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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES – WEST DISTRICT – CULVER CITY COURT

ANTHONY V. FOX, an Individual,

Plaintiff,

vs.

SAFE IN HEAVEN DEAD PRODUCTIONS, INC., a California corporation dba THE VIPER ROOM; TROUSER TRUMPET, INC., a California corporation; JOHN C. DEPP II, an Individual; OBERMAN, TIVOLI & MILLER, LTD. and its successor-in-Interest KAUFMAN, BERNSTEIN, OBERMAN, TIVOLI & MILLER, LLC; LICHTER & GROSSMAN, INC. and its Successor-in-Interest LICHTER GROSSMAN & NICHOLS, INC. and its Successor-in-Interest LICHTER, GROSSMAN NICHOLS & ADLER, INC.; CINDY SZERLIP, an Individual dba CS BUSINESS MANAGEMENT; SALVATORE M. JENCO, an Individual; and DOES 1 through 25, inclusive,

Defendants.

CASE NUMBER: SC 062176

PLAINTIFF'S *REPLY* MEMORANDUM RE APPLICATION OF CRIME/FRAUD EXCEPTION TO ATTORNEY-CLIENT PRIVILEGE

[EVIDENCE CODE SECTION 956]

[Complaint Filed: July 3, 2000]

JUDGE: Honorable Allan J. Goodman
DIVISION: Two (2)

I. INTRODUCTION

In this Reply Memorandum (and, in particular, Section III below), Plaintiff Anthony V. Fox ("Fox") will address the arguments made by Defendants Trouser Trumpet, Inc. ("Trouser") and John C. Depp II ("Depp") in their Memorandum in Opposition to Plaintiff's Assertion of the Crime/Fraud Exception. Before doing that, however, Fox will explain (in Section II below) that the crime-fraud exception should be applied, so as to enable Fox to inquire about the substance of certain communications between Defendants and the law firm of Lichter Grossman & Nichols Inc. (the "Lichter Firm"), and Peter Nichols ("Nichols") and Ann DuVal ("DuVal") of the Lichter Firm, regardless of whether the Court finds that there is a prima facie case of fraud.[1] Specifically, the crime-fraud exception should be applied because there is evidence to support a prima facie case of *criminal activity* on the part of Depp's business manager, Alan Tivoli ("Tivoli"). Both the crime and the fraud related to the diversion of Safe's most valuable asset – its right to the "Viper Room" name and other trademarks and trade dress used in connection with the Viper Room.

II. TIVOLI'S DECLARATION IN SUPPORT OF TROUSER'S TRADEMARK APPLICATION WAS MATERIALLY FALSE; THE SUBMISSION OF THAT DECLARATION TO THE U.S. PATENT & TRADEMARK OFFICE CONSTITUTED A CRIME

The evidence in this case includes Exhibit 87, the Power of Attorney signed on June 7, 1994 by Alan Tivoli, as Treasurer of Trouser, appointing Hecker & Harriman to prosecute Trouser's trademark application for the name "The Viper Room." The same exhibit includes a Declaration of Applicant signed by Tivoli, again as Treasurer of Trouser, in which Tivoli states that: (1) he was the Treasurer of Trouser; (2) he believed that Trouser owned the "Viper Room" mark; and (3) to best of his knowledge and belief "no other person, partnership, firm, corporation, or association has the right to use said mark in commerce...." Tivoli acknowledged that these statements were made "with the knowledge that willful false statements [in the

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[1] A prima facie case of fraud, sufficient to justify application of the crime-fraud exception, is one where there has been "evidence from which reasonable inferences can be drawn to establish the fact asserted, i.e., the fraud." Where, as here, one party has offered evidence of the fraud, the burden is on the other party to contradict and overcome that evidence. *BP Alaska Exploration, Inc. v. Superior Court* (1988) 199 Cal.App.3d 1240, 1262.

declaration] are punishable by fine or imprisonment, or both, under Section 1001 of Title 18 of the United States Code...."[2] The evidence also includes Exhibit 215, a letter dated July 8, 1994 from Christopher A. Mathews of the law firm of Hecker & Harriman to Tivoli informing him that the U.S. Patent and Trademark Office had received the trademark application on June 8, 1994. Exhibit 251 includes, at the fourth page of the exhibit, a fax cover sheet from Mathews to Tivoli which confirms that it was Tivoli who requested that the application be in the name of Trouser Trumpet and that he, i.e., Tivoli, would execute the application and confirm the "first use" date of August 14, 1993. Tivoli was expressly admonished to inform Mathews if the application was "inaccurate in any way." A copy of this fax cover sheet was sent to Peter Nichols.

