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COURT OF APPEALS

STATE OF NEW YORK

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MATTER OF BELZBERG,

Appellant,

-against-

No. 149

VERUS INVESTMENTS HOLDINGS INC.,

Respondent.

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20 Eagle Street  
Albany, New York 12207  
September 4, 2013

Before:

CHIEF JUDGE JONATHAN LIPPMAN  
ASSOCIATE JUDGE VICTORIA A. GRAFFEO  
ASSOCIATE JUDGE SUSAN PHILLIPS READ  
ASSOCIATE JUDGE ROBERT S. SMITH  
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

Appearances:

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Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: 149?

2 Counsel, do you want any rebuttal time?

3 MR. HAVELES: Three minutes, Your Honor.

4 CHIEF JUDGE LIPPMAN: Three minutes, sure.

5 Go ahead.

6 MR. HAVELES: Thank you. Your Honor, Peter  
7 Haveles on behalf of Appellant Samuel Belzberg.

8 First, I want to note I think there are  
9 three indisputable facts that get omitted from the  
10 memorandum decision that the Appellate Division  
11 generated in this case. First is that Winton is a  
12 party to the arbitration, because it received a  
13 direct benefit. And to get a direct benefit - - -

14 CHIEF JUDGE LIPPMAN: Why didn't he receive  
15 the direct benefit?

16 MR. HAVELES: Be - - - well - - -

17 CHIEF JUDGE LIPPMAN: I think there's sort  
18 of a - - -

19 MR. HAVELES: It depends on - - -

20 CHIEF JUDGE LIPPMAN: - - - a pattern - - -  
21 a pattern here with the Appellate Division decision;  
22 they're in effect cutting through everything and  
23 saying oh, he's really the direct beneficiary. Why  
24 is that a wrong approach?

25 MR. HAVELES: Because it depends - - - and

1 let me step back and answer your question by talking  
2 about what the word "direct" means - - -

3 CHIEF JUDGE LIPPMAN: Go ahead.

4 MR. HAVELES: - - - Your Honor, because I  
5 think that answers your question.

6 CHIEF JUDGE LIPPMAN: Sure.

7 MR. HAVELES: The issue is not did I  
8 receive the benefits, so therefore I'm the direct  
9 recipient.

10 CHIEF JUDGE LIPPMAN: Right.

11 MR. HAVELES: The purpose of the word  
12 "direct" that used in the case law outside of this  
13 state that has developed the doctrine is what is the  
14 causal link? Is it a direct cause or an indirect  
15 cause? So we're looking at a causation issue, not  
16 the question of receipt. And that's made very clear,  
17 for instance - - -

18 CHIEF JUDGE LIPPMAN: So putting it in that  
19 context - - -

20 MR. HAVELES: Yes.

21 CHIEF JUDGE LIPPMAN: - - - why isn't he  
22 the direct beneficiary?

23 MR. HAVELES: Because here, the mo - - -  
24 the trade was Winton's trade with Winton's money, and  
25 the trade proceeds came out, and for a week and a

1 half they sat in a bank account, and then ten days  
2 after the trade was executed, Belzberg is saying, the  
3 money is still sitting there; I'm using my authority  
4 to control what happens to Winton's money. I want a  
5 portion of the trade proceeds to be sent to my friend  
6 for a loan.

7 JUDGE SMITH: Assume - - - assume you're  
8 right; it's not a direct benefit.

9 MR. HAVELES: Yes, Your Honor.

10 JUDGE SMITH: You still - - - it's still  
11 pretty clear that he used Winton's money as though it  
12 was his own.

13 MR. HAVELES: Absolutely.

14 JUDGE SMITH: So why doesn't an alter ego  
15 theory work here?

16 MR. HAVELES: Because that's not the - - -  
17 first of all, that's not an issue that was challenged  
18 by the trial court - - - the tri - - - from the trial  
19 court's decision. The trial court performed an alter  
20 ego and veil-piercing analysis, found there was  
21 insufficient evidence of that fact, and the  
22 respondent, Verus, has not appealed and challenged  
23 the trial court's ruling that there is no basis to  
24 pierce the veil.

25 CHIEF JUDGE LIPPMAN: So you can't pierce -

1           - - let's accept that: you can't pierce the  
2           corporate veil, the trial court said. The Appellate  
3           Division doesn't go on piercing the corporate veil,  
4           does it?

