GOLDBERG v. STELMACH

DEMURRERS TO SECOND AMENDED COMPLAINT

Date of Hearing: **February 8, 2007**
Department: Y

Trial Date: **October 24, 2007**
Case No.: LC075563

Moving Party: Yuval Stelmach (Defendant) and REM, LLC (Defendant)
Joinder: REM, LLC (Defendant)
Responding Party: Shlomo Goldberg (Plaintiff)

DEFENDANT STELMACH'S REQUEST FOR JUDICIAL NOTICE

(1) Complaint filed on August 15, 2003 – **GRANTED**
(2) March 9, 2006, Judgment – **GRANTED**
(3) Statement of Decision – **GRANTED**
(4) Bylaws of Tul Investment, Inc. – **DENIED**
(5) November 8, 2005, Order – **GRANTED**
(6) November 8, 2005, Tentative Ruling – **DENIED**
(7) July 12, 2006, Tentative Ruling - **DENIED**
(8) Request for Dismissal filed on July 12, 2006 – **GRANTED**
(9) All trial briefs and closing arguments slides – **DENIED**
(10) Copy of Operating Agreement - **DENIED**
(11) Copy of K-1's – **DENIED**

The Court at the hearing on January 12, 2007, ruled "The Court notes in the next Demurrer, the Court will again take judicial notice [in conformity with the last ruling] of #1 through #11 above."

RULING

After taking this matter under submission, the Court rules as follows:

SUSTAIN DEMURRER WITHOUT LEAVE TO AMEND

DEFENDANT TO PREPARE ORDER AND JUDGMENT WITHIN 5 COURT DAYS.

In the previous complaint filed by Defendant alleges that Defendant Stelmach breached a fiduciary to him. As noted in a prior complaint (LC066042):

> The Stelmachs owe a fiduciary duty as fellow officers, shareholders, directors and/or Managers of corporations and partnerships in which Goldberg owns an interest. The

> Stelmachs have breached their fiduciary duties and obligations to Goldberg by failing to advise him regarding net available funds for distribution, failing to account in a timely manner concerning the assets and liabilities of the company, and failing to pay to Goldberg his pro-rata share of the net available funds for distributions. [*See Exhibit A of Moving Party's Request for Judicial Notice*].

After a court trial, Judge Richard Wolfe issued an 80-page opinion wherein it found in favor of Defendants.

Each Defendant now demurrers to the instant action on the basis that this action is barred by the doctrine of res judicata. As noted in the moving papers of Defendant Stelmach: "Clearly, plaintiff is suing on the same issues which were previously resolved, there was a final judgment on the merits, and plaintiff Shlomo Goldberg was a party, the plaintiff in that suit. As such, plaintiff's instant action is barred by the doctrine of res judicata. However, even if the exact same issues were not litigated, plaintiff certainly could have litigated them in the Goldberg I action, an action including a cause of action for breach of fiduciary duty." *See Demurrer, page 13, lines 5-9.*

The doctrine of res judicata holds that a valid, final judgment on the merits precludes parties or their privies from relitigating the same "cause of action" in any subsequent lawsuit. *Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 896; *Le Parc Community Assn. v. Workers' Comp. Appeals Bd.* (2003) 110 Cal.App.4th 1161, 1169. "Under the doctrine of res judicata, if a plaintiff prevails in an action, the cause is merged into the judgment and may not be asserted in a subsequent lawsuit; a judgment for the defendant serves as a bar to further litigation of the same cause of action." *Mycogen*, supra, at pp. 896–897. The doctrine has two aspects: merger and bar and collateral estoppel. *Aerojet-General Corp. v. American Excess Ins. Co.* (2002) 97 Cal.App.4th 387, 401. Merger and bar, or claim preclusion, precludes the relitigation in a subsequent proceeding of legal claims which actually were raised or could have been raised in the preclusive proceeding. Id. at p. 402. Collateral estoppel, or issue preclusion, prevents relitigation of legal or factual issues actually argued and decided in a prior proceeding. *Castillo v. City of Los Angeles* (2001) 92 Cal.App.4th 477, 481. Res judicata applies when: (1) the claim raised in the prior adjudication is identical to the claim presented in the later action; (2) the prior proceeding resulted in a final judgment on the merits; and (3) the party against whom the doctrine is being asserted was a party or in privity with a party to the prior adjudication. Lyons v. Security Pacific Nat. Bank (1995) 40 Cal.App.4th 1001, 1015.

