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Court of Appeals
Division I
State of Washington No. 73305-2-I

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION I

JACKSON J. MIKA,

Appellant,

v.

JBC ENTERTAINMENT HOLDINGS INC., a Corporation doing business in the State of Washington; JBC OF SEATTLE, WA, INC., a Washington business, a subsidiary of JBC ENTERTAINMENT HOLDINGS INC.; an entity, GEMINI III LP owner of JBC ENTERTAINMENT HOLDINGS INC.; GAMEWORKS ENTERTAINMENT LLC, a Corporation doing business in the State of Washington; MARQUIS HOLMES, an individual, dba. BOSS LIFE ENTERTAINMENT, JANE DOE, Husband and wife, and their community, TONY HUMPHREYS, an individual, Husband and wife, and their community,

Respondents.

BRIEF OF RESPONDENT GEMINI INVESTORS III L.P.

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INTRODUCTION

Respondent Gemini Investors III, L.P. (“Gemini”) respectfully requests that the Court affirm the trial court’s summary judgment dismissal of the corporate disregard and fraudulent transfer claims brought against it by Appellant Jackson Mika (“Mika”). After Mika suffered injuries at a nightclub, he brought suit against numerous individuals and entities, including Gemini. Although Gemini had no role in the events giving rise to Mika’s injury, and although Gemini is merely a minority shareholder of the indirect parent company of the operator of the location where Mika was injured, Mika nevertheless sought to hold Gemini responsible for his injuries. Recognizing that no evidence supported any viable legal theory, the trial court granted summary judgment and dismissed Mika’s claims against Gemini.

Mika’s opening brief looks past the separate corporate existence of the nightclub operator and Gemini, but Gemini was far removed from the governance of the operator and had no role in the operations whatsoever. Gemini’s “role” in the incident is as follows:

- Gemini is a minority shareholder of the holding company JBC Entertainment Holdings, Inc. (“JBC Holdings”).
- JBC Holdings was the parent company of JBC Entertainment LLC (“JBC Entertainment”).

- JBC Entertainment, which was never a party to the lawsuit, was the parent company of several separate entities operating restaurants and nightclubs, including JBC of Seattle, WA, Inc. (“JBC of Seattle”).
- JBC of Seattle, against whom Mika abandoned all claims, was the operator of the nightclub where Mika was injured (doing business as Jillian’s of Seattle). It is JBC of Seattle whom Mika presumably believes is legally responsible for his injuries.

Because Mika never set forth evidence that Gemini had misused the corporate form in any manner, the trial court correctly determined that Mika could not disregard the corporate form and hold Gemini responsible for the alleged negligence of someone else.

Mika’s fraudulent transfer claims were even more implausible. His claims against Gemini were initially dismissed for lack of personal jurisdiction. After this dismissal—with no claims pending and with a ruling that Gemini was not even subject to the power of a Washington court—Gemini’s indirect subsidiary JBC Entertainment sold all of its assets. The sale was an arm’s length transaction to cut ties with a losing investment. Gemini lost \$13 million on the Jillian’s investment, and any

theoretical claim that Mika would have against JBC Entertainment in the future would be inferior to the claims of secured creditors. Indeed, JBC Entertainment's secured lenders were not paid in full. Thus, not only was the sale made to an outsider for adequate consideration and for completely legitimate business reasons, it could not have possibly harmed Mika even in the unlikely event he secured a judgment against JBC Entertainment.

While Mika used this sale as a means to rejuvenate his earlier-dismissed claims, the trial court correctly determined that "the sale was compelled by sound business reasons without regard to the unadjudicated tort claims of the plaintiff." Mika's fraudulent transfer claim also ignored three critical facts that were fatal to his claims: (1) the asset sale occurred after Mika's claims against Gemini had been dismissed, (2) the assets that were sold were subject to a valid security interest, and (3) JBC Entertainment was not, and has never been, a party in this litigation. Quite simply, when JBC Entertainment sold its assets, there was no actual or potential liability to avoid. The asset sale had no impact on this litigation, and Mika's claims to the contrary lack merit.

The trial court properly granted summary judgment to Gemini on Mika's corporate disregard and fraudulent transfer claims, and this Court should affirm.

ISSUES PRESENTED

1. Corporate Disregard Claim. To pierce the corporate veil, the plaintiff must show that (1) the shareholders engaged in intentional misconduct, such as fraud or misrepresentation, and (2) that disregarding the corporate form is necessary to prevent an unjustified loss to the plaintiff. After Gemini was dismissed from the suit, Gemini sold the assets of JBC Entertainment to satisfy debt service that it was unable to pay to its secured creditors. At the time of sale, Mika had no actual or potential claims, much less judgments, against Gemini or JBC Entertainment. Did the trial court properly grant Gemini summary judgment on the corporate disregard claim?

2. Fraudulent Transfer Claim. To establish a fraudulent transfer claim under Washington law, a creditor must prove by “clear and satisfactory evidence” that a debtor made a “transfer” with “actual intent to hinder, delay, or defraud any creditor of the debtor.” RCW 19.40.041. A “creditor” is a person with a claim. At the time of sale, Mika had no pending or actual claims against Gemini or JBC Entertainment, and the assets sold were subject to a valid security interest. Did the trial court properly grant Gemini summary judgment on the fraudulent transfer claim?

