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Unfairly Interchangeable: A Guide for Litigating the Alter Ego Doctrine and Proposal to Codify the Doctrine in California

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UNFAIRLY INTERCHANGEABLE: A GUIDE FOR LITIGATING THE ALTER EGO DOCTRINE AND PROPOSAL TO CODIFY THE DOCTRINE IN CALIFORNIA

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I. INTRODUCTION 39

II. THE SUBSTANTIVE SIDE: PROVING ALTER EGO LIABILITY 42

A. *THE PREREQUISITE OF OWNERSHIP* 43

B. *WHAT IS ONE AND THE SAME? AN UNDERSTANDING OF THE FACTORS* 44

1. When a Company Is Not Adequately Capitalized 46

2. When Two Companies Act as One: The "Single Enterprise" Rule 47

3. When a Parent Company Has Too Much Control Over Its Subsidiary 49

C. *WHEN IS ONE AND THE SAME UNJUST?* 51

D. *WHETHER CALIFORNIA RECOGNIZES REVERSE PIERCING* 53

1. Reverse Piercing Is Not Allowed with Respect to Corporations Outside of the Federal Tax Context 55

2. Reverse Piercing May Be Allowed in the Context of an LLC 56

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III. THE PROCEDURAL SIDE: PURSUING ALTER EGO LIABILITY... 60

A. *HOW TO ADEQUATELY PLEAD ALTER EGO LIABILITY IN THE COMPLAINT* 61

1. Gathering Alter Ego Allegations to Include in the Complaint 63

2. Conducting Alter Ego Discovery and Navigating Privacy Concerns 65

B. *EFFECT ON DISPOSITIVE MOTIONS AND TRIAL WHEN ALTER EGO IS NOT ALLEGED IN THE COMPLAINT* 69

C. *EVIDENCE REQUIRED ON A MOTION TO AMEND THE JUDGMENT TO ADD AN ALTER EGO* 71

1. Conducting Judgment Debtor Discovery to Add the Alter Ego to the Judgment 77

D. *ASSERTING ALTER EGO LIABILITY IN A SEPARATE COMPLAINT WITHOUT OFFENDING THE STATUTE OF LIMITATIONS* 78

E. *SETTLING WITH THE CORPORATION AND SUBSEQUENTLY PURSUING LIABILITY AGAINST THE ALTER EGO* 80

IV. PROPOSAL TO CODIFY THE ALTER EGO DOCTRINE IN CALIFORNIA… 85

V. CONCLUSION 90

I. INTRODUCTION

"For twenty years, Joseph Byrne was the chess master behind a temporary-staffing agency empire."[2] Byrne would convince women to become "Queen for a day" at his agencies and then "cajole them into forming temporary staffing agencies and act as the agencies' sole shareholders and officers."[3] By doing so, Byrne "orchestrated a network of more than a dozen corporate entities that shielded his assets and allowed him to evade the IRS and avoid his personal tax liabilities."[4] Despite effectively keeping his name off corporate documents, "Byrne would continue to make pivotal business decisions and regularly take corporate funds for his own personal use."[5] This allowed Byrne to maintain control of the corporations and their assets while staying out of the reach of his creditors.[6] Each time his creditors would come close to claiming their debts, Byrne would "clear[] the chess board, enlist[] one of his pawns to open a new staffing agency, and move[] all the clients and resources to the new agency," leaving the creditors "to deal with a corporation that has no assets."[7] After Byrne eventually racked up over a million dollars in unpaid taxes, the IRS placed liens against the four staffing agencies' bank accounts.[8] Upon challenge by the staffing agencies that two women, not Byrne, owned, the United States District Court for the Central District of California upheld the tax liens on the corporate bank accounts on the basis that Byrne was the alter ego of the companies, regardless of his absence on corporate records.[9] This result is not uncommon. Many courts have permitted the United States government to recover a taxpayer's delinquent tax liability from the taxpayer's business entity.[10]

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[2] Prompt Staffing, Inc. v. United States, 321 F. Supp. 3d 1157, 1161 (C.D. Cal. 2018).
[3] *Id.*
[4] *Id.*
[5] *Id.*
[6] *Id.*
[7] *Id.*
[8] *Id.* at 1162.
[9] *Id.*
[10] Postal Instant Press, Inc. v. Kaswa Corp., 77 Cal. Rptr. 3d 96, 104 n.3 (Ct. App. 2008).