Two hearings ago, the Court noted the following in its ruling:

> Thus, because the allegations in this action were pled in the underlying action, or could have been raised in that action, this action appears barred by the doctrine of res judicata. Thus, Plaintiff must allege new facts in this Complaint showing what facts differentiate this action from the prior action. Moreover, in that Judge Wolfe entered Judgment in the previous case on March 9, 2006, the instant action is limited to causes of action arising after March 9, 2006. The amended complaint must allege causes of action based upon specifically alleged facts arising after March 9, 2006, and not contain any factual matters that are res judicata between the parties.

Indeed, on January 12, 2007, at the oral hearing on Defendants' demurrer to the First Amended Complaint, Defense counsel insisted that the demurrer be sustained without leave. As the record notes:

> But, your Honor, at this point this is the second time we've been in front of the demurrer after lengthy pleadings. This should really be without leave to amend. He can't even really represent to the Court that he has any basis to try it a third time. This is -- our client spent hundreds of thousands of dollars in this litigation, and went on for years because of Mr. Small's litigation and the expenses. And it's oppressive at this point. I mean this case is really what's wrong with, sometimes, the civil justice system, because they never end. And the Glendora claim, if he had it, it was -- at best he held it back because we litigated the Glendora claim over and over again. And to suggest somehow that there was one thing that was undecided is just wrong. Glendora was decided because it was part and parcel with the whole claim in that case. And it's just unfair they can deep filing complaint after complaint after complaint. There's no -- he can't even represent to the Court any recognizable basis [Stelmach] breached his fiduciary duty to Goldberg as a result of Glendora post March 9th 2006. I mean this was all decided. Glendora -- it's just unfair that this has gone on now for eight months in this case with so much money being spent defending these successive complaints. I mean all I'm requesting the Court is if this could possibly be the last time he could have to amend if he doesn't get it right. Because our

> clients don't have unlimited funds to keep filing demurrer after demurrer after demurrer. I mean at some point -- that's why they thought they won the first trial. They sort of put all their funds into that trial.

However, when asked if he could allege additional facts against Defendants, Plaintiff's counsel said yes. As the record notes:

> THE COURT: Well, Mr. Small, do you have facts to keep either of the defendants in?
>
> MR. SMALL: Yes.

Accordingly, the Court allowed Plaintiff to file a Second Amended Complaint.

Despite the above ruling and representations of Plaintiff's counsel, the Second Amended Complaint contains precious little not alleged in the defective First Amended Complaint. In fact, in the Second Amended Complaint, five paragraphs (5-9), covering 3½ pages, and labeled "The Facts Giving Rise to Defendant's Liability" are with only minor changes and are essentially a re-allegation of the First Amended Complaint. All of the facts referenced in this section concern a series of real estate transactions between the parties, which transactions were the subject of and referenced in the pleadings and judgment in the prior action. Paragraph 10 of the Second Amended complaint covering 6½ pages is labeled "Description of Breaches of Fiduciary Duties." However, much like the five preceding paragraphs, Paragraph 10 largely consists of facts litigated in the prior action as well as improperly pled legal conclusions supporting Plaintiff's arguments as to the scope and effect of the judgment, orders and rulings in the prior litigation. Although paragraph 10 does contain some new facts as to Defendants activities after March 9, Plaintiff alleges even more facts and argument from the prior litigation. Therefore, Plaintiff has failed to use the opportunity accorded in a Second Amended Complaint to heed the Court's rulings requiring removal of all issues previously decided in the prior litigation. Plaintiff's failure to excise res judicata matters as mentioned in the Court's earlier rulings, together with Plaintiff's disregard of other Court rulings, as discussed below, must be considered by the Court on whether to grant Plaintiff yet another opportunity to amend.