STATEMENT OF THE CASE

A. The relationship between Gemini and the JBC entities.

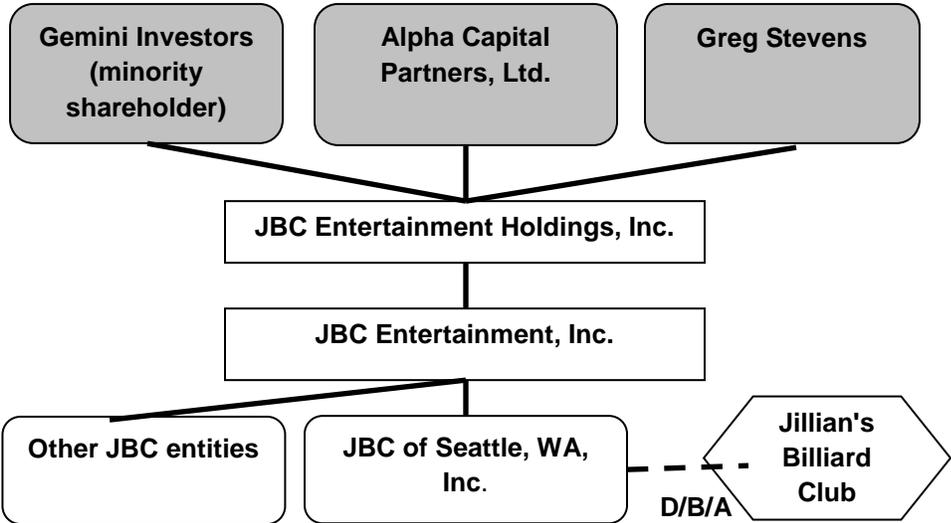
Gemini is an affiliate of Gemini Investors, a private equity firm located in Massachusetts. CP 317, ¶ 2. Gemini has no involvement with the state of Washington. *Id.* ¶ 5. Gemini has conducted no business here, and has no employees, real property, or offices here. *Id.* Gemini does not actively solicit investors in Washington, and it directs no marketing or promotional activities to Washington. *Id.*

In 2004, Gemini, Alpha Capital Partners, and other investors wished to purchase certain establishments doing business under the name of Jillian's Billiards ("Jillian's") out of bankruptcy. CP 1010, ¶ 2. The investor group formed JBC Holdings for the asset purchase. *Id.* ¶ 3. Gemini was a minority shareholder of JBC Holdings, along with Alpha Capital Partners (an unrelated entity) and Greg Stevens. CP 317-18, ¶¶ 3, 6, CP 964, ¶ 6. The investors (through the creation of JBC Holdings) initially financed the purchase of 20 Jillian's clubs. CP 1010, ¶¶ 2-3.

JBC Holdings is the sole shareholder of the separate entity JBC Entertainment. CP 317, ¶ 4. JBC Entertainment is not, and has never been, a party to this lawsuit. *Id.* JBC Entertainment was the parent company of a number of subsidiaries, including JBC of Seattle. *Id.* Gemini had no control over the operations of JBC of Seattle. CP 964, ¶ 7.

JBC of Seattle had exclusive responsibility for the control and operation of the Jillian’s club located in Seattle, Washington that is the subject of the underlying lawsuit. *Id.* ¶ 2.

As the above-description reveals, Gemini is a minority shareholder of the parent company of the parent company of the company that operated Jillian’s. The following diagram shows the relationship between Gemini and the JBC entities:



See CP 317, ¶¶ 3-4.

B. The Jillian’s assets underperform and accumulate debt.

The Jillian’s assets did not turn out to be a profitable investment. CP 1010-11, ¶¶ 4-9. Within two years, JBC Entertainment required

additional capital to keep the Jillian's assets afloat. CP 1010, ¶ 5. By 2011, JBC Holdings had sold or closed 13 of the 20 locations. *Id.* ¶ 4. Some clubs were sold to secure cash to run other locations or fend off the secured lender. *Id.* Other clubs were closed due to their inability to make rent payments or other financial obligations. *Id.*

By 2011, JBC Entertainment was unable to satisfy its obligations to its first- and second-position secured lenders, GE Capital and Fifth Third Bank, and defaulted on its payment obligations to each. CP 1010-11, ¶ 6. For years, JBC Entertainment had survived on limited cash resources, stretching payments to both its secured and unsecured creditors. *Id.* Critical payments such as rent to its landlords were often not paid on time. CP 1010, ¶ 4

Because of the relatively small amount of the JBC Entertainment loan relative to most of its portfolio, GE Capital did not aggressively pursue acceleration of its loan to JBC Entertainment for a period of time, despite the fact that JBC Entertainment was not making payments on its loan. CP 1010-11, ¶ 6. In early 2011, however, GE Capital began to apply pressure to JBC Entertainment for sizable payments or to provide additional credit support from the investor group. CP 1011, ¶ 7. GE Capital held a valid, recorded security interest against the Jillian's assets. CP 959, ¶ 7.

C. Mika files suit and his claims against Gemini are dismissed.

Mika's complaint alleges that he was injured in March 2010 at or near the Jillian's Billiards Club located in Seattle, Washington. CP 3-4. On January 5, 2011, Mika filed a negligence suit against various entities and individuals, including JBC Holdings, JBC of Seattle, and Gemini. CP 3. For unknown reasons, Mika did not name JBC Entertainment, the parent company of JBC of Seattle. CP 3. Among other claims, Mika asserted that the defendants' negligence proximately caused his injuries. CP 7.

On June 30, 2011, the trial court dismissed Gemini from the case on summary judgment for lack of jurisdiction. CP 1173. Gemini argued that (1) the court lacked jurisdiction over it, and (2) liability could not exist as a matter of law because Gemini was legally distinct from the JBC entities. *Id.* Mika points to no evidence that Gemini had reason to believe that, despite obtaining summary judgment, it could potentially be added back into the case at a later date.

