2d Civil No. B222539

COURT OF APPEAL STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

ARNOLD GREENSPAN, as Trustee of the Andrew Meieran Family Trust,

Plaintiff and Appellant,

vs.

LADT LLC, a California Limited Liability Company; LA ABC LLC, a California Limited Liability Company; BARRY SHY, an individual; and DOES 1 through 50,

Defendants and Respondents.

Appeal from the Superior Court of Los Angeles County
Case No. BC 356794, Honorable Joanne B. O'Donnell

APPELLANT'S REPLY BRIEF

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INTRODUCTION

To judge from their brief, respondents think they have committed the perfect crime: They have created an enterprise in which no one can ever be liable to anyone for anything. If allowed to stand, the trial court's legal and evidentiary errors will let them make a clean getaway.

• According to respondents, Shy can't be an alter ego because technically he no longer owns LADT and LA ABC, and the Shy Trust can't be an alter ego because it doesn't control anything. (RB 20-21, 35-36.) But the alter ego doctrines looks to realities rather than form. The evidence that the trial court erroneously excluded demonstrates that Shy structured and ran the trust just as he ran all of his other entities. Shy controls not just the companies, but the trust itself: He has the power to decide "on behalf of the BR Shy Trust" how the trust spends its own money, while his brother the trustee, who knows virtually nothing about the trust much less about the companies, knows "the policy" and just "go[es] in line" with what Shy says he is going to do. (AA 1/80:8-81:2, 2/471:17-473:4; see AOB 6-7.)[1]

• According to respondents, trusts are not subject to the normal alter ego rules and judgment creditors must live with inequitable results caused by abuses of a trust's form. (RB 22-23.) But numerous cases have recognized that alter ego liability applies equally to abuses of a trust's form, because any other rule would allow the very same injustice that the alter ego doctrine was intended to prohibit. (§ I.B.2., *post.*)

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[1] As in the opening brief, we distinguish between admitted and excluded evidence by underlining citations to the latter.

• According to respondents, Shy cannot be added as a judgment debtor because he was the "prevailing party" in the underlying arbitration and it would conflict with the arbitration award to convert him from a prevailing party to a losing party. (RB 15-17.) But the record belies this claim: Shy wasn't even a party to the claim on which the Meieran Trust seeks to add him as a judgment debtor—he prevailed on claims that were entirely *unrelated, and arose before* the parties entered into the purchase agreement whose breach forms the basis of the judgment. (§ I.A., *post.*) And beyond that, the arbitrator *rejected* Shy's effort to be declared a "prevailing party" as to recovering fees and costs, saying that it "would be unjust and inequitable" to consider him a prevailing party because it was clear that Shy *did* breach his fiduciary duty "in the very least" by failing to keep appropriate records, and because it was Shy's litigation misconduct that left the Meieran Trust without sufficient evidence to prove that Shy stole from LADT. (§ I.A.3.b., *post.*)

• According to respondents, there was substantial evidence that Shy's entities were not virtually represented in the arbitration, in the form of their trial counsel's unexplained statement that he might have made "different choices." (RB 31.) But the excluded evidence demonstrates that Shy and his enterprise vigorously litigated the arbitration and confirmation, that the enterprise's interests are aligned, that the defense was paid for at least in part by other parts of the enterprise, and that none of the other entities could have contributed substantively because Shy is the only person with any knowledge about the issues. Counsel's speculative statement, which doesn't suggest a single thing that he might have done differently, doesn't qualify as substantial evidence. If the law were otherwise, no one

could ever prove virtual representation, because trial counsel could always say, with no explanation, that their strategy might have been different. (§ II.D.5., *post*.)

The trial court's errors are obvious. The prejudice, inescapable. The inequitable result, intolerable.

The court should reverse with directions to admit the Meieran Trust's evidence and reconsider the case.

ARGUMENT

I.

THE TRIAL COURT ERRED IN PRECLUDING ALTER EGO LIABILITY AS A MATTER OF LAW.

The trial court saw two legal obstacles to the Meieran Trust's claims. First, it ruled that Shy could not be added to the judgment as an alter ego because he had been a party to the underlying arbitration. (AA 6/1611.) Second, it found that there wasn't "any authority" that a trust could be controlled by someone other than the trustee for alter ego purposes. (*Ibid.*) Neither conclusion is defensible. The same is true for respondents' spin on these issues.

A. Shy's Involvement In The Arbitration Does Not Preclude Adding Him As An Alter Ego Under Code of Civil Procedure Section 187.

1. Shy disclaims preclusion as a rationale for affirming the trial court's order.

The opening brief demonstrates that the trial court's order cannot be supported by principles of preclusion (res judicata or collateral estoppel). Shy's response is that he "did not argue that the section 187 motion failed under the doctrines of claim preclusion (res judicata) or issue preclusion (collateral estoppel)." (RB 17.)

Really? We must have misunderstood his argument that the Meieran Trust's motion is "barred by principles of collateral estoppel, res judicata and law of the case." (AA 3/679:22-680:1.)

Shy's amnesia is not surprising. His trial court papers offered neither authority nor legal theory in support of his argument. (See AA 3/679:9-680:1.) And, as the opening brief shows, there are multiple reasons why the preclusion doctrines cannot apply. (AOB 25-31.)

Shy's problem is that without those doctrines, there is no principled basis on which his addition as a judgment debtor is precluded *as a matter of law*. (See AOB 25, 31-32.) We now show why his appellate arguments add nothing to what he urged in the trial court.

2. No equitable or other principle prevents adding a judgment debtor solely because he was a defendant on a cause of action unrelated to the one underlying the judgment.

Shy contends that "section 187 does not authorize amending a judgment to add a judgment debtor who was a party to the underlying litigation." (RB 17.) He offers no authority for this supposed rule, and his reasoning does not withstand scrutiny.

The arbitration claims arose from conduct that occurred in two distinct time periods, asserted against two distinct sets of defendants. These were:

- Claims *against Shy* arising from his tortious conduct *before* the parties entered into Purchase Agreement—that is, while the Meieran Trust was still a member of LADT. As to these, the Meieran Trust alleged that Shy breached his fiduciary duty to properly manage LADT, that he converted LADT's assets, and

that he committed fraud, all *before* the parties signed the Purchase Agreement. (AA 2/297:20-300:27.)

- Claims *against LA ABC (and ultimately LADT)* for breach of the Purchase Agreement—that is, arising *after* the Meieran Trust sold its membership in LADT to LA ABC, because of LA ABC's failure to pay the purchase price. (AA 2/284:15-297:18.)

The judgment is based solely on the latter claim—failure to pay the purchase price under the Purchase Agreement. (AA 2/284-305.) Shy was never a party to this claim. And the Meieran Trust never sought to hold him liable on it—not even by its motion to reopen, which argued that LADT was jointly and severally liable because section 6 of the Purchase Agreement obligated LADT to pay the purchase price. (AA 2/296:15-24, 297:15-18.)

So adding Shy as an alter ego on the Purchase Agreement claim would not convert him from a prevailing party into a losing party, as he contends. (RB 15-17.) He would not become a losing party *on the claims that predate the Purchase Agreement.* He would only become liable on the unrelated claim for breach of the Purchase Agreement—*a claim as to which he was never sued.* Contrary to what Shy says, this *does* correct a "'misnomer' in the naming of the proper defendant" (RB 15-16)—it corrects a "misnomer" in the naming of the proper defendant *on the Purchase Agreement claim.*

Section 187 does not forbid this result. To the contrary, it vests courts with broad power to add new judgment debtors "at any time." (*Dow Jones Co. v. Avenal* (1984) 151 Cal.App.3d 144, 148-149.)

It certainly does not limit new judgment debtors to persons who are entirely new to the case. Quite the contrary, one of the requirements of adding a judgment debtor is that he *was* involved in the case, in the sense that he must have controlled the defense. (*Minton v. Cavaney* (1961) 56 Cal.2d 576, 581; see *Alexander v. Abbey of the Chimes* (1980) 104 Cal.App.3d 39, 46 ["It is precisely this type of involvement and control by an alter ego which distinguishes this case from those cited by appellant where amendment of the judgments were prohibited"]; pp. 47-51, *post*; RB 15; see AOB 10, 22-23, 59-61.)

While it may be true, as Shy claims, that no authority expressly recognizes that section 187 may be used when the alter ego was named in unrelated causes of action, that argument cuts both ways: Shy points to no authority prohibiting alter ego liability under these circumstances either. It certainly cannot be true that Shy wins just because the issue is one of first impression.

Shy's proposed interpretation of section 187 cannot be correct because it would create—rather than prevent—inequitable results, and it would waste judicial resources. A plaintiff is often unaware at the outset of a case whether a company-defendant will be able to satisfy a judgment; in fact, the alter ego conduct that renders the company judgment-proof might not even have occurred at the time of trial. But if Shy's theory were correct, a plaintiff would always have to assert alter ego liability at the outset of any case when separate claims were made against a corporation and its owner, even without evidence and without any basis for concern regarding satisfaction of the judgment. That would add an unwarranted layer of complexity to litigation. And at that point, even assuming the plaintiff

could conduct such discovery over the defendant's objection, the alter ego argument might fail just because the relevant alter ego facts do not yet exist.

