SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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WIMBLEDON FINANCING MASTER FUND, LTD.,

Index No: 150584/2016

Petitioner,

DECISION & ORDER

-against-

DAVID BERGSTEIN, GRAYBOX LLC, ISKRA ENTERPRISES LLC, WESTON CAPITAL ASSET MANAGEMENT, LLC, ASIA CAPITAL MARKETS LIMITED LLC, GEROVA MANAGEMENT INC., K JAM MEDIA, INC., HENRY N. JANNOL, SPILLANE WEINGARTEN LLP, and VENABLE, LLP,

Respondents.

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SHIRLEY WERNER KORNREICH, J.:

This is a special proceeding in which the petitioner, Wimbledon Financing Master Fund Ltd. (Wimbledon), seeks orders under CPLR 5225 and 5227 compelling respondents to turn over funds to satisfy a judgment issued by this court. Wimbledon's petition, designated as motion sequence number 002, is not decided herein. This decision only addresses motion sequence numbers 001, 003, 004, and 005, which are consolidated for disposition.

In Motion 1, Wimbledon moves by order to show cause for a prejudgment attachment order and preliminary injunction restraining bankruptcy proceeding settlement funds owed to respondent David Bergstein which, upon this court's adjudication of the instant motion, will be transferred to an account belonging to respondent Venable LLP (Venable). In Motion 3, non-party SulmeyerKupetz (SKL), a California law firm that formerly represented Bergstein, moves by order to show cause for leave to intervene based on its alleged attorney's lien on the subject settlement funds. In Motion 4, respondents Bergstein, Henry N. Jannol, Graybox LLC (Graybox), Iskra Enterprises, LLC (Iskra) and K Jam Media, Inc. (KJM) (collectively, the

Bergstein Respondents) move to dismiss the petition (1) under CPLR 3211(a)(4) based on the pendency of a related plenary action before this court, styled *Wimbledon Financing Master Fund, Ltd. v Weston Capital Mgmt., LLC*, Index No. 653468/2015 (the Main Action); and (2) under CPLR 3211(a)(8) for lack of personal jurisdiction. In Motion 5, respondent Weston Capital Asset Management LLC (WCAM) also moves to dismiss the petition pursuant to CPLR 3211(a)(4) based on the pendency of the Main Action.

Motion 1 is opposed by Bergstein. Motions 3, 4, and 5 are opposed by Wimbledon. Venable filed an answer, taking no position on the motions, and has represented that it will follow the court's order regarding the settlement funds. Venable requests, and Wimbledon does not oppose, that the court direct the funds to be transferred to an account in New York.

For the reasons that follow, Motions 1 and 3 are granted and Motions 4 and 5 are denied.

I. Background & Procedural History

This is yet another action in which Wimbledon, an investment fund organized under the laws of the Cayman Islands and which is currently in Official Liquidation, seeks to recover money that, through an elaborate multitude of schemes, allegedly was stolen from it by its managers. The merits of the underlying allegations will be adjudicated in the Related Action, not in this special proceeding. The court, therefore, does not extensively set forth the underlying allegations and limits its discussion to facts pertinent to the instant motions.

Simply put, Wimbledon's assets[1] were swapped for equity in a worthless company called Gerova that allegedly was used to perpetrate securities fraud.[2] Those assets were later

[1] The assets, basically, were limited partnerships in hedge funds. A more detailed discussion of Wimbledon's assets will be warranted in the Main Action.

[2] The allegations regarding Gerova are not at issue in this action.

exchanged for equity in a shell company called Arius Libra, Inc. (Arius Libra). Wimbledon's assets were then pledged by Arius Libra to secure a loan in excess of $8 million (the Loan). The Loan proceeds then, allegedly, were transferred to Wimbledon's managers in multiple sham transactions. The petition alleges that "Bergstein fraudulently transferred approximately $3.16 million of the [Loan] proceeds to his own companies and his personal attorneys, who in turn used the funds for Bergstein's personal use." *See* Petition ¶ 26 ($500,000 to Graybox; $150,000 to Iskra; $2,209,897 to Jannol; $200,000 to Spillane Weingarten LLP; and $900,000 to WCAM). The petition contends that additional "transfers were made to companies owned or controlled by Arius Libra directors Albert Hallac, Jeffrey Hallac, Keith Wellner and Kia Jam, and their confederate, the recently indicted fraudster Jason Galanis." *See* Petition ¶ 27 ($900,000 to WCAM; $700,000 to Asia Capital Markets Limited LLC; $500,000 to Gerova Management, Inc.; and $400,000 to KJM). Wimbledon's managers are alleged to have committed an outright theft of Wimbledon's assets by pocketing the Loan proceeds, knowing that Arius Libra, which was insolvent, would default on the Loan, thereby resulting in Arius Libra forfeiting Wimbledon's assets.