D. After Gemini is dismissed, non-party JBC Entertainment's assets are sold to GameWorks.

On May 20, 2011—more than a month before Gemini was dismissed from Mika's case—GameWorks approached JBC Entertainment about the possibility of purchasing its remaining assets. CP 1011, ¶ 11.

GameWorks successfully operates multi-site entertainment businesses throughout the United States. CP 1012, ¶¶ 13-14. Specifically, GameWorks sought to purchase JBC Entertainment's operating subsidiaries, including locations in California. CP 322.

On August 16, 2011, GameWorks Acquisition LLC was formed. CP 957, ¶ 3. The parties negotiated the sale over several months. CP 958, ¶ 4. When contemplating the asset sale, the investor group understood that if the sale proceeds fell short of the payoff amount for the loan provided by Fifth Third Bank, the bank would draw from the cash collateral provided by the investors to satisfy the shortfall. CP 1012, ¶ 18.

On October 18, 2011, JBC Entertainment sold all of its remaining assets, including JBC of Seattle, through a series of asset sales to GameWorks Acquisition LLC in an arm's-length transaction. CP 957-58, ¶¶ 3-4. The assets were sold at the highest possible value to satisfy JBC Entertainment's secured creditor obligations to avoid a bankruptcy filing or other shutdown of the businesses. CP 1012, ¶¶ 15-16. All but approximately \$50,000 of the entire proceeds from the sale went to satisfy obligations held by the secured creditors of JBC Entertainment. CP 318-19. JBC Entertainment retained this approximately \$50,000 to wind up its corporate affairs. *Id.*

JBC Entertainment sold the Jillian's assets because the company no longer had the cash needed to operate. CP 281, // 11-20. At the time of sale, the company had secured debt obligations of \$6 million, which exceeded the value of its assets. *Id.* The company's shareholders and lenders were unwilling to provide the capital needed to continue to operate the Jillian's assets. *Id.*

Gemini lost \$13 million on its investment in the Jillian's assets. CP 319, ¶ 11. The proceeds of the asset sale were not enough to satisfy both the GE Capital and Fifth Third Bank loans, and Fifth Third Bank recovered against cash collateral to satisfy the outstanding balance of the \$3.6 million unpaid loan to JBC Entertainment. CP 1013, ¶ 19.

When the sale was executed, GameWorks and the sellers shared no common officers, directors, or shareholders. CP 958, ¶ 5. No member of GameWorks' Board of Directors had any prior relationship with the JBC entities, Gemini, or their respective officers, directors, or shareholders. *Id.*

A month after the transaction, GameWorks hired Greg Stevens, the former CEO of JBC Entertainment and JBC of Seattle, as its interim CEO. *Id.* GameWorks hired Stevens because of his experience, and because his previous work (in a niche business for which there are a very limited number of persons qualified to act as CEO) made him an attractive candidate. CP 959, ¶ 8. Five months later, GameWorks determined that

Stevens was the most qualified candidate and made him permanent CEO.

Id.

E. Mika amends his complaint to plead new claims against Gemini and those claims are also dismissed on summary judgment.

After the asset sale, Mika moved the Court to amend his Complaint to add new claims related to the asset sale and to re-name Gemini as a defendant. CP 1176-77. The court granted his request. *Id.* Mika alleged that Gemini engaged in “post-tort activity of ceasing operations of JBC Entertainment and disposing of the assets” to avoid liability for Mika’s injuries. CP 191, ¶ 32. Mika also asserted that Gemini had ultimate control over JBC Entertainment and so should be held liable for JBC Entertainment’s acts or omissions. *Id.* ¶ 33.

On January 11, 2013, Gemini moved for summary judgment. CP 214-33. Gemini again argued that the court lacked personal jurisdiction over Gemini. CP 215. Gemini also argued that it could not be held liable as a matter of law for the alleged negligence of another entity because it is legally distinct from the JBC entities. CP 215-17. Gemini asserted that Mika offered no basis for the court to pierce the corporate veil of three separate corporations to extend liability to Gemini. CP 216. Gemini explained that the asset sale was an arm’s-length transaction and was

intended to satisfy JBC Entertainment's debts to its secured creditors. CP 500-03.

The trial court granted Gemini's motion for summary judgment in a reasoned, written opinion by the Honorable William Downing. CP 513-16. The court concluded that Gemini was subject to the court's jurisdiction as a result of its involvement in the asset sale, but held that the claims against Gemini failed on the merits. CP 515. The court held that the evidence Mika offered was "insufficient, as a matter of law, to permit the [fraudulent transfer] claim to go forward." *Id.* Specifically, the court held that "[t]he proffered evidence, examined in a light most favorable to the non-moving party (plaintiff), does not present a genuine issue as to material facts that, if proven, would establish the plaintiff's claims." *Id.* The court concluded, "[e]ssentially, the plaintiff's claim against Gemini rests upon an inference to be drawn from the timing of the sale of JBC Entertainment's assets while his premises liability claim was pending; in opposition to such speculation stands the overwhelming direct evidence that, at least as far as Gemini is concerned, the sale was compelled by sound business reasons without regard to the unadjudicated tort claims of the plaintiff." CP 516. It noted that Gemini lost money on the transaction and JBC Entertainment's secured creditors received some relief. *Id.*

The court also held that Mika's evidence was insufficient to establish a claim for "piercing the corporate veil" and "holding Gemini liable for torts by a corporate entity of which it was a shareholder." *Id.*¹ The court concluded that there was "no evidence of 'corporate misconduct' by Gemini resulting in actual harm to [Mika]." *Id.* The court dismissed all claims against Gemini. *Id.*

F. The trial court dismisses Mika's claims against other defendants and Mika voluntarily dismisses his remaining claims.

After Gemini's dismissal from the case, claims against the majority of the defendants were dismissed. CP 754-58; CP 831-40. On February 17, 2015, Mika moved the trial court for voluntary dismissal of his remaining claims without prejudice. CP 759-60. On March 3, 2015, the trial court granted the motion. CP 765.