5                       MR. HAVELES: No, the Appellate Division  
6           makes this solely a direct benefit, and it's because  
7           - - -

8                       JUDGE GRAFFEO: They looked at the fact he  
9           initiated this whole scheme.

10                      MR. HAVELES: He controlled - - - he  
11           controlled the trade, absolutely. And he controlled  
12           the trade in that - - -

13                      JUDGE GRAFFEO: Why is that not enough?  
14           Why does that make this - - -

15                      MR. HAVELES: Well - - -

16                      JUDGE GRAFFEO: - - - such an egregious  
17           determination?

18                      MR. HAVELES: Your Honor, that's very much  
19           like the situation that the courts encountered in the  
20           Andres Holding case, where the principal of the  
21           company there, a fellow named Geis, controlled  
22           everything. He - - - it was his company. He owned  
23           it. He was the CEO. He dictated everything that was  
24           happened, but the arbitration agreement was with the  
25           company.

1                   And the court said that the mere fact that  
2 he controlled everything is - - - may - - - you have  
3 to ask is there an agency basis? Agency can't be  
4 enough to give you control or give you a consent to  
5 an arbitration clause. This court and other courts  
6 have said that. Is there an alter ego basis? No,  
7 because he was acting as the C - - -

8                   CHIEF JUDGE LIPPMAN: But the money had to  
9 be paid back to him by the woman who got it?

10                  MR. HAVELES: Yes.

11                  CHIEF JUDGE LIPPMAN: Would that - - -  
12 would that make it then direct benefit, rather than  
13 to Winton?

14                  MR. HAVELES: It would make it - - - no,  
15 because it doesn't go to what enabled him to take the  
16 money and give it to Lindbergh. That's where the  
17 direction of direct comes to. Yes, he would have  
18 been a direct recipient - - -

19                  CHIEF JUDGE LIPPMAN: If Lindbergh had to  
20 pay the money back to him, that's not enough?

21                  MR. HAVELES: No. It would give Winton a  
22 cause of action - - -

23                  CHIEF JUDGE LIPPMAN: Against?

24                  MR. HAVELES: - - - against Belzberg, if  
25 Belzberg kept the money and didn't return it. But

1 the issue is, again, causation, not receipt. If he's  
2 the direct recipient, then yes, the Appellate  
3 Division is correct in that regard, but that is not  
4 how the word "direct" is used in any of the  
5 decisional law. It's always about what is the cause  
6 that - - - the nexus between his receiving the  
7 benefit. Is he exploiting the fact that Winton did a  
8 trade at Jefferies - - -

9 JUDGE SMITH: You - - - you say that the  
10 nexus, the link, has to be between his receipt of the  
11 benefit and the brokerage agreement that contains the  
12 arbitration clause?

13 MR. HAVELES: Absolutely. Because  
14 otherwise you can't imply that he consented to it.  
15 The most - - -

16 JUDGE PIGOTT: How big a deal is this?  
17 When - - - when - - - I know we're talking about, you  
18 know, some pretty big trades here.

19 MR. HAVELES: Yes.

20 JUDGE SMITH: In your view, does this apply  
21 to all of these arbitration clauses that show up in  
22 credit card applications and credit things all, you  
23 know, for ordinary people and such?

24 MR. HAVELES: That's an interesting  
25 question, Your Honor, because, you know, if it's a

1 credit card agreement and I'm the - - - I'm the  
2 credit card holder, and American Express is - - - I  
3 have a complaint with American Express. I'm subject  
4 to that arbitration clause.

5 JUDGE PIGOTT: Now, if your daughter's in  
6 Switzerland and she - - - and you authorize her to do  
7 something and then she wants to contest it, does she  
8 have to fly over here to arbitrate it with American  
9 Express?