In 2012, Arius Libra defaulted on the Loan. Wimbledon was left with worthless Arius Libra equity, rendering Wimbledon insolvent and resulting in its liquidation. On September 20, 2012, the lender, Weston Capital Partners Master Fund II, Ltd. (Partners II), commenced an action in this court against Arius Libra to enforce the Loan by filing a summons and a motion for summary judgment in lieu of complaint. *See Weston Capital Partners Master Fund II, Ltd. v Arius Libra Inc.*, Index No. 653309/2012 (the 2012 Action). By order dated January 15, 2013, this court granted the motion on default and directed the entry of judgment. *See* Index No.

653309/2012, Dkt. 20.[3] On April 4, 2013, judgment was entered against Arius Libra in the amount of $6,619,586.77 (the Judgment). *See* Index No. 653309/2012, Dkt. 24. The Judgment remains outstanding.

On January 22, 2016, Wimbledon commenced this special proceeding by filing the subject petition. *See* Dkt. 1. On January 28, 2016, Wimbledon filed Motion 1, in which it originally sought to attach a $6 million settlement (the Settlement Funds) that was set to be paid to Bergstein in a bankruptcy action, styled *In re Aramid Entertainment Fund. Ltd.*, No. 14-11802 (Bankr SDNY). As noted, Wimbledon claims that Bergstein caused Arius Libra to fraudulently transfer the Loan proceeds to himself and related companies and, therefore, Wimbledon seeks to attach the Settlement Funds to prevent Bergstein, who is not a New York resident, from dissipating them and making himself judgment proof. As recently clarified, Wimbledon now only seeks to attach approximately $3.3 million of the Settlement Funds, which, under the settlement agreement, will be transferred to a Venable bank account and then, pursuant to irrevocable instructions, immediately disbursed. Wimbledon seeks a preliminary injunction prohibiting Venable from disbursing the Settlement Funds upon receipt and an order of attachment restraining those funds pending adjudication of the petition. The parties have represented to the court that the Settlement Funds will not be transferred to Venable until the court decides this motion. Venable does not oppose the motion.

On February 19, 2016, SKL, a law firm, filed Motion 3, in which it seeks to intervene based on a lien on the Settlement Funds it allegedly has for pre-petition legal work. Motions 4

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[3] References to "Dkt." followed by a number refer to documents filed in this action in the New York State Courts Electronic Filing (NYSCEF) system. Reference to documents filed in another action, such as the 2012 Action, are denoted "Index No. __, Dkt. __".

and 5, also filed on February 19, 2016, seek dismissal of the petition. The court reserved on the motions after oral argument. *See* Dkt. 276 (6/2/16 Tr.).

II. Discussion

A. Intervention

Under CPLR 1012, a non-party shall be permitted to intervene when the proposed intervenor's rights are not adequately represented by the parties and will be prejudiced absent intervention.[4] *See Yuppie Puppy Pet Prods., Inc. v Street Smart Realty, LLC*, 77 AD3d 197, 201 (1st Dept 2010). Under CPLR 1013, a court may permit intervention when the person's claim and the main action have a common question of law or fact. *Id.* ("Intervention is liberally allowed by courts, permitting persons to intervene in actions where they have a bona fide interest in an issue involved in that action"). CPLR 5227, moreover, provides that "[t]he court may permit any adverse claimant to intervene in the proceeding and may determine his rights in accordance with [CPLR] 5239," which states that, in an Article 52 proceeding, "[t]he court may permit any interested person to intervene."