On March 31, 2015, Mika filed a notice of appeal seeking review of "the Orders in the Superior Court and Final Judgment entered March 3, 2014." CP 767.

¹ More accurately stated, Mika sought to hold Gemini liable for the alleged negligence of JBC Seattle, which is an indirect subsidiary of a holding company in which Gemini is a minority shareholder.

ARGUMENT

A. Standard of review

The Court of Appeals reviews the trial court's summary judgment de novo. *Huff v. Budbill*, 141 Wn.2d 1, 7, 1 P.3d 1138 (2000). On review of an order granting summary judgment, the appellate court "engage[s] in the same inquiry as the trial court." *Id.* at 7-8 (internal citations omitted). Summary judgment is appropriate where, as here, no genuine dispute of material facts exist and a party is entitled to judgment as a matter of law. *Id.* "All facts and reasonable inferences are reviewed in the light most favorable to the non-moving party, and all questions of law are reviewed de novo." *Id.*

"A material fact is one upon which the outcome of the litigation depends in whole or in part." *Sedwick v. Gwinn*, 73 Wn. App. 879, 884, 873 P.2d 528 (1994) (internal citation omitted). "[M]ere allegations, denials, opinions, or conclusory statements" are insufficient to withstand summary judgment. *Int'l Ultimate, Inc. v. St. Paul Fire & Marine Ins. Co.*, 122 Wn. App. 736, 744, 87 P.3d 774 (2004). Instead, the non-moving party "must set forth specifics indicating material facts for trial." *Id.*

The appellate court "must view the evidence presented through the prism of the substantive evidentiary burden." *Sedwick*, 73 Wn. App.

at 885 (quoting *Adams v. Allen*, 56 Wn. App. 383, 393, 783 P.2d 635 (1989)). Although the operative facts of Mika's corporate disregard and fraudulent transfer claims are the same, the evidentiary burdens are different. On a corporate disregard claim, summary judgment for the defendant is proper if plaintiff "fails to show evidence of either the requisite manipulation or the perpetration of a fraud on plaintiffs." *Minton v. Ralston Purina Co.*, 146 Wn.2d 385, 398, 47 P.3d 556 (2002) (internal citation omitted). On a fraudulent transfer claim, summary judgment is proper if the plaintiff fails to establish "actual intent" to defraud by "clear and satisfactory proof." *Clearwater v. Skyline Constr. Co., Inc.*, 67 Wn. App. 305, 321, 835 P.2d 257 (1992).

Under these standards, the trial court properly granted Gemini summary judgment on Mika's corporate disregard and fraudulent transfer claims. With respect to the corporate disregard claims, the asset sale was an arm's-length transaction intended to satisfy, not defraud, creditors and Mika has failed to produce any evidence of intentional misconduct. Even if he did, his claim still fails because he cannot prove that disregarding the corporate form will "prevent an unjustified loss" to him. With respect to the fraudulent transfer claims, Mika lacks standing because he is not a creditor of any JBC entity or Gemini and, even if he was, he has failed to produce any evidence of a fraudulent transfer committed by Gemini. Even

if Mika were to present evidence of fraud, which he has not, the asset sale is not the proper subject of a fraudulent transfer claim because JBC Entertainment's assets were subject to a valid, perfected security interest that would have been effective against any judgment Mika might have obtained. This Court should therefore affirm.

B. The trial court properly granted Gemini summary judgment on the corporate disregard claim because Gemini is legally distinct from the JBC entities and Mika offers no basis for disregarding the corporate form.

The trial court correctly held that Mika had failed to put forth any evidence to justify disregarding the distinct forms of Gemini and the JBC entities. Mika argues on appeal that the corporate veil should have been disregarded because Gemini effectuated the sale of JBC Entertainment's assets to evade liability for Mika's negligence claim. But three facts are fatal to this claim: (1) prior to the sale, the trial court dismissed all of Mika's claims against Gemini (2) the assets were already subject to a valid prior security interest and (3) Mika failed to name JBC Entertainment as a defendant in the underlying suit. At the time of the asset sale, neither Gemini nor JBC Entertainment had any actual or potential liability to evade. The evidence demonstrates that the asset sale was an arm's-length transaction intended to satisfy, not defraud, creditors, and Mika's mere conclusory statements regarding Gemini's motives or intent were

insufficient to place those facts in dispute. The trial court appropriately resolved this claim on summary judgment and this Court should affirm.

1. Gemini is legally distinct from the JBC entities.

Mika does not dispute, and cannot dispute, that Gemini is a separate legal entity from the operator of Jillian’s, JBC of Seattle. It is a bedrock principle of corporate law that a corporation is legally distinct from its shareholders. “[T]he purpose of a corporation is to limit liability.” *Meisel v. M&N Modern Hydraulic Press Co.*, 97 Wn.2d 403, 411, 645 P.2d 689 (1982). Corporations are created to protect shareholders from personal liability for business debts and claims, such as judgments. *See Rapid Settlements, Ltd.’s Application for Approval of Transfer of Structured Settlement Payment Rights*, 166 Wn. App. 683, 692, 271 P.3d 925 (2012) (noting that ordinarily “a corporation is treated as a separate legal entity and its liabilities are not attributable to its owners and officers”). Whether a corporation is wholly owned by only one shareholder does not lessen its separate legal status: a parent and subsidiary are two separate entities and the acts of one cannot be attributed to the other. *See Minton*, 146 Wn.2d at 398-99.