Tivoli's declaration was false, and he knew it. It is conceivable that Tivoli honestly believed that Trouser owned the "Viper Room" mark – although, given Defendants' refusal to testify as to what Nichols may have told them about that subject, fairness dictates that he be barred from claiming that any such belief was held, much less held in good faith. Regardless of whether or not he believed that Trouser *owned* the Viper Room trademark, Tivoli could not have believed, and cannot justify his representation to the U.S. Patent and Trademark Office, that no one other than Trouser was entitled to *use* the mark; Tivoli clearly knew that Safe was entitled to use and was, in fact, using the mark. He thus committed a crime by stating otherwise in the declaration.

Unlike the false statement in his declaration that he was, as of June 7, 2001, Trouser Trumpet's treasurer,[3] the knowingly false statement relating to the use of the "Viper Room" mark went to the very heart of the application – Trouser's purported right to register the mark – and concerns a key issue in this case. It was clearly the kind of statement that was capable of

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[2] 18 U.S.C. § 1001 makes it a crime, punishable by up to five years in prison, to knowingly and willfully make any false writing or document in connection with any matter within the jurisdiction of any branch of the United States Government. An offense exists regardless of whether the government relied on the false statement if the statement was capable of influencing the decision of the tribunal to which the statement was directed. *U.S. v. Parsons* (10th Cir. 1992) 967 F.2d 452.

[3] There is no evidence that, as of June 7, 1994, Tivoli was an officer of Trouser Trumpet. In fact, Exhibit 182 indicates that Tivoli formally became Chief Financial Officer of Trouser as of December 31, 1994.

misleading, and undoubtedly did mislead, the U.S. Patent & Trademark Office. Because of the "first use" principle (discussed more fully Fox's Supplemental Trial Brief re Trademark Ownership Issue[4]), if Tivoli had disclosed the truth – that Safe had been using the mark since August 1993, many months prior to the time when Trouser did or was even capable of doing business[5] – the registration would never have been issued in Trouser's name.

Moreover, when all is said and done, it is clear that both Tivoli and Nichols had a guilty statement of mind – that is, that they knew full well that Trouser had no legitimate claim to the "Viper Room" name or related marks and trade dress. Brett Curlee has testified that, after noticing an accrual in Safe's financial statement relating to Trouser, he inquired about Trouser at the September 11, 1996 meeting. He further testified that he was told by Nichols and Tivoli, in response to his inquiry about Trouser, that Trouser provided the security guards for the Club. In his Declaration of August 15, 2001 (Exhibit 84 at 4:17-18), Tivoli confirmed that, at the September 11, 1996 meeting, he told Curlee and his co-counsel, Daniel McCarthy, "that the security and body guards for the Club were employed exclusively through a separate corporate entity called Trouser Trumpet, Inc." Tivoli confirmed at trial, however, that, although the original plan was for Trouser to provide security guards, *it never did so*! (At trial, Tivoli knew that he had to tell the truth because, if he had testified that Trouser employed the security personnel, he could have been impeached by Safe's and Trouser's financial records, which had already been received in evidence and which clearly reflected that Trouser had no employees and that the cost of security personnel was included in Safe's operating costs.) Why would Tivoli have lied or attempted to mislead Curlee and McCarthy at the September 11, 1996

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[4] In their Memorandum relating to this issue (at 2:18-19), Depp and Trouser continue to "maintain that Trouser Trumpet *in fact* properly owns the trademark to this day." (Italics included.) There is no factual or legal basis for that claim, and none is cited in the Memorandum. The fact that Depp may have created the name is irrelevant to the issue of who owns it; rather the issue is who first used it. *See* authorities cited pages 2-4 of Plaintiff's Supplemental Trial Brief re Trademark Ownership Issue.

[5] Exhibit 52 reflects Trouser did not have any directors until at least June 2, 1994, when the "Action by Sole Incorporator In Lieu of First Meeting" was printed by Ann DuVal. The first Statement by Domestic Stock Corporation was signed by DuVal on June 3, 1994 (Exhibit 71). As the Court will recall, DuVal testified that she would not have "memorialized" any of Trouser's corporate records "as of" the date of its incorporation in 1993 if any business had been conducted between that date and the date on which the records were prepared.

meeting? The only credible explanation is that he was trying to cover up Trouser's true purpose so as not to derail the on-going buy-out discussions and not to give Fox or his representatives any reason to take legal action to prevent the diversion of Safe's assets pursuant to the purported license agreement – which commenced, not coincidentally, in early 1997, just a few short months after this meeting.

In sum, Plaintiffs have established that Defendants, either directly or through their agents, were involved in a crime. Each communication with Nichols that "reasonably relates" to the subject matter of the crime, *BP Alaska Exploitation, Inc. v. Superior Court* (1988) 199 Cal.App.3d 1240, 1268, 1269 is within the proper scope of questioning at trial.