The Second Department has held that CPLR 5227, which applies to intervention in a special proceeding seeking payment of debt owed to a judgment creditor, "pre-empts the general intervention provisions set forth in CPLR 1012 and 1013." *Vanderbilt Credit Corp. v Chase Manhattan Bank, NA*, 100 AD2d 544, 545 (2d Dept 1984) ("If the defenses pleaded in the movant's proposed answer are without merit, a denial of the application would be warranted because intervention would merely serve to unduly delay the determination of a summary

[4] Of course, it is well settled that an intervention motion will only be granted if it is timely [*see In re HSBC Bank U.S.A.*, 135 AD3d 534 (1st Dept 2016)], but Wimbledon has no basis to challenge the timeliness of SKL's intervention motion since it was filed less than a month after this special proceeding was commenced.

proceeding and prejudice a substantial right of the judgment creditor to receive payment."). The Fourth Department recently issued a similar holding. *See Centerpointe Corp. Park Partnership 350 v MONY*, 96 AD3d 1401, 1402 (4th Dept 2012) (approvingly quoting from *Vanderbilt*). The parties do not cite a First Department case to the contrary and, thus, this court is bound by this appellate standard. *See D'Alessandro v Carro*, 123 AD3d 1, 6 (1st Dept 2014).

SKL has demonstrated there to be at least a question of fact about its entitlement to the Settlement Funds. The parties have a ripe dispute over SKL's legal entitlement to maintain an attorneys' lien on the Settlement Funds. SKL's ability to enforce its alleged lien (i.e., its payment priority over Wimbledon) will be affected absent intervention. The parties dispute the applicability of California law and whether SKL's pre-petition legal work gives rise to an attorney's lien on a bankruptcy settlement. The parties also dispute whether a $1.5 million promissory note executed by Bergstein, dated July 15, 2014, gives rise to an attorneys' lien. *See* Dkt. 132. Wimbledon's primary argument in opposition to intervention is that SKL's retainer agreement appears to only govern pre-bankruptcy work, and, therefore, any bankruptcy proceeds cannot be subject to a lien. Wimbledon, however, does not provide any legal authority, either under New York or California law, regarding SKL's rights to a lien under these circumstances. Consequently, the record on this motion is inadequate to resolve SKL's claim to a portion of the Settlement Funds.

With these considerations in mind, the court grants SKL's intervention motion.[5] This proceeding is an appropriate forum for resolving the conflict between Wimbledon and SKL.[6]

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[5] Below, SKL is directed to file its proposed cross-petition. *See* Dkt. 129.

[6] The court is mindful of the concern that intervention in a special proceeding has the potential for delay. For this reason, SKL's claim will be litigated in an expedited manner and on the same

The Settlement Funds, prior to a judgment in Wimbledon's favor, belong to Bergstein, not Wimbledon or Arius Libra. SKL maintains that it has attorneys' lien priority over Bergstein's unsecured claims (such as those asserted in the *Aramid* bankruptcy action). Wimbledon has not established, either factually or legally, that SKL has no basis to claim a lien on those funds. These questions suffice to justify intervention.[7]

B. Personal Jurisdiction

Turning now to the Bergstein Respondents' jurisdictional arguments, the court finds them to be without merit. They rely on the fact that Bergstein, purportedly, did not engage in the subject transfers while being in New York. Even assuming this is true,[8] that fact is not dispositive. Under CPLR 302(a)(1), jurisdiction over a non-domiciliary may exist "even though the defendant never enters New York [] so long as the defendant's activities here were purposeful and there is a substantial relationship between the transaction and the claim asserted." *See Fischbarg v Doucet*, 9 NY3d 375, 380 (2007). CPLR 302(a)(3)(ii) also provides jurisdiction over a non-domiciliary who "commits a tortious act without the state causing injury to person or property within the state ... if he ... expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international

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schedule as the petition.

[7] This opinion should not be construed as opining on the ultimate merits of SKL's claim to a portion of the Settlement Funds. Rather, Wimbledon will have the opportunity to challenge SKL's claims based on SKL's involvement with Bergstein, which should be supported with proper briefing that addresses the choice of law and substantive lien law issues.