Gemini is legally distinct from the JBC entities. Gemini is a minority shareholder of JBC Holdings, the parent company of JBC Entertainment. JBC Entertainment owned multiple Jillian’s assets,

including JBC of Seattle. JBC of Seattle owned and operated the Jillian's location where Mika was injured. Mika has presented no evidence that Gemini is anything more than a minority shareholder of JBC Holdings, a corporation that is three steps removed from JBC of Seattle. JBC Holdings, and by extension the other JBC entities, are separate legal entities and their acts and omissions cannot be attributed to Gemini.

2. Gemini had no actual or potential liability for Mika's injuries and, even if it did, disregarding the corporate form would have no impact on Mika's ability to recover.

Because Gemini is a distinct legal entity from JBC Seattle, Mika was required to set forth a legal basis for disregarding the corporate separateness of these entities. As the trial court properly recognized, Mika failed to set forth any evidence showing that the corporate forms should be disregarded. Washington courts have great deference for the corporate form and will only disregard it in "exceptional cases." *Uni-com Northwest, Ltd. v. Argus Publ'g Co.*, 47 Wn. App. 787, 798, 737 P.2d 304 (1987) ("[T]he doctrine of disregarding the corporate entity is an equitable remedy and will be imposed only in exceptional cases to prevent fraud or manifest injustice."). In *Meisel v. M&N Modern Hydraulic Press Company*, the Washington Supreme Court outlined a two-factor test for establishing a claim for corporate disregard: (1) the corporate form must

be intentionally used to violate or evade a duty; and (2) disregard must be necessary and required to prevent unjustified loss to the injured party. 97 Wn.2d at 410 (citing *Morgan v. Burks*, 93 Wn.2d 580, 587, 611 P.2d 751 (1980)) (internal quotations omitted). Mika did not present evidence that could meet either prong of this test, and the trial court correctly granted summary judgment on his corporate disregard claim.

a. Mika cannot demonstrate intentional misconduct because Gemini and JBC had no actual or potential liability for Mika’s claims.

To establish the first *Meisel* factor, Mika must prove that the corporate form was “intentionally used to violate or evade a duty.” *Meisel*, 97 Wn.2d at 410. This factor requires an intentional abuse of the corporate form, such as fraud or misrepresentation. *Eagle Pac. Ins. Co. v. Christensen Motor Yachts Corp.*, 85 Wn. App. 695, 708, 934 P.2d 715 (1997).

The only basis that Mika offers to justify piercing the corporate veil is his assertion that Gemini “gutted” JBC Entertainment in an effort to avoid a potential judgment against it. *See* App. Br. at 24-25. This argument fails for three reasons.

First, this argument erroneously presupposes that Mika had an actual or potential claim against Gemini. JBC Entertainment’s sale of JBC of Seattle came after the trial court granted Gemini’s motion for summary

judgment and Gemini was dismissed from this case. Mika's claims had been judged meritless, and the trial court had held that Gemini could not even be sued in Washington. Gemini had no reason to believe it would be drawn back into the case.

Second, Mika offered no evidence to demonstrate that the asset sale was anything other than an arm's-length transaction. JBC Entertainment had not generated sufficient profits or cash flow to re-invest in its units, or to pay its secured lenders on a timely basis to remain in compliance with its secured lender's requirements. JBC Entertainment often faced payroll shortages. Mika does not contest that JBC Entertainment's assets were sold for reasonably equivalent value. JBC Entertainment's first secured lender accepted a modest discount to be paid in full. Although the second secured lender received proceeds from the asset sale, those proceeds only covered approximately 20% of what was due. As a result, the lender collected shareholder guarantees to satisfy the remaining balance. JBC Entertainment retained approximately \$50,000 from the JBC Entertainment asset sale to wind up its corporate affairs. None of the proceeds of the sale of JBC Entertainment's assets (including JBC of Seattle) were distributed to JBC Holdings. The evidence before this Court demonstrates that the parties followed all corporate formalities

throughout the transaction. Mika produces no evidence of impropriety because there is none.

Third, this argument mischaracterizes Gemini's role as a minority shareholder in JBC Holdings. Gemini was involved in the decision to sell JBC Entertainments assets and to repay its defaulted secured credit obligations. But Gemini did not control JBC Holdings or JBC Entertainment. The ultimate decisions were made by JBC Entertainment's shareholders and management, consistent with any corporate decision. Mika makes no assertion otherwise, and he cannot show that Gemini orchestrated any wrongful transfer of assets from its indirect subsidiary.

Mika also asserts that the timing of the sale suggests that Gemini "gutted" JBC Entertainment to avoid liability for Mika's claims. App. Br. at 12. This assertion relies on the incorrect assumption that Gemini and JBC Entertainment had any actual or potential liability to avoid: Gemini had been dismissed from the suit and JBC Entertainment had never been named as a defendant. The assets were sold after Gemini's potential liability for Mika's injuries was dismissed, not incurred.

