Case No. C075019
Nevada County Case No. 78702

IN THE COURT OF APPEAL OF CALIFORNIA
THIRD APPELLATE DISTRICT

Andy and Maryclaire Daus,
Plaintiffs and Appellants

v.

Andy Moore,
Defendant and Respondent.

Appeal from the Superior Court for Nevada County
Sean P. Dowling, Judge

APPELLANTS' OPENING BRIEF

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April 4, 2014

Certificate of Interested Persons

I hereby certify under penalty of perjury that, to the best of my knowledge and belief, the following "persons" are the only known persons that qualify as "interested" persons:

Andy Moore

Andy Daus

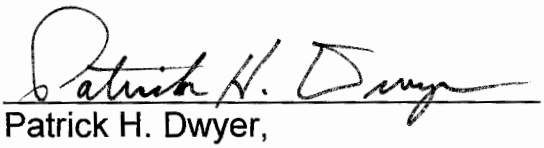
Maryclaire Daus

Brian Howser

Paula Howser

Vaughn Warringer

DC Tech, Inc.



Patrick H. Dwyer,
Attorney for Appellants

Date: April 4, 2014

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I. Introduction

This case presents a textbook example of the principles enunciated in *Jones v. H. F. Ahmanson & Co.* (1969) 1 Cal. 3d 93 ("*Ahmanson*") where the California Supreme Court found that in a closely held company the majority shareholders owe a fiduciary duty to the minority shareholders. Majority share ownership does not create a right to manage a company solely for the majority's benefit and to the minority's detriment. Unfortunately, that is exactly what happened in this case. Respondent Andy Moore, a California corporate attorney, was hired by the Majority Shareholders of DC Tech, Inc. ("Company") to devise a scheme whereby the Majority Shareholders[1] took complete control and transferred the entire economic value of the Company to themselves.

Appellants filed suit against the Majority Shareholders in 2012. During subsequent discovery, Appellants learned that Andy Moore had been hired in February 2010 for the express purpose of finding a way to wrestle the Company from Appellants and transfer all of its economic value to the Majority Shareholders. Moore first devised, and then participated in, a scheme that enabled the Majority Shareholders to take control of the Company with a Special Compensation Committee comprised solely of themselves. The Majority Shareholders then used this committee to pay themselves increased salaries and

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[1] These are the other named defendants: Brian and Paula Howser and Vaughn Warriner.

then bonuses equal to all remaining profits of the Company. In short, the Majority Shareholders took 100% and Appellants received nothing. Appellants stock became worthless.

The legal issues presented here are simple. First, does *conduct* by an attorney in planning, effecting, and participating in a scheme to defraud minority shareholders provide a basis for a cause of action for actual fraud against that attorney where there is no privity between the attorney and the minority? The trial court said no, there had to be an express misrepresentation by the attorney, not just conduct, to create liability. This Court needs to send an unequivocal message to every attorney by saying *yes*, a cause of action for fraud will lie based upon intentional conduct to harm a victim.

Second, does the conduct alleged in the Second Amended Complaint ("SAC") provide the basis to *impute a duty* by that attorney to the minority shareholders that supports a cause of action for professional negligence and/or breach of fiduciary duty? The trial court said no. This court needs to make clear to all California attorneys that *yes*, under these circumstances, there is an imputed duty because, *inter alia*, the minority were the intended victims of the attorney conduct.

Andy Moore is trying to hide behind the rule that an attorney has no duty to disclose facts to someone that is not his client. Appellants have no argument against this established rule. Rather, Appellants stand upon the allegations in the

SAC, CT 77-100, that there was knowing conduct and intent by the attorney to unlawfully harm Appellants, and thus, a duty to Appellants must be imputed. In the case of a close corporation, an attorney may vigorously represent the majority, but may not knowingly devise, effectuate, and participate in a scheme that breaches the fiduciary duty of the majority to the minority.

II. Statement of the Case

A. Relevant Procedural History

Appellants filed a first amended complaint naming defendant Andy Moore on March 13, 2013. CT 1-22. Moore filed a demurrer to the Fifth Cause of Action (breach of fiduciary duty by Moore), Sixth Cause of Action (actual fraud by Moore), and Seventh Cause of Action (professional negligence by Moore) on June 3, 2013. CT 23-43. This demurrer was heard by the trial court on July 26, 2013, and was sustained with leave to amend. CT 75-76. Appellants filed the SAC on August 12, 2013, pursuant to the court's order. CT 77-100. Moore filed another demurrer to the SAC on August 27, 2013. CT 101-121. Appellants filed an opposition to Moore's demurrer to the SAC, CT 122-1150, and Moore filed a reply. CT 151-162. The trial court granted the demurrer without leave to amend on October 8, 2013. CT 164-167. This appeal was filed on October 23, 2013. CT 172-180.