While Byrne's story is a cautionary tale for those who set up shell corporations or creative corporate structures to avoid federal tax liabilities, the lesson goes beyond warning those with some sort of nefarious intent in swindling the government.[11] Take, for example, the story of Harold Balmer, a small golf shop owner with a few bad habits that he does not view as problematic but rather par for the course for a mom-and-pop shop. Specifically, Mr. Balmer regularly uses corporate funds to pay for personal expenses, instructs employees to perform personal errands for him, obtains merchandise from company suppliers for his own enjoyment, and does not keep adequate records of company dealings. While Mr. Balmer does not have any fraudulent or otherwise bad intent in performing these actions, he may have sufficient unity with the corporation and deficiencies in corporate formalities to render him an alter ego of the company if doing so would "prevent what would be fraud or injustice."[12] This means that the company's actions will be deemed to be those of Mr. Balmer's, and thus any judgment against the corporation would also be against Mr. Balmer personally.[13]

This result is known as the alter ego theory of liability.[14] When an entity is but a "double" of its principal, whether this be an individual or another entity, there will be alter ego liability if adhering to the corporate shield would promote injustice or perpetrate a fraud.[15] These are the two elements of the doctrine.[16] In other words, a plaintiff or creditor must first show unity of interest and ownership between a corporation, entity, or company and the alleged alter ego and then show that continuing to recognize the corporate shield would promote injustice or perpetrate a fraud.[17] The plaintiff or creditor must meet both requirements.[18] "There is no litmus test to determine when the corporate veil will be pierced; rather, the result will depend on the circumstances of each particular case."[19] While the doctrine has been recognized as an extreme remedy to be

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[11] *See* Sonora Diamond Corp. v. Superior Court, 99 Cal. Rptr. 2d 824, 836 (Ct. App. 2000).
[12] Associated Vendors, Inc. v. Oakland Meat Co., 26 Cal. Rptr. 806, 814 (Ct. App. 1962).
[13] *See Sonora Diamond Corp.*, 99 Cal. Rptr. 2d at 836.
[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] Mesler v. Bragg Mgmt. Co., 702 P.2d 601, 606 (Cal. 1985).
[19] *Id.*

sparingly used only in exceptional circumstances, there are plenty of cases available throughout the nation on the doctrine.[20]

In California, the alter ego concept appeared as far back as the early 1900s, at which time the higher courts were finding shareholders or directors of corporations personally responsible for corporate debts.[21] One of the earliest found cases, *Relley v. Campbell,* a California Supreme Court case, "is authority for the statement that where one individual owns all the stock of a corporation, the same is but the corporate double of the owner of the stock, and such proof destroys the separate entity of the corporation . . . ."[22] In such instances, the shareholder or director is "virtually the corporation itself, or, as the cases put it, the corporation [is] his 'corporate double.'"[23] Fast forward to 1998, the United States Supreme Court recognized the doctrine, stating that it can apply between a parent corporation and its subsidiary.[24]

One should not confuse the alter ego doctrine with imposing personal liability against an officer for partaking in wrongful conduct.[25] Rather, as these cases and their progeny establish, the doctrine serves to impose personal liability where a corporation conducts its affairs so "as to make it merely an instrumentality, agency, conduit, or adjunct of another corporation" or its principals.[26] It applies where the corporation has "no separate mind, will or existence of its own and is but a business conduit for its principal."[27] It is of no consequence to the doctrine whether a plaintiff asserts it in an action for tortious conduct or contractual breach.[28]

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[20] *See* Associated Vendors, Inc. v. Oakland Meat Co.*,* 26 Cal. Rptr. 806, 813 (Ct. App. 1962).