Mika finally argues that Gemini's shared ownership and control with JBC Holdings and JBC Entertainment are probative of Gemini's motives or intent. But absent evidence of fraud, whether a corporation is a subsidiary of another or shares ownership, officers, or employees is

irrelevant. “Mere common ownership of stock, the same officers, employees, etc., does not justify disregarding the separate corporate identities unless a fraud is being worked upon a third person.” *Minton*, 146 Wn.2d at 399 (citing *Rena-Ware Distribs., Inc. v. State*, 77 Wn.2d 514, 518, 463 P.2d 622 (1970)).

Mika offers no evidence that Gemini had any obligation to him, much less that Gemini avoided that obligation. Mika fails to demonstrate the basis for Gemini’s actual or potential liability where all of Mika’s claims against Gemini had been dismissed. Even if Mika were to demonstrate that Gemini had any obligation to him, which he has not, the asset sale was an arm’s-length transaction intended to satisfy, not defraud, creditors. Mika’s conclusory statements about the “judgment” he is owed and blanket allegations of fraud were insufficient to withstand summary judgment, and the trial court properly dismissed Mika’s claims against Gemini.

b. Disregarding the corporate form would have no impact on Mika’s ability to recover.

To establish the second *Meisel* factor, Mika must demonstrate that piercing the corporate veil is “necessary and required to prevent unjustified loss to the injured party.” *Meisel*, 97 Wn.2d at 410. In other words, the intentional misconduct must actually harm the plaintiff, and

corporate disregard must be “necessary and required” to prevent that harm. “[H]arm alone” is insufficient. *See id.*

Even if the court were to find any evidence of intentional misconduct—and here it should not—that misconduct must actually worsen the plaintiff’s position. *See Eagle Pac. Ins. Co.*, 85 Wn. App. At 708 (declining to pierce the corporate veil despite a finding of intentional misconduct where the misconduct had no effect on plaintiff’s ability to collect its judgment). In *Meisel*, the Washington Supreme Court explained that “[t]he purpose of a corporation is to limit liability, and unless we are willing to say fulfilling that purpose is misconduct, [the party seeking to pierce the corporate veil] is hard put to argue a theory of corporate disregard.” *Id.* at 411. “Failure to disregard must ‘aid the consummation of a fraud or wrong upon others.’” *Morgan*, 93 Wn.2d at 587 (internal citation omitted).

“The absence of an adequate remedy alone does not establish corporate misconduct.” *Meisel*, 97 Wn.2d at 411. As the Washington Supreme Court explained in *Morgan v. Burks*:

The tortfeasor and the tort victim take one another as they are. Plaintiff is not entitled to a solvent defendant, and cannot be allowed to create one by asserting disregard of the corporate entity when the activities, which admittedly otherwise might justify disregard, have had no effect on the plaintiff’s ability to collect a judgment from the defendant corporation at the time the doctrine is asserted.

93 Wn.2d at 589.

Even if Mika had offered evidence of intentional misconduct, which he did not, his claim still fails because he cannot prove that disregarding the corporate form will “prevent an unjustified loss” to him. *See id.* at 587. First, the asset sale had no impact on Mika because he was not, and has never been, a creditor of Gemini or JBC Entertainment. At the time of sale, Mika did not have a claim, much less a judgment, against Gemini because Gemini had been dismissed from the case. The sale of JBC Entertainment’s assets, including JBC of Seattle, was unrelated to this lawsuit.

Second, even if Mika were to obtain a judgment against Gemini or JBC Entertainment, disregarding the corporate form would not impact his ability to recover. JBC Entertainment’s assets were encumbered by several secured creditors with total outstanding secured debt of approximately \$6 million. In the event that Mika could ever obtain a judgment against JBC Entertainment, this unsecured claim would have been inferior to the rights of JBC Entertainment’s secured creditors. Therefore, any judgment held by Mika would have been essentially uncollectable against JBC Entertainment, regardless of whether or not the JBC Entertainment asset sale had occurred.

The trial court correctly concluded that the evidence was “insufficient to establish a claim for ‘piercing the corporate veil’ and holding Gemini liable for torts by a corporate entity of which it was a shareholder” because “[t]here is no evidence of ‘corporate misconduct’ by Gemini resulting in actual harm to the plaintiff.” CP 516. Mika was not permitted to avoid summary judgment by presenting the trial court with self-serving arguments and conclusory statements about Gemini’s “intent” to defraud Mika. *See Int’l Ultimate, Inc.*, 122 Wn. App. at 744 (on summary judgment, the nonmoving party may not rely on speculation, mere allegations, denials, or conclusory statements to establish a genuine issue of material fact). The trial court properly concluded that, as a matter of law, Mika failed to establish a claim for corporate disregard against Gemini.

C. The trial court properly granted Gemini summary judgment on the fraudulent transfer claim because Mika lacks standing and, even if he had standing, the asset sale was intended to satisfy, not defraud, creditors.

The trial court was correct in recognizing that Mika’s fraudulent transfer claim² was foreclosed by “overwhelming direct evidence” that the sale of the Jillian’s assets “was compelled by sound business reasons without regard to the unadjudicated tort claims of the plaintiff.” CP 516.

² Mika’s claim is brought under the Uniform Fraudulent Transfer Act, RCW 19.40 (the “UFTA”).

As it did on Mika's corporate disregard claim, the trial court properly granted Gemini summary judgment on Mika's fraudulent transfer claim.

