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10 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
11 **COUNTY OF KERN, METROPOLITAN DIVISION – UNLIMITED CIVIL**

12 DONALD PESTELL; HANNA PESTELL;) Case No.: S-1500-CV-264437 WDP
13 and PESTELL INTERNATIONAL MINING)
14 AND EXPLORATION, LTD., a Canadian)
15 Corporation,) **PLAINTIFFS’ POST TRIAL CLOSING**
16) **BRIEF**

17 Plaintiffs,)
18 vs.)

19 AMERICAN CARRIAGE, INC.; MARK)
20 FECHNER; JOCELYN FECHNER; MARK)
21 AND JOCELYN FECHNER TRUST, and)
22 DOES 1-20, inclusive,)
23 Defendants.)

24 _____)
25 AMERICAN CARRIAGE, INC.; MARK) Honorable William D. Palmer
26 FECHNER; JOCELYN FECHNER; MARK)
27 AND JOCELYN FECHNER TRUST,) Trial Date: December 19, 2009
28 Cross-Complainants,) Time: 9:00 a.m.
Dept.: 15

vs.)

29 DONALD PESTELL; HANNA PESTELL;)
30 and PESTELL INTERNATIONAL MINING)
31 AND EXPLORATION, LTD, a Canadian)
32 company; and ROES 1-20, inclusive,)
33 Cross-Defendants.)

1 Plaintiffs Donald Pestell, Hanna Pestell, and Pestell International Mining & Exploration,
2 Ltd., hereby respond to Defendants' Post Trial Brief as follows:

3 **A. The Repayment Provisions**

4 Waiver is the intentional relinquishment of a known right. Waiver may result from an
5 express agreement or be inferred from circumstances indicating an intent to waive. It is essential
6 that the promisee could and would have performed the condition had it not been for the
7 promisor's waiver. *Panno v. Russo* (1947) 82 Cal.App.2d 408, 412.

8
9 The rule concerning modification of a written contract is subject to the exception that a
10 party to a contract may by conduct or representations waive the performance of a condition or be
11 estopped because of conduct or representations, to deny that the party has waived the
12 performance *Panno v. Russo, supra* at 412.

13 In or around June of 2009, Defendants sold all of ACI's assets to themselves for an
14 undisclosed amount of money for use in their new, substantially similar business, Motorcoach
15 Services (Mark Fechner trial testimony). The sale took place after the close of discovery in the
16 matter and was only disclosed through trial testimony.

17 Defendants' reply brief repeatedly overlooks the testimony of Mark and Jocelyn Fechner
18 and Donald Pestell at trial in which it was ascertained that repayment would be made upon the
19 sale of ACI *and its assets*.

20
21 Additionally, Stipulated Fact Number 20 specifically states, "On December 12, 2007
22 Jocelyn Fechner sent an amendment to the November 15, 2007 loan agreement stating the
23 purpose of the loan was for the completion of the Pestells' motorcoach and that the loan would
24 be repaid from the sale of ACI and its assets or at the rate of \$100,000 per motorcoach from
25 future ACI motorcoach sales."

26 ACI sold its assets and Mr. Pestell was not repaid through the sale. ACI breached this
27 condition, thereby rendering it impossible for Mr. Pestell to be repaid from the sale of ACI and
28

1 its assets and effectively waiving the condition that repayment be made from the sale of ACI and
2 its assets.

3 Because ACI sold all of its assets, it also made impossible the other condition for
4 repayment of the Pestell loan monies of being repaid through future coach orders. This condition
5 was also rendered impossible by several other acts by Mark Fechner and ACI that were adduced
6 at trial: 1. The closing of ACI and termination of its entire staff; 2. The unauthorized
7 appropriation of the ACI customer list by Mark Fechner to start a new, substantially similar
8 competing business just down the street from ACI, and 3. Mark Fechner, still acting as President
9 of ACI, refusing to entertain inquiries about new coach orders. It would be impossible for ACI,
10 without any assets and now merely a shell corporation defending a lawsuit, to accept and
11 complete any other coaches so this repayment condition was also waived by defendants.

12 Additionally, Defendants now claim the Volvo service truck was an asset of ACI
13 (Defendants' Brief, page 18, lines 1-2). Therefore, its sale in January 2008 was an asset sale and
14 the \$50,000 in proceeds from that sale should have been paid to or credited against future loans
15 from Mr. Pestell pursuant to the loan agreement. They were not.