B. Relevant Factual History

Appellants Andy and Maryclaire Daus, along with the original defendants,

Brian Howser, Paula Howser, and Vaughn Warriner, started the Company, DC Tech, Inc., in 2004, to provide commercial electrical services. Defendants Brian Howser, Paula Howser, and Vaughn Warriner together own 600,000 shares out of a total of 1,000,000 outstanding shares the company ("Majority Shareholders"). Appellants own the balance of 400,000 shares in the company and are minority shareholders. CT 78, ¶¶ 5-11 .

The Company elected subchapter S status with the I.R.S. and has always done its accounting on a partnership basis. CT 78, ¶ 6. Each of these individuals were directors of the Company. CT 78-79, ¶¶ 10, 17. Each individual, except for Maryclair Daus, was a salaried employee of the Company. For all years through 2010 the parties were *paid* salaries approved by the board of directors. Any remaining profit was passed through to each shareholder *pro rata* pursuant to I.R.S. rules for a subchapter S corporation. Distribution of profits (or losses) were never based upon who was or was not an active employee of DC, but was always based upon percentage of stock ownership. CT 79-80, ¶¶ 15-20. Appellant Maryclaire Daus never worked for the company, and thus, was never paid a salary, but she was paid her *pro rata* share of any profit. CT 80, ¶¶ 18-19. For most years there was a net profit that was paid out to all shareholders based upon their *pro rata* ownership. Thus, as owners of 40% of the outstanding stock, Appellants received the salary for Andy Daus, plus 40% of the net profit or loss. CT 80, ¶ 19.

Appellant Maryclaire Daus experienced a personal trauma in the Spring of 2010, and Appellant Andy Daus took a leave of absence as an active employee of the Company to attend to his wife. Appellant Andy Daus continued to be paid compensation as an employee of the Compnay through May, 2010. He declined salaried compensation thereafter. CT 80, ¶ 18. Appellants have only sought their *pro rata* share of profits or losses since this date. However, the Majority Shareholders became hostile and took the position that, because Andy Daus was not actively working for the company, he and Appellant Maryclair Daus were not entitled to any further profits of the Company and their stock was valueless. CT 80, ¶ 20.

In February, 2011, the Majority Shareholders solicited legal advice from Andy Moore about what actions they could take to stop Appellants' participation in the management of the Company and to take Appellants' share of profits for themselves. CT 80, ¶ 21. Numerous ideas were discussed by Moore and the Majority Shareholders, including transferring the company assets to a new business. Moore finally recommended a plan that would remove Appellants as officers, make Moore counsel for the Company, and create a special compensation committee and a special contracts committee. The Majority Shareholders would elect themselves as the only members of these committees and otherwise excluded Appellants from any management of the Company. CT 80, ¶ 22. Through Moore's scheme, the Majority Shareholders took complete

control, paid themselves increased salaries, and paid themselves bonuses equal to any remaining earnings. CT 81-82, ¶¶ 23-28. (hereafter, Moore's plan is called the "Scheme").

To effectuate the Scheme, Andy Moore personally prepared the agenda for a special meeting of the Company Board Of Directors and had the Majority Shareholders send it to Appellants. Moore then held the special meeting at his office. Appellants met Moore at the meeting at his office and Moore never disclosing to Appellants his prior relationship with the Majority Shareholders. CT 80-81, ¶ 22. Moore then acted as secretary for the meeting and prepared the notes for the meeting. Moore incorrectly recorded in the minutes that Appellants had voted in favor of creating the special committees and appointing the Majority Shareholders to those committees. Appellants actually vote "no". CT 81, ¶ 24.

Appellants have not received any payout of profit since the Special Shareholder Meeting even though DC Tech had a profit (over salaries) of approximately $179,000 for 2011 that, in conformance with the prior agreement and practice though 2010, should have been paid out based upon the *pro rata* stock ownership. The amount of profit for 2012 and 2013 has been kept secret from the Appellants, despite the fact that they are still directors of DC Tech. CT 83, ¶¶ 29-30.

Appellants did not know, and did not have reason to know, about the conduct of Andy Moore until December 2012, when Appellants found emails

amongst the documents produced revealing the conduct of the Majority Shareholders and Andy Moore. CT 83, ¶ 33.