That could well have happened here: It is doubtful that the Meieran Trust would have prevailed on an alter ego theory at a time when LADT had—or at least the Meieran Trust was led to believe that it had—more than $47 million. (See AOB 11-12; AA 1/117 [total proceeds from condominium sales over $47 million].) With LADT apparently able to pay the $8.8 million judgment more than five times over, there would be no evidence that an inequitable result would occur absent piercing of the corporate veil.

Shy's approach cannot be how section 187 and the alter ego doctrine were intended to operate.

Even if Shy's proposed rule were correct, that wouldn't help him. As discussed below, even the arbitrator refused to consider Shy a "prevailing party" because it would "be unjust and inequitable, and entirely inconsistent with the litigation realities of this arbitration . . . ." (§ I.A.3.b., *post.*) Right or wrong, the arbitrator's findings are binding on the parties and this Court. Shy cannot claim that it would be unjust to convert him from a prevailing party to a losing party when the arbitrator thought it would be unjust and inequitable to label Shy a prevailing party in the first place.

3. Imposition of alter ego liability would not conflict with the arbitration award.

Shy next argues that section 187 does not permit amendment here because he was not just a defendant in a lawsuit, but a defendant in an arbitration. (RB 16-17.) Shy makes this argument in two forms. Neither has any merit.

a. Judgments confirming arbitration awards can be amended just like any other judgment.

Shy recognizes that section 187 permits amendment of the judgment confirming an arbitration award, but he claims this is only true when the alter ego was not a party to unrelated causes of action in that arbitration. (RB 16.) He bases this argument on *Hall, Goodhue, Haisley & Barker, Inc. v. Marconi Conf. Center Bd.* (1996) 41 Cal.App.4th 1551, 1555 (*Hall*). (RB 16.) But *Hall* decrees no such rule.

It is true that in *Hall*, the alter ego had not been a party to the arbitration and thus, that only the superior court would have had jurisdiction over him. (*Hall*, supra, 41 Cal.App.4th at p. 1555.) But the Court of Appeal did not decide that this was a necessary requirement for a section 187 motion. (*Ginns v. Savage* (1964) 61 Cal.2d 520, 524 fn.2 [cases do not stand for propositions not considered].)

To the contrary, *Hall* held that section 187 applies to judgments confirming arbitration awards because of "the express mandate of section 1287.4 that judgments confirming arbitration awards are subject to all the provisions of law relating to a judgment in a civil action, and may be

enforced like any other civil judgment." (*Hall, supra,* 41 Cal.App.4th at p. 1555.)

As discussed above, section 187 must be interpreted to permit amendment of judgments even when the new judgment debtor was a named defendant to unrelated causes of action in the same suit. Anything else would permit inequitable results and could even sanction fraud. (See § I.A.2., *ante*.) As *Hall* recognized, section 1287.4 mandates that the same rule apply to judgments confirming arbitration awards. (41 Cal.App.4th at p. 1555.)

b. Contrary to Shy's assertion, imposing alter ego liability would not "fundamentally change" the arbitration award—rather it would be entirely consistent.

Shy also contends that adding him as a judgment debtor would "undeniably effectuate a fundamental change in the underlying arbitration award," in violation of the limited scope of review of arbitration awards. (RB 16-17.) But his argument is based on misstatements of the arbitrator's findings.

No exoneration by the arbitrator. Shy claims that "the Meieran Trust litigated many of the same accusations against Shy that it (again) raised in its section 187 motion, including that he conspired with LADT and LA ABC and made improper transfer of funds from those entities for his own benefit." (RB 16.) According to Shy, adding Shy as a judgment debtor would effectively reverse the arbitrator, because "[t]he arbitrator found that there was no evidence of improper distributions." (RB 16.)

It's hard to square this with the record. What the arbitrator actually *said*—at the very portion of the Final Award Shy cites—was that the reason the arbitrator could not find that the transactions constituted a breach of fiduciary duty or conversion was an absence of evidence *for which Shy was to blame*. (AA 2/299:12-18 ["claimant (the Meieran Trust) is not to be faulted for the dearth of financial records, ledgers or other regular books of accounts"], 300:12-14, 303:6-13.) In the arbitrator's words, "Shy breached his fiduciary duties to the Trust in his management of LADT *in the very least* by his failure to maintain reliable financial records" and then "mounted a campaign of obfuscation in discovery . . . ." (AA 2/299:16-18, emphasis added, 303:7-10.) After "claimant's [the Meieran Trust's] efforts in motion practice to obtain financial records was [sic] repeatedly frustrated by respondents, the hearing proceeded with the limited production respondents had made," leaving the Meieran Trust to attempt to make its case with "literally no source documents and minimal back-up information made available by Shy." (AA 2/298:2-9, 303:10-13.)

So, the arbitrator hardly exonerated Shy. In fact, the "*only* factual finding the arbitrator does make on this cause of action is to find that Shy breached his fiduciary duties to the Trust in his management of LADT in the very least by his failure to maintain reliable financial records." (AA 2/299:16-18, emphasis added.) He couldn't decide anything more because Shy made that impossible. The arbitrator laid the blame so squarely with Shy that, according to the arbitrator, it "would be unjust and inequitable, and entirely inconsistent with the litigation realities of this arbitration" to consider Shy as having prevailed for purposes of recovering attorney's fees. (AA 2/303:6-7.)

Different transactions. Shy gets the facts wrong in another way. The Meieran Trust's alter ego evidence is *not* based on the same transactions that were in issue during the arbitration. As noted earlier, the arbitration was concerned with transactions occurring before the August 20, 2004 Purchase Agreement. (AA 2/298:13-14 [Meieran Trust "seeks to recover the amount due the Trust prior to August 20, 2004"], 300:16-18 ["distributions prior to the August 2004 Purchase Agreement"].) In contrast, the Meieran Trust's alter ego evidence is based almost entirely on transactions occurring *after* that date—transactions that could not have been a part of the Meieran Trust's fiduciary duty and conversion claims. (See, e.g., AA 2/318 [$3.4 million transfer in February 2005], 337 [$4.8 million transfer in March 2005], 341 [$1.25 million transfer in May 2005]; see also AA 2/332:21-25 [Shy testimony about post-Purchase Agreement transfers], 461:6-464:8 [same], 2/373:13-377:7 [bank testimony about transfers in 2005]; AOB 13-14, 16.) What's more, the Meieran Trust didn't even discover these transactions until after the arbitration. (See AOB 12-16; AA 5/1113:5-13.) That the arbitrator considered *some* transactions between Shy and LADT does not mean that he considered and ruled on *other* transactions.

Apples and oranges. Perhaps most importantly, imposition of alter ego liability would not contradict the arbitration award even if the trial court considered exactly the same transactions. That is because the questions before the arbitrator were completely different from those before the trial court, even if the evidence were the same. Evidence that Shy was commingling funds and making loans/distributions without respecting corporate formalities would support an alter ego argument, but that same

evidence might be insufficient to support a claim that Shy was actually stealing money from LADT in breach of his fiduciary duty or converting LADT's property. For instance, if it is unclear whether Shy was putting in as much as he was taking out, there is no proof that he was stealing—but he could still be engaging in alter ego conduct.

In fact, the arbitrator's findings would be entirely consistent with a court's later imposition of alter ego liability against Shy. The arbitrator found that "the evidence is clear that Shy has exclusive control over each of his entities, and that he pays little attention to which account is used to make payments on the Purchase Agreement" and that Shy's "failure to maintain reliable financial records" regarding his own transactions with the entities made it impossible to tell whether he was stealing from the entities. (AA 2/297:8-10, 299:16-18.)[2] Shy simply ignores these findings.

Nothing in the arbitration award would conflict with a court's later imposition of alter ego liability against Shy. In fact, there is every indication that the arbitrator would have held Shy liable as an alter ego had that been argued. The Meieran Trust did not raise that issue during the arbitration, believing that LADT had more than sufficient assets to satisfy the judgment for breaching its own obligations under the Purchase

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[2] Respondents assert that the arbitrator based LADT's liability on an alter ego determination. (RB 7.) The Final Award does not use this language, and in any event it makes the equitable rationale an alternative finding subordinate to the determination that LADT was a party to the Purchase Agreement and breached its own direct obligations. (AA 2/296:17-24, 297:15-18.) This Court previously recognized this in its decision in *Greenspan v. LADT, LLC* (2010) 185 Cal.App.4th 1413, 1444 (after discussing submission and decision of LADT's liability as a party to the Purchase Agreement, the Court recognized that the arbitration award "may" also be "in part" based on alter ego liability).

Agreement, and that therefore the alter ego doctrine was not necessary to avoid an inequitable result. (AOB 12, 54-55.) When the truth was later discovered, a section 187 motion was the appropriate vehicle to avoid an inequitable result.

B. The Single Enterprise Theory Provides A Sufficient Basis For Alter Ego Liability As To All Respondents.

Under the single enterprise rule, a court can impose alter ego liability when it determines "that though there are two or more personalities, there is but one enterprise; and that this enterprise has been so handled that it should respond, as a whole, for the debts of certain component elements" of the enterprise. (*Las Palmas Associates v. Las Palmas Center Associates* (1991) 235 Cal.App.3d 1220, 1249-1250 (*Las Palmas*), internal quotation marks and citations omitted.) There is no merit to respondents' arguments against application of the single enterprise rule.