[8] *See* Dkt. 245 at 24 (alleging that "[o]n at least one occasion, Bergstein appears to have flown to a meeting in New York to meet with Wellner and Albert and Jeffrey Hallac to discuss, among other things, the unwind of Gerova that ultimately led to Bergstein's control of Wimbledon's assets and the fraudulent transfer of the Partners II loan proceeds to the Bergstein Respondents.").

commerce." *See LaMarca v Pak-Mor Mfg. Co.*, 95 NY2d 210, 214 (2000). Hence, personal jurisdiction may exist even when the defendant never sets foot in New York. *See Paterno v Laser Spine Institute*, 24 NY3d 370, 376 (2014) ("The lack of an in-state physical presence is not dispositive of the question whether a non-domiciliary is transacting business in New York."); *Deutsche Bank Secs., Inc. v Montana Bd. of Investments*, 7 NY3d 65, 71 (2006) ("the growth of national markets for commercial trade, as well as technological advances in communication, enable a party to transact enormous volumes of business within a state without physically entering it."). "So long as a party avails itself of the benefits of the forum, has sufficient minimum contacts with it, and should reasonably expect to defend its actions there, due process is not offended if that party is subjected to jurisdiction even if not 'present' in that State." *Kreutter v McFadden Oil Corp.*, 71 NY2d 460, 466 (1988) (collecting United States Supreme Court authority); *see Daimler AG v Bauman*, 134 SCt 746, 754 (2014).

Wimbledon has established that personal jurisdiction exists over the Bergstein Respondents with respect to the transactions at issue in the petition. Wimbledon claims, *inter alia*, that: (1)"Bergstein communicated on an almost daily basis via phone and email with WCAM general counsel Keith Wellner in New York regarding Arius Libra and the fraudulent distribution of Partners II funds"; (2) "Bergstein directed Wellner (located in New York) as well as other WCAM officers and employees to effectuate each of the fraudulent transfers at issue in this case"; (3) "To carry out Bergstein's instructions, WCAM employees located in New York instructed Partners II's fund administrator, also located in New York, to initiate the transactions"; and (4) "Albert Hallac explained in his guilty plea allocution that '[m]any of the acts described to [the magistrate judge accepting his guilty plea for conduct related to the conduct at issue here] occurred while conducting business in the City of New York' and that the

email server used by WCAM through which Bergstein's emails were transmitted and received was located in New York."[9] *See* Dkt. 245 at 24-25 (citations omitted). In other words, Bergstein, while working outside of New York, directed the alleged fraudulent conspiracy, which was effectuated by his co-conspirators in New York.

The First Department has held that an out-of-state defendant who orchestrates a conspiracy in New York is subject to personal jurisdiction in New York. *See Lawati v Montague Morgan Slade Ltd.*, 102 AD3d 427, 428 (1st Dept 2013); *see also Tucker v Sanders*, 75 AD3d 1096 (4th Dept 2010). Importantly, New York has rejected the fiduciary shield doctrine. *See Kreutter*, 71 NY2d at 470. Thus, courts routinely find that parties, such as Bergstein, who control a company's fraudulent activities in New York, are subject to personal jurisdiction in New York. *See, e.g., Nat'l Union Fire Ins. Co. of Pittsburgh v Archway Ins. Services, LLC*, 2013 WL 3816529 (Sup Ct, NY County 2013) (Schweitzer, J.). Likewise, jurisdiction exists over out-of-state defendants who illegally cause funds to be fraudulently transferred from New York. *See Mulford v Fitzpatrick*, 68 AD3d 634, 635 (1st Dept 2009), citing *Catauro v Goldome Bank for Savings*, 189 AD2d 747, 748 (2d Dept 1993); *see also AMP Servs. Ltd. v Walanpatrias Found.*, 34 AD3d 231, 232 (1st Dept 2006). Indeed, "[i]t would be a travesty to permit the use of our institutions to channel stolen funds ...by those who impudently claim they are beyond our borders! It would be a gross violation of common sense and reality to shelter such activities." *Banco Nacional Ultramarino, S.A. v Chan*, 169 Misc2d 182, 188-89 (Sup Ct, NY County 1996), *aff'd sub nom. Banco Nacional Ultramarino, S.A. v Moneycenter Trust Co.*, 240 AD2d 253 (1st

[9] Albert Hallac's allocution is discussed more extensively below.

Dept 1997). The Bergstein Respondents' motion to dismiss for lack of personal jurisdiction is denied.