In summary, Moore engaged in the following intentional conduct to defraud Appellants:

i. Moore established an attorney client relationship with the Majority Shareholders weeks before the special director's meeting;

ii. Moore devised the Scheme at the request of the Majority Shareholders for the express purpose of depriving the Appellants of any economic value in the Company;

iii. Moore prepared all of the special meeting paperwork (notice, agenda, resolutions) and then instructed the Majority Shareholders how to carry out the Scheme by means of a special meeting;

iv. Moore then acted out his own part in the Scheme by conducting the special meeting at his office, by acting as the secretary for the meeting, and creating false minutes of the meeting;

v. Moore kept hidden from the Appellants his prior relationship with the Majority Shareholders and that he had devised the Scheme for the purpose of driving Appellants out and transferring the entire economic value of the Company to the Majority Shareholders;

vi. Moore had himself elected as Company counsel at the beginning of the special director's meeting, thereby establishing a separate attorney-client relationship with the Company with a fiduciary duty to all of the directors; and

vii. Moore never disclosed to Appellants, who were directors of the Company, that he had acted in the sole interests of the Majority and not in the interests of the Company.

III. Statement of Appealability

On October 23, 2013, Appellants filed a Notice of Appeal, CT 172-180, from the Judgment of Dismissal After Order Sustaining Demurrer filed in Department 6 of the Superior Court for the State of California, County of Nevada, on October 8, 2013. CT 164-166. The Notice of Appeal was timely filed under California Rules of Court, Rule 8.104. The Appeal was made pursuant to California Code of Civil Procedure §904.1(a)(1).

IV. **The Standard of Review**

A demurrer tests the sufficiency of a pleading as a matter of law and the courts apply the *de novo* standard of review. *Prakashpalan v. Engstrom, Lipscomb and Lack* (2014) 223 Cal. App. 4th 1105; *California Logistics, Inc. v. State of California* (2008) 161 Cal. App.4th 242, 247. A complaint will be sufficient if it alleges ultimate (not evidentiary) facts that set out the essential facts of a plaintiff's case with precision and particularity sufficient to acquaint the defendant with the nature, source, and extent of the plaintiff's claim. Legal conclusions are insufficient. *Ibid.*

The court will assume the truth of the allegations in the complaint, but not the truth of contentions, deductions, or conclusions of law. *Ibid.* If the plaintiff "has stated a cause of action under any possible legal theory", then the trial court's to sustain the demurrer without leave to amend was an abuse of discretion. *Ibid.*

V. Legal Argument

A. The Sixth Cause Of Action For Actual Fraud Based Upon Moore's Conduct States A Valid Cause Of Action

The Appellants' Sixth Cause of Action, CT 93-94, ¶¶ 82-89, presents a conceptual issue: can a fraud be perpetrated solely by *conduct* or must there also be an express written or verbal misrepresentation. In addition, the Sixth Cause of Action presents the further question of whether it makes any difference if the alleged perpetrator is an attorney.

Respondent Andy Moore argued that the Sixth Cause of Action presents only a case of fraudulent concealment[2] and that he had no duty to disclose anything to the Appellants because he was not their lawyer. The trial court ruled in favor of Andy Moore.

Appellants contend that there were two conceptual errors made by the trial court. First, that the trial court failed to comprehend that the Sixth Cause of Action alleges a fraud by an *actual course of conduct* by Moore, not just a fraudulent concealment of information. Second, the trial court mistakenly believed, contrary to established law, that because Moore was an attorney, that

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[2] Fraudulent concealment, discussed further at the end of Section V.A, *infra*, is one species of actual fraud. *Landmark v. Morgan* (2009) 2009WL160214 (N.D. Cal.) ("*Landmark*") at p. 5, citing *Stevens v. Superior Court* (1986) 180 Cal. App.3d 605, 608-09 (holding that actual fraud includes the "intentional concealment of a material fact.") and *Barder v. McClung* (1949) 93 Cal. App.2d 692, 697 ("The suppression of that which is true, by one having knowledge or belief of the fact, is actual fraud.").

he was not subject to an action for actual fraud. The trial court did not grasp that an attorney has the same general obligation that any person has to not commit the tort of fraud.

To conceptually lay out the issues for this Court, Appellants present the following four factual scenarios, the last of which (i.e., no. 4) mirrors the allegations of the Sixth Cause of Action in the SAC[3].

1. majority shareholder engages lawyer to review corporate documents and, if those documents and corporate law so permit, to draft a resolution to create a special compensation committee. Lawyer has no knowledge of majority shareholder's intent to use the special compensation committee to take all of the company's earnings and leave minority nothing. Lawyer reviews corporate documents, finds no impediment, drafts the resolution, and gives it to majority shareholder. Lawyer has no further involvement.