1. There is no merit to respondents' argument that the arbitrator already considered the same issues underlying their alter ego liability.

The Shy Trust and the LLCs recycle Shy's argument, claiming that application of the single enterprise rule to them "is premised entirely on" Shy's transfer of funds among the entities, which according to respondents was an issue addressed and decided in Shy's favor in the arbitration. (RB 22.) Not so.

For one thing, as shown above the arbitrator did not decide any alter ego issue in Shy's favor. At most he decided that—because of Shy's obfuscation and inadequate discovery responses—it was impossible to

determine whether Shy stole money from LADT *before the Purchase Agreement*. (See § I.A.3., *ante*.) The arbitrator's inability to decide whether Shy stole money *while the Meieran Trust was still a member of LADT* does not negate the possibility that Shy's entities commingled funds either before or after the August 2004 Purchase Agreement or the possibility that they were operated as a single enterprise. But that, not Shy's pre-Purchase Agreement theft, is what is at issue in the Meieran Trust's section 187 motion. (*Ibid.*)

Besides, the Meieran Trust's single enterprise argument is not "premised entirely" on the documents evidencing financial transactions. To the contrary, the argument is based largely on evidence like:

- Shy's absolute control over the entities (AA 1/254:1-6, 258:11-22, 3/705:11-14, 706:20-21);
- Shy's testimony that he consider the distinction between the entities "irrelevant" to the way he manages their finances (AA 1/100);
- Shy's pre-arbitration brief acknowledging his "state of mind" as permitting offsets of debts that LA ABC owed to Meieran's entities with a debt allegedly owed by Meieran's entities to LABAR (AA 1/212:20-213:6);
- The state of LA ABC's planned undercapitalization, which included never even having a bank account or assets other than its interest in LADT, even though LA ABC was subject to millions of dollars in liabilities (AA 2/296:21-22, 429:9-11,

430:19-21, 431:3-7, 440:21-24, 441:21-24, 504:15-17, 3/701:7-8);

- The testimony of the Shy Trust's trustee that he knows virtually nothing about the trust itself—much less the companies it owns—and that Shy is the person to talk to on all such matters (AA 5/1272-1296);
- Shy's testimony that the trustee knows "the policy" and just "go in line with what—what that I'm doing" (AA 1/80:8-81:2; see also AA 1/79:7-24, 254:5-6, 268:19-269:4);
- Shy's testimony that he has the authority to decide "on behalf of the Shy Trust" whether the trust should make contributions or loans to the companies (i.e., control over the trust itself, not just management of the companies) (AA2/471:17-473:4);
- The fact that the entities share the same business address, employees, attorneys, and accountant (AA 1/59:15-23, 2/456:23-457:5, 458:9-19, 2/499:9-13, 503:11-20, 3/644-655, 5/1261-1263);
- The entities' failure to maintain minutes or many other types of records (AA 1/259:21-260:2, 2/458:9-19); and
- The decision to drain LADT of all assets and then funnel in just enough money from other entities to allow LADT to continue to operate (AA 1/38:22-26, 114-117, 2/412, 443:13-447:5, 459:12-22). (See also AOB 14-15, 46, 59.)

2. The Shy Trust can be held liable under the single enterprise rule.

The trial court found that there is "no authority" for the proposition that a trust can be controlled by someone other than the trustee. (AA 6/1611.) The opening brief explained that although a trust's founding documents might vest complete control with the trustee, it is well established that the trust's form can be abused in actual practice and that courts can apply alter ego principles in those circumstances. (AOB 32-34.) The Shy Trust fails to offer any cogent response.

a. There is ample authority and policy reason to warrant holding a trust liable as part of a single enterprise.

The Shy Trust's primary argument is that the trust "cannot be a 'sister corporation' that is liable as part of a single enterprise" because a trust isn't a corporation. (RB 22.) From this, the Shy Trust concludes that the only consequence of abusing a trust's form must be that the IRS can look to the trust to satisfy the trustor's tax liability. (RB 23.) So, according to the Shy Trust, private judgment creditors should just be left to suffer inequitable results when a judgment debtor uses a trust to evade liability.

The argument elevates the typical phrasing of the alter ego rule over the rule's substance and equitable purpose. That is why numerous courts have squarely rejected the argument. And it is why the Shy Trust cites no authority for its position.

The alter ego doctrine and its single enterprise corollary are typically phrased in relation to corporations because the doctrines are typically

employed in relation to corporations. But numerous courts have held that there is "no reason why the alter ego concept should not have the same effect in the case of a trust." (*Vaughn v. Sexton* (8th Cir. 1992) 975 F.2d 498, 504; see also *United States v. Carell* (M.D. Tenn. 2009) 681 F.Supp.2d 874, 890-892 ["proposition that a trust may potentially be liable as the alter ego" is not seriously disputed]; *In re Bellardita* (Bankr. E.D.Cal. Sept. 19, 2008, 05-60471-A-7), 2008 WL 4296554, at pp. *11-12 [finding trust to be an alter ego under California law]; *In re Maghazeh* (Bankr. E.D.N.Y. 2004) 310 B.R. 5, 15-19 (*Maghazeh*) [finding irrevocable trust to be debtor's alter ego; "Even if the Court were to accept that the Maghazeh Trust was formed for proper purposes, the Debtor's subsequent treatment of the Maghazeh Trust as his own personal vehicle to shield his assets from his creditors and to perpetrate a fraud on this Court warrants piercing the Maghazeh Trust"]; *In re Vebeliunas* (S.D.N.Y. 2002, 01 CIV 1108) 2002 WL 115656, at pp. *4-5 [alter ego application to trusts necessary to avoid inequitable results of abusing the trust's form], *revd. on other grounds*, (2d.Cir. 2003) 332 F.3d 85, 91-93 [finding insufficient evidence of debtor's control of trust]; *In re Gillespie* (Bankr. E.D.Ark. 2001) 269 B.R. 383, 388 (*Gillespie*) ["Although the doctrine is most often applied with regard to corporations, it also applies to trusts"]; *Bracken v. Earl* (Tenn.Ct.App. 2000) 40 S.W.3d 499, 502-503 [applying principles of corporate alter ego to trusts to avoid inequitable result of a sham trust].)

Maghazeh, *supra*, 310 B.R. 5, is strikingly similar to the present case. Much as Shy did here by installing his brother Moti Shai as trustee, there the debtor created an irrevocable trust and made his two children the trustees. (*Id.* at pp. 7-8.) Like Moti Shai here, "Lisa Maghazeh [the

daughter trustee] knows almost nothing about the Maghazeh Trust and Paul Maghazeh, Jr. [the son trustee] knows very little about it as well." (*Id.* at p. 18; AOB 6-7; AA 5/1272:1-10, 1275:16-1277:7, 1278:21-1279:6, 1280:7-1282:17, 1284:13-17, 1286:3-1289:4, 1292:17-25, 1294:15-1296:10.) And as the trial court could easily have found here with respect to Moti Shai—had it considered the excluded evidence—"The Debtor also admits that although he has no 'legal' control over the Maghazeh Trust, the trustees are his children who would not take any action which would put him in the street." (*Maghazeh*, *supra*, 310 B.R. at pp. 18-19.) The court concluded that "[t]he facts of this case support a finding that as a matter of law, the Debtor is the true owner of the Maghazeh Trust because every step taken by the Maghazeh Trust was taken by him directly or taken by his son at his request. The trustees had nothing to do with the decisions to fund the Maghazeh Trust or to place assets in the Maghazeh Trust, and the Debtor not only made all of the decisions for the Maghazeh Trust, but funded every asset it owned." (*Id.* at p. 19.)

The United States Supreme Court has noted that enterprise liability is "a principle of liability which is concerned with realities, not forms." (*Anderson v. Abbott* (1944) 321 U.S. 349, 363 [64 S.Ct. 531, 538, 88 L.Ed. 793].) "'[C]ourts will not permit themselves to be blinded or deceived by mere forms of law. . . .'" (*Ibid.*, citation omitted.) And numerous other courts have held that the same focus on realities over form and the same concern about equitable results dictates application of alter-ego concepts to trusts. The Shy Trust offers no contrary authority or logic. It urges that courts turn a blind eye to the use of a trust to cause inequitable results. That can't be the law.

b. The Shy Trust's alternative argument misstates the Meieran Trust's argument.

Respondents' only other argument is essentially a single sentence: "No authority holds that the trustee would become responsible for the *liabilities of the donor*." (RB 23, emphasis added.) They say that this is essentially reverse alter ego liability—reaching a corporation's assets to satisfy a judgment against the shareholder—which was disapproved in *Postal Instant Press, Inc. v. Kaswa Corp.* (2008) 162 Cal.App.4th 1510. (RB 23.)

But that isn't even close to what we argued. We argued that (1) the trustee acquiesced to Shy's treatment of the Shy Trust as a component of the single enterprise that includes LADT, LA ABC, Harpro, and 6th St. Loft and (2) the enterprise can be held liable as a whole for the debts of any of its *constituent parts*. (AOB 21, 32-34, 52-54.) In other words, the Shy Trust, Harpro, 6th St. Loft and Shy can *all* be held liable for *LADT's and LA ABC's liabilities*. Shy's control over *all* of the entities, with the trustee's undisputed consent, is only relevant because it evidences the single enterprise.

