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8 trustees of the Mark and Jocelyn Fechner Trust

8 SUPERIOR COURT OF CALIFORNIA

9 COUNTY OF KERN - UNLIMITED JURISDICTION

10 DONALD PESTELL; HANNA PESTELL;  
11 and PESTELL INTERNATIONAL  
12 MINING AND EXPLORATION, LTD. a  
13 Canadian company,

12 Plaintiffs,

13 v.

14 AMERICAN CARRIAGE, INC.; MARK  
15 FECHNER; JOCELYN FECHNER;  
16 MARK AND JOCELYN FECHNER  
17 TRUST; and DOES 1 to 20, inclusive,

17 Defendants.

CASE NO. S-1500-CV-264437 WDP

Complaint filed: 7/8/2008

**DEFENDANTS' POST TRIAL BRIEF**

18 ALL RELATED CROSS-ACTIONS  
19

20 COME NOW, Defendants American Carriage, Inc. and Mark Fechner and Jocelyn  
21 Fechner, individually and as trustees of the Mark and Jocelyn Fechner Trust, and submit their  
22 Post Trial Brief, as follows:

23 **I.**

24 **ISSUES**

25 Following the trial in this matter, the Court defined three issues it wanted addressed in the  
26 parties' Post Trial Briefs, as follows:

27 1. If American Carriage, Inc. ("ACI") actually owes a debt to Plaintiffs Donald  
28 Pestell, Hanna Pestell and Pestell International Mining and Exploration, Ltd's (collectively,

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1 “Pestell”), was the debt excused by the terms of the parties’ loan agreement?

2 2. If the debt is not excused, does it flow through to Mark and Jocelyn Fechner  
3 (collectively, “Fechner”) and the Mark and Jocelyn Fechner Family Trust (“Trust”)?

4 3. Since the tax consequences flow through to Fechner in a Subchapter S  
5 Corporation, do ACI’s debts and liabilities flow through to Fechner?

6 II.

7 **POINTS AND AUTHORITY**

8 **A. ISSUE NO. 1: IF ACI ACTUALLY OWES A DEBT TO PESTELL, WAS THE**  
9 **DEBT EXCUSED BY THE TERMS OF THE PARTIES’ LOAN AGREEMENT?<sup>1</sup>**

10 **ACI is Not Required to Repay Pestell, Because the Loan Agreement’s Conditions**  
11 **Precedent for Repayment Did Not Occur.**

12 After trial, the Court stated that it was leaning heavily toward finding that ACI owed a  
13 debt to Pestell. However, the Court asked if the debt was excused by the terms of the parties’  
14 loan agreement. ACI interprets the issue framed by the Court as asking whether, if ACI owes a  
15 debt to Pestell, Pestell’s right of repayment on the debt never accrued because the conditions  
16 precedent set forth in the parties’ loan agreement never occurred. It is ACI’s contention that  
17 because the conditions precedent never occurred, Pestell’s cause of action to sue on the contract  
18 for failure to pay has not yet accrued, and, nonetheless, ACI is not obligated to repay the loan to  
19 Pestell.

20 The pertinent facts adduced at trial are as follows:

21 In 2007, a situation confronted ACI which has never occurred before, that being that no  
22 new contracts came in for the conversion of luxury motor coaches. Further, walk-in traffic and  
23 telephone traffic of interested persons considering one of ACI’s high end motor coaches dwindled  
24 to levels not previously seen before. Throughout this timeframe, ACI continued with all of its  
25 regular advertising and promotional efforts (through the Spring of 2008) as had been done in the  
26 past and also attended the usual rally’s for coach owners, as rally’s had been a lucrative source of

27 <sup>1</sup> This issue was not directly discussed by Pestell in their Post Trial Brief. Pestell does cite *Panno v. Russo* (1947) 82  
28 Cal.App.2d 408 to argue that an exception to the rule concerning contract modification is waiver or estoppel  
regarding the performance of a condition. This is not a case involving contract modification, and Pestell has neither  
pleaded nor proved waiver or estoppel.

1 sales in the past. All of these efforts, which had worked for over ten years, were no longer  
2 effective.

3 In addition, in 2007, the coaches that ACI had taken in on trade, including a Monaco and a  
4 Featherlite, were only able to be sold for less than what ACI paid for them which is further  
5 evidence of the deterioration of the RV market at the time. As to the Featherlite sale that  
6 occurred in October 2007, and in lieu of putting that money back towards the current line of  
7 credit as historically had been done, the Fechner's left the entire \$310,000 of sales proceeds in the  
8 company to allow it to continue operations.<sup>2</sup> At this time, the cash flow situation of ACI was  
9 becoming critical to the point that closure seemed a possibility unless further sales were  
10 generated.

11 While ACI was working on two to three coaches throughout most of 2007, which included  
12 the Pestell coach, by October 2007 the only significant ongoing project was the Pestell coach. In  
13 the accounting records, the Pestell coach is known as coach 0827. With ACI's cash flow  
14 problems becoming critical in late October 2007, the Board of Directors of ACI authorized Mr.  
15 Fechner to communicate with Mr. Pestell and advise him of the situation and present ACI's  
16 proposals,<sup>3</sup> which was done by way of Mr. Fechner's October 29, 2007 email. *See*, Exhibit 2.  
17 These proposals included putting more money into the project, relinquish ACI and its assets to  
18 Pestell to operate as he saw fit, and such other solutions as may work for both parties. Upon  
19 receiving this e-mail, Mr. Pestell shortly thereafter traveled to Tehachapi to meet with Fechner in  
20 early November 2007.

21 At this meeting, the financial situation of ACI and various options were discussed, and  
22 Mr. Pestell proposed that he loan ACI money to complete the coach with his advances repaid  
23 when ACI was either sold (which sale efforts had been ongoing since early 2006 when authorized  
24 by the Board of Directors of ACI<sup>4</sup>) or in installments of \$100,000 per new coach sale that ACI  
25 makes prior to the sale of ACI. *See*, Exhibits 3 and 4. In connection with making this loan,

26 \_\_\_\_\_  
27 <sup>2</sup> This line of credit was the Fechner equity line of credit (i.e., a line of credit secured by the real property owned by  
the Fechner's and provided to ACI for its purposes of paying for trade-ins and possibly for operating capital).

28 <sup>3</sup> These Board of Directors Minutes are Exhibit 44\_0048.

<sup>4</sup> These Board of Directors Minutes are Exhibit 44\_0040.

1 Pestell did not request that ACI alter its operations in any way, did not suggest that ACI lower its  
2 ongoing overhead in any way, and did not require any other actions be taken concerning the  
3 operations of its business. Mr. Pestell also stated that he asked for security for the loan he was  
4 proposing, but Mr. Fechner told Mr. Pestell that ACI did not own the real property.

5 Mr. Pestell, undeniably a successful and experienced businessman who had even been in  
6 the business of making loans on a secured and unsecured basis in his business career, also did not  
7 insist on obtaining a promissory note, guaranty or any financial documents of ACI prior to the  
8 time of making this loan. As is shown by the evidence, all parties were optimistic that the coach  
9 would be completed and ACI could stay in business. Had ACI stayed in business, it would have  
10 benefited Pestell in that his loan could possibly have been repaid, and would have benefitted ACI  
11 and Fechner as well by allowing them to continue in a business that they had built up over close  
12 to twenty years (which includes time incurred in the same industry prior to the formation of ACI).

13 It is undisputed that Pestell made the loan payments called for under his agreement with  
14 ACI. Those payments were \$125,000 paid in mid-November 2007, \$140,000 paid in mid-  
15 December 2007, \$140,000 paid in the first part of January 2008, \$140,000 payment made in mid-  
16 February 2008 and a final payment of \$425,000 paid in March 2008. It is also undisputed that  
17 Pestell never paid the final payment due under the coach contract with ACI which, pursuant to  
18 Exhibit 1, is the sum of \$144,000.