In Paragraph 10(a)(iv) of the Second Amended Complaint, it states: "Following return of the Glendora funds to Stelmach's control, and after the entry of the judgment in the prior action, Stelmach distributed

approximately one half of the interpled funds to plaintiff's ex-wife, leaving plaintiff as the only equity owner not to receive his pro-rata share totaling at least $210,000 plus accrued interest. Despite Stelmach's ongoing and continuous fiduciary duty to do so, and despite distributions made to all other owners, and despite his averments in the interpleader action admitting plaintiff's entitlement to one half the funds, Stelmach has refused to distribute any of the Glendora funds, which he controls, to the plaintiff." Thus, because paragraphs 5-10 of the Second Amended Complaint primarily concern facts litigated between these same parties in the prior action as well the enforcement of an order entered in the prior action, the doctrine of res judicata requires enforcement of the order through the prior action and consequently barred in subsequent lawsuits. As noted in *Sutphin v. Speik* (1940) 15 Cal.2d 195, 202:

> Next is the question, under what circumstances is a matter to be deemed decided by the prior judgment? Obviously, if it is actually raised by proper pleadings and treated as an issue in the cause, it is conclusively determined by the first judgment. But the rule goes further. If the matter was within the scope of the action, related to the subject-matter and relevant to the issues, so that it could have been raised, the judgment is conclusive on it despite the fact that it was not in fact expressly pleaded or otherwise urged.

Plaintiff cites the case of *Allied Fire Protection v. Diede Construction* (2005) 127 Cal.App.4th 150, 155, for the following:

> Res judicata is not a bar to claims that arise after the initial complaint is filed. These rights may be asserted in a supplemental pleading, but if such a pleading is not filed a plaintiff is not foreclosed from asserting the rights in a subsequent action. (Yager v. Yager (1936) 7 Cal.2d 213, 217, 60 P.2d 422.) The general rule that a judgment is conclusive as to matters that could have been litigated "does not apply to new rights acquired pending the action which might have been, but which were not, required to be litigated [Citation]." (Kettelle v. Kettelle (1930) 110 Cal.App. 310, 312, 294 P. 453.)

At oral argument, Plaintiff's counsel contended that because Judge Wolfe ultimately signed an order returning the interpled funds after trial began, the instant case presents more compelling facts for subsequent litigation than the facts set forth in *Allied Fire Protection*. However, Plaintiff overlooks the fact that in *Allied Fire Protection*, the Plaintiff was unaware of Defendant's deliberate fraud until discovery commenced. In the prior

action before Judge Wolfe, the order returning the funds did not involve Defendants Stelmach and/or REM, LLC. and did not involve a situation where Plaintiff suddenly discovered hidden facts during discovery. Indeed, after the money was interplead, Plaintiff voluntarily dismissed Glendora and Tul Investments from the previous action and, for whatever reason, has made a deliberate decision not to name either party in this action. Thereafter, Judge Wolfe ordered the interplead money returned to Glendora. While Plaintiff objected to the release of the money, no writ was taken following the order. Indeed, Plaintiff did not appeal the underlying Statement of Decision. As noted in *Aerojet-General Corp. v. American Excess Ins. Co.*, supra, 97 cal.App.4th at p. 402: "A party cannot by negligence or design withhold issues and litigate them in consecutive actions. Hence the rule is that the prior judgment is res judicata on matters which were raised or could have been raised, on matters litigated or litigable." (Sutphin v. Speik (1940) 15 Cal.2d 195, 202 [99 P.2d 652], italics in original.)" Thus, because Plaintiff voluntarily dismissed Glendora and Tul from the previous litigation, Plaintiff cannot now try to bring a separate action against Defendants Stelmach and REM, LLC based on a matter that was or could have been decided by Judge Wolfe.

Moreover, the *Allied Fire Protection* case is distinguishable from this action because, as noted by Defendant REM, LLC:

> Paragraph 10(a) of the SAC still references the sale of the Glendora property as its core complaint, and the sale of the property occurred prior to 3/9/06, which cannot be the basis for the claims underlying the SAC. Because paragraph 10(a) still addresses a factual situation that occurred before March 9, 2006, and because Judge Wolfe issued an order on the exact matter, this paragraph is barred by the doctrine of res judiciata.