10 MR. HAVELES: Well, she is, in that  
11 context, because she's used the credit card herself,  
12 just like Winton used the Jefferies account, under  
13 this analysis, my daughter, who - - - amusingly, she  
14 does leave to go to school in Europe tomorrow, Your  
15 Honor, so I'll remember not to give her the American  
16 Express card - - -

17 JUDGE PIGOTT: Good luck.

18 CHIEF JUDGE LIPPMAN: Don't give her the  
19 card. Big mistake.

20 MR. HAVELES: Yeah, no, no, no.

21 CHIEF JUDGE LIPPMAN: Don't give her the  
22 card.

23 MR. HAVELES: I know that; even before this  
24 question, Your Honor, I knew that. The fact is that  
25 - - - yes, because she is the direct recipient, she

1 used the credit card, she exploited the credit card  
2 agreement.

3 JUDGE RIVERA: Well, isn't it - - -

4 JUDGE SMITH: Well, suppose - - - suppose  
5 you get a cash advance on your card, and she - - -  
6 and she takes the money?

7 MR. HAVELES: If she gets a cash advance,  
8 and then I give her the money, Your Honor - - -

9 JUDGE SMITH: Or she steals the mon - - - I  
10 mean, your daughter wouldn't do it - - -

11 MR. HAVELES: If she steals the money - - -

12 JUDGE SMITH: - - - but she steals the  
13 money.

14 MR. HAVELES: - - - then she's got to - - -  
15 she's done it by virtue of taking advantage of my  
16 relationship, even though I put it - - -

17 JUDGE SMITH: But you said - - - you said -  
18 - - you say, then, she's bound by the arbitration  
19 agreement?

20 MR. HAVELES: No, I do not.

21 JUDGE PIGOTT: How about if she - - - you  
22 do exactly what you just said, only it's the plane  
23 ticket that's going to get her back home?

24 MR. HAVELES: If I bought the plane ticket  
25 - - -

1 JUDGE PIGOTT: Right.

2 MR. HAVELES: - - - and it's a credit card  
3 issue, and then she uses the plane ticket, she is not  
4 the direct benefit of the credit card agreement - - -

5 JUDGE PIGOTT: So if there's an arbitration  
6 over that - - - if there's an arbitration over that,  
7 they can't bring her in, make her fly - - -

8 MR. HAVELES: No, it's between me and  
9 American Express whether or not that charge is valid.

10 JUDGE PIGOTT: But if this decision is the  
11 way it is, does it mean that she does?

12 MR. HAVELES: Yes.

13 JUDGE PIGOTT: That's the way you interpret  
14 the decision?

15 MR. HAVELES: Yes, because she was the  
16 direct recipient. The question is not whether she's  
17 a direct recipient. The question is was it the  
18 credit card agreement - - - in your analogy, Your  
19 Honor - - - as opposed to her relationship with me  
20 that enabled her to get on that plane.

21 JUDGE GRAFFEO: So what was missing here?  
22 That Jefferies should have had your client sign - - -

23 MR. HAVELES: Well, no, because the issue -  
24 - -

25 JUDGE GRAFFEO: - - - the contract, as

1 well, and then that way he would have - - -

2 MR. HAVELES: Remember, this is a - - -

3 JUDGE GRAFFEO: - - - he would have been  
4 bound by the arbitration clause?

5 MR. HAVELES: This is a third-party claim.  
6 But the issue here is Winton, which did the trade - -  
7 -

8 JUDGE GRAFFEO: No, I'm asking what would  
9 Jefferies have had to do if they wanted to hold your  
10 client to the arbitration clause?

11 MR. HAVELES: In your hypothetical, Your  
12 Honor, Jefferies - - - he either - - - Jeff - - - he  
13 either would have had to be a signatory to the  
14 agreement, or he would have had to had given his  
15 personal funds to Jefferies to exploit the agreement  
16 that Verus had with Jefferies. Now, I just add, to  
17 deal with Your Honor's hypothetical, because I see my  
18 - - -

19 CHIEF JUDGE LIPPMAN: Go ahead, finish your  
20 thought.

21 MR. HAVELES: - - - is that here, Jefferies  
22 is not suing Mr. Belzberg. This is a third-party  
23 claim where Verus, which was a co-venturer in the  
24 trade, is seeking contribution indemnification with  
25 respect to the tax claim. Jefferies, however, would

1 not - - - could not assert a claim against Mr.  
2 Belzberg, because it was not his money; it was not  
3 his trade. He was not the person who had the  
4 proceeds.

5 JUDGE SMITH: Isn't - - - isn't there  
6 something inequitable about saying that they can't  
7 assert a claim against him, because it's not his  
8 money, even though he took the money and used it for  
9 personal purposes?