The difference between reverse piercing and our case is best conceptualized by thinking of a vertical line and a horizontal circle. Shareholder and corporation have a vertical relationship—the shareholder owns the corporation. Picture the shareholder on top: Conventional alter ego doctrine is applied upwards from corporation to shareholder so as to make the shareholder liable for the corporation's debts. Reverse piercing is applied downwards to make the corporation liable for the shareholder's debts. (*Postal Instant Press, supra,* 162 Cal.App.4th at p. 1513.)

In contrast, the single enterprise rule involves a relationship between affiliated entities, all holding equal status—this single enterprise can be conceptualized as a circle that is controlled as one unit. (*Las Palmas, supra,* 235 Cal.App.3d at pp. 1249-1250; AOB 21.) The Meieran Trust's argument involves the single enterprise rule—the circle that is collectively liable. So, *Postal Instant Press*' discussion of reverse piercing has no application.[3]

3. That Shy does not directly own LADT or LA ABC does not bar alter ego liability.

Citing *Riddle v. Leuschner* (1959) 51 Cal.2d 574, 580 (*Riddle*), respondents argue that because Shy does not own LADT or LA ABC (at least on paper), there can be no alter ego liability. (RB 20.) Not so.

Riddle's concern was to ensure that alter ego liability was not imposed against someone who was acting as a normal manager is supposed to act—that an *owner's* excessive control over a company, not a *manager's* control, is what indicates alter ego conduct. (*Riddle*, *supra*, 51 Cal.2d at p. 580.) But *Riddle* did not consider alter ego liability in the single enterprise context. Nor did it consider anything like the facts here, where

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[3] We nonetheless note that "[t]he California Supreme Court has not spoken on" the issue of reverse piercing (162 Cal.App.4th at p. 1518), and several federal and out-of-state cases have found reverse piercing to be an appropriate exercise of equitable powers. (See, e.g., *Fischer Inv. Capital, Inc. v. Catawba Development Corp.* (N.C.App. 2009) 689 S.E.2d 143, 151; *In re Phillips* (Colo. 2006) 139 P.3d 639, 645; *C.F. Trust, Inc. v. First Flight L.P.* (2003) 266 Va. 3, 11 [580 S.E.2d 806, 810]; *Goya Foods, Inc. v. Unanue* (1st Cir. 2000) 233 F.3d 38, 43; *McCall Stock Farms, Inc. v. United States* (Fed. Cir. 1993) 14 F.3d 1562, 1568; *Minich v. Gem State Developers, Inc.* (1979) 99 Idaho 911, 917 [591 P.2d 1078, 1084].)

a party *controls the owner*—controls *the owner's decisions* regarding the companies and controls *the owner's money*. Under these circumstances, *Riddle*'s concern is satisfied: Alter ego is being imposed against the effective owner, not just the corporate manager. After all, ownership is a bundle of rights concerning control of property. Whoever controls the owner acts as an owner. Even respondents recognize that the alter ego doctrine extends to "equitable owners" who do not actually hold title. (RB 20-21; see also AOB 21.) Here, the excluded evidence taken together with the admitted evidence establishes that Shy was exercising control as an owner and not just as a manager.

For instance, in *Goldsmith v. Tub-O-Wash* (1962) 199 Cal.App.2d 132, 139, Hersch was held liable as an alter ego on the basis of his testimony that he owned and controlled a company, even though Barth held the shares and "the uncontroverted evidence indicated that the business was in Barth's name, as were all the necessary licenses and permits, as well as state and federal tax forms." The same is true here. Shy testified as if he personally "own[s] 100 percent interest in LADT LLC," he says that LABAR "represent[s his] interest in LADT," and he refers to the entity accounts as "my" accounts. (AA 2/469:5-18, 3/586 ¶ 1, 5/1198:19-25.) The financial records even refer to the Shy Trust as "Barry." (AA 1/96:22-98:2.)

Likewise, the evidence establishes that Moti Shai—the trustee of the trust that owns LADT and LA ABC on paper—has ceded ownership authority to Shy. Shy has the power to decide "on behalf of the Trust" whether the Trust will make loans and contributions. (See AOB 8; AA 2/471:17-473:4.) That is *control over the trust*, not just managerial

control over the trust's companies. The trust's "office" is really just a drawer in Shy's office. (AA 5/1266:21-1267:15, 1268:21-1269:10.) And on those occasions when Shy does consult with the trustee, the trustee "know—know the—the—the policy" and "go in line with what—what that I'm doing." (AA 1/80:8-81:2.) It could not be any other way since the trustee knows virtually nothing about the trust, much less about the companies the trust technically owns. (AOB 6-7; AA 5/1272:1-10, 1275:16-1277:7, 1278:21-1279:6, 1280:7-1282:17, 1284:13-17, 1286:3-1289:4, 1292:17-25, 1294:15-1296:10.) Rather, as the trustee explained, Shy was the person to talk to in order to learn whether the trust has an accountant, maintains any financial ledger, pays anyone to perform any work, or ever contributed money toward or received money from LADT or LA ABC. (AOB 6-7; e.g., AA 5/1272:11-25, 1280, 1292:17-1293:11.)

This evidence provides ample basis for a finding that Shy acts (and that the Shy Trust allows him to act) as if he is the real owner of LADT and LA ABC and of the Shy Trust's bank accounts.

Moreover, recent case law suggests that lack of title does not bar liability for those who control and dominate an enterprise but do not actually own every sister company within the enterprise. (See *Zoran Corp. v. Chen* (2010) 185 Cal.App.4th 799, 802-804 [summary judgment denying alter ego liability reversed even though alleged alter ego "did not own stock in any of the defendants except" two of them; individual "dominated and controlled the defendant companies"].) In the context of the single enterprise rule, substance reigns over form. (See *Troyk v. Farmers Group, Inc.* (2009) 171 Cal.App.4th 1305, 1342, quoting *Sonora Diamond Corp. v. Superior Court* (2000) 83 Cal.App.4th 523, 539 [""No one characteristic

governs, but the courts must look at all the circumstances to determine whether the doctrine should be applied.'"].)

II.

THE TRIAL COURT'S ERRONEOUS EXCLUSION OF SUBSTANTIAL PORTIONS OF THE MEIERAN TRUST'S EVIDENCE DEPRIVED THE TRUST OF THE OPPORTUNITY TO ESTABLISH RESPONDENTS' STATUS AS ALTER EGOS.

A. Standard Of Review.

Although respondents understandably would like this appeal to be governed by the substantial evidence rule (RB 24-25), the trial court's blanket exclusion of evidence dictates a different approach.

The question before the Court is not, as respondents urge, whether the *admitted* evidence supports the denial of the Meieran Trust's section 187 motion. Rather, the question is whether the erroneous *exclusion* of evidence was *prejudicial*. This devolves to the question of whether "'it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error'"—that is, if the trial court had admitted the evidence. (*Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 800, citation omitted.)

There is only one reasonable way to evaluate this probability: One must (a) assume that the trial court believed the evidence, and then (b) decide whether, with all of the excluded evidence deemed admitted and believed, there was substantial evidence to support a finding of alter ego liability. That is because (1) this Court cannot presume that the trial court

rejected any of the excluded evidence, since by definition the trial court never weighed it at all, and (2) this Court cannot weigh the excluded evidence itself. What remains is that the trial court *could* have believed all of the excluded evidence. And if that is true, then the inquiry must be whether, had the trial court believed all that evidence, the totality of the evidence *could* have led the trial court to find for the Meieran Trust.

"Could" in this context isn't a matter of probability, but rather of legal sufficiency: Could the trial court have *permissibly* found alter ego—meaning was there substantial evidence of alter ego? If there was, then the exclusion of evidence was undeniably prejudicial, because it is "reasonably probable" that the result would have been different absent the error. This is particularly true given that "'[p]robability' in this context does not mean more likely than not, but merely a *reasonable chance*, more than an *abstract possibility*." (*Cassim v. Allstate Ins. Co.*, *supra*, 33 Cal.4th at p. 800, citation omitted, emphasis in original.)

To look at this another way, the fact that the trial court did not consider the excluded evidence brings the case within the principle that the substantial evidence rule "operates only where it can be presumed that the court has performed its function of weighing the evidence. If analysis of the record suggests the contrary, the rule should not be invoked." (*Estate of Larson* (1980) 106 Cal.App.3d 560, 567 (*Larson*); see *Kemp Bros. Const., Inc. v. Titan Elec. Corp.* (2007) 146 Cal.App.4th 1474, 1477-1478 [where record showed that the trial court failed to perform its function of weighing evidence, the presumption of correctness has been overcome, warranting reversal].)

What this comes down to is that in determining prejudice, the Court must view the excluded evidence in the light most favorable to the Meieran Trust, just as with a grant of motion of limine or a nonsuit. The standard "is the opposite of the traditional substantial evidence test" because the exclusion of evidence—just like instructional and other errors—effectively deprived the Meieran Trust of the benefits of a trial on the merits. (See *GAB Business Services, Inc. v. Lindsey & Newsom Claim Services, Inc.* (2000) 83 Cal.App.4th 409, 423, disapproved on other grounds in *Reeves v. Hanlon* (2004) 33 Cal.4th 1140, 1154 [instructional error].)