16 The Fechners, through their bad faith conduct, have effectively waived all repayment
17 conditions on the loan agreement by pillaging ACI and rendering it valueless.

18 It offends the notions of justice that the proceeds from the sale of ACI's assets, already
19 promised by ACI as payment for corporate debts, should be used to defend the very action for
20 recovery of those same debts. The fact that these actions were condoned by defendant's counsel,
21 who ultimately received the proceeds from the sale of the assets, makes the scenario even more
22 egregious and insulting to the Plaintiffs and the court. It is incomprehensible that ACI and the
23 Fechners should be allowed to continue to steal from Plaintiffs in this manner.

24 To uphold the existence of these alleged conditions under this fact scenario would result
25 in an unjust and inequitable result allowing ACI and the Fechners to receive a windfall of
26 \$565,000 for their fraudulent and bad faith actions. The conditions should be deemed as having
27 been waived through the fraudulent acts of the officers of ACI.
28

1 **B. The Fechners and the Family Trust are the alter egos of ACI**

2 The two primary considerations in applying alter ego are “(1) That there be such a unity
3 of interest and ownership that the separate personalities of the corporation and the individual no
4 longer exist; and (2) that, if the acts are treated as those of the corporation alone, an inequitable
5 result will follow.” *Associated Vendors, Inc. v. Oakland Meat Co.* (1962) 210 Cal.App.2d 825,
6 837.

7
8 Both parties have listed the 18 factors outlined in *Associated Vendors* in their briefs so I
9 will not relist them here. Defendants claim factors 5 through 8 from *Associated Vendors* do not
10 apply here but give no legal basis for this conclusion. The Family trust was a separate legal entity
11 from ACI and those factors are applicable to the alter ego doctrine as to the Trust and ACI.

12 The gist of alter ego is really whether the shareholders and officers of a corporation
13 utilized the corporate entity for their own personal benefit and abused the protection afforded
14 under the Corporations Code to the detriment of others. The Fechners did just that. They lived
15 out of their corporation and had a good run until a combination of their abuse of the
16 corporation’s assets and a downturn in the economy got the best of them. At that point, they
17 shifted all their personal debt into the corporation, continued to live extravagantly, and left the
18 Pestells with a \$970,000 debt owed by a defunct corporation.

19 The Fechners did not acknowledge the distinction between themselves as individuals and
20 the legal entities for which they were fiduciaries, the Family Trust and ACI. Throughout trial
21 Jocelyn Fechner testified about the Fechners’ equity line of credit, which was actually a line of
22 credit secured by Trust property. Mark Fechner claimed complete ignorance despite his roles as
23 Trustee of the Family Trust and President of ACI. Ignorance is no defense to the law.

24
25 1. **Advice of Accountants and Attorneys**

26 The Fechners claim they acted upon the advice of accountants and attorneys in their Trial
27 Brief as a defense. This is not a valid defense since ACI was not a close corporation
28

1 (Corporations Code § 300, which allows for reconsideration of such advice, is applicable only to
2 close corporations).

3 Even so, at trial Jocelyn Fechner stated she did not meet regularly with an accountant,
4 and never more than four times in a year (in direct contradiction to Defendants’ Brief, page 11,
5 lines 21-22). At trial neither Mark Fechner nor Jocelyn Fechner could not recall specific
6 meetings with ACI’s accountant who was noticeably absent from Defendant’s witness list.

7
8 Defendants cite board minutes in their Trial Brief as having been reviewed and approved
9 by prior legal counsel, even though this was not established at trial. Even if this were true, the
10 Board Minutes do not accurately reflect the goings-on at ACI. For example, not one Board
11 Meeting mentions loans to or from shareholders yet Defendants claim shareholders made loans
12 to ACI and ACI’s federal tax statements show the Fechners received loans from ACI (Exhibit
13 61_0024, line item 7). Even the board minutes describing the loans from Mr. Pestell are
14 inaccurate and authorize receipt of an investment from Mr. Pestell instead of a loan (Exhibit
15 44_0049).

16 **2. Fechner Equity Line of Credit Usage**

17 Defendants’ Trial Brief dedicates a significant amount of its argument to the matter of the
18 alleged Fechner Equity Lines of Credit used for “flooring” of trade coaches at ACI. The Fechner
19 Equity Lines of Credit were equity lines secured against the 1401 Goodrick property that was
20 owned by the Mark and Jocelyn Fechner Family Trust. There is no documentation evidencing
21 these loans. There are no board minutes approving loans from the Fechners or the Fechner
22 Family Trust. There are no board minutes authorizing the use of the Pestell loans to pay the
23 Fechner Equity Line of Credit.