10 MR. HAVELES: No, not at all, because they  
11 have Winton, the party that did the trade, and  
12 exploited the contract in the arbitration against - -  
13 -

14 CHIEF JUDGE LIPPMAN: So they're subject to  
15 it, but he's not.

16 MR. HAVELES: Yes, and - - -

17 CHIEF JUDGE LIPPMAN: Okay. All right.

18 MR. HAVELES: And Justice Kornreich held  
19 that - - -

20 CHIEF JUDGE LIPPMAN: Okay.

21 MR. HAVELES: - - - and that's not on  
22 appeal.

23 CHIEF JUDGE LIPPMAN: Let's hear from your  
24 adversary, and then you'll have your rebuttal.

25 MR. HAVELES: Thank you, Your Honor.

1 CHIEF JUDGE LIPPMAN: Thank you.

2 MR. HECHT: Thank you, Your Honor. Charles  
3 Hecht of Wolf Haldenstein for Verus.

4 CHIEF JUDGE LIPPMAN: Counsel, what was the  
5 Appellate Division doing here? I gather they didn't,  
6 you know, think that your adversary's client had  
7 acted in the most exemplary fashion. Were they  
8 trying to do justice here, or can they - - - could  
9 they put in this estoppel doctrine in relation to  
10 him?

11 MR. HECHT: Your Honor - - -

12 CHIEF JUDGE LIPPMAN: Is it that they  
13 didn't think he was, you know - - -

14 MR. HECHT: No, it's two things. First of  
15 all, equitable estoppel is a - - -

16 CHIEF JUDGE LIPPMAN: But it would only be  
17 stretched so far, though, right?

18 MR. HECHT: Right. But what they did here  
19 is they said, look, once - - - she testified, Doris  
20 Lindbergh, that she was going to pay Sam Belzberg.  
21 He received a direct benefit, just like as if  
22 Belzberg had taken the profit and put it in his own  
23 pocket. I disagree; he received a direct benefit.  
24 That's pragmatic - - -

25 JUDGE RIVERA: But isn't - - - isn't it

1           that he got the money off of his relationship with  
2           Winton, not because Winton had gone through this  
3           money-making venture, which wasn't very money making  
4           in the end, anyway?

5                     MR. HECHT:  No, Judge.  The reason that we  
6           have a problem here is there are proceeds from a  
7           trade, and it was the profits from the proceeds of  
8           the trade.  That's what - - -

9                     JUDGE PIGOTT:  Well, the real - - -

10                    MR. HECHT:  - - - the benefit flowed from,  
11           not from the fact that he was in a position to  
12           misappropriate - - -

13                    JUDGE RIVERA:  Because it's the exact - - -

14                    MR. HECHT:  - - - Winton's money.

15                    JUDGE RIVERA:  Because it's the exact  
16           number.  Because if he had loaned her 500,000 - - -  
17           it's not the exact number - - - would it have been a  
18           different case?

19                    MR. HECHT:  Not necessarily.  The fact is  
20           that that trade generated the money, not his  
21           relationship with - - -

22                    JUDGE SMITH:  Well, suppose a - - - suppose  
23           a clerk in the office, in his office or in Winton's  
24           office, some office, had allegedly stolen the money  
25           after the trade, do you - - - does that clerk have to

1 arbitrate with - - - with Verus?

2 MR. HECHT: The answer is if the clerk was  
3 the one who was, like Belzberg, who exploited the  
4 agreement - - - he went to Verus - - -

5 JUDGE SMITH: Well, well, well. That - - -  
6 that - - - isn't that a question they can answer? Of  
7 course, the clerk exploited the agreement; he stole  
8 the money.

9 MR. HECHT: Well, but no - - - but what the  
10 cases require is that you have to actually knowingly  
11 exploit the agreement.

12 CHIEF JUDGE LIPPMAN: Yeah, but once the  
13 Supreme Court said that - - - that it refused to  
14 pierce the corporate veil, why isn't it Winton who's  
15 on the hook and not him?

16 MR. HECHT: Well, Winton's on the hook - -  
17 -

18 CHIEF JUDGE LIPPMAN: Isn't this sort of a  
19 circuitous way to get around the Supreme Court not  
20 piercing the corporate veil?