19 During the time that Pestell was making his loan payments and slightly prior thereto, ACI  
20 recognized that it was not receiving new business and, accordingly, made significant efforts to cut  
21 its expenses. These items included eliminating the Volvo truck payment which was in excess of  
22 \$2,500 per month; discharging an ineffective production manager for a savings of approximately  
23 \$6,000 per month at the end of October 2007; reduction of officers' salaries; restructuring of  
24 employee insurance plans; returning of excess inventory which generated many thousands of  
25 dollars from October 2007 through March 2008; instituting a recycling program for scrap metal  
26 generated by production, resulting in the receipt of thousands of dollars; and making small cuts,  
27 such as not buying donuts for weekly staff meetings and cutting back on charitable contributions.  
28 ACI, like any company desiring to remain in business and profit from the goodwill and reputation

1 it had created throughout its years of operation, was simply doing what it could to remain in  
2 operation and to complete Pestell's coach.

3 During the time Pestell made his loan payments, no further contracts were entered into by  
4 and between ACI and potential customers for construction of the high-end luxury coaches that  
5 ACI had developed its business reputation on. Pestell would call Fechner regularly, and Fechner  
6 would tell Pestell that business did not look good. Despite this, Pestell continued to make  
7 payments to ACI on the agreed loan which, as all parties testified, was for the purpose of keeping  
8 ACI in operation to provide for the completion of his coach.

9 Pestell apparently believes that he could not have taken the coach to another converter to  
10 be finished, but Mr. Fechner, obviously an expert in the industry, testified that Pestell's coach  
11 could have been taken to Marathon since the interior conversion had not occurred as yet.  
12 Marathon is the largest converter in the United States. However, Pestell chose to stick with ACI  
13 for the completion of their coach, obviously having confidence in their work product based upon  
14 other ACI coaches they had seen.

15 It was made clear at trial that had other orders come in at the time that Pestell's coach was  
16 being constructed and up to the time ACI closed in March 2008, ACI would not have closed and  
17 would have continued in business. Further, had orders come in 2007 as had occurred in the past,  
18 there also would have been no reason to obtain a loan from Pestell. If such had occurred, the  
19 company simply would have continued as normal and Pestell's coach would have been completed  
20 without extra funds being invested.

21 The loan terms dictated by Mr. Pestell provide that Pestell would be paid back upon the  
22 sale of ACI or in installments of \$100,000 per future coach sale. Neither of those two events  
23 happened, despite ACI's good faith advertising and promotions through March 2008 and in  
24 attempting to sell the company in 2006 through to the time of closing.

25 **1. No cause of action accrues upon a contract to pay "when able," until the**  
26 **condition precedent is performed and the debtor is able to pay.**

27 A condition precedent is defined under California law as "one which is to be performed  
28 before some right dependent thereon accrues, or some act dependent thereon is performed." Civil

1 Code § 1436; *see also Platt Pacific, Inc. v. Andelson* (1993) 6 Cal.4th 307, 313, 862 P.2d 158,  
2 162, 24 Cal.Rptr.2d 597, 601 and *Realmuto v. Gagnard* (2003) 110 Cal.App.4th 193, 199, 1  
3 Cal.Rptr.3d 569, 573. An obligation, such as to repay a loan, “is conditional, when the rights or  
4 duties of any party thereto depend upon the occurrence of an uncertain event.” Civil Code §  
5 1434. The Restatement of the Law on Contracts defines a “condition” as “either a fact (other than  
6 the mere lapse of time) which, unless excused (a) must exist or occur before a duty of immediate  
7 performance of a promise arises, in which case the condition is a ‘condition precedent.’”  
8 Restatement (First) of Contracts § 250 (1932).

9 In this case, the parties’ loan agreement provides that ACI will repay Pestell’s loan upon  
10 the happening of one of two events: (1) either the sale of ACI or (2) in installments of \$100,000  
11 per new coach sale that ACI makes prior to the sale of ACI. These repayment terms (the  
12 “Condition”) were the condition precedent to ACI’s obligation to repay Pestell and Pestell’s right  
13 to repayment. As clarified in trial, the Condition was dictated by Pestell during the parties’ oral  
14 negotiations in November 2007 and memorialized in Exhibit 4. The Condition never occurred,  
15 because neither of those two events happened. “A party to a contract may absolutely limit his  
16 liability to pay a certain sum to funds to accrue to him from a certain source, and under such  
17 circumstances a recovery cannot be had without pleading and proof that funds became available  
18 to the debtor from the source which he specified.” *Martin v. Martin* (1935) 5 Cal.App.2d 591,  
19 593, 43 P.2d 314, 315. Mr. Pestell’s dictated Condition (which were admittedly accepted by  
20 ACI) limits ACI’s liability, and Pestell cannot now recover without proof that funds became  
21 available to ACI pursuant to the occurrence of the Condition.

22 Moreover, the Condition is analogous to contracts that contain the provision that the  
23 obligor will pay “when able.” In this instance, ACI has agreed that it would pay Pestell upon the  
24 sale of ACI or other coach sales, or, essentially, “when able.” Unfortunately, ACI never became  
25 able to pay, because the economy hindered the occurrence of the Condition. “In an action upon a  
26 contract to pay ‘when able,’ the promise is conditional and ‘no cause of action accrues until the  
27 condition is performed; that is to say, until the debtor is able to pay.’” *Horacek v. Smith* (1948)  
28 33 Cal.2d 186, 191, 199 P.2d 929, 932 (citations omitted). This rule is based upon the premise

1 that a promisee can claim nothing more than the promise gives him or her. *See, Curtis v. City of*  
2 *Sacramento* (1886) 70 Cal. 412, 414, 11 P. 748, 749.

3 As such, in this case, Pestell's cause of action against ACI arising from ACI's failure to  
4 pay on the loan has not yet accrued, because the Condition has not occurred. Pestell currently has  
5 no cause of action against ACI on these grounds and, without fraud, Pestell, as a matter of law,  
6 cannot prevail in this case.

7 **2. ACI's obligation to repay the loan to Pestell is discharged, because the**  
8 **condition precedent never occurred.**

9 "Under the law of contracts, parties may expressly agree that a right or duty is conditional  
10 upon the occurrence or nonoccurrence of an act or event." *Andelson, supra*, 6 Cal.4th at 313.  
11 "The existence of a condition precedent normally depends upon the intent of the parties as  
12 determined from the words they have employed in the contract." *Realmuto, supra*, 110  
13 Cal.App.4th at 199. Moreover, "[t]he rule undoubtedly is, ... that where the performance of an  
14 agreement depends upon the happening of an event over which neither party has control, or upon  
15 the existence of a specific fund, and where the contingent event does not occur or the fund is not  
16 realized, then the obligation is discharged." *Detwiler v. Clune* (1926) 77 Cal.App. 562, 566-567,  
17 247 P. 264, 266.

18 In this case, the parties chose to condition ACI's repayment of Pestell's loan. This intent  
19 is evident in the agreement itself, and was dictated by Mr. Pestell during his meeting with  
20 Fechner in November 2007. Despite ACI's efforts to continue to market its business and efforts  
21 to sell the company, no sales occurred. The state of the economy was out of the parties' control,  
22 and both parties desired a different result. When ACI did not sell, and ACI received no new  
23 coach contracts, ACI's obligation to repay the loan was discharged pursuant to the terms of the  
24 contract and the Condition.

25 Therefore, ACI is not required by law to repay the sums loaned from Pestell to ACI, and  
26 judgment must be rendered in Defendants favor.

27 ///

1 **B. ISSUE NO. 2: IF THE DEBT IS NOT EXCUSED, DOES IT FLOW THROUGH**  
2 **TO FECHNER AND THE TRUST?**

3 **Fechner and the Trust Are Not the Alter Egos of ACI, and Pestell Failed on Their**  
4 **Burden of Proof to Prove Otherwise at Trial.**

5 It is the general rule that the conditions under which a corporate entity may be disregarded  
6 vary according to the circumstances of each case. *See, Las Palmas Assocs. v. Las Palmas Center*  
7 *Assocs.* (1991) 235 Cal.App.3d 1220. Society recognizes the benefits of allowing persons and  
8 organizations to limit their business risks through incorporation, and, accordingly, public policy  
9 dictates that imposition of alter ego liability be approached with caution. *Ibid.* In sum, to pierce  
10 the corporate veil based on an alter ego theory, the corporation must be a sham and exist for no  
11 other purpose than as a vehicle for fraud.