24
25 Defendants’ Trial Brief refers to Trial Exhibit 93 as evidence of the Equity Line of Credit
26 loans. Trial Exhibit 93 is merely a list of funds transfers and loan payoffs, none of which
27 mention the Fechner Equity Line of Credit or what the money was used for. The exhibit does not
28 state the purpose of the loans or the terms of the loans or which alleged trade-in coaches the

1 loans relate to. The exhibit does not indicate these are shareholder loans. The exhibit is merely a
2 list of numbers that could mean anything. The exhibit does not attribute monthly payments made
3 by ACI against said loans (as testified to at trial and shown in the corporate ledger). If ACI were
4 making the monthly payments on these alleged loans, and the Fechners did not charge ACI
5 interest (Jocelyn Fechner's trial testimony), then why weren't the monthly payments by ACI
6 credited toward those loans?

7 Mark Fechner, Jocelyn Fechner and Mr. Pestell each testified at trial that the Fechners did
8 not tell Mr. Pestell about any debts owed to them from ACI at the time the loans were requested
9 or made. Mark and Jocelyn Fechner did not obtain permission from Mr. Pestell to pay for
10 personal debts from monies loaned by him to ACI. Mr. Pestell specifically testified that he would
11 not have loaned the money to pay the personal debts of the Fechners. Stipulated Fact number 20
12 states the intent of the Pestell loans was for completion of his coach, not to pay for losses
13 incurred on other coach trade ins or to pay personal loans from the Fechners to ACI.

14 These alleged shareholder loans, for which ACI made monthly payments to the Bank and
15 paid more than \$570,000 to the Fechners in 2007 (Trial Exhibit 68_0171) and \$140,000 in 2008
16 (Pestell January 2008 loan payment, amount to more than \$730,000 in undocumented loans from
17 the Fechners or their family trust that were given priority in repayment ahead of ACI's
18 documented corporate debts.

19 An example of the misuse of corporate funds to shift the personal, undocumented loans
20 of the Fechners to ACI and its customers is the decision made by Jocelyn Fechner not to pay the
21 past due Pestell Shell balance in the amount of \$412,286 that was due on August 28, 2007((Trial
22 Exhibit 24) and instead paying herself \$230,000 on August 29, 2007, the very next day, against
23 an undocumented shareholder loan. Jocelyn Fechner testified at trial that Prevost, to whom the
24 shell balance was owed, would not accept partial payment. Prevost was not present to testify but
25 it seems highly unlikely that a creditor apprised of the situation of ACI at the time would not
26 accept partial payment of a debt rather than no payment at all.
27
28

The bottom line is that the use of shareholder loans by the corporation was never approved in writing, was never mentioned in a board meeting, had no terms, and was never disclosed to Mr. Pestell. There was no arms-length dealing in regard to alleged shareholder loans and the conduct by the Fechners in giving those loans priority when it came to repayment was an abuse of the Fechners' positions as officers of ACI.

3. Officer Compensation

Defendants' Forensic Accounting expert Jerry Randall analyzed the reasonable compensation for Mark and Jocelyn Fechner based on their salaries and perks. His analysis is found on Trial Exhibit 67_0067. Mr. Randall's analysis has several missing perks clearly established in the General Ledger that significantly affect the outcome of his analysis and show the Fechners were in fact grossly overcompensated in 2007.

A comparison of salaries and perks between Mr. Randall's summation on Trial Exhibit 67_0067 and the evidence at trial follows:

	<u>Randall Exh Amt</u>	<u>Evidence Amt</u>	<u>Exh No.</u>
Mark Fechner salary:	\$ 57,800.00	\$ 57,800.00	Stip.
Jocelyn Fechner salary:	\$ 18,000.00	\$ 18,000.00	Stip.
Perks:			
Meals:	\$ 5,988.00	\$ 7,300.16	68_0319-20
Officer's Life:	\$ 352.00	\$ 352.00	Stip.
Auto	\$ 19,876.00	\$ 76,880.77	68_0235-36
Medical	\$ 8,924.00	\$ 8,924.00	Stip.
Fuel	None	\$ 15,210.69	68_0255-58
Income Tax Est.	\$ 23,612.00	\$ 58,500.00	46_0027-8, 41, 61
Total Perks:	\$ 58,752.00	\$167,167.62	

As you can see, and reference by the 2007 ACI General Ledger, Mr. Randall's analysis of the perks received by Mark and Jocelyn Fechner is more than \$100,000 off in favor of the