Also, the prior litigation resolved the issue of breach of fiduciary duty in favor of Defendants. Yet Plaintiff alleges that Defendants are in "violation of his ongoing fiduciary obligations." Since the Second Amended Complaint fails to allege any acts giving rise to a breach of a continuing fiduciary duty, there is no basis for this factual allegation. In any event, even if there were such a breach of a continuing fiduciary duty, the scope of the prior judgment would include enforcement of a judgment against Defendant. Plaintiff's, relying on *Allied Fire Protection*, argue that "In Allied, a subcontractor sued his general for delay damages based upon their written contract. The subcontractor obtained a jury verdict in federal court in that the prime contract was with a federal agency. During the course of discovery in the federal action, the subcontractor

learned of additional contractually mandated delay damages which the general contractor had tried, unsuccessfully, to hide. Although this allegation was referenced in the subcontractor's pretrial statement, it was not pursued at trial." However, unlike *Allied Fire Protection*, Plaintiff pleads no facts showing concealment. In fact, not only were the disputed funds not concealed, but Plaintiff admits the funds he now seeks were interplead by Glendora and received by the court a year before the trial. Further distinguishing *Allied Fire Protection* where plaintiff merely decided not to pursue an item of damages concealed by defendant, here Plaintiff voluntary dismissed Glendora and therefore consented to end the court jurisdiction over this defendant. Thereafter Plaintiff made no effort to seek a writ or even appeal the decision returning the disputed funds to Glendora. Ironically, since Plaintiff has decided not to name Glendora in the Second Amended Complaint. Plaintiff's actions have once again deprived the court of jurisdiction over the very same defendant.

Plaintiff also claims since the prior litigation omitted reference to a timetable for Glendora's distribution of funds to Plaintiff (the November 8, 2005 order of Judge Wolfe noted "upon its distribution"), constitutes an independent basis for bringing a new action as to Defendants Stelmach and REM, LLC. However, the order and subsequent Statement of Decision by Judge Wolfe fully reflects the amount of money due and owing between Defendants and Plaintiff. Therefore, issues regarding these funds were fully litigated in the prior action. Moreover, while it is possible that Glendora could have been named as a party in this action, Plaintiff admitted at oral argument to making a tactical choice not to name Glendora as a party Defendant, but now may bring a motion to add new parties.

Plaintiff also asserts on page 7 of his opposition: "Only after the trial and decision did Stelmach, in violation of his ongoing fiduciary obligations, and in marked contrast to the position he advocated on behalf of Glendora, decide to distribute to all other owners, including himself, but "...has refused to distribute any of the Glendora funds, which he controls, to the Plaintiff" However, in his 80-page Statement of Decision, Judge Wolfe noted the following on page 70 of his opinion:

> Accordingly, the referencing and/or reviewing of the documents...does not allow for the conclusion that the Plaintiff has sustained his burden of proof by the required preponderance of the evidence that the individual, singled out-entries were either not explained or clarified and/or otherwise constituted mishandling or misappropriation of funds....

Thus, on page 39, Judge Wolfe noted: "As will be discussed...because this Court cannot conclude that Mr. Goldberg has sustained his burden of proof with regard to his claim of fraud...it follows therefore that Mr. Goldberg has not sustained his burden of proof with regard to his claim of a breach of fiduciary duty."

Accordingly, per the foregoing, there are insufficient facts set forth in the amended complaint to show that this action is not barred by res judicata.

Next, Paragraph 10(b) of the Second Amended Complaint states:

> On or about August 7, 2006, Stelmach, acting on behalf of Tul Investments, Inc., as majority shareholder and President, caused to be issued various K-1's and related tax documents both to the federal and California authorities ("tax documents"). The tax documents were false and known to be false by Stelmach when issued in that they falsely asserted that Stelmach, via various entities, had distributed tens of thousands of dollars to plaintiff since the rendition of the judgment for which tax was due and owing. Those documents have subjected the Plaintiff to tax exposure and liability including claims and levies by the IRS and FTB for allegedly back due taxes. ...