12 In *Mesler v. Bragg Mgmt. Co.*<sup>5</sup>, the California Supreme Court explained the alter ego  
13 doctrine as a theory of vicarious liability under which the owners of a corporation may be held  
14 liable for harm for which the corporation is responsible where, because of the corporation's  
15 utilization of the corporate form, the party harmed will not be adequately compensated for its  
16 damages. *Id.*, at 301 The alter ego doctrine is strictly limited by the demands of equity; it applies  
17 "only in narrowly defined circumstances and only when the ends of justice so require." *Ibid.*

18 To apply the alter ego doctrine, there are two primary considerations: "(1) that there be  
19 such unity of interest and ownership that the separate personalities of the corporation and the  
20 individual no longer exist, and (2) that, if the acts are treated as those of the corporation alone, an  
21 inequitable result will follow." *See, Associated Vendors, Inc. v. Oakland Meat Co* (1962) 210  
22 Cal.App.2d 825, 837, 26 Cal.Rptr. 806, 813. "Both of these requirements must be found to exist  
23 before the corporate existence will be disregarded." *Ibid.*

24 "Certainly, it is not sufficient to merely show that a creditor will remain unsatisfied if the  
25 corporate veil is not pierced, and thus set up such an unhappy circumstance as proof of an  
26 'inequitable result.'" *Id.*, at 842 and 816. Mere failure to meet a financial obligation to a creditor,  
27 therefore, does not prove misconduct or injustice. "The alter ego doctrine does not guard every

28 <sup>5</sup> (1985) 39 Cal.3d 290, 300, 302-304, 216 Cal.Rptr. 443, 702 P.2d 601.



1 unsatisfied creditor of a corporation but instead affords protection where some conduct  
2 amounting to bad faith makes it inequitable for the corporate owner to hide behind the corporate  
3 form. Difficulty in enforcing a judgment or collecting a debt does not satisfy this standard.”  
4 *Sonora Diamond Corp.* (2000) 83 Cal.App.4th 523, 539. Thus, alter ego is an extreme remedy,  
5 sparingly used. *Ibid.*

6 In *Associated Vendors, Inc.*, *supra*, the court catalogued the numerous factors other courts  
7 had considered in evaluating alter ego liability cases, including:

- 8 1. The treatment by an individual of the assets of the corporation as his own;
- 9 2. The failure to obtain authority to issue stock or to subscribe to or issue the same;
- 10 3. The holding out by an individual that he is personally liable for the debts of the  
11 corporation;
- 12 4. The failure to maintain minutes or adequate corporate records, and the confusion  
13 of the records of the separate entities;
- 14 5. The identical equitable ownership in the two entities;
- 15 6. The identification of the equitable owners thereof with the domination and control  
16 of the two entities;
- 17 7. Identification of the directors and officers of the two entities in the responsible  
18 supervision and management;
- 19 8. Sole ownership of all of the stock in a corporation by one individual or the  
20 members of a family;
- 21 9. The use of the same office or business location;
- 22 10. The employment of the same employees and/or attorney;
- 23 11. The failure to adequately capitalize a corporation; the total absence of corporate  
24 assets, and undercapitalization;
- 25 12. The use of a corporation as a mere shell, instrumentality or conduit for a single  
26 venture or the business of an individual or another corporation;
- 27 13. The concealment and misrepresentation of the identity of the responsible  
28 ownership, management and financial interest, or concealment of personal business activities;

1           14.       The disregard of legal formalities and the failure to maintain arm's length  
2 relationships among related entities;

3           15.       The use of the corporate entity to procure labor, services or merchandise for  
4 another person or entity;

5           16.       The diversion of assets from a corporation by or to a stockholder or other person or  
6 entity, to the detriment of creditors, or the manipulation of assets and liabilities between entities  
7 so as to concentrate the assets in one and the liabilities in another;

8           17.       The contracting with another with intent to avoid performance by use of a  
9 corporate entity as a shield against personal liability, or the use of a corporation as a subterfuge of  
10 illegal transactions; and,

11          18.       The formation and use of a corporation to transfer to it the existing liability of  
12 another person or entity.

13 *See, Associated Vendors, supra*, at 838-840; *see also, Mid-Century Ins. Co. v. Gardner* (1992) 9  
14 Cal.App.4th 1205, 1213, fn. 3 and *Sonora Diamond Corp., supra*, at 538-539.

15           These factors must be supported by affirmative proof and substantial evidence. *See,*  
16 *Associated Vendors, supra*, at 840, and *Consolidated Photographic Industries, Inc. v. Marks*  
17 (1952) 109 Cal.App.2d 310, 314, 240 P.2d 718, 721. And, “[t]he existence of a corporation  
18 separate from its stockholders or officers cannot be destroyed upon mere suspicion or surmise.”  
19 *Marks, supra*, at 314-315. The burden of proof is on the plaintiff to provide such substantial  
20 evidence and establish the requisite unity of interest, justifying a disregard of the corporate veil.  
21 *See, MacPherson v. Eccleston* (1961) 190 Cal.App.2d 24, 27, 11 Cal.Rptr. 671, 672.

22           Furthermore, “[t]he courts have cautioned against relying too heavily in isolation on the  
23 factors of inadequate capitalization or concentration of ownership and control.” *Mid-Century Ins.*  
24 *Co. v. Gardner, supra*, at 1213. In fact, undercapitalization alone is insufficient to require  
25 invocation of the alter ego doctrine. *See, Associated Vendors, supra*, at 841-842. “[I]t is  
26 incumbent on the one seeking to pierce the corporate veil to show by evidence that the financial  
27 setup of the corporation is just a sham, and accomplishes injustice.” *Carlesimo v. Schwebel*  
28 (1948) 87 Cal.App.2d 482, 493, 197 P.2d 167, 174.

1           The following testimony at trial clearly shows that ACI was not a sham and demonstrate  
2 why ACI should be regarded as a separate entity from Fechner:

3           Plaintiffs' case is brought and directed by Mr. Pestell, a sophisticated international  
4 businessman who has also been in the business of lending money in his career on an unsecured  
5 (i.e., documented) basis. Other plaintiffs include Hanna Pestell, Mr. Pestell's wife who neither  
6 appeared nor testified during trial, and Pestell Mining and Exploration, Ltd.

7           ACI is, at all times, relevant to this case, a local Kern County company that operated in  
8 Tehachapi and employed up to thirty-five people, but which was forced to close in the wake of  
9 the historic economic downturn our country is currently experiencing, which downturn  
10 commenced on or about 2006 and continues to this day. Fechner owned and operated ACI from  
11 the time of its incorporation in 1996 through the current time.

12           ACI was in the business of constructing high-end motor coaches. Pestell entered into a  
13 contract to have ACI construct a luxury motor coach for the sum of \$1,680,000. The motor coach  
14 was fully constructed and delivered to Pestell.

15           ACI prepared its annual budget and planned its expenses and overhead based upon  
16 constructing three to four luxury coaches per year. ACI accounted separately for each coach  
17 construction, and applied customer payments directly to each such customers coach as was shown  
18 in ACI's accounting records. This same practice was followed as to Pestell's coach. ACI also  
19 kept detailed accounting records showing all inflows and outflows related to its business on a  
20 QuickBooks accounting program.<sup>6</sup>

21           To assist with accounting issues, ACI always employed certified public accountants who  
22 regularly consulted with ACI regarding its accounting and who also prepared its tax returns. ACI  
23 naturally relied on its accountants to properly prepare tax returns in compliance with all  
24 applicable tax laws. This accounting work also included regular reviews and adjustments made  
25 by ACI's accountant as to whether any sums paid for by the corporation should instead be  
26 charged to Fechner as distributions from ACI, which was a Sub-Chapter S Corporation for tax

27 <sup>6</sup> Under Corporations Code § 1500, a corporation must keep adequate and correct books and records of account.  
28 Further, a computerized record system is permissible, as long as the accounting records are readily convertible into  
written form. See, Marsh's California Corporation Law (3d Ed.), Corporate Records and Reports, § 13.1.