1 Fechners. Defendants will argue that part of the Auto Expense in the ledger is the purchase and
2 resale of Jocelyn Fechner's Lexis in 2007. The Lexis was paid off in the amount of \$31,491
3 (Trial Exhibit 68_00235) and sold a week later for \$26,600 (Trial Exhibit 68_0067). Logic
4 dictates that his would reduce the Auto Expenses and total perks of the Fechners by \$26,600
5 thereby making their total perks \$140,567.62 – still significantly higher than the number used by
6 Mr. Randall in his analysis.
7

8 Mr. Randall's analysis of the salary and perks received by Mark Fechner using Mr.
9 Randall's number shows Mark Fechner was undercompensated by about \$4,000 in 2007 and that
10 Jocelyn Fechner was overcompensated by \$4,239 in 2007.
11

12 If we use the numbers garnered from the corporate ledger and evidence produced at trial,
13 minus the credit for the sale of the Lexis, \$140,567.62, and subtract Mr. Randall's estimate of the
14 perks, \$58,752, there were \$81,815.62 in perks received by the Fechners in 2007 that Mr.
15 Randall did not include in his report.
16

17 If we split the \$81,815.62 in half and attribute one half of the additional perks to Mark
18 Fechner (\$40,907.81) and the other half to Jocelyn Fechner (\$40,907.81) we see that Mark
19 Fechner was overcompensated by \$36,907.81 and Jocelyn Fechner was overcompensated by
20 \$45,146.81 in 2007. Jocelyn Fechner received more than double the reasonable compensation of
21 a person in a similar position according to Mr. Randall's analysis and Mark Fechner received
22 approximately 1/3 more compensation than was reasonable. This in a year that the business was
23 failing and could not meet its liabilities and in a year in which Defendants' Trial Brief alleges the
24 Fechners took pay cuts in 2007 to reduce overhead.
25
26

27 ///
28

1 **4. Meals**

2 Consider the fact that the Fechners ate 221 meals and spent more than \$7300 on those
3 meals at the expense of ACI in 2007 (Exhibit 68_0319-322). Mark Fechner testified at trial that
4 he could charge the company for his lunch every day because he was hungry and he was the
5 President. ACI quit purchasing donuts for employees and cut back on employee insurance
6 benefits yet the Fechners continued to spend an average of \$33 per day on their personal meals.
7 No board minutes approve such extravagance and Mr. Vaughan and Mr. Randall both testified
8 that this was not the normal practice of most businesses.
9
10

11 **5. Fuel**

12 One of the perks Mr. Randall overlooked completely was the payment of all fuel
13 expenses of the Fechners. This was in addition to the auto expenses such as car payments and
14 repairs. ACI spent \$15,210.69 on fuel for the Fechners in 2007. There were 203 separate charges
15 in 2007, meaning the Fechners purchased fuel at the expense of ACI more than once every other
16 day in 2007, a year in which no new orders came in and business was slow. Even if some of
17 these fuel charges were business-related, there is no way two people who reside less than 15
18 miles from their office could possibly have used \$15,000 in fuel in one year.
19
20

21 If you do the math estimating fuel was \$3.50 per gallon in 2007 and assume the Fechners
22 drove vehicles that got 15 miles per gallon and worked five days a week 50 weeks of the year,
23 you would find the Fechners would have had to have driven 251 miles per day for each of those
24 working days in 2007 ($\$15,211 / \$3.50 \text{ gallon} = 4346 \text{ gallons}$; $4346 \text{ gallons} \times 15 \text{ miles} = 65,190$
25 miles ; $65,190 \text{ miles} / 260 \text{ working days} = 251 \text{ miles per day}$).
26
27
28

1 The Fechners testified they were in the office nearly every day. They ate meals at
2 restaurants in Tehachapi nearly every day at the company's expense. So where did all the fuel
3 purchased by ACI go?
4

5 **6. Dividends and Distributions**

6
7 Defendants' Trial Brief states that the Fechners received no dividends from ACI (page
8 18, line 20, page 18, Footnote 13). This is absolutely incorrect based on evidence and testimony
9 at trial.