C. Prior Pending Action

The pendency of the Main Action is not a basis to dismiss or stay this special proceeding under CPLR 3211(a)(4). Dismissal under CPLR 3211(a)(4) is discretionary. *Id.* ("the court need not dismiss upon this ground but may make such order as justice requires"); *see Anonymous v Anonymous*, 136 AD3d 506, 507 (1st Dept 2016) (noting this court's "broad discretion" to deny a motion under CPLR 3211(a)(4)), citing *Whitney v Whitney*, 57 NY2d 731, 732 (1982). While there is certainly some overlap with the Main Action, it is well settled that an overlap of claims does not defeat the existence of good cause to maintain a separate action where "the nature of the relief sought is not the same or substantially the same." *See Kent Dev. Co. v Liccione*, 37 NY2d 899, 901 (1975). The expedited relief sought under Article 52 is sufficient good cause to maintain this proceeding.[10]

D. Attachment & Injunction

Finally, the court turns to Wimbledon's motion for an attachment and preliminary injunction. CPLR 6201 provides that an attachment may be granted where a plaintiff "would be entitled, in whole or in part ... to a money judgment against one or more defendants" when "the defendant is a nondomiciliary residing without the state" or "the defendant, with intent to defraud his creditors or frustrate the enforcement of a judgment that might be rendered in plaintiff's favor, has assigned, disposed of, encumbered or secreted property, or removed it from

[10] It should be noted that a primary basis for respondents' 3211(a)(4) argument collapsed when the petition was transferred to this part by the previously assigned Justice.

the state or is about to do any of these acts." *See* CPLR 6201(1) & (3). The Court of Appeals has explained:

> By means of attachment, a creditor effects the prejudgment seizure of a debtor's property, to be held by the sheriff, [, actually or constructively,] so as to apply the property to the creditor's judgment if the creditor should prevail in court. Attachment simply keeps the debtor away from his property or, at least, the free use thereof; it does not transfer the property to the creditor. It is frequently used when the creditor suspects that the debtor is secreting property or removing it from New York and/or when the creditor is unable to serve the debtor, despite diligent efforts, even though the debtor would be within the personal jurisdiction of a New York court.

Hotel 71 Mezz Lender LLC v Falor, 14 NY3d 303, 310-11 (2010) (citations omitted). An order of attachment may be issued even where, unlike here, the defendant is not amenable to personal jurisdiction so long as the subject property is located in New York (which is the case here). *See id.* at 311.

That said, an order of attachment should not be issued without the movant demonstrating a likelihood of success on the merits. *See VisionChina Media Inc. v S'holder Representative Servs., LLC*, 109 AD3d 49, 59 (1st Dept 2013). Likewise, pursuant to CPLR 6301, "[i]njunctive relief may only be awarded if the movant makes a clear showing of a probability of success on the merits, a danger of irreparable injury in the absence of an injunction, and that the balancing of the equities weighs in its favor." *Goldstone v Grade Terrace Apt. Corp.*, 110 AD3d 101, 104-05 (1st Dept 2013), citing *Nobu Next Door, LLC v Fine Arts Housing, Inc.*, 4 NY3d 839 (2005), accord *Doe v Axelrod*, 73 NY2d 748 (1988).

Wimbledon has demonstrated a likelihood of success on the merits. Its petition, briefs, and supporting evidence set forth the fraudulent nature of the subject transfers. The meager defense proffered by the Bergstein Respondents in opposition to the instant motions is uncompelling. Rather than substantively rebut Wimbledon's allegations, they principally argue

that Wimbledon failed to proffer a sufficient prima facie basis to infer Bergstein's involvement in the Arius Libra scheme. The court disagrees. In addition to the facts pleaded in the petition, Albert Hallac's sworn statement at his July 30, 2015 plea allocution is a strong indication of Bergstein's involvement in the subject fraud. *See* Dkt. 179. He stated that "the factual basis for [his] plea is as follows":

> ...I was the president of Weston Capital Asset Management. Weston was a registered investment advisor and **had offices in New York**, Connecticut and West Palm Beach, Florida. Weston managed over a dozen hedge funds for its investors. From in or about 2009 through at least in or about late 2012, I, along with others, participated in a scheme to defraud Weston investors. Generally speaking: I failed to disclose to my investors material information about financial transactions involving their moneys; I failed to dis[close] to investors the transfer of moneys from one investment fund to benefit the investors of another fund; I, along with the others, retained certain investor funds that were improperly transferred to an account that I controlled; and I agreed to make a false representation to assist a co-conspirator in an attempt to defraud another company.
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> Allow me to explain these acts more specifically. In or about the fall of 2009, Fund.com, a public company, agreed to purchase a substantial ownership interest in Weston. I soon learned that Fund.com was controlled by Jason Galanis, an individual who was barred by the SEC from being an officer or director of a public company. While I disclosed the purchase of Weston by Fund.com to my investors, I did not disclose to the investors Galanis' control over, or involvement in, Fund.com. Similarly, in or about early 2010, I agreed with Galanis to enter into a transaction between one of Weston's hedge funds called the Wimbledon Financing Fund, and an entity controlled by Galanis called the Gerova Financial Corporation. As part of that transaction I had the Wimbledon Financing Fund exchange all of its assets, which at the time consisted of investments in other hedge funds, with Gerova for restricted shares of Gerova stock believed to be worth approximately $85 million. While the details of the transaction were fully disclosed to investors of the Wimbledon Financing Fund, I did not disclose Galanis' control over or involvement with Gerova. In both instances I was concerned that Galanis' involvement in the deals, and the fact of his SEC bar, would upset my investors and cause them to oppose or aggressively question the deals. I intentionally withheld this information about Galanis from the investors and did not instruct anyone else at Weston to inform the investors of Galanis' involvement with either Fund.com or Gerova.