1 purposes.

2 In addition, from its inception in 1996, ACI employed and regularly consulted with its  
3 corporate attorney, William Kruse, concerning the preparation of its Board of Directors' Minutes,  
4 whether contemplated actions were acceptable and/or advisable, and on general legal matters.<sup>7</sup>  
5 The matters on which ACI consulted with Mr. Kruse and which Mr. Kruse advised ACI were  
6 permissible actions to undertake, included the following:

- 7 1. That ACI would be a Sub-Chapter S Corporation for tax purposes. Board of  
8 Director Minutes, dated January 31, 1997. Exhibit 44 \_ 0008.
- 9 2. That ACI was authorized to enter into sales contracts without the necessity of  
10 board meetings. Board of Director Minutes, dated February 26, 1997. Exhibit 44  
11 \_ 0012.
- 12 3. That ACI have various promotional apparel, such as jackets, hats and shirts,  
13 designed with the company logo to provide to customers and employees. Board of  
14 Director Minutes, dated January 6, 1998. Exhibit 44 \_ 0014.
- 15 4. That ACI would have Fechner personally obtain a credit card to allow ACI greater  
16 purchasing power and for ACI's use. Board of Director Minutes, dated January 6,  
17 1998. Exhibit 44 \_ 0015.
- 18 5. That ACI pay Federal and State income and estimated taxes relating to ACI's  
19 profit for shareholders. Board of Director Minutes, dated December 9, 1998.  
20 Exhibit 44 \_ 0016.
- 21 6. That ACI pay health and dental insurance to the officers as part of its  
22 compensation package. Board of Director Minutes, dated December 9, 1998.  
23 Exhibit 44 \_ 0016.
- 24 7. That ACI lease equipment from Fechner. Board of Director Minutes, dated  
25 December 2, 2002. Exhibit 44 \_ 0025.

26  
27 <sup>7</sup> Plaintiffs Brief also points to the fact the ACI used Mr. Kruse as its attorney and he also prepared the Fechner's  
28 trust as a basis for alter ego. Such an argument ignores reality and it is not reasonable nor expected for a small  
corporation to hire different counsel for different tasks, whether those tasks are for the company or its owners  
individually.

- 1 8. That ACI obtain financing to build motor coaches for customers. See, for example  
2 Exhibit 44 \_ 0027, Board of Director Minutes, dated May 5, 2003.
- 3 9. That ACI lease real property owned by Fechner for its uses in its business. Board  
4 of Director Minutes, dated December 12, 2003. Exhibit 44 \_ 0028.
- 5 10. That ACI provide funding for vehicles and all related expenses for Fechner so long  
6 as they were acting as officers of ACI. Board of Director Minutes, dated  
7 December 12, 2003. Exhibit 44 \_ 0029.
- 8 11. That ACI pay all legal expenses for any actions taken against Fechner while acting  
9 on behalf of ACI. Board of Director Minutes, dated December 12, 2003. Exhibit  
10 44 \_ 0029.
- 11 12. That ACI pay for life insurance for Fechner. Board of Director Minutes, dated  
12 December 12, 2003. Exhibit 44 \_ 0029.
- 13 13. That ACI obtain commercial financing to allow for uninterrupted operating capital.  
14 Board of Director Minutes, dated September 27, 2004. Exhibit 44 \_ 0032.
- 15 14. That ACI acquire a service truck from financing through Bank of Sierra for loan  
16 amount of \$150,000. Board of Director Minutes, dated December 14, 2004.  
17 Exhibit 44 \_ 0034.
- 18 15. That ACI acquire a company show coach along with the terms of the financing for  
19 that acquisition. Board of Director Minutes, dated May 11, 2005. Exhibit 44 \_  
20 0035.
- 21 16. That ACI obtain a further line of credit for operating capital. Board of Director  
22 Minutes, dated September 5, 2005. Exhibit 44 \_ 0036.
- 23 17. That ACI explore the possibility of selling ACI. Board of Director Minutes, dated  
24 February 20, 2006. Exhibit 44 \_ 0039.
- 25 18. That ACI obtain an additional line of credit for trade-ins. Board of Director  
26 Minutes, dated July 24, 2006. Exhibit 44 \_ 0041.
- 27 19. That ACI obtain a line of credit in a specific amount. Board of Directors Minutes,  
28 dated October 2, 2006. Exhibit 44 \_ 0042.

- 1           20. That ACI sell the service truck. Board of Directors Minutes, dated August 2,
- 2                   2007. Exhibit 44 \_ 0045.
- 3           21. That, in an attempt to reduce ACI's overhead, ACI sell the service truck for the
- 4                   specific amount of \$110,708.25. Board of Directors Minutes, dated October 18,
- 5                   2007. Exhibit 44 \_ 0046.
- 6           22. That ACI make a specific proposal to Pestell to allow for completion of their
- 7                   coach. Board of Directors Minutes, dated October 25, 2007. Exhibit 44 \_ 0047.
- 8           23. That ACI accept Mr. Pestell's proposal concerning the terms of the completion of
- 9                   his coach. Board of Directors Minutes, dated November 19, 2007. Exhibit 44 \_
- 10                  0049.
- 11           24. That all open line of credits be renewed when they came due. Board of Directors
- 12                  Minutes, dated December 17, 2007. Exhibit 44 \_ 0050.
- 13           25. That ACI finance the on going litigation brought by Pestell. Board of Directors
- 14                  Minutes, dated June 1, 2009. Exhibit 44 \_ 0053.

15           In addition to these numerous specific items which were authorized, which is not an  
16 inclusive list of everything authorized in the Minutes in the Board of Directors of ACI, ACI also  
17 had annual minutes, typically in December of each year, whereby ACI's officers were elected for  
18 the upcoming year. In addition to this, ACI also had regular annual Minutes of Shareholders  
19 meetings in November of each year, whereby the Shareholders elected the members of the Board  
20 of Directors.<sup>8</sup>

21           Prior to the Fall of 2006, all financing that had been obtained by ACI for its operations,  
22 including purchase of trade-ins, had been through Bank of Sierra ("Bank"). These loans were in  
23 the name of ACI with Fechner as guarantors. Occasionally, the Bank would take specific

24 \_\_\_\_\_  
25 <sup>8</sup> Pestell complains that insufficient minutes were kept. However, it has long been the law in California that a record  
26 of corporate acts and resolutions is not essential to their validity. See, *Bank of Napa v. Ferguson Burns Estate, Inc.*  
27 (1920) 48 Cal.App. 319, 326, 192 P. 66. Further, these minutes comply with the recordkeeping requirements of  
28 Corporations Code § 1500 as well. The purpose of the minutes is to indicate that a meeting was called and held, and  
to record what matters were considered and what actions were taken. The minutes do not necessarily have to detail  
the discussions had at a particular meeting. Departing from the provisions of former statutes, the Corporations Code  
no longer requires that the minutes include the time and place of a meeting, the persons present, or any other specific  
contents. See, *Marsh's California Corporation Law* (3d Ed.), *Corporate Records and Reports* § 13.2.

1 collateral for the loans. However, in 2006, the Bank advised that it would not be able to renew an  
2 existing line of credit that had been used by ACI for a number of years for flooring purposes. At  
3 that point in time, Fechner met with the Bank's Mr. Hamlin, and he presented various options to  
4 ACI for credit. Due to the amount of the credit that was being requested, the Bank requested that  
5 Fechner individually enter into a line of credit that was secured by their real property upon which  
6 ACI operated. This line of credit was then used to finance ACI's flooring and operations as  
7 necessary.

8 In the end, securing the line of credit this way actually resulted in Fechner being  
9 financially damaged by virtue of agreeing with Mr. Pestell's proposal to accept the loan. This is  
10 because in October 2007, had ACI closed, the entire proceeds of the Featherlite sale, \$310,000,  
11 would have been applied to the Fechners equity line of credit and ACI would then have closed for  
12 lack of business. Instead, the entire \$310,000 was left in ACI's account for its operations, with  
13 only a portion of that being repaid in January 2008 in the sum of \$140,000. By staying in  
14 business and completing Pestell's coach, Fechner personally lost at least \$170,000. ACI and  
15 Fechner were doing what they could to keep ACI in business as a viable company.