10
11 The corporate ledger, Exhibit 68 at trial, shows specific dividend categories on page 27
12 (\$38,400), page 198 (\$21,161.58), and pages 236-239 (\$27,584.97). Exhibits 49 and 50, the
13 credit card statements of ACI, have the notation "DIV" throughout. Jocelyn Fechner testified that
14 "DIV" meant dividend and she understood those charges to be shareholders dividends that ACI's
15 accountant would reconcile at year end. Jocelyn Fechner admitted at trial that she took dividends
16 from ACI on a regular, if not daily, basis in the form of personal credit card purchases and
17 believed she was entitled to those purchases as a shareholder.
18

19
20 The California Corporations Code defines "distributions to shareholders" in Section 166,
21 in pertinent part, as follows:

22 "Distribution to its shareholders" means the transfer of cash or property by a
23 corporation to its shareholders without consideration, whether by way of dividend
24 or otherwise, except a dividend in shares of the corporation, or the purchase or
25 redemption of its shares for cash or property, including the transfer, purchase, or
26 redemption by a subsidiary of the corporation. The time of any distribution by
27 way of dividend shall be the date of declaration thereof and the time of any
28 distribution by purchase or redemption of shares shall be the date cash or property
is transferred by the corporation.

1 The basis for issuance of shareholder distributions is tied to the retained earnings of the
2 corporation, as defined in Corporations Code § 500(a):

3
4 Neither a corporation nor any of its subsidiaries shall make any distribution to the
5 corporation's shareholders (Section 166) except as follows:

6 (a) The distribution may be made if the amount of the retained earnings of
7 the corporation immediately prior thereto equals or exceeds the amount of
8 the proposed distribution.

9 Distributions under Section 166 are prohibited where a corporation cannot meet its
10 liabilities pursuant to Corporations Code § 501:

11 “Neither a corporation nor any of its subsidiaries shall make any distribution to
12 the corporation's shareholders (Section 166) if the corporation or the subsidiary
13 making the distribution is, or as a result thereof would be, likely to be unable to
14 meet its liabilities (except those whose payment is otherwise adequately provided
15 for) as they mature.” California Corporations Code §501

16 Contrary to Defendants’ Trial Brief, their expert Jerry Randall did, after numerous
17 evasive answers testified that, in his opinion and according to income tax returns, ACI had no
18 retained earnings in 2007 or 2008. Mr. Randall’s work papers also show negative retained
19 earnings in 2007 and 2008 (Trial Exhibit 67_0003, under “Stockholder’s Equity”). Mr. Randall
20 also testified at trial that he agreed with the analysis completed by Plaintiffs’ accounting expert,
21 Kenneth Vaughan, Trial Exhibit 66, which shows ACI had negative retained earnings in 2007
22 and 2008. Mr. Vaughan’s analysis continues on page two of Exhibit 66 to show the Fechners
23 took \$370, 545 in distributions in 2007 and \$33,848 in 2008. Mr. Randall agreed with these
24 numbers and statements at trial.

25 Both experts agree there were no retained earnings in 2007 or 2008 and that the Fechners
26 took more than \$400,000 in distributions from ACI during that time period. Under California
27 State law, these distributions were unlawful. If these were not distributions or dividends, then the
28 conduct of the Fechners in taking from ACI paid for amounts to theft.

///

1 **7. The AAA Account and Federal Tax Law**

2
3 The present suit was brought in the State court. Obscurities of federal tax law shall not
4 outweigh the codified laws of the State of California which specifically provided for
5 distributions by California corporations.
6

7 Even so, as was proven at trial through the evidence, the AAA account never had a
8 positive balance according to the federal tax returns provided by ACI as evidence.
9

10 To determine the true balance in ACI's Accumulated Adjustments Account, the court
11 must look at all the evidence presented at trial, including tax returns that predate the action, to
12 determine the AAA accounted was improperly credited and calculated beginning in 2003. Below
13 is an analysis of ACI's AAA account from 2003 through 2008:
14

15

<u>Year</u>	<u>Beg. Bal.</u>	<u>End Bal.</u>	<u>Gain/Loss</u>	<u>True Bal.</u>	<u>Exhibit</u>
16 2003	\$ 7443	(\$226,423)	(\$233,866)	(\$226,423)	61_0094
17 2004	\$524,766	\$440,866	(\$ 83,900)	(\$310,323)	61_0084
18 2005	\$440,866	\$115,836	(\$325,030)	(\$653,353)	61_0063
19 2006	\$115,836	\$355,936	\$240,100	(\$413,253)	61_0045
20 2007	\$355,936	\$ 38,976	(\$316,960)	(\$730,213)	61_0024
21 2008	\$ 38,976	(\$523,980)	(\$562,956)	(\$1,293,169)	61_0004