2. Majority shareholder engages lawyer to find a way to get rid of the minority shareholder or to minimize the minority shareholder's economic value in company. Lawyer examines the corporate articles and by-laws and concludes that the board of directors could create a special compensation committee and then tells majority shareholder how a special compensation committee could be used to pay the entire earnings of the company to majority shareholder, leaving the minority shareholder no economic value. Lawyer does nothing else.

3. Majority shareholder engages lawyer to find a way to get rid of minority shareholders or to minimize the minority's economic value in company. Lawyer designs a plan for the creation of a special compensation committee that the majority can use to pay themselves the entire earnings of the company, leaving the minority nothing. Lawyer drafts for majority a notice of special meeting of the board of directors, the meeting agenda and the corporate resolutions to effect the plan. Lawyer does nothing else.

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[3] These four scenarios assume, like this case, that the company is a closely held corporation with a fiduciary duty of majority to minority shareholders pursuant to *Ahmanson*.

4. Majority shareholder comes to lawyer and asks the lawyer to find a way to get rid of minority shareholders or to minimize the minority's economic value. Lawyer designs a plan for the creation of a special compensation committee that the majority can use to pay themselves the entire earnings of the company, leaving the minority nothing. Lawyer drafts a notice of special meeting of the board of directors, drafts the meeting agenda, holds the special meeting in his office, has himself elected as counsel for the company, falsely records several key votes by Appellants at the meeting as being in the affirmative, and never tells the minority about his prior engagement as counsel for majority.

Appellant would agree that in scenario no. 1 lawyer has not committed either an actual fraud or a fraudulent concealment and was probably not even negligent.[4] Thus, there would not be any liability to the minority.

Appellant would argue that scenario no. 2 presents a possible case for a concealment by lawyer that is best analyzed under the rule that fraudulent concealment requires the plaintiff to show that there was a duty to disclose.

Appellant would argue that scenario no. 3 presents a possible case for actual fraud by lawyer because the lawyer physically participates in the conduct intended to harm the minority by drafting the notice of special meeting of the board of directors, the meeting agenda, and the corporate resolutions that carry out the plan, and further, the lawyer intends that his contact harm the minority.

Appellant has pleaded scenario no. 4 in the Sixth Cause of Action. CT 93-94, ¶¶ 82-89. Appellant argues that Moore's physical participation as described

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[4] The question of whether the lawyer would have a duty to tell the majority about the fiduciary duty of the majority to minority shareholders under *Ahmanson*, and thus, breached an imputed duty to minority, is too remote to discuss here.

in scenario no. 4 constitutes *an actual fraud by conduct* that is not just a concealment of facts, but actual conduct intended to be misleading. In other words, Moore's intentional conduct, hidden from Appellants, *was a misrepresentation.*

1. **Fraud Can Be Perpetrated By Any Manner Of Conduct**

Appellants directed the trial court's attention to *Wells v. Zenz* (1927) 83 Cal. App. 137, 140, where the Court of Appeal eloquently stated how an *actual* fraud can be perpetuated by *any manner of conduct*:

> [f]raud is a generic term which embraces all the multifarious means which human ingenuity can devise and are resorted to by one individual to get an advantage over another. No definite and invariable rule can be laid down as a general proposition defining fraud, as it includes all surprise, trick, cunning, dissembling, and unfair ways by which another is deceived.

Appellants cannot find any authority that holds that a fraud can only be committed by a verbal or written misrepresentation as ruled by the trial court. Indeed, California statutes concerning fraud recognize that pure conduct can be the basis for fraud. See e.g., Civil Code § 1572, no. 5 that provides that "[a]ny other act fitted to deceive" is actionable.

2. **Attorneys Are Subject To The Same Rules**

Just because someone is an attorney does not make them exempt from the general law of actual fraud that applies to all persons. California courts have long held that an attorney may be sued for actual fraud regardless of

whether there is "privity" with the victim. A good survey of the law in this area was presented by the Court of Appeal in *Shafer v. Berger, Kahn, Shafton, Moss, Figler, Simon & Gladstone* (2003) 107 Cal. App. 4th 54. That survey went back to 1895 and the California Supreme Court's ruling in *Buckley v. Gray* (1895) 110 Cal. 339, where the Supreme Court recognized that an attorney could be held liable for defrauding a third party without "privity" stating:

> It is a general doctrine ... that an attorney is liable for negligence in the conduct of his professional duties ... to his client alone ... and not to third parties. The exceptions to this general rule ... are where the attorney has been guilty of fraud or collusion, or of a malicious or tortious act. Responsibility for a fraudulent act is independent of any contractual relation between the guilty party and the one injured; and one committing a malicious or tortious act, to the injury of another, is liable therefor, without reference to any question of privity between himself and the wronged one. Buckley v. Gray 110 Cal. at 342.