In early 2011, a series of negative articles appeared about Galanis, as well as other of his associates, and their involvement with Gerova. As a result, Gerova's stock plummeted and it was eventually delisted from the American Stock Exchange. The stock that the Wimbledon Financing Fund held in Gerova became worthless. Around this time, **Galanis introduced me to another individual named David Bergstein**. **Bergstein** offered to help me recover, on behalf of the Wimbledon Financing Fund investors, the assets that they had given to Gerova in exchange for the now worthless Gerova stock. However, **Bergstein** would only assist in this effort if the Wimbledon Financing Fund would contribute the recovered assets **to another company [Bergstein] created, called Arius Libra**, in order to help finance investments in medical billing companies. Hoping to recover Wimbledon Financing Fund's assets from Gerova, I agreed to this transaction. Part of the Gerova unwind transaction put together by **Bergstein** required paying off approximately $5 million worth of Gerova's debts. **Bergstein** had assured me that the assets Arius Libra received from the financing fund, which had been recovered from Gerova, would be used to both obtain a loan to pay off the expenses of Gerova as well as provide operating capital for Arius Libra. **Bergstein**, however, failed to obtain the promised loan for Arius Libra and **[Bergstein] then convinced me to take cash held in another Weston fund called the Partners II fund, and loan that cash to Arius Libra**. From in and or about August 2011 through December 2011, I caused Partners II to loan Arius Libra up to $9 million. While the loans were collateralized with the Wimbledon Financing Fund assets in Arius Libra's possession, I did not inform the investors of Partners II that **I had made this loan with their assets for the benefit of a separate group of Weston investors.** ...

In and around November 2011, **Bergstein convinced me to enter into another transaction** between a Weston fund called the Wimbledon TT Fund and an entity **Bergstein** controlled called Swartz IP. As part of this transaction, I agreed to invest the cash held by the TT Fund into Swartz IP. I did not conduct proper due diligence on Swartz IP nor did I inform the investors of the transaction. The total amount of money transferred to Swartz IP was approximately $17 million. I, along with **Bergstein** and others, also arranged for three million of the TT Fund to be used to repay part of the loan Arius Libra owed to the P II fund. Again, this was not disclosed to the TT investors. ... In addition, **Bergstein** caused $750,000 of the TT Fund money to be transferred to an entity called Purplebox. This entity was an investment vehicle created for the benefit of myself and two other executives of Weston. When I realized that the money **Bergstein** sent to Purplebox account belonged to the TT investors, I did not return the moneys to the TT Fund as I should have.

By this time I had transferred 240,000 of the 750,000 out of the Purplebox account for my personal use. In 2012, **Bergstein requested I assist them in acquiring another company called Bidz.com. Bergstein asked me to falsely represent that Weston would be the guarantor of Bergstein's purchase on**

> **Bidz.com. Specifically, Bergstein falsely created and e-mailed me a financial statement for a Weston fund called Partners III that had no assets. Bergstein asked me to falsify -- falsely represent that this fund, Partners III, would back him as the guarantor for the acquisition.** I knew the financial statement was false, but I forwarded the balance sheet to an attorney working on the transaction and represented the financial statement to be accurate.
>
> When I communicated with investors, it was by telephone, e-mail, and regular mail and the investors were in many states. **Many of the actions described to you today occurred while conducting business in the City of New York.**

See id. (7/30/15 Tr. at 24-29) (emphasis added; paragraph breaks edited for clarity).