B. The Trial Court's Blanket Ruling On Evidentiary Objections Was Itself An Abuse Of Discretion.

In *Nazir v. United Airlines, Inc.* (*Nazir*), the trial court made a one-sentence evidentiary ruling with no further explanation: "Defendants' evidentiary objection No. 27 is OVERRULED, and the remainder of Defendants' evidentiary objections are SUSTAINED." ((2009) 178 Cal.App.4th 243, 255, capitalization in original.) The Court of Appeal held that this ruling "was manifest error" because it did not "provide any meaningful basis for review." (*Ibid.*)

The trial court here made an equivalent unexplained one-sentence ruling: "BR Shy Trusts's [*sic*] evidentiary objections are ruled on as follows: No. 28 is overruled; all others are sustained (1-27, 29)." (AA 6/1610) And as in *Nazir*, the trial court's ruling was not "'guided and controlled . . . by fixed legal principles,'" and the individual objections did not receive the type of individualized attention that they should have received. (178 Cal.App.4th at p. 255, citation omitted, ellipses in original.) For instance, the trial court purported to rule on the Shy Trust's objections

even though the Shy Trust made no objections, and it overlooked one objection that was set forth on a separate page. (See AOB 37.) Likewise, the trial court sustained an objection that was premised on an obviously erroneous description of the objected-to exhibit (See AOB 37, 48 & fn. 9) and sustained same objections that were patently frivolous (see pp. 27-28, 32-35, *post.*)

Yet, as similar as these rulings are, respondents contend that "*Nazir* is nothing like this case" because instead of hundreds of boilerplate objections, they offered only 80. (RB 29, 39.) The numbers may be different, but the cases are the same.

Boilerplate. Many of respondents' objections were verbatim identical to one another—copied and pasted word-for-word even when the result made no sense. (Compare, e.g., AA 4/1026:1-10 [objection to Exhibit 4] with AA 4/1026:12-21 [objection to Exhibit 5]; compare AA 4/1028:9-15 [objection to Exhibit 15] with AA 4/1028:17-23 [objection to Exhibit 16].) The most glaring example is the objections to Exhibit 23 [a record produced by Shy himself], which are based entirely on the assertion that Exhibit 23 was produced by a bank. The objection says it draws this false information from paragraph 25 of Peter Smith's declaration. But that paragraph addresses only Exhibit 18—not Exhibit 23. The Non-Trust Parties' error was caused by their word-for-word copying of their objection to Exhibit 18. (AOB 48 & fn. 9.) This is the very definition of "boilerplate." (See Black's Law Dict. (6th ed. 1990) p. 175, col. 2.)

Frivolousness. As in *Nazir*, many if not most of the objections were frivolous. (178 Cal.App.4th at pp. 255-256.) This is certainly true of:

- Objections that depended entirely on their obvious misrepresentation of the objected-to exhibit (AOB 48 & fn. 9);
- Objections on grounds of ambiguity and vagueness, which are only proper objections to the form of questions, not to the presentation of documentary exhibits (AOB 44, 46);
- Objections that respondents did not receive notice of bank representative depositions, when the evidence is clear that they did (respondents do not argue otherwise on appeal) (AOB 49);
- Relevance objections where relevance was clear from the briefing (AOB 44); and
- Hearsay objections to Shy's testimony even though Shy is a party, is the sole manager of the LLCs, and is the person that the Shy Trust's trustee repeatedly suggested is the only person who knows anything about the trust or the trust's companies. (AOB 40-51.)

Respondents don't even try to defend the merits of these objections.

Failure to specifically identify objected-to evidence. Just like the objecting parties in *Nazir*, the Non-Trust Parties made no effort to specify the particular portions of offered evidence to which they objected, which guaranteed that they would overwhelm the trial court. (178 Cal.App.4th at pp. 255-256.) Although California Rules of Court, rule 3.1354 governs only summary judgment motions, it provides an appropriate and well-known model of good practice for any kind of motion. The Non-Trust Parties failed to comply with at least two of its requirements, in that they failed to state page and line numbers (Cal. Rules of Court, rule

3.1354(b)(2)) and they failed to "[q]uote or set forth the objectionable statement or material" (Cal. Rules of Court, rule 3.1354(b)(3); see AA 4/1025:9-1033:3). Far from adopting one of the two formats required by the summary judgment rules (see rule 3.1354(b), and examples following text), the Non-Trust Parties used a shotgun approach, often raising four separate objections to a document at large. (See AA 4/1024-1033.) Since they failed to direct the trial court to the relevant passages and Evidence Code sections, the trial court had no meaningful basis—nor indeed does this Court—to review the objections.

Number of objections. It is true, as we noted ourselves in the opening brief (AOB 37), that *Nazir* involved far more than the 80 objections posed here. (RB 39-40.) But *Nazir*'s standard isn't a numbers game. The volume and nature of the objections were more than enough to cause the same problems the Court of Appeal noted in *Nazir*. A trial court's unexplained blanket ruling on 80 boilerplate objections provides no meaningful basis to review the court's ruling. That was the basis for reversal in *Nazir*, and it should yield reversal here.

C. Even If The Court's Blanket Ruling Is Not Reversible Error, The Trial Court Erred By Excluding The Meieran Trust's Substantial Evidence Of Alter Ego.

In its opening brief, the Meieran Trust showed that none of the asserted grounds supported the trial court's exclusion of 21 pieces of evidence. (AOB 39-51.) As we explained, the objections were generally frivolous. Not surprisingly, respondents offer no response to the vast majority of these issues. What little they do say does not help them.

1. Respondents have tacitly conceded the Meieran Trust's arguments regarding foundation, relevance, ambiguity, and notice of depositions.

Only about half of the Non-Trust Parties' 80 objections were on the grounds of hearsay or lack of authentication. (See AA 4/1024:9-1033:3.) The others included lack of foundation, relevance, failure to give notice of depositions, vague and/or ambiguous. But hearsay and authentication are the only objections that respondents address in their brief. (RB 41-45.)

The opening brief makes clear that there is no basis for any of these objections. (AOB 43-50.) We can only take respondents' silence as tacit confirmation.

2. There was no basis for the authentication objections.

a. Respondents have tacitly conceded that the Meieran Trust's evidence is authentic, except for deposition transcripts and deposition exhibits.

Respondents' authentication arguments address only one category of excluded evidence: deposition transcripts and deposition exhibits. (RB 41.) Respondents do not address their frivolous authentication objections to the remainder of the excluded evidence, including those received through subpoenas or document productions. (See AOB 42-43, 48, 50.)

b. The deposition transcripts and deposition exhibits were properly authenticated by counsel's declaration.

The Meieran Trust's exhibits were accompanied by counsel's declaration attesting to their authenticity. (See AA 1/38:2-6, 40:15-17, 41:22-23, 42:1-2, 45:16-21, 46:2-6; see AA 5/1111:27-28.) This was enough to establish the authenticity of deposition transcripts and deposition exhibits.

The threshold for authenticating a document is very low: If the proponent's evidence is sufficient to sustain a finding of authenticity, the trial court should admit it. (*Jazayeri v. Mao* (2009) 174 Cal.App.4th 301, 321, citing Evid. Code, § 1400.) "The fact conflicting inferences can be drawn regarding authenticity goes to the document's weight as evidence, not its admissibility." (*Jazayeri, supra*, 174 Cal.App.4th at p. 321; see also *People v. Martinez* (2000) 22 Cal.4th 106, 128 [objection that a computerized record is "incomplete" generally goes to the weight of the evidence and not its admissibility]; *McAllister v. George* (1977) 73 Cal.App.3d 258, 261-263 [where invoice for dental services was authenticated by its contents, "contrary inferences flowing from the facts that the bill was handwritten, not on official stationery, and signed by a student were issues going to the weight of the evidence to be resolved by the (factfinder)"].) "The law is clear that the various means of authentication as set forth in Evidence Code sections 1410-1421 are not exclusive. Circumstantial evidence, content and location are all valid means of authentication." (*People v. Gibson* (2001) 90 Cal.App.4th 371, 383.)

Ambriz v. Kelegian (2007) 146 Cal.App.4th 1519 is dispositive. In that case, the plaintiff submitted a single page from a witness' deposition in support of her opposition to the defendant's motion for summary judgment. (*Id.* at p. 1526.) As here, the plaintiff's counsel "attested, under penalty of perjury, that the copies of the documents lodged constituted 'true and correct copies of what they purport to be.'" (*Id.* at pp. 1526-1527, fn. 3; see AA 1/75, 84, 247, 263; AA 2/320, 366, 425, 496, 507, 514; AA 5/1261.) The defendants objected that the plaintiff failed to include a reporter's certificate for the deposition excerpt, and the trial court sustained the objection. (*Ambriz, supra*, 146 Cal.App.4th at pp. 1526-1527.) The Court of Appeal reversed. (*Id.* at pp. 1527-1528.) It explained that "[t]here was no reason for the court to be concerned that the transcript was not what [the plaintiff's] attorney claimed it to be, i.e., a portion of the [witness'] deposition." (*Id.* at pp. 1527-1528 & fn. 3.) Evidence Code section 1400 required nothing more.

c. Assuming that authentication also required that the original transcripts be lodged, the Meieran Trust did so before the hearing.