The California Supreme Court has consistently upheld this rule over the years and restated it in *Goodman v. Kennedy* (1976) 18 Cal. 3rd 335, at 383, and reiterated the rule as follows:

> If defendant [an attorney] committed actual fraud in his dealings with Pitcher, the fact that he did so in the capacity of attorney does not relieve him of liability. *Greenwood v. Morradian* (1955) 137 Cal. App. 2d 532, 539; see *Warner v. Roadshow Attractions Co.* (1942) 56 Cal. App.2 d 1, 7. The limitations upon liability for negligence based upon the scope of an attorney's duty of care do not apply to liability for fraud. *Buckley v. Gray*, *supra*, 110 Cal. 339, 342.

Another leading decision on pleading actual fraud against an attorney is *Cicone v. URS Corp.* (1986) 183 Cal. App. 3d 194 ("*Cicone*"). In holding that an attorney is accountable for actual fraud without alleging any special duty to the victim, the court specifically noted that there is no requirement that an independent duty must be alleged:

> In California it is well established that an attorney may not, with impunity, either conspire with a client to defraud or injure a third person or engage in intentional tortious conduct toward a third person.... Thus, the case law is clear that a duty is owed by an attorney not to defraud another, even if that other is an attorney negotiating at arm's length.
>
> Thus, while duty is not an element of fraud in the traditional sense, a duty is owed to others to refrain from intentionally tortious conduct. *Therefore, any inference arising from the lower court's decision that the element of duty bars [the sellers' attorney's] causes of action for fraud and deceit [against the buyer's attorney] is not supported by law. Cicone*, 183 Cal. App. 3d at pp. 201 202. [Emphasis added.]

The most recent example of the courts holding attorneys liable for actual fraud appears to be *Stueve Brothers Farms, LLC v Berger Kahn* (2013) 222 Cal App 4th 303, 321, where the Fourth District Court of Appeal again made it very clear that a separate independent duty (typically privity) is not required for an action for actual fraud against an attorney:

> Attorney Allen and Berger Kahn nonetheless had a duty not to commit an intentional tort, such as fraud, against the Stueves or anyone else. *Berg & Berg Enterprises, LLC v. Sherwood Partners, Inc.* (2005) 131 Cal. App.

> 4th 802, 825–826 [duty not to commit fraud]; *Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal. 4th 503, 515 [duty to refrain from injuring another]; Fuller v. First Franklin Financial Corp. (2013) 216 Cal. App.4th 955, at p. 967 [duty to refrain from committing intentional tort against anyone].) "Thus, there can be liability for conspiring to commit an intentional tort even absent any duty [other than the general duty to refrain from injuring another]. [Citations.]" *Fuller v. First Franklin Financial Corp., supra*, 216 Cal. App. 4th at p. 967.

3. **Appellants Have Properly Pleaded Actual Fraud**

The factual allegations in the SAC make out a straightforward case of actual fraud against Andy Moore. As described above in the Statement of Facts, Section II.B, *supra*, the Majority Shareholders approached Andy Moore, a practicing corporate attorney, and asked how they could take over the Company (a Sub S corporation) and run it solely for their own benefit, to the exclusion of Appellants, the minority shareholders. Moore agreed to advise the Majority Shareholders how to accomplish this. Moore then devised the entire Scheme, and further, directly participated in carrying out the Scheme. The fact that Moore may not have made an express or overt affirmative verbal or written misrepresentation to Appellants does not exonerate his secret, knowing, tortious conduct that was directed at Appellants.

Simply put: Moore's conduct was a misrepresentation.

However, if this Court finds that the allegations in the Sixth Cause of Action are best categorized as a claim for fraudulent concealment, i.e., that the element

of intent should be replaced by a requirement of an independent duty to disclose, the Appellants then argue that such independent duty is thoroughly established in this case upon the same criteria used to impute a duty for breach of fiduciary duty and constructive fraud (as alleged in the Fifth and Seventh Causes of Action) as discussed and analyzed as follows.