III. PLAINTIFF HAS PRESENTED A PRIMA FACIE CASE OF A FRAUD; DEFENDANTS HAVE NOT CONTRADICTED AND OVERCOME THE EVIDENCE PRESENTED BY PLAINTIFF

Depp and Trouser argue that there was no fraud, and thus no basis for invoking the crime-fraud exception to the attorney-client privilege, because the facts which are alleged to have constituted the fraud were known to Tivoli and Nichols and thus Safe; that even if Fox has proven an intentional tort, he has not proven fraud; that proof of "constructive fraud" will not suffice to justify application of the crime-fraud exception; and that Fox was required to establish, and did not establish, "reliance." In addition, Depp and Trouser claim that they and Tivoli reasonably believed that Trouser owned the "Viper Room" mark. Finally, Depp and Trouser argue that it has already been adjudicated that the Lichter firm was not involved in a fraud. None of these arguments are well taken, as explained below.

First, it is firmly established that the secret diversion of corporate assets by insiders constitutes *fraud* and entitles an innocent shareholder to seek redress by way of a derivative complaint. In *Burt v. Irvine* (1965) 237 Cal.App.2d 828, 855, for example, the Court of Appeal held that the trial court had abused its discretion in dismissing, without leave to amend, a derivative complaint against various company insiders on the basis that they had caused the company to sell properties at less than fair value and that they had secretly benefited from those transactions. In discussing the evidence, the Court said:

> An analysis of the record in light of the foregoing principles reveals that respondents Long and McFadden, together with Fant, are named as selecting buyers and fixing the price and disregarding further negotiations with other reputable subdividers interested in the property. Such allegations if sustained and augmented by a showing of a diversion of corporate assets for less than the price which otherwise could have been received give rise to a action of action in fraud. (Emphasis added.)

See also, *Reid v. Robinson* (1923) 64 Cal.App. 46, 52 (holding that the trial court had properly overruled demurrer to stockholders' complaint for fraud based on the secret diversion of the corporation's assets to certain insiders); *Beal v. Smith* (1920) 46 Cal.App. 271, 279; *James v. Steifer Mining Co.* (1918) 35 Cal.App. 778, 783. In short, the fact that Tivoli may have known about the fraud does not mean that Safe knew about it; the guilty state of mind of a corporate agent is not attributed the company where, as here, the company is suing the agent for his misconduct. *Meyer v. Glenmoor Homes, Inc.* (1966) 246 Cal.App.2d 242, 264 (knowledge of corporation's president not imputed to corporation where the president defrauded the corporation); *First Nat. Bank of Reedley v. Reed* (1926) 198 Cal. 252, 259 ("[T]here is an exception to the general rule imputing to the principal the knowledge of the agent, which exception is to the effect that, if the agent and the third party are acting in collusion to defraud the principal, the principal will not be held bound by the knowledge of the agent.")

Second, Depp and Trouser's contentions regarding "reliance" are erroneous. In *BP Alaska Exploration, Inc.*, *supra*, 199 Cal.App.3d at 1262-63, the Court expressly rejected the contention that the party seeking to invoke the crime-fraud exception must establish "reliance." The crime-fraud exception focuses on the behavior of the client, not the party affected by the client's fraud. Moreover, there was, in fact, reliance to the extent that Safe paid fees to Trouser pursuant to the phony license agreement. Further, one of the elements of the fraud was the concealing of the diversion of Safe's assets by way of the misrepresentations relating to Trouser's business at the September 1996 meeting made to Fox's attorneys, Curlee and McCarthy. Curlee accepted the representation made at this meeting, and Fox did not initiate any legal action until after the truth had been revealed during the round of buy-out negotiations that occurred in 1999-2000.

Third, Depp's argument that it "is clear from the evidentiary record to date that Mr. Depp was unaware of any alleged wrongdoing" (Mem. at 8:10-12) is nothing more than an unsupported, self-serving contention. Depp acknowledged at trial that Safe was not supposed to have been charged for the use of the "Viper Room" mark, that he learned about the payments during discovery, and that he did nothing about it. *Depp has yet to offer any excuse for Trouser having retained the payments received from Safe!* In addition, there is substantial evidence in the record that is consistent with Depp having known what was going on all along: There is the written consent signed by Depp authorizing the execution, delivery and filing of the license agreement (Exhibit 70), as well as a notice to Safe directing it to make payments under the license agreement to Trouser (Exhibit 77). As the Court will recall, there was surprising testimony regarding Exhibit 77. After his counsel agreed, prior to trial, that there would be no foundational objection to this Exhibit, Depp suggested, at trial, that his signature was forged on it. The Exhibit was ultimately received, over Depp's objection, when Tivoli, evidently not wanting to be the fall guy, made a point of the fact that he had personally witnessed Depp's signature to numerous documents and that the signature on Exhibit 77 appeared to be Depp's. However, for present purposes, the point is not really whether Depp signed this document or even whether Depp knew about the license agreement and payments to Safe. Rather, the point is that either Depp *or one of his representatives* signed Exhibit 77, and that person had to have known that there was no basis for having Safe make any payments to Trouser – as the evidence is uncontested that no officer or director of Safe ever authorized, ratified or otherwise approved of the license agreement.[6] In sum, even if the Court were to find that there is insufficient evidence regarding Depp's state of mind to justify application of the crime-fraud rule, the rule should still be applied, so as to permit inquiry into communications with the Lichter Firm,