22
23
24

25 Mr. Randall testified that the AAA account is a federal tax category and only used for federal
26 tax purposes. Mr. Randall admitted at trial that he had not analyzed ACI's AAA account back to
27 2003, despite those documents having been provided through discovery. Mr. Randall was
28 evasive in giving an answer to how consideration of the \$750,000 discrepancy between ACI's

1 2003 AAA ending balance and 2004 beginning balance greatly affected future balances in the
2 AAA account. When pressed to formulate an opinion based upon the evidence at trial Mr.
3 Randall admitted this discrepancy would result in a negative AAA account for years subsequent
4 to 2003. The analysis above shows that according to ACI's federal tax returns, which are the
5 basis for the AAA account, ACI had not had a positive amount in the account since the
6 beginning of 2003.

7 This shows that the Fechners, even on this obscure federal tax theory, could not have taken
8 distributions from ACI at any time after 2002.

9 Also of interest is that Jocelyn Fechner testified at trial that she did not know what a AAA
10 account was.

11 **8. The Pestell Shell Balance**

12 The other factor involved in determining shareholder distributions and officer perks is
13 whether a corporation has sufficient funds to meet its liabilities at the time the distributions are
14 taken. ACI, for an unexplained reason, never input the \$412,000 Pestell shell invoice into their
15 Quickbooks system in 2007. The shell payment was due on August 28, 2007 (Exhibit 24) and the
16 Fechners admitted at trial that they knew it was due and did not pay it. The Fechners also
17 testified that Mr. Pestell had paid enough toward his coach at the time the shell payment was due
18 to cover the amount. Neither Mark Fechner nor Jocelyn Fechner could explain where the money
19 Mr. Pestell paid toward his coach went. Instead of paying a debt owed on a coach for which
20 funds were provided and not accounted for, the Fechners chose to pay for their personal,
21 undocumented loan in the amount of \$230,000 the day after the Pestell shell balance came due.
22 Just two weeks later, on September 17, 2007, they issued themselves a \$6000 "dividend"
23 (Exhibit 46_0065, check no. 3269) with full knowledge the corporation could not meet its
24 existing liabilities.
25

26 **9. ACI Board Minutes**

27 Board minutes from ACI in December 1998 authorize the payment of estimated taxes for
28

1 shareholders in years of profit. While this is documented and possibly a viable shareholder perk,
2 it is tied to ACI having a profit, which it did not have in 2007. Despite having no profit, ACI
3 paid \$58,500 in estimated taxes for the Fechners in 2007.

4 This is an example of how the Fechners, despite having seemingly proper board minutes,
5 did not bother to adhere to them.

6 Some very significant items are missing from the board minutes, including references to
7 any of the following: shareholder loans, monies borrowed from ACI by the shareholders (Exhibit
8 61_0024, line item 7), purchases of daily meals, the taking of a loan from Mr. Pestell (Board
9 minutes show it as an “investment”, Exhibit 44_0049), distributions to shareholders, the sale of
10 the service truck to an insider, diversion of Pestell loan monies to payment of personal debt in
11 January 2008, making ACI a guarantor on the 1401 Goodrick Property (Stipulated Fact 34),
12 using trust assets to obtain financing for ACI, using a personal loan to finance ACI, the
13 termination of ACI’s lease at 1401 Goodrick prior to the end of its term, the closure of ACI, and
14 the acceptance and use of the \$425,000 loan from Pestell Intl. in March 2008.

15
16 ACI may have kept board minutes, but they were incomplete as to significant matters
17 which greatly affected ACI. In fact, there are more board minutes authorizing shareholder and
18 officer perks than actual business transactions of ACI. Even where there are board minutes
19 authorizing actions, they did not reflect the conduct of its officers and shareholders.

20 ACI could have thousands of pages of board minutes, but so long as the officers and
21 shareholders did not act in accordance with them, they are irrelevant.

22 **10. Capitalization of ACI in 2007 and 2008**

23
24 Both Mr. Randall and Mr. Vaughan testified at trial that ACI was not adequately
25 capitalized in 2007 and 2008 even without considering the undocumented Pestell shell invoice
26 that was due in 2007. Had the shell balance, \$412,000 been added to Mr. Randall’s reports prior
27 to trial, there would have been significant undercapitalization in 2007 and 2008. It is impossible
28

1 for a corporation that is operating at a loss, with no assets and hundreds of thousand of dollars in
2 liabilities to be adequately capitalized.