B. The Allegations Under The Fifth And Seventh Causes Of Action Impute A Duty By Moore

1. Actual And Constructive Fraud Distinguished

Both California statutory and judicial authority provide for causes of action based upon either *constructive* or *actual* fraud. See e.g., Compare California Civil Code §1571; *Landmark*, *supra* at 10n2. Actual fraud requires the pleading of *intent*, whereas, constructive fraud does not. These two types of fraud differ in that constructive fraud requires a pleading of a duty and the breach of that duty, while actual fraud requires the pleading of specific intent. Compare California Civil Code §1572 (actual fraud in a contractual context requires "intent to deceive") with §1573 ("without an actually fraudulently intent").[5]

Constructive fraud is routinely used as the basis for professional

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[5] Appellants point out that CC §§1571 through 1572 are under the Civil Code Chapter 3 "Contracts". Appellant has not found any authority that clearly holds whether these statutory rules apply beyond a contract context. The cases otherwise cited herein do not specifically cite to these statutes and appear to be based on the common law of fraud as it has developed alongside the statutory rules for fraud in contract matters. Appellants suggest clarification of whether CC §§ 1571-1573 apply only to contract cases or to any fraud action.

negligence and breach of fiduciary duty actions such as those pleaded here by Appellants in the Fifth and Seventh Causes of Action in the SAC. Actual and constructive fraud are often confused. See *Landmark* at p. 5 where the District Court for the Northern District presented the clear distinction between the two types of fraud as follows: "While a constructive fraud claim 'allows relief for negligent omissions constituting breach of a duty in a confidential relationship,' ... a claim for actual fraud must be premised on an intentional misrepresentation or omission of material fact." See also, *Worthington v. Davi* (2012) 208 Cal App. 4th 263, 283.

2. **Appellants Properly Pleaded Constructive Fraud**

The Appellants have pleaded two counts that are based upon facts that create an implied (i.e., an imputed) duty by Moore to Appellants. These causes of action are the Fifth (breach of fiduciary duty), CT 90-93, ¶¶ 65-81, and Seventh (professional negligence), CT 95-96, ¶¶ 90-94.

Appellants allegations in both the Fifth and Seventh Causes of Action are based directly upon the leading authority cited by Respondent Moore, himself, in both of his demurres in the trial court, *Skarbrevik v.Cohen, England & Whitfield* (1991) 231 Cal. App. 3d, 692, 711 ("*Skarbrevik*"). In *Skarbrevik* at 700-707, the Court of Appeal reviewed the criteria to be used to impute a duty on the part of an attorney. The Court began its discussion, at 701, with this preface:

The question of whether an attorney may, under certain

> circumstances, owe a duty to some third party is essentially one of law and, as such, involves 'a judicial weighing of the policy considerations for and against the imposition of liability under the circumstances. Citing to *Goodman v. Kennedy* (1976) 18 Cal. 3d 335, 342; *Schick v. Lerner* (1987) 193 Cal. App. 3d 1321, 1329

The Court then reviewed the policy concerns that might warrant the imposition of liability by imputing a duty:

> Determination of whether in a specific case an attorney will be held liable to a third person not in privity is a matter of policy and involves the balancing of various factors, among which are the extent to which the transaction was intended to affect the plaintiff, the forseeability of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the [attorney's] conduct and the injury, and the policy of preventing future harm. [Citation.] Citing to *Lucas v. Hamm* (1961) 56 Cal. 2d 583, 588.

Focusing on the foreseeability of harm, the Court then noted that:

> Limited exceptions to the privity rule have evolved in situations where the third party is the intended beneficiary of the attorney's services or the foreseeability of harm to the third party resulting from professional negligence is not outweighed by other policy considerations. (St. Paul Title Co. v. Meier (1986) 181 Cal. App. 3d 948, 951 ....)

3. **Application Of The *Skarbrevik* Crireria To Moore's Conduct**

Applying the criteria set out in *Skarbrevik*, the following is an analysis of these factors to the allegations in this case:

> ***The extent to which the transaction was intended to affect the plaintiff***

The SAC alleges that the Scheme was designed by Moore for the purpose of harming the Appellants. Moore was asked by the majority Shareholders to find a way to get rid of Appellants, or in the alternative, to strip Appellants of any economic benefit. In response, Moore devised the Scheme which was solely intended for this purpose. CT 80-82, ¶¶ 21-25.

The foreseeability of harm

The harm to Appellants was contemplated by Moore from the outset of his actions. Thus foreseeability of harm to Appellants is established by the very purpose of Moore's conduct and advice to the Majority Shareholders.

The degree of certainty that the plaintiff suffered injury

The allegations in the SAC clearly assert that Appellants were seriously harmed in excess of $71,600 for 2011, plus unknown amounts for 2012, 2013, and continuing into the future. CT 93, ¶ 79, CT 95, ¶ 93.

The closeness of the connection between the attorney's conduct and the injury

The Scheme demonstrates that Moore's conduct was the direct causation of Appellants' harm. But for Moore's shameful advice to the Majority Shareholders, Appellants would have continued to receive their *pro rata* share of the Company's earnings and this entire lawsuit would have been unnecessary.