[21] *See* Relley v. Campbell, 66 P. 220, 221 (Cal. 1901); Rutz v. Obear, 115 P. 67, 67–68 (Cal. Ct. App. 1911); Deming v. Maas, 123 P. 204, 204–07 (Cal. Ct. App. 1912); U.S. Farm Land Co. v. Bennett, 203 P. 794 (Cal. Ct. App. 1921).

[22] *Rutz*, 115 P. at 68.

[23] *Deming*, 123 P. at 204.

[24] United States v. Bestfoods, 524 U.S. 51, 72–73 (1998).

[25] *See* Daimler AG v. A-Z Wheels LLC, 334 F. Supp. 3d 1087, 1095–1107 (S.D. Cal. 2018).

[26] Toho–Towa Co. v. Morgan Creek Prod., Inc., 159 Cal. Rptr. 3d 469, 481 (Ct. App. 2013) (citing Las Palmas Assocs. v. Las Palmas Center Assocs., 1 Cal. Rptr. 2d 301, 317 (Ct. App. 1992).

[27] *Toho–Towa Co.,* 159 Cal. Rptr. 3d at 480.

[28] JUSTICE BARON & LOUISE A. LAMOTHE, CALIFORNIA CIVIL PRACTICE: BUSINESS LITIGATION § 5:18 (citing Minton v. Cavaney, 364 P.2d 473, 474–76

Case law suggests that the doctrine can even be applied as between government entities.[29]

While the alter ego doctrine is supposed to be an extreme remedy that is sparingly used, it seems to make its way through the judicial system more than originally intended.[30] Despite robust case law on the doctrine, many attorneys remain uncertain on how to manage the doctrine through the course of litigation.[31] Therefore, this article details various aspects of the doctrine to promote a better and more thorough understanding amongst practitioners. Part II details the substantive aspects of the doctrine, i.e., the two prongs—unity of interest and ownership and whether a corporation's separate existence would promote injustice or perpetuate fraud. It also analyzes whether and when reverse piercing is recognized in California. Part III describes the procedural aspects of the doctrine, including how and when to pursue it in litigation, while also providing practical litigation tips. Part IV sets forth the author's proposal for the California legislature to codify the doctrine to promote transparency and consistency in its scope and application for both the judiciary and practitioners, as well as heightened awareness and accountability in the business community. Ultimately, until the California legislature codifies the doctrine in a way that presents, clarifies, or otherwise elaborates on its requirements, complexities, and intricacies, this article serves to provide a comprehensive overview of the doctrine to educate and guide practitioners on how and when to assert it, while helping them recognize and overcome potential challenges and uncertainties.

II. THE SUBSTANTIVE SIDE: PROVING ALTER EGO LIABILITY

"The alter ego doctrine arises when a plaintiff comes into court claiming that an opposing party is using the corporate form unjustly and in derogation of the plaintiff's interests."[32] It is the plaintiff's burden to overcome the presumption of the separate existence of the corporate

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(Cal. 1961); Mesler v. Bragg Mgmt. Co., 702 P.2d 601, 602–10 (Cal. 1985). (strict product liability and negligence); Wyatt v. Union Mortgage Co., 598 P.2d 45, 48–56 (Cal. 1979) (misrepresentation and "bait and switch" advertising); *Bestfoods*, 524 U.S. at 61 (CERCLA action for cost of cleaning up industrial waste)).

[29] *See* Tucker Land Co. v. State of California, 114 Cal. Rptr. 2d 891, 892–98 (Ct. App. 2001).

[30] *See* JPV I L.P. v. Koetting, 304 Cal. Rptr. 3d 550, 564 (Ct. App. 2023).

[31] *See* Robbins v. Blecher, 60 Cal. Rptr. 2d 815, 819 (Ct. App. 1997); *Associated Vendors, Inc.*, 26 Cal. Rptr. at 813; Automotriz Del Golfo De Cal. S. A. De C. V. v. Resnick, 306 P.2d 1 (Cal. 1957).