16 The Fechner equity line of credit was handled and accounted for separately and distinctly  
17 in ACI's accounting records. *See*, Exhibit 93 (which is derived from ACI's QuickBooks  
18 programs chart of accounts as testified by Mrs. Fechner). This method of accounting was the  
19 same as was done for any other loan which had been obtained for benefit of ACI, whether it was  
20 in the name of ACI or in an individual's name. The evidence at trial showed that there were only  
21 two loans obtained in Fechner's individual name, one for \$150,000 concerning the Volvo service  
22 truck (which was documented in that fashion as the Bank told Mr. Fechner that it would be a  
23 lesser interest rate than if the Bank made a loan to ACI) and the Fechner equity line of credit  
24 addressed above (which, as noted above, was the manner the Bank requested the loan be  
25 documented).

26 In January 2008, when Pestell made his \$140,000 loan payment for that month, Fechner  
27 applied the payment to Fechner's' equity line of credit. As noted above, this was because the  
28 Fechner equity line of credit had not been paid back the \$310,000 of proceeds received from the

1 sale of the Featherlite as had been historically done by ACI when such sales occurred.  
2 Immediately paying back the line of credit based upon sales on trade-in vehicles was also the  
3 agreement between Fechner and ACI.

4 This \$140,000 loan payment was reflected on ACI's books as being received by the ACI  
5 and then applied as a payment to the Fechner equity line of credit. *See*, Exhibits 92 and 93. In  
6 addition, ACI, as it did on all loan payments from Pestell, issued Pestell a receipt for the payment.  
7 *See*, Exhibits 8 through 13. Mr. Pestell never testified that he questioned ACI as to how it was  
8 applying any payments and never asked to see any of ACI's financial records.

9 Even though ACI paid \$140,000 toward the Fechner equity line of credit in January 2008,  
10 such did not hinder ACI's operations nor did it alter the completion of Pestell's coach<sup>9</sup>. ACI's  
11 register (which Mrs. Fechner stated would reflect the accurate balance in ACI's checking  
12 account) shows that from January 1, 2008 to March 7, 2008, which was about when Pestell's  
13 coach was delivered, ACI had sufficient funds on hand to complete the coach. *See*, Exhibit  
14 46\_0086 to \_0099. Hence, any issues concerning the application of the \$140,000 are simply a red  
15 herring, as ACI was adequately capitalized to complete the construction. Further, the expert  
16 testimony of Mr. Randall indicated that ACI's records showed that even though ACI received  
17 \$280,000 of loan payments from the Pestells in 2008, ACI's cost of completion of the coach were  
18 approximately \$370,000. In other words, ACI and/or Fechner contributed an additional \$90,000  
19 out of their own pockets towards completion of Pestell's coach. *See*, Ex. 67\_0028 to 0029.

20 As testified to by Mr. Randall, an expert in accounting and business valuation, ACI was  
21 adequately capitalized.<sup>10</sup> This evidence was not rebutted by Pestell at trial. As such, Pestell has  
22 failed to meet its burden of proof in this regard. In an action alleging alter ego based upon  
23 undercapitalization, the burden is on the plaintiff to establish what would constitute reasonable  
24 capital for the corporate defendant. *See*, *Carlesimo, supra*, at 490. Here, Pestell made no  
25 showing whatsoever.

26 <sup>9</sup> As testified to at trial, by applying this payment to the Fechner equity line of credit, it also lowered ACI's overhead  
27 by lowering payments on that line of credit. As ACI's accounting records show, the interest payments on the  
28 Fechner equity line of credit were always made by ACI. *See*, Exhibit 68\_0030 to \_0031, and \_0336.

<sup>10</sup> Pestell's counsel misstates in their Post Trial Brief that both experts testified ACI was undercapitalized. Neither  
expert expressed such opinion. In fact, Mr. Randall testified that ACI was adequately capitalized.



1 Mr. Randall additionally testified that ACI accounted for all monies that it received and  
2 spent through its QuickBooks accounting program; ACI kept better than normal corporate  
3 records; ACI complied with the required corporate filings including those with the State of  
4 California and Federal and State Taxing authorities; there was nothing unusual or inappropriate  
5 concerning the use of personal credit cards to purchase corporate and/or individual purchases as  
6 long so they were clearly accounted for<sup>11</sup>; he did not perceive any significant comingling of  
7 assets; and ACI was simply a victim of the downturn in the economy based upon his review of  
8 the recreational vehicle market from 2006 to 2008. Finally, Mr. Randall compared Fechner's  
9 compensation, including all perks, and found that to be well within the norm of similarly  
10 employed persons in similarly sized businesses. Most, if not all, of this evidence was not  
11 contested by Pestell at trial.

12 It was further testified to by Fechner that all accounting practices upon which they were  
13 questioned had been the normal, consistent practice throughout ACI's existence. Fechner further  
14 testified that ACI's common practice was to present all financial information to its accountant at  
15 year end, so the accountant could make the appropriate adjustments and prepare its tax returns.  
16 ACI clearly demonstrated a pattern of care in its recordkeeping for years leading up to ACI's  
17 dealings with Pestell, and thereafter.

18 In addition, the Volvo service truck was the subject of extensive questioning at trial by  
19 Pestell's counsel. This was a vehicle which was purchased by ACI from Tec of California for  
20 \$77,311 on February 28, 2005. *See*, Exhibit 94. To finance this purchase and the conversion of  
21 the service truck, Fechner took out a \$150,000 loan from the Bank in December 2004. Fechner  
22 took the loan out in an individual name because, in meeting the Bank's Mr. Hamlin, it was  
23 explained to Fechner that a personal loan was at a lesser interest rate than a corporate loan. ACI

24 \_\_\_\_\_  
25 <sup>11</sup> Pestell's counsel spent extensive time at trial questioning the Capitol One and American Express Credit card statements and the  
26 charges thereon. As shown in those credit card statements in Exhibits 49 and 50, the bill would be allocated between corporate  
27 expenses and individual expenses. ACI would pay the bill, which both experts indicated was not unusual. Pestell's counsel also  
28 spent extensive time trying to characterize the notations of dividends on those credit card statements as being a formally declared  
dividends as if ACI was a publically traded company such as Microsoft. As noted by Mr. Randall, these are not actually dividends  
to shareholders. Rather, all monies received by the owners by a Sub-Chapter S Corporation are distributions, not dividends.  
Further, as shown on the General Ledger of the Corporation, these credit card statements were extensively broken down and  
allocated on the QuickBooks accounting program. *See, for example*, Exhibit 68\_0141 to \_0156.

1 always paid the interest payments on that loan, because the Volvo service truck was an asset of  
2 ACI. *See, for example*, Exhibit 68\_0056. The service truck was purchased for legitimate  
3 business purposes to be used while attending rally's, and as a marketing tool, with the rear portion  
4 of the intended conversion of this truck to be used for actually storing tools and materials to allow  
5 servicing of customer coaches.

6 The conversion of this service truck was never fully completed and in an effort to increase  
7 the cash flow of the company, the Board of Directors authorized the sale of the Volvo service  
8 truck in August 2007. *See*, Exhibit 44\_0045. With no buyers for the service truck and after  
9 significant marketing efforts, Fechner finally agreed to have a drop ship internet company known  
10 as Serious Off Road Products (which was owned by Fechner) purchase the truck for  
11 approximately \$50,000. As shown at trial, the purchase proceeds were placed directly in ACI's  
12 bank account for use by the corporation and the sale reduced ACI's monthly overhead. *See*,  
13 Exhibit 46\_0091. In making this sale, Fechner obtained listing price information for comparable  
14 vehicles and arrived at the eventual sale price. *See*, Exhibit 77. Simply stated, the best price that  
15 could be obtained under the circumstances for this aging vehicle was obtained.<sup>12</sup>

16 Pestell's counsel additionally spent a large amount of time at trial discussing ACI's  
17 income tax returns which were admitted at trial as Exhibit 61. Pestell's counsel tried to compare  
18 and contrast the balance sheets shown on those tax returns and argued that there were negative  
19 retained earnings and, therefore, it is inappropriate to give shareholder dividends with negative  
20 retained earnings. Besides the fact that Fechner received no dividends<sup>13</sup>, the tax returns showed  
21 that ACI actually profited in 2006 and 2007. *See*, Exhibit 61\_0021 (line 21) and 61\_0042 (line  
22 21).