Respondents also contend that the hearing transcripts were not properly authenticated because "the originals were not lodged with the court." (RB 41.) The argument is wrong on all fronts.

To begin with, there was no requirement for lodging under the Evidence Code sections governing authentication. (See Evid. Code, § 1400; *Ambriz, supra,* 146 Cal.App.4th at pp. 1527-1528 & fn. 3.) Nor is lodging required under the Los Angeles Superior Court Rules, which

provide timing requirements for lodging exhibits "except those attached to papers . . . ." (Super. Ct. L.A. County, Local Rules, rule 9.0(b).)[4]

Respondents argue otherwise, citing *Wahlgren v. Coleco Industries, Inc.* (1984) 151 Cal.App.3d 543, 546 (*Wahlgren*). They argue—apparently claiming an analogy, since they use the "see" signal(s)—that *Wahlgren* stands for the proposition that "[a]uthentication of deposition and hearing transcripts is governed by Code of Civil Procedure section 273." (RB 41.) But that's not what *Wahlgren* says. *Wahlgren* says authentication of "'*former testimony*' is governed by Code of Civil Procedure section 273." (151 Cal.App.3d at p. 546, emphasis added.) It applies where the "former testimony" hearsay exception is at issue (i.e., in a case involving "depositions taken in a prior unrelated action"). (*N.N.V. v. American Assn. of Blood Banks* (1999) 75 Cal.App.4th 1358, 1396, fn. 19 [*Wahlgren* does not govern in cases where "we are dealing with the deposition taken in the same action"].) The Meieran Trust has never invoked the former testimony exception. All of the transcripts at issue here were from this or related actions. (See AA 6/1581.)

In any event, the Meieran Trust *did* lodge the original transcripts with the court, curing whatever deficiency there might have been. (AA 6/1580-1581 [notice of lodging]; see AOB 39-40, 45-47, 50-51.) That wasn't good enough, respondents claim. Citing no authority, they say the lodging was too late and therefore unfair: "Many of those depositions were

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[4] We are aware of only one rule requiring lodging of original deposition transcripts, Los Angeles Superior Court rule 8.71. But it doesn't apply here. It only applies to lodging deposition transcripts "before the commencement of trial" if they will be read into evidence. (Super Ct. L.A. County, Local Rules, rules 8.70, 8.71.)

of non-parties and were taken after judgment was entered, the parties to this action had never seen those depositions," and it would be unfair for respondents to "hav[e] to review hundreds of pages of hearing transcripts at the last minute . . . ." (RB 42.) They told the same story to the trial court. (AA 6/1592-1593.) On this basis, they claim that even though the record is silent on the point, this Court should presume that the trial court rejected the lodging and find that it acted within its discretion in doing so.[5]

But since respondents' objections to the supposedly late lodging were meritless, the trial court would have abused its discretion in rejecting the lodging on that basis. There are two reasons:

First, even when lodging is required, Los Angeles Superior Court rules only require exhibits to be lodged "in time for the hearing or at such other time as the court may order." (Super. Ct. L.A. County, Local Rules, rule 9.0(b).) So, even assuming that the Meieran Trust was required to lodge the deposition transcripts, it did so within the time permitted by the rules.

Second, respondents vastly overstate the number of non-party transcripts. Only two of the eleven transcripts were from non-parties (the bank representatives' examinations). That is hardly "many." Most of the transcripts—seven of them—were testimony of Shy himself. (AA 6/1581:5-21; see also 1/249:15-20, 250:4-5, 252:18-22; 265:15-20, 266:3-4.) One was the deposition of Moti Shai as the Shy Trust's trustee

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[5] Respondents state that the alternative is that the trial court "accepted the lodging of the depositions and sustained the objections on other grounds." (RB 42.) If so, the late-lodging objection disappears—and, as we have shown, the other authentication objections were frivolous.

(AA 6/1581:20-21), and another was of Amit Tidhar, Shy's agent and nephew, who was represented by Shy's counsel (AA 5/1201-1229 [proof of service], 1231-1259 [same]; see AOB 49). Respondents indisputably already had these transcripts, and there could be no possible basis for the trial court's refusing to consider them on the basis respondents urged. As to the two bank representative transcripts, here too any delay in reviewing them was not the Meieran Trust's responsibility—respondents received notice of the examinations but chose not attend (see AOB 49), a point they do not contest in their brief.

Besides, respondents have only raised this argument in the context of authentication. (RB 42.) They have never explained why they or the court would have needed to digest the "hundreds of pages" of the full transcripts in order to be able to address the authenticity of excerpts that the Meieran Trust relied on.

* * * *

The transcripts and exhibits were sufficiently authenticated. Shy never even suggested that they were not what they purported to be. All parties had access to these transcripts, and there was no indication that the meaning of the witnesses' testimony was changed by offering only selected pages. (See Evid. Code, § 1402 [altered writings are admissible where proponent shows that alteration did not change the meaning or language of the instrument].) In this situation, there can be no legitimate basis for exclusion.

3. The trial court abused its discretion by sustaining the hearsay objections.

Presumably because the hearsay objections were so meritless and the exceptions so obvious, respondents do not seek to support exclusion on the merits. Instead, they argue that the Meieran Trust waived the applicable hearsay exceptions by not specifically identifying them to the trial court. The waiver rule that respondents rely on has no application here.

Respondents cite two cases for their waiver theory. (RB 44-45, citing *Shaw v. County of Santa Cruz* (2008) 170 Cal.App.4th 229, 282; *People v. Fauber* (1992) 2 Cal.4th 792, 854.) These cases note two requirements to preserve hearsay exceptions: The party urging an exception to the hearsay rule must (1) lay "a proper foundation for" the applicable exceptions to the hearsay rule and (2) make some attempt to show that the evidence came within a particular exception to the hearsay rule. The Meieran Trust substantially complied with both.

a. The Meieran Trust laid a proper foundation for application of the hearsay exceptions.

The declarations that accompanied the improperly excluded evidence laid more than an adequate foundation for the application of the hearsay exceptions. The parties' briefing made this even more evident.

Shy's statements. The declarations demonstrate that the vast majority of this evidence consists of Shy's testimony or documents produced by Shy during the course of the arbitration. (AA 1/37-42, 44-46, 48-50 [counsels' declaration describing evidence].) This is also plain on

the face of many of the documents themselves. (See, e.g., AA 1/56, 75, 84, 252, 2/425, 496, 507.)

Certainly everyone understood that Shy was a party to the arbitration and to the section 187 motion. His status as the sole manager of LADT, LA ABC, Harpro and 6th St. Loft was also adequately established by admitted evidence and throughout both sides' briefing. (AOB 4-9; AA 1/21:17-30:9, 3/706:10;.) And the Meieran Trust's briefing and evidence more than laid a foundation that (1) the Shy Trust's trustee considered Shy the only person capable of answering questions about the trust, its assets, and its business dealings and (2) Shy was empowered to control the trust, including making decisions regarding how the trust spent its money. (AOB 6-8, 41; AA 1/21:17-30:9.)

Taken together, this evidence adequately laid a foundation for application of the party admission exception to the hearsay rule. In fact, the foundation was so strong that the exception was both obvious and irrefutable.

Tidhar's declaration and deposition testimony. On their face, Tidhar's declaration and deposition transcript establish that he is Shy's nephew and an agent of several of Shy's entities who was testifying about subjects within the scope of his duties (i.e., about his positions within the enterprise), which again establishes the foundation for the hearsay exception. (AOB 45.)

Bank business records. The Meieran Trust also laid a sufficient foundation regarding the bank records produced pursuant to a subpoena duces tecum. It is clear on the face of these documents that they effectuated

banking transactions, and the bank representatives established each requirement of the business records exception to the hearsay rule. (AOB 48-50.) For instance, the majority of these records were accompanied by a sworn declaration by a bank representative attesting that the documents were true and correct copies of records "prepared by personnel of Citibank N.A. and/or its affiliates and suppliers in the ordinary course of business at or near the time of the acts, conditions or events recorded." (AA 2/310.)

b. The Meieran Trust's counsel effectively raised hearsay exceptions by making their applicability entirely obvious.

The cases that respondents cite require that, in addition to laying a foundation for the hearsay exception, counsel must also identify the exception itself. While this is not a requirement of Evidence Code section 354, there was good reason to apply the rule in each those cases. There isn't such a reason here. Besides, the Meieran Trust effectively raised the issue.

Differences between objections mid-trial and in motion practice. Each of respondents' cases involves objections made in the midst of trial. (*People v. Fauber* (1992) 2 Cal.4th 792, 853-854; *Shaw v. County of Santa Cruz* (2008) 170 Cal.App.4th 229, 237, 282.) Under those circumstances, it is entirely reasonable to expect counsel to specifically identify applicable hearsay exceptions: The court often has not yet heard the foundational facts justifying the exception, and so it is fundamentally necessary for counsel to offer a succinct statement of the exception and an offer of proof allowing conditional admission of the evidence. And especially before a jury, the

court considering hearsay objections mid-trial must act quickly, should not be expected to instantly recall other evidence or argument that identifies the applicable hearsay exception, and has very limited ability to consider the issue in chambers.