[32] *Mesler*, 702 P.2d at 606.

entity.[33] Both elements of the alter ego doctrine must be satisfied before the corporate existence can be disregarded.[34] It is "essentially an equitable [doctrine]," so the ultimate determination is "within the province of the trial court."[35] Case law indicates that the underlying factual findings are "a question of fact for the trier of fact," whose "conclusion . . . will not be disturbed if it be supported by substantial evidence."[36] While "the law as to whether courts will pierce the corporate veil is easy to state," it is admittedly "difficult to apply."[37] This section explores the prerequisite of ownership, and the meaning of the two elements—unity of interest and ownership and unjust or fraudulent result. It also provides examples of how the courts have applied the two elements in different scenarios.

A. *The Prerequisite of Ownership*

"[T]he Ninth Circuit [has] interpreted California law as implying that ownership is a prerequisite" for alter ego liability.[38] In this respect, the Ninth Circuit approvingly cited to an earlier opinion "applying California law and holding that a wife's 'community property interest in [her husband's] stock holdings . . . is sufficient to satisfy the ownership requirement.'"[39] Therefore, there is a "possibility that equitable ownership might be sufficient in some contexts."[40] For example, "[t]he California Supreme Court has noted that an individual's expectation that he would receive shares of a corporation 'supports an inference that he was an equitable owner' and justifies imposition of alter ego liability."[41] As another example, "the California Court of Appeal [has] imposed alter ego liability on a managing agent and attorney-in-fact although it did not own the interinsurance exchange at issue" because the "managing agent was the equitable owner."[42] Finally, in the context of trusts, "equitable interest is traditionally sufficient to confer ownership rights" because "under

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[33] Macpherson v. Eccleston, 11 Cal. Rptr. 671, 672 (Ct. App. 1961).
[34] *Associated Vendors, Inc*., 26 Cal. Rptr. at 813.
[35] Talbot v. Fresno-Pac. Corp., 5 Cal. Rptr. 361, 366 (Ct. App. 1960).
[36] *Associated Vendors, Inc.*, 26 Cal. Rptr. at 813.
[37] *Talbot*, 5 Cal. Rptr. at 366.
[38] In re Schwarzkopf, 626 F.3d 1032, 1038 (9th Cir. 2010).
[39] *Id.*
[40] *Id.*
[41] *Id.* at 1038–39 (quoting Minton v. Cavaney, 364 P.2d 473, 475 (Cal. 1961)).
[42] *Id.* at 1039 (quoting Troyk v. Farmers Grp., Inc., 90 Cal. Rptr. 3d 589, 620 (Ct. App. 2009)).

California law, trust beneficiaries hold an equitable interest in trust property and are 'regarded as the real owner[s] of [that] property.'"[43]

B. *What Is One and the Same? An Understanding of the Factors*

In 1924, in the case of *Wenban Estate, Inc. v. Hewlett*, the California Supreme Court described the first prong of the alter ego doctrine as, "the corporation is not only influenced and governed by that person, but that there is such a unity of interest and ownership that the individuality, or separateness, of the said person has ceased."[44] Such unity is not established merely because a corporation has one shareholder and no other owners exist.[45] In other words, being a "sole stockholder does not in itself suffice to show" to make one an alter ego.[46] It is the relationship between the individual and the corporation that is of relevance.[47]

By 1962, in *Associated Vendors, Inc. v. Oakland Meat Co.*, the California court of appeals was able to cite to various cases by which it identified a list of non-exhaustive factors to determine whether a company and an individual are one and the same:

[1] "Commingling of funds and other assets, failure to segregate funds of the separate entities, and the unauthorized diversion of corporate funds or assets to other than corporate uses";

[2] "[T]he treatment by an individual of the assets of the corporation as his own";

[3] "[T]he failure to obtain authority to issue stock or to subscribe to or issue the same";