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24 <sup>12</sup> Pestell's counsel also spent a significant amount time inquiring as to the ACI's payoff of a vehicle in July 2007,  
25 which slightly exceeded \$31,000. As previously noted, the minutes authorized the payment of all vehicle related  
26 expenses. Fechner testified that while there was a \$31,000 pay off on July 16, 2007, the same vehicle was then sold  
27 for \$26,600, and that money was deposited directly back into ACI on July 25, 2007. *See*, Exhibit 68\_0067.

28 <sup>13</sup> As with many other misstatements and misrepresentations in Pestell's Post Trial Brief, Pestell states that Fechner  
took numerous, undocumented dividends from ACI. As evidenced at trial, Fechner took no dividends. Fechner did  
receive several distributions from ACI; however, every distribution was documented and approved by the Board of  
Directors and were taken by Fechner in their normal course of business (i.e., taken in the manner they had been taken  
in the past as a part of Fechner's compensation package).

1 Furthermore, on those same income tax returns, it shows the accumulated adjustments  
2 account (“AAA”) balance at the bottom of the balance sheet (e.g., Exhibit 61\_0024). These  
3 balance sheets for 2007 and 2008 tax returns show a positive balance in the AAA. Mr. Randall  
4 tried to explain this at trial. For purposes of analyzing shareholder distributions, Mr. Randall  
5 further explained that the question should be whether there was a positive balance in the AAA,  
6 not whether there were positive retained earnings.<sup>14</sup> If there is such a positive balance, and the  
7 distributions do not exceed that balance, then (as here) there is no taxable dividend. See also,  
8 Internal Revenue Code § 1368(c)(2). Mr. Randall also noted in his testimony that the retained  
9 earnings on the books of the corporation actually did show a positive balance. It was therefore  
10 made clear that tax returns are different vehicles than what is shown on the books of a company  
11 and that there was no taxable dividends distributed to the Fechner’s.

12 In sum, if the debt owed to Pestell is not discharged, the question becomes whether the  
13 debt flows through to Fechner and the Trust. As discussed, there is significant evidence  
14 disproving alter ego and very little evidence proffered by Pestell to prove alter ego.

15 After trial, the Court mentioned in its tentative comments that there was some  
16 “intermingling” of assets, but the unrefuted state of the testimony is that intermingling, if any,  
17 was based upon the advice of counsel and/or ACI’s accountant. Furthermore, “some”  
18 intermingling alone does not rise to the level of loss of corporate identity or unity of interest if  
19 financial relations are authorized and accounted for. As evidenced in trial, all of ACI’s financial  
20 decisions and actions were authorized by its Board of Directors, approved of by its attorney  
21 and/or accountant, and ACI kept meticulous records for a company of its size.

22 Intermingling occurs when accounting for transactions between the corporation and its  
23 shareholders fail to distinguish shareholder transactions from corporate transactions. This did not  
24 happen in this case. Financial transactions between shareholders who are active employees in the  
25 corporation are unavoidable and normal, and unity of interest only occurs when the parties fail to

26 \_\_\_\_\_  
27 <sup>14</sup> Pestell’s counsel also spent a significant amount of time talking about the tax returns and the fact that the Prevost  
28 shell was not reflected in the return. Mr. Randall correctly testified that the shell would have been an item of  
inventory and not reflected separately on the tax return balance sheet until it was paid, and that it is reflected on the  
tax return and trial balance as such, which payment did not occur until 2008.

1 adequately account for those transactions in an arms length fashion. One of the primary issues for  
2 consideration to resolve an alter ego issue at trial is for the trier of fact to find bad faith. In  
3 entering into this transaction, the Court properly indicated in its tentative comments made to  
4 counsel on December 18, 2009 that while perhaps the parties were somewhat naïve, they both  
5 clearly entered into the transaction at hand with the level of optimism and good faith that forms  
6 the basis of the free market system.

7 Plaintiffs Brief also briefly discussed factors 5 through 8 from the *Associated Vendors*  
8 case as a basis for alter ego liability. *See*, page 9 for these factors. However, factors 5 through 7  
9 all relate to the situation where the complaining party is attempting to pierce the corporate veil  
10 and establish alter ego liability of a second corporation, and those factors are therefore  
11 inapplicable to this case. As to factor 8, the sole ownership of all stock of a company by the  
12 members of a family is simply a situation inherent in most, if not all, small corporations. Factor 8  
13 does not establish alter ego liability.

14 Finally, Plaintiffs Brief attempts to use factors 15 and 16 from the *Associated Vendors*  
15 case to establish alter ego liability (they are listed on pages 9 and 10). Factor 15 (i.e, the use of  
16 the corporate entity to procure labor, services or merchandise for another person or entity) does  
17 not show alter ego liability as there was no evidence in the record of any such occurrences.

18 As to factor 16 (i.e., the diversion of assets from a corporation by or to a stockholder or  
19 other person or entity, to the detriment of creditors, or the manipulation of assets and liabilities  
20 between entities so as to concentrate the assets in one and the liabilities in another), there was  
21 simply no testimony that would support any such conclusion as all transactions that were  
22 questioned were ones where fair consideration was received for the sale (e.g., the Volvo service  
23 truck) and the assets of the Fechner's and ACI were always kept separate ab initio. There was no  
24 evidence of diversion or manipulation of assets.

25 Pestell has unquestionably failed to meet its burden of proof to establish alter ego liability.  
26 Fechner should not be personally liable to Pestell, and ACI's corporate identity should not be  
27 disregarded.

28

1 C. ISSUE NO. 3: SINCE THE TAX CONSEQUENCES FLOW THROUGH TO  
2 FECHNER IN A SUBCHAPTER S CORPORATION, DO ACI'S DEBTS AND  
3 LIABILITIES FLOW THROUGH TO FECHNER?

4 A Subchapter S Corporation is Merely a Tax Election and Does Not Alter  
5 Shareholders' and Officers' Protections and Rights Afforded Under California  
6 Corporations Law.

7 Pestell's brief correctly states that a Subchapter S Corporation permits the corporation to  
8 retain the corporate advantage of limited liability for its shareholders while being treated for  
9 income tax purposes as if it were a partnership, passing through to its shareholders items of  
10 income, loss, deduction or credit with minimal taxation at the corporate level. See, Internal  
11 Revenue Code §§ 1362, 1363 and 1366 and California Revenue & Taxation Code §§ 23801 and  
12 23802.5. To be eligible for the Subchapter S election, the corporation must be a small business  
13 corporation. *Ibid.* As pointed out by Pestell, the functionality of a Subchapter S corporation is  
14 merely a tax election, allowing the corporation to avoid double taxation and does not alter the  
15 corporations' rights and obligations under the California Corporations Code. Accordingly, even  
16 though the income tax consequences flow from ACI through to Fechner, ACI's non-tax liabilities  
17 and debts do not flow through to Fechner.