Defendants demurrer to paragraph 10(b) on the basis that (1) Plaintiff lacks standing, and (2) a misjoinder of parties. As noted in the demurrer of REM, LLC:

> For the same legal reasons cited above, Tul Investments is an indispensable party with respect to any tax documents issued by Tul Investments, and Tul Investments would be adversely affected by any order from this Court pertaining to Plaintiffs claims regarding tax documents issued by Tul Investments. Consequently, this Court should similarly dismiss the instant action because the SAC prevents an indispensable party from now appearing in this action.
>
> Plaintiff voluntarily chose not to sue Tul Investments, Inc., perhaps because of attorney's fee provisions in the Tul Investments, Inc., operating agreement. Since Tul Investments, Inc. issued the allegedly erroneous K-1s, however, Tul Investments, Inc., is an indispensable party to the present case. This Court, respectfully, should not now allow

> plaintiff to proceed with this action alleging erroneous information in K-1s issued by Tul Investments, Inc., because plaintiff voluntarily chose not to name Tul Investments as a party, and Tul Investments Inc., is indispensable to such claims. Plaintiff is now barred by this Court's November 2, 2006 order from naming Tul Investments, Inc., as an additional party, but the absence of Tul Investments, Inc., from this case creates a misjoinder of parties. Defendant REM LLC incorporates herein the legal arguments pertaining to indispensable parties set forth above in connection with the Glendora claims alleged in Paragraph 10(a). Again, plaintiff should not be permitted to benefit from his own procedural gamesmanship.

Generally, a parent cannot be liable for the actions of a subsidiary. *Laird v. Capital Cities/ABC, Inc.* (1998) *68 Cal.App.4th 727*. Rather, the Complaint must allege facts showing alter-ego. Two general requirements must be met before the alter ego doctrine will be invoked: (1) there must be such unity of interest and ownership that the separate personalities of the corporation and the shareholder do not in reality exist, and (2) the result will be inequitable if the acts are treated as those of the corporation alone. *Sonora Diamond Corp. v. Superior Court* (2000) 83 Cal.App.4th 523, 538. "'[O]nly a difference in wording is used in stating the same concept where the entity sought to be held liable is another corporation instead of an individual.' [Citation.]" *Mesler v. Bragg Management Co.* (1985) 39 Cal.3d 290, 300.) The corporate form of one company will be disregarded when "'"it is so organized and controlled, and its affairs are so conducted, as to make it merely an instrumentality, agency, conduit, or adjunct of another corporation." [Citations.]' [Citation.]" *Las Palmas Associates v. Las Palmas Center Associates* (1991) 235 Cal.App.3d 1220, 1249.) To the extent, the Second Amended Complaint fails to allege any facts supporting an alter-ego theory, Defendant REM, LLC is correct in noting that Tul Investments. Inc. appears to be an indispensable party to this action. Indeed, at oral argument, Plaintiff acknowledged that he had no facts to support an alter-ego theory except as between Stelmach and REM, LLC.

As noted in Weil and Brown, *Civil Procedure Before Trial* (2006) §§7:79 and 7:80:

> Application: Demurrers on this ground lie only where it appears from the face of the complaint (or matters judicially noticed) that:

> Defect (nonjoinder) of parties--some third person is a 'necessary' or 'indispensable' party to the action; and hence must be joined before the action may proceed. (See discussion of 'necessary' and 'indispensable' parties at ¶ 2:151 ff.)