According to Albert Hallac, it was Bergstein that actually proposed the Loan to Arius Libra, a company he created. Bergstein was not merely doing Albert Hallac's bidding, but appears to have been the one calling the shots. This comports with Wimbledon's allegations. And while Bergstein may yet challenge these allegations, on this record, he has not rebutted them.

That said, to the extent Albert Hallac's allocution should be taken with a grain of salt, the merit of Wimbledon's case are further bolstered by the findings of two California federal courts in a similar case involving Bergstein's companies, including Graybox, one of the respondents in this action. *See Wimbledon Fund, SPC (Class TT) v Graybox, L.L.C.*, 2015 WL 5822580 (CD Cal. Sept. 29, 2015) (*Graybox I*), *aff'd sub nom. Wimbledon Fund, SPC Class TT v Graybox, LLC*, 2016 WL 1554271 (9th Cir Apr. 18, 2016) (*Graybox II*). In that case, Wimbledon asserted similar claims of fraudulent transfers. In *Graybox I*, the federal district court granted Wimbledon's motion to restrain Graybox from dissipating $2.9 million it was set to receive from the very same *Aramid* bankruptcy action at issue here. The district court found a likelihood of success on the merits based on similar evidence to that submitted by Wimbledon in this action, and set forth an extensive recitation of facts to demonstrate the apparent merit of Wimbledon's

claims. The district court noted the "serious accusations regarding the corporate integrity of Graybox **and other entities controlled and/or managed by Bergstein**." *See id.* at *7 (emphasis added). The Ninth Circuit affirmed, noting, among other things, "Bergstein's prior use of Graybox funds to pay his personal entertainment and gaming expenses." *See Graybox II*, 2016 WL 1554271, at *2.

Based on the federal courts' decisions in *Graybox*, Albert Hallac's allocation, and the record submitted on this motion, the court finds that Wimbledon has established a likelihood of success on the merits. In light of this showing, the equities clearly lie with Wimbledon. The federal courts came to the same conclusion. *See Graybox I*, 2015 WL 5822580, at *7-8; *Graybox II*, 2016 WL 1554271, at *2. Irreparable harm would be suffered absent an injunction since, as in *Graybox*, the Settlement Funds will be dissipated immediately after receipt by Venable. *See Graybox II*, 2016 WL 1554271, at *2 ("Graybox acknowledged that it intended to dissipate the assets to related entities"). An injunction and attachment are highly appropriate under these circumstances. Given the underlying facts of this case and the fact that Bergstein is an out-of-state respondent who has issued instructions to immediately dissipate the Settlement Funds, compelling reasons exist to issue an order of attachment.

That said, the mechanics of the injunction and attachment are important. The Settlement Funds should flow from the bankruptcy trustee to a Venable account in New York and be immediately restrained. The account must be subject to a prior injunction prohibiting the funds from being dispersed pursuant to the irrevocable instructions, and the funds, once in the account, must then be attached. Hence, Wimbledon and Venable are directed to meet and confer with the bankruptcy trustee and, as directed below, shall submit a proposed order to implement the injunction and attachment. Accordingly, it is

ORDERED that SKL's motion for leave to intervene is granted, and it shall file its proposed cross-petition within 3 days of the entry of this order on the NYSCEF system; and it is further

ORDERED that WCAM's and Bergstein's motions to dismiss are denied; and it is further

ORDERED that Wimbledon's motion for an attachment and preliminary injunction is granted, and Wimbledon and Venable shall jointly submit a proposed implementing order (by e-filing and fax) in accordance with this decision within 7 days of the entry of this order on the NYSCEF system; and it is further

ORDERED that the parties shall jointly call chambers within 7 days of the entry of this order on the NYSCEF system to discuss the scheduling of a hearing on the petition, before which the parties must meet and confer regarding any necessary discovery.

Dated: August 19, 2016

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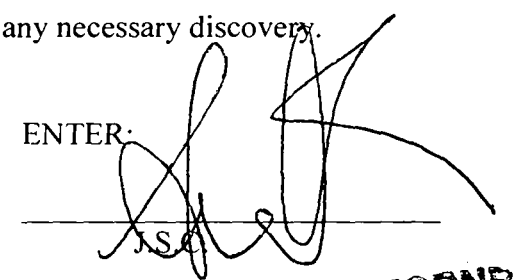

J.S.C.

SHIRLEY WERNER KORNREICH J.S.C.