronically filed with the Clerk of Court of the Middle District of North Carolina using the CM/ECF system, which will send notification of filing to counsel of record for the parties.

This the 29th day of April, 2015.

/s/ Venus Y. Springs  
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