In the present matter the Court finds that based upon the Second Amended Complaint, Tul Investments and Glendora are necessary parties to any litigation arising out of Plaintiff's claims to the formerly interplead funds. See *CCP* §389 and 2 Witkin, California Procedure (4th ed .1997), Pleading §§163-165. Although Plaintiff neglected to make the requisite motion, based upon the following the court declines to order Tul Investments and Glendora into this litigation: (1) Plaintiff's claims have been litigated as to the demurring Defendants in the prior litigation; (2) that Glendora and Tul Investment were voluntarily dismissed by Plaintiff from the prior litigation, (3) Plaintiff failed to use the opportunity afforded by the Court's written ruling sustaining the previous demurrer, where in with respect to these absent defendants the court stated "the court sustains the demurer so that it [absent corporate defendants] may properly be added as a party Defendants" and Glendora and Tul were indispensable parties but, to date, Plaintiff has not sought to add them as parties; (4) that Defendants have objected to proceeding without these defendants; (5) Plaintiff with knowledge of the actions of these defendants has made a tactical decision to exclude these necessary but absent defendants in the Second Amended Complaint; (6) the Court could not provide complete relief without the addition of Glendora and Tul; and (7) under *CCP* §389(c), "a complaint...shall state the names...who are not joined, and the reasons why they are not joined." The amended complaint fails to comply with *CCP* §389(c) and, moreover, Plaintiff has made a conscious decision not to bring in Glendora and Tul Investments. As Plaintiff's counsel admitted on January 12, 2007:

> THE COURT: Why isn't Glendora a party in this action?
>
> MR. SMALL: It could be. But I don't think it has to be. And I appreciate the fact that the Court is saying later on in the demurrer that Tul investments --...
>
> THE COURT: See, now hold it right there.
>
> MR. SMALL: Okay.
>
> THE COURT: Just focus. That's Glendora, right?

MR. SMALL: That's what Glendora said, yes.

THE COURT: And they're not a party here, right.

MR. SMALL: That's right.

THE COURT: And you need to keep on repeating that like a mantra. Do you do yoga. Keep on repeating that and then sooner or later that little light bulb will go on....

Mr. SMALL: ...I appreciate what the Court is saying, hinting broadly, directly, concerning Glendora being a party....

MR. SMALL: I think I have an opportunity to do so.
If I could, your Honor, I'd just like to go back for one more moment, because I don't want to do anything that will cause me trouble in the Court on the next go-round.
The Court has given a broad suggestion here in the tentative ruling suggesting that Tull Investments is an indispensable party and, therefore, should be joined as a party to this action. The Court has also given me what I believe -- the same sort of hint suggesting that if I can make a viable claim here against Glendora, it too, needs to be a party to this action, separate and apart from what I may do before Judge Wolfe again. And I just want to be clear that the Court is not precluding me in an amended pleading from adding other parties as Does, because as it -- as it was, and based on this Court order, the Court said that I can't add causes of action which I would have liked to have added. But I didn't -- I deliberately --

At this oral argument, however, Plaintiff's counsel now argued that it was this Court's fault that Plaintiff could not amend his complaint. As the Court record notes:

The COURT: So why isn't Glendora a party here?

Mr. SMALL: Because the Court has not thus far allowed me to bring in additional - -

The COURT: I haven't stopped you from bringing in anybody.

Mr. SMALL: Yes, well, I respectfully disagree, your Honor, because when –

The COURT: When did I order you not to bring in anybody?

Mr. SMALL: When you allowed me to amend in the past you cited a case which said I could not bring in any new - -

The COURT: But Judge Adler never told you you couldn't bring a motion.

Mr. SMALL: And I am [bringing] a motion [and] I've recognized that.

The COURT: We've been traveling on this case, we're now into Volume 2 here. So you've had an entire – almost two volumes to bring a motion with your amended complaints. You could have don't that.

Mr. SMALL: I could have done that, you Honor. But I decided not –

The COURT: I didn't say you couldn't do it. What I'm saying is you need to bring a proper motion to do it....Why isn't Glendora a party on the first day? That's sort of a lack of diligence here, Mr. Small...