As a threshold matter, Mika is not, and has never been, a creditor of Gemini or JBC Entertainment and so he lacks standing to assert a fraudulent transfer claim against Gemini. Even if Mika had standing, he failed to produce any actual evidence of a fraudulent transfer committed by Gemini. Because JBC Entertainment was not a party in the lawsuit and Mika had no pending or actual claims against it, JBC was free to sell its assets as it wished. Furthermore, the asset sale is not the proper subject of a fraudulent transfer claim because JBC Entertainment's assets were subject to a valid, perfected security interest that would have been effective against any judgment Mika may have obtained. They are not considered "transfers" under the UFTA. Because Mika's fraudulent transfer claim fails as a matter of law, this Court should affirm the trial court's summary judgment on the claim.

1. Mika lacks standing because he is not a creditor of Gemini.

Mika's fraudulent transfer claim founders at the outset because he is not, and never was, a "creditor" of Gemini. Under Washington law, a transfer is fraudulent as to a creditor "if the debtor made the transfer . . . with actual intent to hinder, delay, or defraud any creditor of the debtor."

RCW 19.40.041(a)(1). A creditor is “a person who has a claim.” RCW 19.40.011(4). A “claim” is “a right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured.” RCW 19.40.011(3).

Mika lacks standing to assert this claim because he is not, and has never been, a creditor of Gemini or JBC Entertainment.³ He has no “right to payment”, disputed or otherwise, because neither Gemini nor JBC Entertainment has or had any actual or potential liability to Mika. Even if Mika were to secure a judgment against JBC of Seattle, JBC Entertainment is a distinct legal entity and is not is liable for the debts or obligations of JBC of Seattle. At most, Mika has contingent unsecured claims against other named parties in the lawsuit, but in no respect does either Gemini or any other named JBC entity currently have any financial obligation to Mika, disputed or otherwise. Mika lacks standing to assert this claim and this Court should affirm the trial court’s summary judgment dismissal of his fraudulent transfer claim against Gemini.

2. Gemini did not cause a “transfer” under the plain language of the UFTA.

³ Because Mika has no actual or potential claims against Gemini or JBC Entertainment, it follows that they are also not “debtors” of Mika. *See* RCW 19.40.011(6) (A debtor is “a person who is liable on a claim.”).

The asset sale, even if Mika had standing to challenge it, is not the proper subject of a fraudulent transfer claim because JBC Entertainment’s assets were encumbered by a perfected security interest at the time of the sale. Mika must demonstrate that the disputed transaction is subject to the UFTA as an element of his claim. *Eagle Pac. Ins. Co.*, 85 Wn. App. at 704. Mika claims that the asset sale was “[a] transfer made . . . [w]ith actual intent to hinder, delay, or defraud [a] creditor of the debtor.” RCW 19.40.041(a)(1) (emphasis added); *cited in* App. Br. at 12. But because the assets that were the subject of the asset sale were subject to a valid security interest, there was no “transfer” under the UFTA.

A “transfer” is “every mode . . . of disposing of or parting with an asset or an interest in an asset . . .” RCW 19.40.011(12) (emphasis added). The statutory definition of an “asset” expressly excludes “[p]roperty to the extent it is encumbered by a valid lien.” RCW 19.40.011(2)(i). A “lien” is defined broadly as a “charge against or an interest in property to secure payment of a debt or performance of an obligation, and includes a security interest created by agreement . . .” RCW 19.40.011(8). A lien is “valid” if it is “effective against the holder of a judicial lien subsequently obtained” RCW 19.40.011(13).

Mika does not contest that GE Capital held a valid, perfected security interest in JBC Entertainment’s assets at the time of sale. Such a

perfected security interest would be effective against any subsequently obtained judicial lien, such as a judgment. The proceeds of the asset sale were not even sufficient to fully repay JBC Entertainment's secured lenders, and so Mika had no chance of recovery even if he were to somehow obtain a judgment against JBC Entertainment. The UFTA properly recognizes that no "transfer" occurs of assets that are subject to a prior, valid security interest. *See* RCW 19.40.011(2)(i), (8).

Because Mika cannot show that the asset sale involved a "transfer" of "assets" under the UFTA, his claim seeks relief that is wholly outside of the UFTA. The trial court properly held that Mika's fraudulent transfer claim failed as a matter of law.

3. The asset sale was not intended to defraud creditors and bears no indicia of fraud.

Even if Mika could show standing and a transfer—and he cannot—his claim nevertheless failed on the merits because the Jillian's asset transfer was not fraudulent. "[A] fraudulent transfer occurs where one entity transfers an asset to another entity, with the effect of placing the asset out of the reach of a creditor, with either the intent to delay or hinder the creditor or with the effect of insolvency on the part of the transferring entity." *Thompson v. Hanson*, 168 Wn.2d 738, 744, 239 P.3d 537 (2009) (emphasis added) (citing RCW 19.40.041(a)(1), (2)). A creditor must

prove actual intent to defraud by “clear and satisfactory proof.” *Sedwick*, 73 Wn. App. at 885. The burden of proof rests on the party alleging the fraudulent transfer. *Id.*⁴

Mika failed to offer any evidence to support that burden. His assertions that he need only “raise a reasonable inference” to withstand summary judgment are inconsistent with the case law. *See* App. Br. at 22. When considering the summary judgment of a fraudulent transfer claim, the court “must view the evidence presented through the prism of the substantive evidentiary burden.” *Adams v. Allen*, 56 Wn. App. 383, 393, 783 P.2d 635 (1989), *overruled on unrelated grounds by Caughill v. Grp. Health Co-op. of Puget Sound*, 124 Wn.2d 217, 232, 876 P.2d 898 (1994). Mika had the burden of proving that Gemini had the actual intent to defraud, and he failed to present any evidence to meet his burden.