The policy of preventing future harm

The public policy factor is obviously met here. Lawyers must not be

allowed to engage in such conduct. The "technicalities" argued by Moore must not be allowed to thwart the goals and purposes of the law of fraud.

With all five criteria squarely met, the Court should apply the *Skarbrevik* analysis and find that the Appellants' allegations impute a duty by Moore to Appellants that sustains the Fifth and Seventh Causes of Action.

4. **Additional Factors Supporting An Imputed Duty**

In addition to the factors set out in *Skarbrevik*, there are other important reasons found in the allegations that support the finding of an implied duty on the part of Moore.

a. **Moore Owed A Duty To Appellants Under Rule 3-210**

It would have been proper for Moore to represent the Majority Shareholders in their individual capacities and give them advice about what actions they could take to further their interests in the Company. However, Moore had a duty under the Rules of Professional Conduct, Rule 3-210, to only give advice that was within the bounds of the law, including within the boundary of the *Ahmanson* rule that majority shareholders owe a fiduciary duty to the minority shareholders.

Moore's advice was a clear violation of Rule 3-210 because he counseled the Majority Shareholders to break the law. Indeed, this breach of Rule 3-210 led the Majority Shareholders directly to a violation of Corporation

Code §310 (requirement of disclosure of conflicts by directors).[6] The intentional violation of Rule 3-210 by an attorney should provide the basis for imposition of a duty to persons intended to be harmed or for whom it is reasonably foreseeable that they would be harmed.

b. Moore Had A Fiduciary Duty To Disclose Under Rule 3-600

An attorney representing a corporation owes it a fiduciary duty. *Skarbrevik* at 703-704. A corporation is represented and controlled by its directors. Corporations Code §300. This fiduciary duty includes the obligation on the company attorney to disclose actual or apparent conflicts of interest to the directors. See California Rules of Professional Responsibility Rule 3-600D and Rule 3-310. This would include conflicts of interest arising out of controversies between groups of shareholders, especially if there are conflicts between shareholders as to the control of the company.

It is established law that legal counsel for a company may not "act as proxy for one contending group of shareholders" against another. *Goldstein v. Lees 46* (1975) Cal App. 3d 614, 622 ("*Goldstein*"). In so holding, the *Goldstein* court quoted the following from the Committee on Professional Ethics and Grievances of the American Bar Association in Opinion 86:

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[6] Appellants are not arguing here that Moore's conduct exonerates the Majority Shareholders from liability. There are plenty of independent grounds for holding them liable as joint tort feasors.

> In acting as the corporation's legal advisor he [legal counsel] must refrain from taking part in any controversies or factional differences which may exist among shareholders as to its control. When his opinion is sought by those entitled to it, or when it becomes his duty to voice it, he must be in a position to give it without bias or prejudice and to have it recognized as being so given. Unless he is in that position his usefulness to his client is impaired.

Indeed, the factual circumstance presented in this case was foreseen by the *Skarbrevik* court which reviewed Business and Professions Code §6068(e) and the Professional Rules of Conduct, Rule 3-600D. In *Skarbrevik*, the court found that:

> The attorney [for the company] is obligated to explain to the organization's directors, officers, employees, members, shareholders, or other constituents the identity of the client for whom the attorney is acting, and shall not mislead such a constituent ... *Id.* at 704.

The law is unequivocal: Moore had a fiduciary duty to disclose to Appellants, who were independent directors of the Company, his prior and adverse representation of the Majority Shareholders. Had Moore fulfilled this duty, Appellants would have been able to stop the special meeting at the outset, or if required, file for injunctive relief to stop the resolutions that were adopted from coming into effect.

When the ethical requirements of the Rules of Professional responsibility are added together with the *Skarbrevik* criteria, the grounds for imputing liability to Moore are overwhelming.

D. The Discovery Rule Tolls The Statute Of Limitations

Although the trial court did not specifically address this issue in ruling on the demurrer to the SAC, it was raised by Moore in his demurrer.

There is no dispute the correct statute of limitations for the Fifth and Seventh Causes of Action is one year. However, it is well known that a statute of limitation for torts, including breach of fiduciary duty, is tolled by the discovery rule if the plaintiff did not know or have reason to know about the cause of action until essential evidence was discovered. *April Enterprises, Inc. v. KTTV* (1983)147 Cal. App. 3d 805, 826-827. Appellants properly amended the SAC to make the appropriate allegations in the complaint to support their claim under the discovery rule that they did not know and did not have reason to know about Moore's wrongful conduct until Appellants received discovery responses from the other defendants in December 2012. CT 83, ¶ 33.