3 **11. The Proposition that the monies were investment, not loans**

4 Defendants' Trial Brief contradicts testimony and the stipulated facts presented at trial by
5 claiming the money loaned from Mr. Pestell and Pestell Intl. was not a loan instead it was
6 additional consideration for the Pestell coach.
7

8 All parties agreed in their testimony that all the money in controversy was understood to
9 be a loan and that Mr. Pestell expected to be repaid the monies. Mark Fechner also testified that
10 \$1,680,000 was the fair value of the Pestell coach per the original coach agreement. There is
11 absolutely no basis for any argument that the monies were anything other than a loan.
12

13 **C. The Undocumented \$425,000 Loan**

14 Defendants argue in their brief that the \$425,000 loan in March 2008 from Pestell Intl. to
15 ACI was part of the original November 15, 2007 loan agreement because there was knowledge
16 of the outstanding debt at the time the original loan agreement was made. If this is true, then why
17 wasn't it included in the original loan document?
18

19 Mr. Pestell's testimony at trial answers this question. Mr. Pestell testified at trial that he
20 was never told the exact amount owing on the shell but that he was told it would be negotiated
21 down to \$100,000 or \$200,000. ACI's own ledger does not even show an amount due on the
22 Pestell shell in 2007. The shell invoice, the largest component of the coach, mysteriously and
23 conveniently disappeared from ACI's accounting records until all the undocumented and
24 unauthorized Fechner shareholder loans were paid off.
25

26 There is no evidence that the \$425,000 paid from Pestell Intl. to ACI in March 2008 was
27 part of the November 15, 2007 loan agreement. The fact that it was actually used by ACI for its
28

1 intended purpose, to pay off the Pestell shell balance, only indicates that on one occasion ACI
2 and the Fechners used Pestell loan monies as they promised they would.

3
4 **D. FRAUDULENT MISREPRESENTATION**

5 **1. The January 2008 Pestell Loan**

6
7 Defendants' Trial Brief refers to Plaintiffs emphasis of the misappropriation of an entire
8 loan installment in the amount of \$140,000 for use in payment of personal loans of the Fechners
9 a "red herring." This cavalier attitude is indicative of the sense of entitlement displayed by of the
10 Fechners when it came to ACI's assets and money.

11
12 On January 3, 2008 Jocelyn Fechner sent an e-mail to Mr. Pestell stating, "I need to
13 remind you that we need the January installment by the first of next week if we are to continue
14 work on your coach." There is no doubt that Jocelyn Fechner's intent in sending this e-mail was
15 to induce Mr. Pestell to send money to ACI for use on his coach. The entire check, made payable
16 to ACI (Exhibit 25), was never even deposited in ACI's, the payee's, bank account. Instead, it
17 went directly to pay the Fechner Equity Line of Credit that Mr. Pestell had no knowledge of and
18 in no way related to the construction of his coach (Jocelyn Fechner testified the Equity Line of
19 Credit was used for trade-in flooring only and that Mr. Pestells trade-in coach sold at a profit in a
20 timely manner).

21 This is fraud. Mrs. Fechner lied to get Mr. Pestell to send money and then stole that
22 money from Mr. Pestell to his detriment. The fact that Defendants' Trial Brief attempts to show
23 ACI had sufficient funds in January 2008 to complete Mr. Pestells' coach makes the scenario
24 even more egregious, for why would ACI represent that it needed loan monies when it had
25 enough money to complete his coach? The proper e-mail for Jocelyn Fechner to send on January
26 3, 2008 would have been one stating the January loan installment was not needed. Instead, she
27 chose to deceive Mr. Pestell for her personal gain. It is impossible not to find the requisite intent
28 for fraudulent misrepresentation in this instance.

1 Jocelyn Fechner testified that the Family Trust began negotiations for the sale of the 1401
2 Goodrick property in late December 2007 and those negotiations were finalized in the first two
3 weeks of January 2008. Since the Equity Line of Credit was against the 1401 Goodrick property,
4 which was in escrow for sale, why would ACI or the Fechners choose to pay off the Equity Line
5 of Credit using Mr. Pestell's money other than to personally gain from such a payoff?