Motion practice is a completely different animal. The trial court receives everything in advance, has no trial management concerns, and can consider objections in detail in the solitude of chambers. Indeed, the few cases that *Shaw* and *Fauber* rely on that do not involve objections decided in the midst of trial, do *not* address whether a hearsay exception must be specifically identified. Rather, they implicate only the requirement that the party lay a proper foundation. In fact, *Shaw*, *supra*, 170 Cal.App.4th at p. 282, cites these cases only for the proposition that a court is precluded from considering an evidentiary issue on appeal if the appellant failed to make *an offer of proof* regarding the foundational issues necessary to appellate review.[6]

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[6] In *Heiner v. Kmart Corp.* (2000) 84 Cal.App.4th 335, 345 (cited in *Shaw*, *supra*, 170 Cal.App.4th at p. 282), the trial court requested an offer of proof whether the alleged licensing deficiencies were likely to lead to disciplinary proceedings. The appellant made no such offer and thus, waived the objection. Likewise, *Tudor Ranches Inc. v. State Comp. Ins. Fund* (1998) 65 Cal.App.4th 1422 (cited in *Shaw*, *supra*, 170 Cal.App.4th at p. 282) addressed the trial court's grant of motions in limine that "expressly invited Tudor to present its evidence to the jury and to request reconsideration at that time of any in limine rulings . . . ." (65 Cal.App.4th at p. 1433, emphasis omitted.) The Court of Appeal held that Tudor waived the issue because it did not take the opportunity to make an offer of proof but instead stipulated to a judgment. (*Id.* at pp. 1433-1434.)

Hearsay exception effectively raised. While perhaps even in motions practice it would not be reasonable to expect the court to recognize an unusual or obscure hearsay exception on its own, that was not the case here: Everything before the court made the applicable hearsay exceptions as open and obvious as they possibly could be—including the Meieran Trust's briefs, which argued that Shy was in full control of the entire enterprise (see pp. 36-38, *ante*) and was therefore the only person authorized to speak on the entities' behalf. Indeed, the Meieran Trust presented the court with the explanation that the Shy Trust had authorized Shy to speak on its behalf. (*Ibid.*) Likewise, the cover page of the bank documents included a certification attesting to every element of the business records exceptions. (*Ibid.*)

Additionally, the Meieran Trust argued at length that Harpro, 6th St. Loft, and the Shy Trust were "virtually represented" on the basis of Shy's words and actions. (AA 1/32-33.) It is difficult to see any difference between that and an assertion that Shy's words and actions are attributable to these entities and therefore admissible as party admissions. So what more could the Meieran Trust have said?

Appellate review, of course, depends on an adequate foundation for the consideration of the evidentiary exclusion. That is why foundational offers of proof are required by the Evidence Code and the cases that do not involve exclusions decided in the midst of trial. But it is unnecessary and unreasonable to require a party, on pain of waiver, to tell the trial court something that any experienced trial judge should instantly recognize and that was effectively raised by counsel.

D. The Evidentiary Errors Were Prejudicial.

1. Respondents misstate the prejudice standard and fail to challenge the Meieran Trust's arguments under the appropriate standard.

Respondents fail to challenge the Meieran Trust's showing of prejudice under the correct standard. Instead, they inflate the burden that the Meieran Trust is required to show. California's prejudice standard is well settled: As noted earlier, prejudice is shown "when the court, after an examination of the entire cause, including the evidence, is of the opinion that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (*Cassim v. Allstate Ins. Co.*, *supra*, 33 Cal.4th 780, 800, internal quotation marks and citation omitted.)

Respondents incorrectly argue that "[e]videntiary error is prejudicial if in the absence of the error, the appealing party *would have probably* obtained a more favorable result." (RB 45, emphasis added, citing *College Hospital Inc. v. Superior Court* (1994) 8 Cal.4th 704, 715 (*College Hospital*); see also RB 45 [Meieran Trust "must show . . . it *probably would have made a difference* in the result", emphasis added].) But "probability" in the context of prejudice does not mean "probably" or even "more likely than not"; it just means "a *reasonable chance*, more than an *abstract possibility*." (*Cassim*, *supra*, 33 Cal.4th at p. 800, emphases in original.)

2. The excluded evidence was central to the Meieran Trust's effort to prove alter ego; without it, the Meieran Trust could not be expected to prove its case.

Reversal is necessary here because the trial court improperly excluded nearly everything—28 of the Meieran Trust's 45 pieces of evidence. (AA 6/1610.) These exhibits were crucial to the Meieran Trust's case, and it is reasonably probable that the trial court would have granted the Meieran Trust's alter ego motion had it not erroneously excluded the evidence. As we explained above, the addition of the improperly excluded evidence could have yielded a different result, because the trial court *could* have believed the evidence and, on the basis of the evidence, *could* have found alter ego. (§ II.A., *ante*; see *GAB Business Services, Inc. v. Lindsey & Newsom Claim Services, Inc.*, 83 Cal.App.4th 409, 423, disapproved on other grounds in *Reeves*, *supra*, 33 Cal.4th at p. 1154.) Indeed, even a subset of the excluded evidence could have yielded a different result. (See AOB 52-58.) The Court must therefore reverse the trial court's order and allow the trial court to weigh all of the evidence. (See *Kemp Bros. Const., Inc. v. Titan Elec. Corp.*, *supra*, 146 Cal.App.4th at p. 1477-1478.)

The Meieran Trust submitted substantial evidence that Shy created a single enterprise that was configured to avoid creditors. (AOB 4-9, 52-58.) Shy put his family trust at the center of the enterprise in order to distance himself from liability while controlling the trustee and, through him, LA ABC and LADT. (See pp. 15-16, 18-19, 21-22, *ante*; AOB 6-8, 53-54.) The excluded exhibits include Shy's admissions that he—not Moti, his brother-trustee—makes most of the important decisions for the entities

that are nominally owned by the trust. (AA 1/79:7-24, 254:5-6, 268:19-269:4.) Shy testified that he not only controls the trust's companies, but also makes financial decisions "[o]n behalf of the BR Shy Trust" regarding what to do with the Shy Trust's money. (AA 2/471:17-473:4.) Additionally, Shy's financial records show that Shy sometimes simply refers to the Shy Trust as "Barry." (AA 1/96:22-98:2, see also AA 1/109.)

Without again reviewing all of the erroneously excluded evidence to show that it constituted substantial evidence of alter ego (see AOB 38-58), we will highlight those excluded exhibits that were most probative on the issue, because Shy now claims that "the Meieran Trust does not even attempt to provide the analysis necessary to meet its burden of establishing prejudice" (RB 46). The excluded substantial evidence shows:

- Shy's single enterprise is comprised of several shell entities that include judgment debtors LADT and LA ABC as well as respondents Harpro and 6th St. Loft (AA 1/126-127, 208:14-16, 254:7-255:24, 268:19-269:4, 296:21-22, 2/429:9-11, 430:19-21, 440:21-24, 456:23-457:3, 486:20-21; see AOB 4-9, 34, 46, 54-55);
- Judgment debtor LA ABC never had any employees, never prepared financial statements, was intended to hold nothing other than its interest in LADT, and apparently does not even have a bank account of its own—Shy does not recall if LA ABC ever had a bank account or paid its own bills. (AA 2/429:9-11, 430:19-21, 431:3-7, 440:21-24, 441:21-24, 504:15-17; AOB 5-6);

- Shy shuffled money from entity to entity in a manner that disregarded legal formalities and prevented the Meieran Trust from being able to enforce the judgment entered against LADT and LA ABC. (AA 2/315-316, 318, 333:6-13, 337, 340-341, 332:21-25, 372:9-373:6, 373:13-377:17, 441:1-9, 461:6-464:8, 467:22-470:3, 486:11-13, 493:10-13; see also AOB 11-16, 54-55, 57-58, AA 2/469:5-18 [referring to entity accounts as "my" accounts].) This includes draining the judgment debtor's accounts and then causing the various parts of the enterprise to funnel in just enough money to allow judgment debtors to pay certain bills and remain operations (AA 2/372:9-373:12; see also AA 5/1194:16-1195:25.)

- Shy believes the distinction among the entities he controls is "irrelevant" in terms of how they actually operate (see AA 1/100:11-13 ["[I]f the source of the fund came from—from Barry Shy or from Harpro or from LADT, it's all irrelevant, you know."]).

- The Shy Trust's purchase of Shy's interest in LABAR and LA ABC was structured in a way that LADT would annually transfer $888,716 to the Shy Trust, which the Shy Trust would then pay to Shy. (AA 1/127, 2/476:15-479:22.) The effect was that the Shy Trust used the entities' own assets to buy the entities and continued to ensure that Shy received distributions from the entities—just as if Shy had continued to own them.

If the trial court had admitted and believed this excluded evidence, it could easily have found alter ego. That fact establishes prejudice from the exclusions.

3. There is no basis for respondents' claim that the trial court actually did consider the Meieran Trust's evidence despite sustaining objections to it.