21 MR. HECHT: No, it's not, Your Honor,  
22 because the trade - - -

23 CHIEF JUDGE LIPPMAN: What is it, then?  
24 What did the Appellate Division do here?

25 MR. HECHT: The trade here generated

1 approximately 5 million - - - 6,400,000 dollars in  
2 cash.

3 CHIEF JUDGE LIPPMAN: Right.

4 MR. HAVELES: 5.3 million, 5.2 and a half  
5 million was the - - - what I call, the Belzberg side  
6 of the trade. What the Supreme Court held was that  
7 Winton is required to arbitrate because its benefit -  
8 - -

9 CHIEF JUDGE LIPPMAN: Right.

10 MR. HECHT: - - - i.e., the return of five  
11 million dollars, flowed from the trade.

12 CHIEF JUDGE LIPPMAN: Right, right.

13 MR. HECHT: What the trial court then made  
14 a mistake, which was corrected by the Appellate  
15 Division, said, well, you treat the profit  
16 differently. But the profit, just like the principal  
17 - - - the return of principal - - - both flowed from  
18 the same trade through the same account.

19 JUDGE SMITH: Now, whose profit was it?

20 MR. HECHT: It was really Winton's profit.

21 JUDGE SMITH: Yeah, isn't - - - isn't that  
22 the problem? That - - - and is your adversary right,  
23 you're not relying on an alter ego theory?

24 MR. HECHT: No, we're not, because the law  
25 in New York says you have to be an officer, or

1 director, or a shareholder. And even though he set  
2 this up, and in reality, from the testimony, his kids  
3 had no idea what was going on. He set this up as a  
4 vehicle for whatever reason. He - - - and he buy - -  
5 - he trades the money just like he wants.

6 JUDGE GRAFFEO: So if it's Winton's profit,  
7 how do you get to him?

8 MR. HECHT: Because he misappropriated the  
9 profit and gave it to his friend - - -

10 JUDGE RIVERA: Isn't that then an action  
11 from Winton to him?

12 MR. HECHT: - - - to buy a home. Pardon  
13 me?

14 JUDGE RIVERA: Isn't that Winton's action  
15 against him?

16 MR. HECHT: But Winton's not going to sue  
17 him. It's a trust he set up and funded solely for  
18 his kids.

19 JUDGE SMITH: Well, well, well - - -

20 JUDGE RIVERA: But that's not about this  
21 problem; that may be about a different problem.

22 MR. HECHT: Yes, but the problem is when  
23 you knowingly borrow a brokerage account, which is  
24 what Belzberg did here, and use that account, that's  
25 a different situation. You can't have it both ways.

1 CHIEF JUDGE LIPPMAN: Yeah, but if she pays  
2 it back to Winton, what does it have to do with him?

3 MR. HECHT: But she didn't. The Appellate  
4 Division said that Belzberg's testimony on this is  
5 totally unbelievable, because he testified - - - he  
6 filed an affidavit - - -

7 CHIEF JUDGE LIPPMAN: The Appellate  
8 Division had a different factual findings - - -

9 MR. HECHT: Yeah - - -

10 CHIEF JUDGE LIPPMAN: - - - view of this  
11 than the trial court - - -

12 MR. HECHT: And they're the final say, yes.  
13 And four judges - - -

14 JUDGE SMITH: Then you're saying they found  
15 that he intended to steal this money from his  
16 children and is never going to pay it back? I didn't  
17 see that in there.

18 MR. HECHT: No, but he - - - his argument  
19 is I stole the money. And therefore - - - since I  
20 was able to steal Winton's money, therefore I don't  
21 have to arbitrate.

22 JUDGE SMITH: Well, maybe steal - - - in  
23 this case, possibly borrowing is a little strong - -  
24 - a little more accurate - - - there's no real  
25 evidence that he intended - - - that he doesn't

1 intend to make his children whole, is there?