[4] "[T]he holding out by an individual that he is personally liable for the debts of the corporation";

[5] "[T]he failure to maintain minutes or adequate corporate records, and the confusion of the records of the separate entities";

[6] "[T]he identical equitable ownership in the two entities; the identification of the equitable owners thereof with the domination and control of the two entities; identification of the directors and officers of the two entities in the responsible supervision and management; sole ownership of all of the stock in a corporation by one individual or the members of a family";

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[43] *In re Schwarzkopf*, 626 F.3d at 1038 (citing Steinhart v. Cnty. of L.A., 223 P.3d 57, 72 (Cal. 2010)).
[44] Wenban Estate, Inc., v. Hewlett, 227 P. 723, 732 (Cal. 1924).
[45] Waters v. Superior Court of Los Angeles County, 377 P.2d 265, 272 (1962).
[46] *Id.*
[47] *Id.*

[7] "[T]he use of the same office or business location; the employment of the same employees and/or attorney";
[8] "[T]he failure to adequately capitalize a corporation; the total absence of corporate assets, and undercapitalization";
[9] "[T]he use of a corporation as a mere shell, instrumentality or conduit for a single venture or the business of an individual or another corporation";
[10] "[T]he concealment and misrepresentation of the identity of the responsible ownership, management and financial interest, or concealment of personal business activities";
[11] "[T]he disregard of legal formalities and the failure to maintain arm's length relationships among related entities";
[12] "[T]he use of the corporate entity to procure labor, services or merchandise for another person or entity";
[13] "[T]he diversion of assets from a corporation by or to a stockholder or other person or entity, to the detriment of creditors, or the manipulation of assets and liabilities between entities so as to concentrate the assets in one and the liabilities in another";
[14] "[T]he contracting with another with intent to avoid performance by use of a corporate entity as a shield against personal liability, or the use of a corporation as a subterfuge of illegal transaction";
[15] [T]he formation and use of a corporation to transfer to it the existing liability of another person or entity."[48]

The court explained that no single factor is determinative, and instead a court must examine all the circumstances to determine whether to apply the doctrine to the particular case.[49] For example, in *Mid-Century Ins. Co. v. Gardner*, 11 Cal.Rptr.2d 918, where a husband and wife were the sole owners of a landscaping business, the husband's domination of ownership and control of the business was not sufficient to render him an alter ego of the company because the other factors were not present.[50] As the court put it, "[t]he plaintiff ha[d] a gaping lacuna in its proof with respect to *any* evidence that Mr. Gardner generally treated corporate assets as his own or disregarded the separate nature of the business."[51] The single

[48] *Associated Vendors, Inc.*, 26 Cal. Rptr. at 813–15.
[49] *Id.*
[50] Mid-Century Ins. Co. v. Gardner, 11 Cal. Rptr. 2d 918, 924 (1992).
[51] *Id.*

factor of domination of ownership and control was "not significant in insolation."[52]

1. When a Company Is Not Adequately Capitalized

The concept of inadequate capitalization means that the "corporation is organized and carries on business without substantial capital in such a way that the corporation is likely to have no sufficient assets available to meet its debts."[53] "The problem usually arises where a parent company, itself adequately financed, inadequately finances a subsidiary, and thus the stockholders seek to secure double insulation from liability, or where a stockholder seeks to become a preferred creditor of the corporation, or where some direct element of fraud is present."[54] The rule has been more accurately described as "inadequate financing," and the court has indicated that it would be applied "with great caution as to one-man corporations."[55]

In *Associated Vendors*, the court noted that testimony established that the company had adequate operating capital. Specifically, the company paid all its bills for two years except for the money owed to a co-defendant; the bills were paid promptly; and the rent was paid until the company vacated the premises.[56] Conversely, in *Carlesimo v. Schwebel*, "a total capitalization of $1,221.82 was held to be insufficient, as a matter of law, to operate a business engaged in the buying and selling of groceries."[57] In *Claremont Press Pub. Co. v. Barksdale*, contributing only $500 in capital to a venture that incurred costs of $650 to $1,000 per week was insufficient, especially where the defendant had been advised that at least $10,000 in capital was required.[58] Indeed, less than two months after operations began, the balance sheet showed a net worth of minus $1,800.[59] Moreover, in *Minton v. Cavaney*, a company that operated a public swimming pool was found to be inadequately capitalized because it did not have any assets.[60] The company leased the swimming pool from its