After filing the excerpts of depositions, the Meieran Trust lodged copies of the complete transcripts along with its reply brief. The Non-Trust Parties objected to the initial excerpts. (AA 4/1024-1033.) The Shy Trust objected when the complete transcripts were lodged. (RB 46.) The trial court's order explained that it excluded specific pieces of evidence pursuant to the first set of objections and that the second set of objections was therefore moot. (AA 6/1614.) From this mootness ruling, respondents argue that the trial court must have considered all of the evidence—including the full deposition transcripts—because the objections to the full transcripts were deemed moot: They say that "[a]ny ambiguity on this point must be construed in favor of affirming the judgment." (RB 46.)

The argument takes us through the looking-glass.

One cannot presume something that directly contradicts the trial court's order. Here, the only available presumption is that the trial court intended its evidentiary rulings to have some meaning, since otherwise it would not have made them. The additional objections were moot because the evidence was already excluded, not because the trial court actually considered the evidence.

4. Shy's involvement in the underlying arbitration did not excuse consideration of alter ego evidence in weighing the equities.

Respondents argue that there was no prejudice as to the trial court's decision regarding Shy because "none of the excluded evidence would have been relevant on the point" of whether it would be equitable to add an alter ego who was a party to the underlying arbitration. (RB 47.) Their argument misses the mark.

First, we have already explained why Shy's status as a defendant on unrelated causes of action does not make it inequitable to add him as an alter ego judgment debtor. (See § I.A., *ante.*) This is, and the trial court decided it as, a question of law.

Second, the excluded evidence does indeed establish why it would be equitable to hold Shy liable now. The excluded evidence includes a large quantum of information of which the Meieran Trust was not aware during the arbitration. Most importantly, the Meieran Trust was not aware that Shy and his enterprise had drained LADT of more than $47 million and were keeping it afloat by funneling in the precise amounts of money needed to pay selected bills. Consideration of what the Meieran Trust knew during the arbitration and what it later discovered easily could have led the trial court to agree that it is equitable to add Shy as a judgment debtor now.

5. If the trial court had considered all of the erroneously excluded alter ego evidence, it could have concluded that the Shy Trust, Harpro and 6th St. Loft were all virtually represented in the arbitration.

The parties agree that Shy controlled every facet of the underlying arbitration. Adding the excluded evidence to the admitted evidence creates more than enough to establish that Shy virtually represented the Shy Trust and the LLCs.

As the opening brief explained, virtual representation is established in "the usual" alter ego scenario because "the interests of the corporate defendant and its alter ego are similar so that the trial strategy of the corporate defendant effectively represents the interests of the alter ego." (*NEC Electronics Inc. v. Hurt* (1989) 208 Cal.App.3d 772, 778-780; see AOB 22-23.) An alter ego is virtually represented when "nothing appears in the record to show that [the additional judgment debtor] could have produced a scintilla of evidence that would have in any way affected the results of the trial . . . ." (*Mirabito v. San Francisco Dairy Co.* (1935) 8 Cal.App.2d 54, 58, 60.)

Here, the evidence establishes that the interests of the entire enterprise are aligned and that Shy considers the interests of his enterprise as a whole. Money is moved among the entities without regard for formalities, because entity-separateness is "irrelevant" to Shy's real aim. (AA 1/100:9-15, 2/488:19-489:1; see AOB 9, 15.) The entire enterprise is run so that the judgment debtors can continue operating while avoiding creditors. (AA 2/433:13-447:5, 459:12-22; see AOB 14-16.) The evidence

also shows that Shy effectively runs the Shy Trust as one more piece of the enterprise—the trustee knows nothing about the trust and has ceded authority to Shy to make decisions not only regarding the trust's companies but also about the Shy Trust's money. (AA 1/79:7-24, 80:8-81:2, 2/471:17-473:4, 254:5-6, 268:19-269:4, 373:13-377:17, 471:17, 473:4, 5/1266-1269, 1272-1293; see AOB 15-16.) And the evidence shows that Shy is the sole repository for all information regarding the LLCs and the Shy Trust, so there is nothing that anyone else could have added to the arbitration. (AA 5/1272-1293; AOB 6-7.) Even LADT's legal bills in this case were paid for by an intra-enterprise "loan." (AA 2/459:12-22; see AA 2/412; see AOB 14-15.)[7]

Respondents make three arguments against virtual representation. None undercuts the impact of the excluded evidence.

First, respondents argue that it is "beside the point whether the participation of Harpro and 6th St. Loft would have made a difference"—they say that "the party itself" needs to control the litigation. (RB 32, emphasis omitted, citing *NEC Electronics*, *supra*, 208 Cal.App.3d at pp. 778-779.) This argument requires little response. Both *Mirabito* and *NEC Electronics* set forth this standard and make clear that the party to be added as a judgment debtor need not have actually controlled the litigation, as long as its interests were virtually represented. (*NEC Electronics*, *supra*,

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[7] Even now, with alter ego liability at issue, respondents still repeatedly refer to themselves—including entities that are wholly owned by the Shy Trust—in short-hand simply as "Shy." (See RB 39-42.)

208 Cal.App.3d at p. 780; *Mirabito*, *supra*, 8 Cal.App.2d at p. 60.) As *NEC Electronics* put it, the question is whether the case was fully and fairly tried and whether "the interests of the corporate defendant and its alter ego are similar so that the trial strategy of the corporate defendant effectively represents the interests of the alter ego." (208 Cal.App.3d at p. 780.) Ignoring the case law can't change the legal standard.

Second, respondents argue that the Meieran Trust's statement of the virtual representation standard would eviscerate the rule and "would require that *any time* a corporation is determined to be the alter ego of a judgment debtor, that corporation must be added to the judgment regardless of the corporation's actual control of the underlying litigation." (RB 32-33, emphasis in original.) Not at all. In fact, the opening brief explains the limited circumstances in which an alter ego would not be virtually represented. (AOB 23.) We provided the example from *NEC Electronics*, *supra*, 208 Cal.App.3d at pp. 780-781. There, it was not worthwhile for the corporate defendant to participate in the trial because the corporation was on the verge of bankruptcy. (*Ibid.*) Had the alter ego been a named defendant, he would have had an entirely different motivation to defend the suit. (*Ibid.*) Thus, the alter ego was not virtually represented in the corporation's decision to forego a defense. (*Ibid.*)

What we *did* argue—and what the cases say—is that virtual representation is not difficult to establish in the usual alter ego scenario. (See AOB 23-24, 59-61.) Here, LADT and LA ABC vigorously defended the arbitration and vigorously appealed the award's confirmation. In fact, this Court is well aware of the multitude of arguments LADT and LA ABC made to avoid confirmation, including their efforts to file two separate

briefs to do so. There is no evidence that they would have acted differently had the other entities been involved.

Third, respondents argue that Shy's counsel testified that he "'might well have made different choices in how [he] handled the case, if [he] had represented'" the other entities. (RB 31-32, citing AA 3/715:5-15.) That does not qualify as even "a scintilla of evidence," much less substantial evidence. Shy's counsel did not, and the respondents' brief does not, suggest a single way that he would—or even could—have handled the case differently. There is no legitimate dispute that the arbitration was vigorously litigated and that the defendants aggressively urged every conceivable defense. Nor can it be disputed that Shy knew all of the information pertaining to the Shy Trust and the LLCs, that nothing particular to any of the other entities was pertinent to the arbitrable disputes, that the entire enterprise was united in its interests, and that Shy thinks about the interests of the entire enterprise rather than the concerns of any one part. (See AOB 4-9, 12-16, 59-61.) In light of this evidence, it isn't surprising that Shy's counsel did not try to explain what "different choices" he might have made. It can't be done.

Respondents cannot defeat virtual representation by a conclusory, self-serving assertion unsupported by any explanation. If they could, it would never be possible to establish virtual representation because counsel could always offer a flip, speculative assertion to the contrary.

More to the point, respondents' argument ignores the prejudice standard: The question is whether, had it considered the excluded evidence, the trial court decided that the entities were virtually represented—not whether there is some evidence showing that they were not virtually

represented. Considering all of the evidence, there is more than enough to establish that the entire enterprise was virtually represented during arbitration and confirmation.

CONCLUSION

The trial court erred in multiple respects, both by denying alter ego liability on legal grounds and by its blanket exclusion of evidence that was plainly admissible. There was not just substantial but compelling evidence that Shy structured his single enterprise to thwart judgment creditors and that only the alter ego doctrine can avoid the inequitable result that was Shy's aim from the very beginning.

The palpable prejudice from the trial court's errors requires reversal with directions to admit all of the Meieran Trust's evidence and to reconsider its section 187 motion in light of that evidence.

Dated: October 13, 2010

Respectfully submitted,

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CERTIFICATION

Pursuant to California Rules of Court, rule 8.204, subdivision (c), I certify that this **APPELLANT'S REPLY BRIEF** contains 12,630 words, not including the tables of contents and authorities, the caption page, signature blocks, or this Certification page, as counted by the word processing program used to generate it.

Dated: October 13, 2010

GARY J. WAX

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 5900 Wilshire Boulevard, 12th Floor, Los Angeles, California 90036.

On **October 13, 2010**, I served the foregoing document described as: **APPELLANT'S REPLY BRIEF** on the parties in this action by serving:

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Executed on **October 13, 2010**, at Los Angeles, California.

(✗) (State) I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Charice L. Lawrie