2 MR. HECHT: Not that I know of, but the  
3 point is, he used that money - - -

4 JUDGE GRAFFEO: So - - -

5 JUDGE RIVERA: So there's not clear  
6 evidence that she's really paying it back?

7 MR. HECHT: Pardon me?

8 JUDGE RIVERA: There's no clear evidence  
9 she's really paying it back.

10 MR. HECHT: She - - -

11 JUDGE RIVERA: Doesn't she say, he said to  
12 pay it when I can?

13 MR. HECHT: Right. But she thought - - -

14 JUDGE RIVERA: And if she never can?

15 MR. HECHT: But she - - - he - - - the  
16 answer is that was her testimony. She didn't say she  
17 was paying Winton. She said I've never heard of  
18 Winton. I've had no dealings with Winton.

19 JUDGE PIGOTT: Were the mistakes ever made  
20 here, if there were mistakes, one, somebody didn't  
21 withhold the tax money? I mean, before you  
22 distribute the cash, shouldn't you have anticipi - - -  
23 somebody should have anticipated there might have  
24 been a tax event, and withhold the - - - that would  
25 be my understanding. And the other one that occurs

1 to me is did Jefferies allow somebody to trade on an  
2 account for which they did not have an agreement?

3 MR. HECHT: Well, Jefferies - - - it's not  
4 in the record, but Jefferies did have an agreement  
5 with Winton, and we're trying to get - - -

6 JUDGE PIGOTT: Well, yeah, but not with - -  
7 - but not with Belzberg. And Belzberg - - - you  
8 know, somebody says I'll put the trade in for you,  
9 and they did it at their peril, did they not?

10 MR. HECHT: Well, the answer back on the  
11 withholding tax is that withholding taxes were on the  
12 proceeds, and no one knew - - - at least we didn't  
13 know - - - because we hadn't traded in it before, and  
14 Belzberg admitted that he had. But the withholding  
15 taxes came after the fact. And what hap - - -

16 JUDGE PIGOTT: Yeah, and was it a surprise  
17 to somebody that, you know, you got - - - you've got  
18 a profit, and there's no tax event?

19 MR. HECHT: But the withholding taxes  
20 weren't on the profits. The withholding taxes were  
21 on the sales' proceeds; that's how the Canadian  
22 withholding taxes work. And what happened here was,  
23 Belzberg made seven calls, he and his people, the day  
24 the money came into Jefferies: get that money out.  
25 So they suspected something. We didn't.

1           And Jefferies, the next day, was told by  
2           the Canadian Tax Authorities, you owe a tax of a  
3           million dollars, almost. And they came to us because  
4           we're the customer of record. And we started paying  
5           on it, and then we said, well, wait a minute. We  
6           went to Belzberg and said, we want what's  
7           attributable to your share, your group, whether it's  
8           Winton, you or your friend Lindbergh. You controlled  
9           it; you asked to use our account. You should pay  
10          your equitable share of the withholding taxes.

11           And in the end, what direct benefits  
12          estoppel is, it's a way of balancing that the courts  
13          have come up with in the last twenty-five years of  
14          the difference between the federal policy of  
15          encouraging arbitration and another policy that sig -  
16          - - that you have to be a signatory to the agreement.  
17          So the courts have developed exceptions to that.

18           JUDGE PIGOTT: Do you have any thoughts on  
19          - - - you know, I mentioned to your opponent, you  
20          know, about - - - does this affect all arbitration  
21          agreements in credit situations?

22           MR. HECHT: If - - - I would say it could,  
23          yes. If you knowingly - - - if I borrowed your  
24          credit card, and I ran up charges, and the credit  
25          card company sues me, I should be able to bring you

1 into the arbitration, because - - -

2 JUDGE PIGOTT: But it's my card.

3 MR. HECHT: It's my card; I borrowed it.

4 JUDGE PIGOTT: Yeah.

5 MR. HECHT: And under the Supreme Court - -  
6 - the recent Supreme Court ruling, in a credit card  
7 situation case, you have to arbitrate, even if it - -  
8 -

9 JUDGE PIGOTT: I do, but do you?

10 MR. HECHT: I should, equitably, because I  
11 knowingly used your card, and when I used your card,  
12 I knew that there were terms and conditions to that  
13 agreement.

14 JUDGE PIGOTT: So if - - - so if counsel's  
15 daughter's in Switzerland, and he's got a - - - and  
16 he wants to fight over this airplane ticket, he's got  
17 to bring her back?