18 Under federal law, AAA "is an accumulation of the corporation's taxable income items  
19 passed through to shareholders, less loss and deduction items and previous distribution made by  
20 the corporation. ... Accordingly, when distributions are equal to or less than the AAA balance,  
21 such distributions are not taxable to the shareholders. Distributions exceeding the AAA balance,  
22 however, are deemed distributions from earnings and profits and are taxable to the shareholders  
23 as a dividend." *Heller v. Franchise Tax Board* (1994) 21 Cal.App.4th 1730, 1734, 27 Cal.Rptr.2d  
24 88, 90-91. As discussed above, the AAA balance reflected at the bottom of the balance sheet on  
25 ACI's income tax return shows a positive balance, and as evidenced at trial, no shareholder  
26 dividends were ever declared in ACI's tax returns. See, for example, Exhibit 61\_0024 concerning  
27 the positive balance in the AAA. Mr. Randall tried to explain this at trial.<sup>15</sup>

28 <sup>15</sup> Pestell's counsel again misstates Mr. Randall's testimony when she states that both experts testified that ACI had no retained earnings for 2007 and 2008. Mr. Randall testified that there were retained earnings per ACI's books, in addition to a positive AAA balance. Moreover, Pestell's counsel misrepresents the facts when she states that Fechner took more than \$400,000 in distributions from ACI during the time that it was in business Pestells. This \$400,000  
930943.1 11878.003

1 Further, as is shown by the K-1's issued to ACI's shareholder (which is the document  
2 shareholders use to report their income at a personal level), no dividends were received and  
3 certain sums were charged to the individual shareholder as nondeductible items, which included  
4 life insurance, medical insurance, and meals. *See, for example*, Mr. Fechner's 2007 K-1, at  
5 Exhibit 61\_0038 (at lines 5a, 5b, and 16c) to \_0039. This pattern repeats itself with other tax  
6 years' K-1's as well that are a part of Exhibit 61. Pestell's counsel simply does not understand  
7 how distributions of property are accounted for in Subchapter S corporations and counsel's  
8 implication of improper dividends is flatly incorrect.

9 Thus, from a tax and corporate financial perspective, ACI made no inappropriate  
10 shareholder distributions, and all distributions made to Fechner were consistent with ACI's  
11 normal business practice.

12 **D. OTHER ISSUES ADDRESSED BY PESTELL IN THEIR POST TRIAL BRIEF:**

13 **1. THE LOAN MONEY WAS USED FOR ITS INTENDED PURPOSE.**

14 As discussed above, Pestell's loan money was always used for only its intended purpose,  
15 to wit, to keep ACI in operation so that ACI could complete Pestell's coach.<sup>16</sup> Pestell never  
16 demanded that ACI's operations be managed in certain fashion and never inquired into the use of  
17 the loan funds. Any expenses paid by ACI as distributions to Fechner were documented,  
18 approved and were made in a manner consistent with history of ACI's shareholder distributions  
19 and as a part of Fechner's compensation.

20 **2. ACI DID NOT FRAUDULENTLY CONVEY ITS ASSETS TO FECHNER**  
21 **TO AVOID PAYMENT TO PESTELL.**

22 Pestell claims in its Post Trial Brief, for the first time, that ACI fraudulently conveyed its  
23 assets to Fechner to avoid payment to Pestell under Civil Code § 3439.04. This claim is not a  
24 stated cause of action in Pestell's complaint and should be disregarded by the Court.

25 Nonetheless, ACI responds to this allegation by invoking the defense stated in Civil Code

26  
27 sum is not itemized nor explained in Plaintiffs Brief, so it is impossible to respond to at this time in detail.

28 <sup>16</sup> Pestell's Post Trial Brief mischaracterizes (and "miscalculates") the facts in regard to this issue. As previously noted, Pestell was not ACI's only customer in 2007, and ACI derived income from other customers through 2007 and other sources through closing.

1 § 3439.08, which states in relevant part that “[a] transfer or an obligation is not voidable ...  
2 against a person who took in good faith and for a reasonably equivalent value or against any  
3 subsequent transferee or obligee.” Civil Code § 3839.08; *see also, In re First Alliance Mortgage*  
4 *Company* (2003) 298 B.R. 652. Over two years after ACI closed, Fechner purchased some  
5 remaining ACI assets<sup>17</sup> at what he estimated was fair consideration for purposes of funding ACI  
6 to cover litigation costs arising from Pestell’s lawsuit against ACI and Fechner. The idea that  
7 ACI should have sold these assets to pay to Pestell about a year after Pestell sued ACI is absurd.

8 Moreover, one who alleges fraud “assumes the burden of establishing his charge, and the  
9 presumptions of honesty and fair dealing must be overcome by evidence of convincing force.”  
10 *Fares v. Morrison* (1942) 54 Cal.App.2d 773, 776, 129 P.2d 735, 737. For allegations of  
11 fraudulent intent, deliberate wrongful conduct on the part of the transferee is required; one cannot  
12 become fraudulent by accident or negligently. *See, Lewis v. Folksam General Mutual Insurance*  
13 *Society* (1994) 30 Cal.App.4th 1850, 1858-1859, 37 Cal.Rptr.2d 63, 69.

14 Pestell has failed to meet the burden of proof for this allegation, and the argument also  
15 lacks any evidentiary foundation based upon the testimony at trial. Fechner purchased the assets  
16 in question in good faith. ACI sold the assets in good faith, for the sole purpose of funding the  
17 company to cover litigation costs arising from Pestell’s lawsuit. The fact that the assets were sold  
18 to an ACI shareholder and officer, who is aware of the facts of the matter, does not prove  
19 fraudulent intent, so long as the transfer was made in good faith. *See, Annod v. Hamilton &*  
20 *Samuels* (2002) 100 Cal.App.4th 1286, 123 Cal.Rptr.2d 924.

21 Pestell’s allegation of fraudulent transfers accordingly fails.

22 **3. FECHNER IS NOT PERFORMING ACI WORK AND HAS NOT**  
23 **REFUSED TO ACCEPT OTHER COACH ORDERS, AND ACI DID NOT**  
24 **BREACH THE IMPLIED COVENANT OF GOOD FAITH AND FAIR**  
25 **DEALING.**

26 “Every contract imposes upon each party a duty of good faith and fair dealing in its  
27 performance and its enforcement.” Restatement (Second) of Contracts § 205 (1981). Fechner’s

28 <sup>17</sup> Contrary to Pestell’s allegation, and as testified to by Fechner, these assets are not the same assets listed in the VR  
Brokers valuation packet.

1 actions were all undertaken in good faith. As discussed above, ACI commenced efforts to sell the  
2 company in 2006. These efforts continued through to the Spring of 2008 and were, ultimately,  
3 unsuccessful. Fechner would have wanted nothing more than to sell the business and to make  
4 money off of the company built and developed for so many years. This would have benefitted  
5 them financially, and would have allowed ACI to pay back Pestell. However, the economy took a  
6 sever economic downturn, and this was out of ACI's control.

7 In addition, ACI undertook its regular marketing effort through March 2008, hoping to get  
8 another coach sale. ACI was set up so that it could move locations if such order came in. But no  
9 orders did surface, again, likely due to the economy.

10 Approximately fourteen months after closing ACI's business operations, Fechner started a  
11 new business, servicing luxury motor coaches. This is no way related to ACI. ACI's primary  
12 business was to design and convert luxury motor coaches. ACI required \$100,000 a month to  
13 stay in operation. At times, ACI completed warranty work on the ACI coaches. Fechner's new  
14 business merely provides service work to any motor coach. As testified to at trial, Motorcoach  
15 Services operates on about \$899 a month of overhead. Motorcoach Services does not use ACI  
16 assets in its operation.

17 Further, Fechner testified at trial that before ACI closed, had it received any serious offers  
18 for coaches, ACI would not have closed and would have continued its operations with a reduced  
19 work force at another facility ACI knew was available. Since closing, Fechner testified that they  
20 had received no serious offers to build motor coaches, and even if they had, Fechner is not in a  
21 position to operate ACI's prior business at this time.

22 At all times in business with Pestell, ACI and Fechner acted in good faith. This was the  
23 clear state of the evidence at trial, and Pestell has failed to prove otherwise.

#### 24 4. COMMON COUNT ALLEGATION.

25 ACI argues that the March 2008 loan to ACI was a part of the loan contracted for with  
26 Pestell in October and November 2007. The October 29, 2007 e-mail sent by Fechner to Pestell  
27 not only disclosed ACI's proposal to complete the coach or to turn over the business to Pestell,  
28



1 but also disclosed the fact that the shell for Pestell's coach that was supplied by Prevost had not  
2 been paid. Exhibit 2. Hence, as of the November 2007 meeting, the fact of this payment not  
3 being made was known to Pestell. A Common Count claim cannot allow Pestell to get around the  
4 terms of the agreed loan transaction, which is a contract.