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[6] Under Safe's bylaws (Exhibit 207), Safe's board could not act except pursuant to a board meeting or unanimous written consent. It is undisputed that there were never any such meetings or consents. In addition, because Depp and Jenco were, insofar as the license agreement was concerned, interested directors, and because Depp cannot possibly demonstrate – and has not ever contended – that the license agreement was in Safe's best interest, the license agreement could not have become effective without Fox's consent.

because of the substantial evidence of fraudulent and criminal activity by Depp's business manager, Tivoli, as discussed above, and other representatives.

Depp and Trouser contend, at page 9 of their Memorandum, that Fox "has not established that Safe owned the trademark." They argue further that since Depp created that name and did so prior to the time when the parties signed their 1993 agreement, Depp owned the name. As has been previously explained, as a matter of law, Depp's creation of the name did not result in his having any rights to it. Trademark rights cannot exist without use in commerce. While Depp and Fox could have agreed that any rights to the name resulting from Safe's use of it would insure to Depp's benefit, the evidence is clear that there was no such agreement. Indeed, Depp acknowledged that he never discussed the issue with Fox. In addition, most of the monies paid under the license agreement were paid as "merchandising fees." The fees were based on a percentage of merchandise sold with one of the logos used at the Viper Room attached. There is no evidence whatsoever that would support the theory that Depp or Trouser owned these logos.

Having thus far asserted his privileges at every turn as to any discussions with Nichols relating the license agreement, Depp should not be permitted claim that he *reasonably* believed that he owned the "Viper Room" trademark and that his attorney's efforts to document that ownership were merely "bungled" (Mem. at 8:17) – particularly since there is no evidence whatsoever of any effort having been made to document Depp's ownership. There is no evidence that any minutes, letter, memorandum, consent, resolution, ratification, agreement or documentation of any kind was ever submitted to Safe or its board for consideration.

Depp and Trouser's final argument is that Fox lost his right to invoke the crime-fraud exception when his motion to add the Lichter firm as a defendant was denied. The only issue decided by that motion was whether the evidence presented *at that time* was sufficient to justify Fox's request that Lichter be included as a defendant in this case. There was no determination that the Lichter firm was not involved in a fraud or crime, or that it did not participate in communications relating to a fraud or crime in which its client was involved.

IV. CONCLUSION

For the foregoing reasons, the Court should find that there is a prima facie case of Defendants' direct involvement in aiding and abetting, or covering of, or knowingly profiting from a crime or fraud relating to the procurement by Trouser of a trademark registration for the "Viper Room" name, the purported ownership of that name by Trouser Trumpet, and the purported license agreement and payments made by Safe pursuant thereto and, therefore, that the communications between them and the Lichter firm relating to the "Viper Room" trademark are subject to inquiry at trial.

Respectfully submitted,

DATED: November 12, 2001

PIRCHER, NICHOLS & MEEKS
LAW OFFICES OF BRETT B. CURLEE
LAW OFFICES OF JAY R. STEIN

By: _____
James L. Goldman
Attorneys for Plaintiff ANTHONY V. FOX

PROOF OF SERVICE

STATE OF CALIFORNIA)
) **ss.**
COUNTY OF LOS ANGELES)

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is **PIRCHER, NICHOLS & MEEKS** - 1925 Century Park East, Seventeenth Floor - Los Angeles, California 90067.

On November 12, 2001, I served as described below the document described as

PLAINTIFF'S *REPLY* MEMORANDUM RE APPLICATION OF CRIME/FRAUD EXCEPTION TO ATTORNEY-CLIENT PRIVILEGE [EVIDENCE CODE SECTION 956]

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☒☒ **BY MAIL**

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☒ **STATE**

I declare under penalty of perjury under the laws of the State of California, that the foregoing is true and correct, and that this Proof of Service was executed on November 12, 2001 at Los Angeles, California.

FEDERAL

I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made, and that this Proof of Service was executed on November 12, 2001 at Los Angeles, California.

CASANDRA J. BROOME