18 MR. HECHT: Well, if he - - - if - - - he  
19 doesn't have to, but the daughter, once she used it,  
20 and she used it and had the benefits of it, then she  
21 should - - -

22 JUDGE PIGOTT: He used it - - - he used it  
23 to buy - - -

24 MR. HECHT: - - - be part of the  
25 proceeding.

1                   JUDGE PIGOTT: He used it to buy her the  
2 ticket. She doesn't make the plane, and she says,  
3 the reason I didn't make the plane is for whatever  
4 reason. We're not paying it - - - we're not paying  
5 this.

6                   MR. HECHT: But that's why we didn't appeal  
7 this to Doris Lindbergh - - -

8                   JUDGE PIGOTT: I see.

9                   MR. HECHT: - - - because she got the  
10 benefit, but she didn't knowingly exploit the  
11 agreement.

12                  JUDGE SMITH: Try - - - try - - - let me  
13 try another hypothetical. You got a corporate  
14 treasurer, opens a corporate brokerage account at  
15 Jefferies. There's trading in the account. There's  
16 a profit. And one day the treasurer decides to take  
17 some of that money and loan it to his friend. Did -  
18 - - can - - - is the treasurer bound by the  
19 arbitration agreement with Jefferies?

20                  MR. HECHT: I think yes, because he, A,  
21 knowingly exploited it, which is part one of the  
22 test. Two, the profits from the trade flowed from  
23 the ability to trade that particular account, and,  
24 three, he got a benefit, because he directed where  
25 that money is to go.

1                   JUDGE SMITH: Is that true even - - - in  
2 this case I gather there's no evidence that Belzberg  
3 actually intended to use this for personal purposes  
4 at the time the agreement was entered into.

5                   MR. HECHT: We don't know. All we know is  
6 that he orchestrated everything. He said the  
7 principal goes back to Winton; the profit goes to my  
8 friend, Doris Lindbergh. So you don't have to get to  
9 that, because here the Appellate Division found that  
10 based on the credible evidence that Lindbergh was to  
11 repay Belzberg.

12                   So you don't have to go to the next step  
13 is, suppose there was no subsequent financial  
14 arrangement, and that's one important factor which  
15 they cite, and which - - - incorrectly. They say it  
16 has to be a financial benefit. But the cases all say  
17 it has to be a direct benefit. And "direct" does not  
18 necessarily mean a direct financial benefit.

19                   CHIEF JUDGE LIPPMAN: Okay, counsel.

20                   MR. HECHT: Thank you.

21                   CHIEF JUDGE LIPPMAN: Counsel, rebuttal?

22                   MR. HAVELES: Yes, Your Honors. Let me  
23 first deal with some comments to me with Judge  
24 Pigott. The - - - things didn't happen quite - - -  
25 and it also goes to Judge Smith's questions. Things

1 didn't happen the way it was just described by  
2 counsel here.

3 On November 4, the day of the trade closes,  
4 an e-mail is sent by Winton - - - by Chang - - -  
5 Chan, who's acting on behalf of Winton, A from 115,  
6 saying, "Send the proceeds to Winton, without  
7 exception". On November 7th, "Have the proceeds gone  
8 to Winton?" On November 10, "Have the proceeds gone  
9 to Winton?" On November 13, "Why haven't you sent  
10 the profits yet to Winton?" Only on November 18, ten  
11 days after the trade is over, is there an e-mail  
12 saying, the portion you haven't wired out yet, please  
13 wire to Lindbergh.

14 So this notion that this was a preconceived  
15 thing is belied by the e-mails that Verus itself put  
16 into the record from their own e-mail files.

17 CHIEF JUDGE LIPPMAN: Did the AD have a  
18 basis to say that - - - that Lindbergh has to pay the  
19 money back to Belzberg?