5 Alternatively, if the Court does not believe that this sum was a part of the original loan  
6 transaction, ACI argues that this sum was never really a loan at all. Rather, on or about March 3,  
7 2008 the sum of \$425,000 was paid by Pestell to ACI for the shell. The sum was immediately  
8 wired by ACI to Prevost to pay for the shell, so that Pestell could have title to his coach. *See*,  
9 Exhibits 28 through 30. ACI acted as the "middle man" in the transaction. Further, Pestell could  
10 obviously have paid this sum to Prevost himself. The money was never actually loaned to ACI.

11 If Pestell wanted this sum paid back by ACI as an overage for the purchase price of the  
12 coach, Pestell could have sued ACI for breach of the original coach contract. However, Pestell  
13 chose to not sue ACI on the coach contract.

14 **5. THE INTENT REQUIREMENT FOR FRAUDULENT**  
15 **MISREPRESENTATION HAS NOT BEEN SHOWN.**

16 Fraud "is never presumed; but must be established by proof. The presumption always is  
17 in favor of good faith, innocence, honesty and fair dealing, ... This presumption has been held to  
18 approximate in strength that of innocence of crime." *Marchinca v. State Board of Equalization*  
19 (1952) 107 Cal.App.2d 501, 510, 237 P.2d 725, 731; *see also, Pinney & Toliff v. Chrysler*  
20 *Corporation* (1959) 176 F.Supp. 801, 803. A party asserting fraud has the burden of proving it  
21 by a preponderance of the evidence. *See, Liodas v. Sahadi* (1977) 19 Cal.3d 278, 562 P.2d 316.  
22 However, courts that have used the higher level of scrutiny through the clear and convincing  
23 evidence standard have had that use upheld. *See, Pinney & Toliff, supra; see also, Gold v.*  
24 *Maxwell* (1959) 176 Cal.App.2d 213, 1 Cal.Rptr. 226. In any event, it is clear that a heightened  
25 level of proof is required to prove fraud. Here, Pestell has failed to prove that Fechner acted  
26 fraudulently.

27 In addition to all the facts discussed above, the pertinent facts are as follows:

28 ACI was one of only a few companies in North America to build high-end, custom motor

1 coaches. On November 28, 2006, Pestell and ACI entered into the Luxury Motor Coach  
2 Agreement for the construction, purchase and sale of a high-end, custom motor coach. The  
3 purchase price set forth in the contract was \$1,680,000, to be paid in 10 installments and credited  
4 by the amount of \$405,000 for Pestell's trade-in motor coach. The 10<sup>th</sup> and final payment due  
5 under the Contract of exactly \$144,000 was never paid by Pestell because of subsequent dealings  
6 between the parties.<sup>18</sup>

7 In October 2007, ACI had approximately \$350,000 in its account. However, \$310,000 of  
8 that was due to be paid back to Fechner's equity line for sums loaned to ACI for a trade in,  
9 leaving only enough money to stay open for a week. As such, on October 29, 2007, Fechner sent  
10 correspondence to Pestell stating that ACI was out of funds and would have to close in a week,  
11 even though the Pestell motor coach was not yet complete. See, Exhibit 2. The October 29, 2007  
12 correspondence relayed that Pestell could pay more money, allowing ACI to complete  
13 construction of the motor coach, Pestell could assume ownership and control of ACI and  
14 complete construction of the motor coach themselves or the parties could discuss other options.

15 On or about November 15, 2007, in correspondence, ACI agreed to Pestell's payment of  
16 \$675,000 for completion of the motor coach and the repayment of which would come from the  
17 proceeds of the sale of ACI or the construction of subsequent motor coaches on behalf of third  
18 parties. The sale of ACI and the construction of subsequent motor coaches never transpired, even  
19 though ACI hired a broker to market the business<sup>19</sup> and ACI continued marketing efforts through  
20 Spring 2008. In addition, at this time, ACI took several measures to reduce the company's  
21 overhead costs and delayed repaying the \$310,000 to the Fechner equity line of credit. These  
22 efforts were made to keep the business in operation, so that ACI could complete Pestell's coach  
23 and hopefully survive the unprecedented economic downturn.

24 During the parties' negotiations in November 2007, and at all times, Fechner never  
25 represented that ACI owned real property or other significant assets. Fechner told Pestell that  
26 these items were not owned by ACI. As to the real property, why would Fechner contradict the

27 \_\_\_\_\_  
28 <sup>18</sup> Which, if the court finds liability of ACI to Pestell, should reduce that liability by \$144,000 as a setoff.

<sup>19</sup> ACI commenced efforts to the sell the company in 2006 and continued with these efforts through the Spring 2008.

1 public record? That proposition simply makes no sense. Fechner always had the intention of  
2 selling the real property and equipment as a package should ACI receive an offer to sell its  
3 business. But no offers came in. In this transaction, Pestell either believed he heard what he  
4 wanted to hear or he made unwarranted assumptions.

5 On or about December 12, 2007, in correspondence, the parties amended the November  
6 15, 2007 agreement and adjusted Pestell's payment of \$675,000 to \$560,000<sup>20</sup>, pursuant to the  
7 same repayment terms. Pestell never sought ACI's execution of a promissory note, a guaranty by  
8 Fechner nor any security, such as a deed of trust. ACI also did not ask for any of ACI's  
9 financials. Pestell's payment was also voluntarily made with the knowledge that ACI was shortly  
10 going out of business if it had no buyers or customers other than Pestell.<sup>21</sup> In or about February  
11 2008, ACI requested Pestell pay an additional \$425,000 to ACI to pay to Prevost for the motor  
12 coach's shell.<sup>22</sup> This payment was the final payment made by Pestell.

13 As of March 2008, Pestell paid a total of \$2,506,000 (in cash and in kind (with the motor  
14 coach trade-in)) to ACI and received the high-end, custom motor coach that he had bargained for.  
15 Following delivery of the motor coach to Pestell, and without any pending motor coach contracts,  
16 no prospective customers and no purchase offers, ACI closed for business. ACI was left with no  
17 money and could not repay Pestell.

18 There were no misrepresentations. Rather, both parties seem to have entered into the loan  
19 transaction with the best intentions. Fechner wanted nothing more than to continue ACI's  
20 business. They had developed ACI from the ground up, invested years of sweat and hard work  
21 and wanted only success. When the economy started to change, ACI sought to sell the business.  
22 Rather than close as it did without any new customers, Fechner would have much preferred to sell  
23 the company and profit after paying Pestell back. However, there were no buyers. The evidence  
24 does not prove fraud; rather, it shows a family's dream failing. And Pestell, unfortunately, was a  
25

26 <sup>20</sup> Pestell actually paid \$545,000 to ACI, rather than the agreed upon \$560,000.

27 <sup>21</sup> By the close of ACI's business operations, ACI had had no new customers for new luxury custom coaches in  
28 approximately 16 months. However, contrary to the misstatement in Pestell's Post Trial Brief, ACI did conduct  
business in 2007 with customers other than Pestell.

<sup>22</sup> In the October 29, 2007 email, Pestell was made aware that the shell had not been paid for.

1 victim of the company's failure.

2 III.

3 CONCLUSION

4 The parties entered into a loan transaction, the repayment for which was conditioned upon  
5 the sale of ACI or future coach customers. Because neither condition occurred, Pestell's cause of  
6 action to sue on the debt has not yet accrued. Nonetheless, when the condition did not occur,  
7 ACI's obligation to repay the loan was discharged.

8 There is no alter ego liability or fraud in this case and Pestell has failed to meet its burden  
9 of proof in all respects. Pestell's Post Trial Brief is replete with misstatements and  
10 misrepresentation of facts and relies on many statements that lack foundation in the trial record.  
11 The true facts are that each and every one of Fechner's actions was made in good faith and with  
12 good intentions.


13 In the end, Pestell received exactly what they bargained for, a completed coach.  
14 However, the same cannot be said for ACI and Fechner who were forced to close a business that  
15 they had developed, worked on, and put their heart and sole into, for almost twenty years.

16 The facts and law mandate a judgment in Defendants favor on all claims and causes of  
17 action.

18 Dated: January 14, 2010

KRONICK, MOSKOVITZ, TIEDEMANN & GIRARD  
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