6 **2. The October and November 2007 Misrepresentations**

7 ACI lied to Mr. Pestell from the onset of negotiations for the loans. ACI said it had no
8 operating capital when it had more than three months' operating capital in the bank, ACI's
9 officers told Mr. Pestell and a valuation expert that it had more than \$400,000 in assets. ACI's
10 officers told Mr. Pestell ACI owned the building in which it was located. ACI paid off an
11 undocumented, unsecured loan on a vehicle that the evidence shows the Fechners told two
12 people (broker and Pestell) was their personal vehicle, and which the Fechners themselves
13 purchased and own to this day, all within days of representing to Mr. Pestell that ACI would
14 close in days without an injection of capital. These misrepresentations were made for the sole
15 purpose of inducing Mr. Pestell to lend ACI money. He lent the money based on those
16 representations. As a result of relying on those misrepresentations, Mr. Pestell was damaged.

17 **E. The lack of a promissory note or lien**

18 Defendants' Trial Brief erroneously states that Mr. Pestell never attempted to obtain a
19 promissory note or security for the loans. Mr. Pestell testified that he did request a note or lien on
20 the building and assets, which he was told ACI owned, and that Mark Fechner told him was
21 owned by ACI, and evidence of such a request was presented at trial.

22 As evidence of Mr. Pestell's desire for a secured loan, in March 2008, Mr. Pestell sent a
23 proposed secured loan document (Exhibit 14) to which Mark Fechner replied that his attorneys
24 advised not to sign a loan secured by the equipment at ACI (Exhibit 7).

25 It seems a flawed argument to insist that a third party with no knowledge of the true state
26 of ACI have a secured note when the Fechners themselves allegedly loaned hundreds of
27
28

1 thousands of dollars to ACI without a single shred of documentation or an ounce of security
2 other than knowing they were in control of ACI's bank account. Then again, there is no law
3 requiring security, or even documentation for a loan.

4 **F. Continued Abuse of the Corporation by the Fechners**

5 Defendants' Trial Brief claims ACI made cut backs to reduce overhead in late 2007,
6 including no longer buying donuts, cutting back on employee benefits, recycling scrap items, and
7 returning excess inventory. The strange thing is that while ACI cut back on benefits to
8 employees and tightened its belt by recycling and returning inventory, ACI's officers continued
9 to receive perks, gifts, dividends, and take three family vacations on the company's dime during
10 this time of crisis. Is it really all that horrible that the Fechners, while on what Jocelyn Fechner
11 testified was "the worst Hawaiian vacation of her life", had to shop at Costco and stay with
12 friends and only have ACI pay for their car rental, fuel, meals, Costco expenses, snorkel trips,
13 and souvenirs. This trip, was just days after a family outing to Big Bear that was paid for by ACI
14 and just one month after a family trip to Seattle that ACI also footed the bill for.

15
16 It also doesn't make sense that in a time of financial crisis, where ACI couldn't afford
17 \$30 worth of donuts at a safety meeting, ACI would give 23 employees each \$100 gift certificate
18 to the Elephant Bar and, in addition to the gift certificates, have a Christmas party at a country
19 club at further expense of more than \$2300. Those acts alone nullify all the recycling profits.

20 **CONCLUSION**

21
22 The Fechners lived out of their corporation. There was no difference between the
23 financial dealings of ACI, the Fechner Family Trust, or the Fechners as individuals and the unity
24 of interest was so great that even Mark Fechner and Jocelyn Fechner could not explain the
25 distinctions at trial.

26 ACI paid for virtually everything but the Fechners' mortgage and a few groceries in what
27 the Fechners themselves describe as the worst year for ACI ever. Jocelyn Fechner unilaterally
28 and quite conveniently ensured that hundreds of thousands of dollars in undocumented,

1 unsecured personal loans from the Family Trust and the Fechners as individuals were repaid with
2 priority over documented corporate debts.

3 There is nothing naïve about covering one’s own debts in lieu of corporate debts. There
4 is nothing naïve about accepting hundreds of thousands of dollars in officer perks while
5 withholding employee benefits in a guise to save money. There is nothing naïve about sending
6 written misrepresentations about the financial state of a corporation solely to induce someone to
7 send money and then using that money for anything other than its intended purpose. There is
8 nothing naïve about bad faith appropriation of corporate assets and money to avoid personal
9 debt. The only naïve person in this matter was Mr. Pestell, whose trusted the Fechners and
10 attempted to help them save their “family dream”.

11 If ever there were an exemplary case for alter ego, this is it.

12 There is no basis for a finding other than in Plaintiff’s favor for the entire loan amounts,
13 interest at the legal rate, costs, and punitive damages amounting to at least twice the amount of
14 actual damages to ensure the Fechners, who continue to conduct business with the public and
15 own corporation, realize the consequences of their actions.

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18 Respectfully submitted,

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21 January 21, 2010

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27
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