20 MR. HAVELES: They based it on the fact - -  
21 - on the testimony that Ms. Lindbergh had given that  
22 she thought she was going to have to pay Mr.  
23 Belzberg. And my reaction to that is, that's - - -  
24 that is a fair factual observation, but so what?  
25 Because what the Appellate Division did in its

1 memorandum decision is collapse Winton and Belzberg  
2 and treat them as one and the same. Judge Smith - -  
3 -

4 JUDGE SMITH: Which is pretty much what  
5 Belzberg did, too.

6 MR. HAVELES: Well, to some extent, except  
7 initially until after ten days after some money is  
8 still sitting around, he says, send the money off - -  
9 -

10 CHIEF JUDGE LIPPMAN: Well, that's what  
11 this - - - also what the Supreme Court refused to do,  
12 right?

13 MR. HAVELES: Right, and that's exact - - -

14 CHIEF JUDGE LIPPMAN: To pierce the  
15 corporate veil.

16 MR. HAVELES: And that's exactly what your  
17 hypothetical addresses, Judge Smith. And that is, if  
18 the corporate treasurer does a trade for the  
19 corporation, the corporation is the one that has the  
20 direct connection - - - the causal connection - - -  
21 to that trading agreement.

22 He steals the money; he exploiting his  
23 relationship as the treasurer of his employer. He's  
24 not exploiting the brokerage agreement. Whether he's  
25 stealing money from a bank account, or a brokerage

1 agreement, or from the corporate petty cash box in  
2 the office itself, that was because he was exploiting  
3 his relationship, and the word "direct" refers to the  
4 cause, what enabled - - -

5 JUDGE GRAFFEO: So Verus' - - - so Verus'  
6 remedies are against who?

7 MR. HAVELES: Winton, and Winton is a  
8 party. And Winton, because Verus argued before  
9 Justice Kornreich, received the benefit, because it  
10 was Winton's money and Winton's - - -

11 JUDGE SMITH: So suppose - - - suppose  
12 Bellberg (sic) has - - - Belzberg has depleted  
13 Winton's assets so that Winton isn't good for the  
14 money?

15 MR. HAVELES: Well, then, if he has  
16 depleted the assets, just like in any case where you  
17 have a judgment enforcement case, you could go and  
18 argue fraudulent conveyances, because the - - - or  
19 the like, if the assets are depleted during the  
20 course of this litigation, or they - - - either a  
21 constructive or actual fraudulent conveyance. You  
22 could - - - there are other causes of action one has  
23 when a judgment debtor no longer has assets to pay a  
24 debt.

25 JUDGE SMITH: But is it fair - - - you say

1           you can bring a lawsuit.  But I bargained for an  
2           arbitration remedy?

3                       MR. HAVELES:  Well, I did bargain for an  
4           arbitration remedy, but the remedy here, Your Honor,  
5           is with Winton.  Winton was the party that advanced  
6           the funds for the trade as to which Winton and Verus  
7           were co-venturers.  And Winton kept on asking for a  
8           week and a half for the proceeds before finally, when  
9           there was 250,000 or so still in the account, they  
10          said - - -

11                      JUDGE RIVERA:  But that's sort of neither  
12          here nor there, because Belzberg really ran this.

13                      MR. HAVELES:  Yes, Belzberg - - -

14                      JUDGE RIVERA:  Winton doesn't know anything  
15          about this.

16                      MR. HAVELES:  But all of the case laws that  
17          have dealt with principals - - - who either because  
18          they're the officer or because they're the agent - -  
19          - have always said the fact that you're the principal  
20          or agent does not allow us to imply you as a  
21          nonsignatory as subject to the arbitration clause.  
22          The principal is.

23                      CHIEF JUDGE LIPPMAN:  So what's wrong with  
24          the Appellate Division's thinking?  What was wrong  
25          with their approach?

1 MR. HAVELES: They misunderstood the word  
2 "direct". They used direct - - -

3 CHIEF JUDGE LIPPMAN: So then your basic  
4 argument is causation; it's not direct.

5 MR. HAVELES: It's not who - - - am I the  
6 direct recipient - - -

7 CHIEF JUDGE LIPPMAN: In that context, it's  
8 causa - - -

9 MR. HAVELES: And I don't really - - - I  
10 don't make the distinction about this is financial or  
11 not - - -

12 CHIEF JUDGE LIPPMAN: Okay.

13 MR. HAVELES: - - - it's about what was the  
14 cause of getting there, Your Honor.

15 CHIEF JUDGE LIPPMAN: Thank you, both.  
16 Appreciate it.

17 MR. HAVELES: Thank you, Your Honors.

18 CHIEF JUDGE LIPPMAN: Thank you.

19 (Court is adjourned)  
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C E R T I F I C A T I O N

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of Belzberg v. Verus Investments Holdings Inc., No. 149 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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