To survive summary judgment, Mika was required to provide evidence that Gemini actually intended to defraud him. Even assuming Mika is a creditor of Gemini, which he is not, Mika fails to present any evidence of actual intent. Courts consider several indicia of fraud in determining whether a debtor had the requisite intent, including:

⁴ Mika cites *Sedwick v. Gwinn* for the proposition that a fraudulent transfer cannot be resolved on summary judgment where the debtor denies the actual intent to defraud. But *Sedwick* concerned the propriety of a grant of summary judgment for the *plaintiff*, not the defendant. 73 Wn. App. 879, 887, 873 P.2d 528 (1994).

1. The transfer or obligation was to an insider;
- ...
4. Before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit;
5. The transfer was of substantially all the debtor's assets;
- ...
7. The debtor removed or concealed assets;
8. The value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;
9. The debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred; [and]
10. The transfer occurred shortly before or shortly after a substantial debt was incurred.

RCW 19.40.041(1), (4), (5), (7), (8), (9), (10).⁵ These indicia of fraud may provide “circumstantial evidence of intent,” but “no more.” *Sedwick*, 73 Wn. App. at 887 (internal citations omitted). They are intended only to guide the court’s inquiry. *Id.*

The asset sale bears no indicia of fraud, and Mika’s arguments to the contrary rely on incorrect assumptions of fact and law. First, the transfer was not to an “insider.” An “insider” is any one of the following: “(1) a general partner of the debtor; (2) a relative of a general partner in or

⁵ The other “indicia” of fraud are not relevant to this dispute. *See* RCW 19.40.041(2) (whether “[t]he debtor retained possession or control of the property transferred after the transfer”), (3) (whether “[t]he transfer or obligation was disclosed or concealed”), and (6) (whether “[t]he debtor absconded”).

a person in control of the debtor; (3) another partnership in which the debtor is a general partner; . . . or (4) a person in control of the debtor.” RCW 19.40.011(7)(iii)(A)-(E). GameWorks fits none of those definitions. Neither Gemini nor JBC Entertainment had any prior relationship to GameWorks or its directors, officers, or shareholders. The asset sale was an arm’s-length transaction and all parties observed the proper corporate formalities. Mika’s assertions of collusion between Gemini and GameWorks are baseless.

The fourth, fifth, and ninth badges of fraud are inapplicable because JBC Entertainment, not Gemini, sold its assets. Because JBC Entertainment was not a named party and Mika has no pending or actual claims against it, whether JBC Entertainment transferred most or all of its assets or became insolvent after the transfer is irrelevant. Regardless, JBC Entertainment had been judgment proof for years, so the asset sale would have had no impact on a judgment creditor’s ability to collect.

The eighth factor weighs *against* a finding of fraud. JBC Entertainment was sold for reasonably equivalent value. Gemini and JBC Entertainment were motivated to seek the highest price possible to satisfy JBC Entertainment’s obligations to secured creditors. Due to its existing portfolio of multi-site entertainment businesses, GameWorks was uniquely positioned to offer a high price for the JBC Entertainment assets. Mika

does not dispute that JBC Entertainment was sold for reasonably equivalent value.

The fourth and tenth factors also weigh *against* a finding of fraud because the transfer occurred after a debt was dismissed, not after it was incurred. RCW 19.40.041(10) (whether the transaction occurred “shortly before or shortly after a substantial debt was incurred” may suggest it was fraudulent); RCW 19.40.041(4) (whether “the debtor had been sued or threatened with suit . . . before the transfer was made”).⁶ At the time of sale, Gemini had been dismissed from the lawsuit and Mika had no actual or pending claims against it.

Gemini is entitled to summary judgment because Mika failed to demonstrate that, even with all reasonable inferences drawn in his favor, he could establish the elements of a fraudulent transfer claim. The trial court properly dismissed Mika’s fraudulent transfer claim on summary judgment, and this Court should affirm.

⁶ Mika’s reliance on *Allen v. Kane*, 79 Wn.2d 248, 140 P. 534 (1914), is misplaced. That case involves two individuals and a contract dispute. *Id.* at 249-50. The Court considered the propriety of a transfer that occurred immediately after the defendant broke a contract with plaintiff. *Id.* That case was decided decades before the Washington legislature enacted the Uniform Fraudulent Transfer Act and does not illuminate the facts or law surrounding this dispute.

CONCLUSION

The facts of this case are subject to only one interpretation: JBC Entertainment's assets were sold to satisfy, not defraud, creditors. Mika set forth no actual evidence to dispute that interpretation. This case presents none of the exceptional circumstances that justify piercing the veil of one, much less three, legally distinct corporations to extend liability to Gemini. Even if this court were to pierce the corporate veil, Mika fails to present any, much less "clear and satisfactory," evidence that the asset sale was a fraudulent transfer.

Summary judgment allows parties to avoid the time and expense of trial where, as here, it is clear that the plaintiff cannot marshal the evidence needed to support his position. The material facts are undisputed and Mika's mere accusations and conclusory statements are insufficient to withstand summary judgment. Mika placed no material facts in dispute, and as the trial court determined in a well reasoned opinion, Gemini was entitled to judgment as a matter of law on both claims. This Court should therefore affirm.

Respectfully submitted this 23rd day of November, 2015.

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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on November 23, 2015 I caused service of the foregoing document on the following:

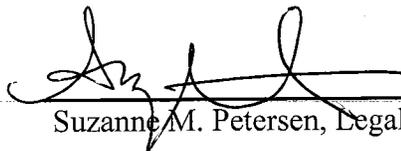
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