The case referenced by the Court was *People v. Clausen* (1967) 248 Cal.App.2d 770, 785-786. As explained in Weil and Brown, *Civil Procedure Before Trial* (2006) §6:635.5:

> Generally, where a court grants leave to amend after sustaining a demurrer, the scope of permissible amendment is limited to the cause(s) of action to which the demurrer has been sustained: '(S)uch granting of leave to amend must be construed as permission to the pleader to amend the cause of action which he pleaded in the pleading to which the demurrer has been sustained.' [People v. Clausen (1967) 248 CA2d 770, 785-786, 57 CR 227, 238 (emphasis added)]

Thus, there is nothing in either the previous rulings or the *Clausen* case which prevented Plaintiff from bringing a motion to add Glendora and/or Tul as a party Defendant. Indeed, the last ruling encouraged Plaintiff to bring a motion. As the last ruling noted:

> Finally, paragraph 10(c) of the First Amended Complaint notes: "Between 3/10/06 and the present, Defendants have collected hundreds of thousands of dollars in rental income...Plaintiff has received no accountings nor distributions since 3/10/06 despite being a shareholder and/or member of the various entities..." In that, again, it appears that Tul Investments, Inc. is an indispensable party to the facts set forth in paragraph 10(c), the Court sustains the demurer so that it may properly be added as a party Defendants.

Also, at oral argument on January 12, 2007, the following exchange took place:

> MR. SMALL: ...And I just want to be clear that the Court is not precluding me in an amended pleading from adding other parties as Does, because as it -- as it was, and based on this Court order, the Court said that I can't add causes of action which I would have liked to have added. But I didn't -- I deliberately –
>
> THE COURT: What I meant was -- and what this says is is that -- let's say you came in here with an amended complaint naming all kind of Does, and then when asked "Where did you get the authority to do that", you would say, "Well, Judge Adler said that I had leave to amend". That means the sky is open to anything you want. That's not what I'm saying. I'm giving you leave to file an amended complaint with respect to these defendants on these causes of action. So, Like, if you wanted to add another defendant, then you'd have to file a motion like everybody else. This isn't sort of like an easy-way, back-door way to frame to bring new parties.
>
> MR. SMALL: Okay. Then I'm glad I asked it, because I frankly misunderstood. I thought that you said that bringing in a new party, whether it's a Doe or otherwise, would be permissible by way of an amended.
>
> THE COURT: By way of an amendment, yeah. But you'd have to bring a motion.
>
> MR. SMALL: Okay. Okay. I understand.

Thus, contrary to Plaintiff's counsel representations at this hearing, this Court never precluded Plaintiff from moving to add parties. Rather, the

Court simply noted, and Plaintiff's counsel admits "I understand," that he needed to bring a motion. No such motion was brought before this hearing. Therefore, Plaintiff was told at the oral hearing as well as the Court's written ruling that their were necessary parties absent from this litigation. Counsel's acknowledgment that he understood this issue, and failure to take the requisite action, constitutes a waiver. "Waiver is the intentional relinquishment of a known right after full knowledge of the facts and depends upon the intention of one party only." *Republic Ins. Co. v. FSR Brokerage, Inc.* (2000) 80 Cal.App.4th 666, 678; *Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 31.

The Amended Complaint seeks to hold Defendant Stelmach personally liable because he allegedly knew the K-1's "were false and known to be false." *See Second Amended Complaint, page 11, lines 2-3.* As noted in *United States Liab. Ins. Co. v. Haidinger-Hayes, Inc.* (1970) 1 Cal.3d 586, 595:

> Directors or officers of a corporation do not incur personal liability for torts of the corporation merely by reason of their official position, unless they participate in the wrong or authorize or direct that it be done. They may be liable, under the rules of tort and agency, for tortious acts committed on behalf of the corporation (3 Witkin, Summary of Cal.Law (7th ed. 1960) s 48(c), pp. 2342-2343; 13 Cal.Jur.2d, s 353; 19 C.J.S. Corporations s 845; Knepper (1969) Liabilities of Corporate Officers and Directors).

Here, while Stelmach may have known the K-1's were false, there are no facts alleging that he participated in the wrong, authorized the issuance of the false K-1's or directed that false K'1's be issued.