In Moore's demurrer to the SAC, it is argued that Appellants have not been specific enough about alleging what facts they did not know until the discovery responses were received. However, a simple review of the alleged facts proves that Appellants did not know until December 2012 about Moore's actual conduct. Appellants were unaware until they received discovery responses that:

> i. the Majority Shareholders had solicited advice from Moore about "what actions they could take to remove Appellants as directors and officers, eliminate the Appellants' exercise of business judgment or control over DC Tech's affairs, diminish or eliminate the economic value of Appellants' DC Tech stock, transfer the business of DC

Tech to a new entity to be owned by the Majority Shareholders and not by the Appellants, or alternatively, for the Majority Shareholders to purchase Appellants' DC Tech stock at a price far below its real economic value"; CT 80, ¶ 21;

ii. Moore had devised the detailed Scheme in response to the Majority's request; CT 80-81, ¶ 22;

iii. Moore was the author of the Special Meeting agenda, caused the agenda to be sent to Appellants, never disclosed his prior relationship with the Majority, and knowingly falsified the votes on the formation of the special committees; CT 81, ¶ 24;

iv. the Majority subsequently voted themselves as the only members of the special committees; CT 81, ¶ 25.

These are critical facts that Appellants did not learn about until they were able to see the actual communications between Moore and the Majority Shareholders that led to the special meeting. Consequently, the discovery rule has been properly pleaded.

E. Causation and Damages

Finally, Moore asserted that Appellants have failed to plead allegations showing causation between his wrongdoing and the harm suffered by Appellants. The causation of damages for the fifth, sixth, seventh causes of action are set out in the SAC in ¶¶ 21-29, 65-76, 82-88, and ¶¶ 90-94. CT 80-83, 90-96. The causation issue is simple: Moore designed and implemented the Scheme to defraud the Appellants by enabling the Majority to extract all earnings from the Company, leaving Appellants nothing. Further, the Scheme allowed the Majority Shareholders to take complete control of the management the Company. As a

direct result, the stock of Appellants has been rendered valueless. "But for" Moore's fraudulent conduct, the Company would have continued to operate as it had in the past and Appellants would have been paid their *pro rata* share for 2011 and thereafter. Appellants stock would have its fair market value and if the Majority Shareholders wanted to buy Appellants' share for that value, the matter could have been settled.

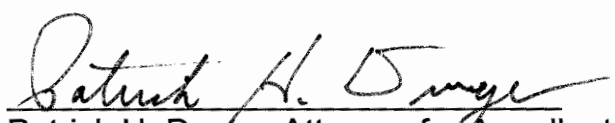
Lastly, Moore's tortious conduct is the direct cause of Appellants having to initiate this litigation against the Majority Shareholders. If the Appellants had received their rightful *pro rata* share of earnings, this litigation would never have been necessary. Further, had Moore disclosed his prior relationship to Appellants prior to or at the time of the special meeting, Appellants would have been able to prevent or stop the special meeting and/or to prevent the subsequent harm by directly confronting the Majority Shareholders, and if they were not respoinsive, then through injunctive relief from the superior court.

VI. Conclusion

For the foregoing reasons, the trial court's ruling sustaining the demurrer of Andy Moore to Appellants' Second Amended Complaint should be reversed and the case remanded.

Respectfully Submitted,

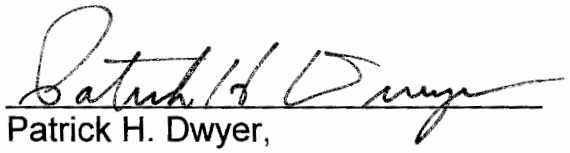
Dated: April 4, 2014



Patrick H. Dwyer, Attorney for Appellants

Certificate of Word Count

I hereby certify under penalty of perjury that, to the best of my knowledge and belief, the total number of words in the body of this brief (i.e., Sections I through VI) is approximately 6358.



Patrick H. Dwyer,
Attorney for Appellants

Date: April 4, 2014

PROOF OF SERVICE

I hereby certify under penalty of perjury that a copy of the Appellants' Opening Brief in the matter of Daus v. Andy Moore, Case No. 78702, appeal No C075019 was served via U.S. First Class mail upon the following:

1. Counsel for Defendant and Respondent addressed as follows:

   Gregory S. Cavallo, Shopoff Cavallo & Kirsh LLP, 100 Pine Street, Suite 750, San Francisco 94111; email address: Gregory Cavallo <greg@scklegal.com>

2. The Superior Court for the County of Nevada, Department 6, 201 Church Street, Nevada City, California 95959 (one copy).

A further copy is served upon the California Supreme Court by the electronic submission to the Court of Appeal, Third Appellate District.

Signature

Patrick H. Dwyer
Print Name

Date: April 4, 2014