However, even assuming that Stelmach could be held personally liable, Plaintiff has not alleged damage. At best, he asserts that the false K-1's potentially expose Plaintiff to the possibility of paying back due taxes. *See Second Amended Complaint, paragraph 11, lines 6-8.* However, this damage is merely speculative and not based on any actual damage. Indeed, the Court does not know what potential damages, if any, the Plaintiff could even possibly incur and whether such speculative damages are within the monetary jurisdiction of this Court. Moreover, as Plaintiff admits that he has not personally incurred any damage to date, any action for the issuance of the false K-1's should have been brought as a derivative action since any injury suffered was incurred by the corporation. As noted in Weil and Brown, *Civ. Proc. Before Trial* (2006) §2:14:

> Claims for injury or damage to a corporation or its property belong to the corporation, not its stockholders. They have no standing to sue for such wrongs even if the value of their stock is disminished. The loss suffered by the stockholder is deemed incidental to the wrong suffered by the corporation. [See *Jones v. H.F. Ahmanson & Co.* (1969) 1 C3d 93, 107, 81 CR 592, 598]
>
> Similarly, a member of a *limited liability company* formed under Corps.C. § 17300 cannot sue individually for fraudulent transfer of the company's assets. The *entity* is the real party in interest. If it refuses to sue, however, the member may bring a derivative suit on behalf of the entity (¶ *2:15*). [*PacLink Communications Int'l, Inc. v. Sup.Ct. (Yeung)* (2001) 90 CA4th 958, 964-965, 109 CR2d 436, 439-440]

Also, the Court notes that the Second Amended Complaint deliberately intertwines the issues of the K-1's with the prior litigation before Judge Wolfe. Such was done despite this Court's prior order not to do so. As the previous ruling notes:

> Thus, Plaintiff must allege new facts in this Complaint showing what facts differentiate this action from the prior action. Moreover, in that Judge Wolfe entered Judgment in the previous case on March 9, 2006, the instant action is limited to causes of action arising after March 9, 2006. The amended complaint must allege causes of action based upon specifically alleged facts arising after March 9, 2006, and not contain any factual matters that are res judicata between the parties.

Nevertheless, after due warning from the Court, Plaintiff places the K-1 issue together within the context of the prior litigation and all in the same paragraph of the Second Amended Complaint. Plaintiff deliberately attempts to inextricably link the issue of the K-1's with the prior litigation as a tactical strategy. This strategy appears to be an attempt to relitigate the prior action by way of the K-1's. For example, the meritless attempt to assert an ongoing violation of a fiduciary duty from the prior litigation, as discussed above. While there may have been an independent action against Defendant Stelmach for ordering the issuance of false K-1's, any damages must be separate and distinct from the prior action. To the extent this amended complaint continues to link the two together, such is improper.

The court also notes that the K-1's are not attached to the Second Amended Complaint (as ordered in the last ruling). Since the K-1 information has not been attached or set out *in haec verba*, this amended complaint remains vague and uncertain. This defect was referenced in the Court's written order sustaining the demurrer to the First Amended Complaint. In addition, the filing of federal K-1's would appear to be within the jurisdiction of the federal court and not state court.

Finally, paragraph 10(c) of the Second Amended Complaint notes:

> Between 3/10/06 and the present, Stelmach has collected and controlled hundreds of thousands of dollars in rental income from various properties in which plaintiff has a minority interest. Plaintiff is informed and believes that Stelmach has calculated and distributed net distributable proceeds to himself and other equity owners, but not any pro-rata share to the Plaintiff. Plaintiff has received no accountings nor distributions since 3/10/06 despite being a shareholder and/or member of the various entities whose proceeds and distributions Stelmach controls. The failure by the Stelmach to distribute to Plaintiff, while having distributed to himself and other equity owners, constitutes a breach of his fiduciary obligations to the plaintiff.

Thus, Tul Investments, Inc. is an indispensable party to this action. However, for whatever reason, Plaintiff has deliberately decided not to name Tul Investments as a party Defendant. Moreover, as noted above, by deliberately linking this issue to the prior litigation, Plaintiff deliberately intertwines the issues as a tactical strategy, which appears to be an attempt to relitigate the prior action. Finally, there is no indication that Plaintiff made any demand for an accounting to see if, in fact, he was entitled to any distribution.

Accordingly, per the foregoing, the Court sustains the demurrer without leave to amend.