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[52] *Id.*
[53] Automotriz Del Golfo De California S. A. De C. V. v. Resnick, 306 P.2d 1, 4 (1957).
[54] Carlesimo v. Schwebel, 197 P.2d 167, 174 (1948).
[55] *Id.*
[56] Associated Vendors, Inc. v. Oakland Meat Co., 26 Cal. Rptr. 806, 806 (Ct. App. 1962).
[57] *Id.* at 816 (citing *Carlesimo*, 197 P.2d 167 (1948)).
[58] Claremont Press Pub. Co. v. Barksdale, 10 Cal. Rptr. 214, 216 (1960).
[59] *Id.*
[60] Minton v. Cavaney, 364 P.2d 473, 474–75 (Cal. 1961).

owner.[61] The company, however, forfeited the lease after failing to pay rent.[62] In addition, the company "never had any substantial assets."[63] The response to a special interrogatory asking if the company "ever had any assets" was, "insofar as my own personal knowledge and belief is concerned said corporation did not have any assets."[64] For these reasons, the court found that the capital was "trifling compared with the business to be done and the risk of loss."[65]

Accordingly, case law makes it clear that inadequate financing is "an important factor" in determining whether there is unity of interest between stockholders and the corporation.[66] That is because shareholders must not conduct "corporate business without providing any sufficient basis of financial responsibility to creditors."[67] Policy holds that "shareholders should in good faith put at the risk of the business unincumbered capital reasonably adequate for its prospective liabilities."[68] As noted above, the capital should not be "illusory or trifling compared with the business to be done and the risks of loss."[69]

2. When Two Companies Act as One: The "Single Enterprise" Rule

"Alter ego liability is not limited to the parent-subsidiary corporate relationship; rather, 'under the single-enterprise rule, liability can [also] be found between sister [or affiliated] companies.'"[70] For example, in *Elliot v. Occidental Life Insurance Co.*, the court found that

[61] *Id.* at 474.
[62] *Id.* at 475.
[63] *Id.*
[64] *Id.* at 474.
[65] *Id.* at 475.
[66] Automotriz Del Golfo De California S. A. De C. V. v. Resnick, 306 P.2d 1, 4 (Cal. 1957).
[67] *Id.*
[68] *Id.*
[69] *Id.*
[70] Troyk v. Farmers Grp., Inc., 90 Cal. Rptr. 3d 589, 619 (Ct. App. 2009) (quoting Las Palmas Assocs. v. Las Palmas Center Assocs., 1 Cal. Rptr. 2d 301, 318 (Ct. App. 1991)).

the plaintiff's husband's two successive employers were in fact one firm.[71] There, the plaintiff's husband, Robert Elliot, was issued life insurance by his employer, Oroweat Baking Company of San Francisco (Oroweat SF), naming plaintiff as his beneficiary.[72] "The insurance in question was made available to Elliott under a pre-existing master policy which had been issued to the Western Conference of Teamsters for Bakery Driver-Salesmen in Northern California."[73] Elliot's first employer was a "qualified sub-group under the master policy with the union."[74] Oroweat SF made one premium deduction on Elliot's behalf, but Elliot was thereafter transferred to a different bakery, Oroweat Oakland Bakery (Oroweat Oakland).[75] After the transfer, Oroweat SF and Oroweat Oakland failed to make any premium deductions on Elliot's behalf.[76]

The court found that there was sufficient evidence to support the jury's finding that the two employers were in fact one firm.[77] While Oroweat SF was a corporation and Oroweat Oakland was a co-partnership, "the same three individuals owned all of the stock in the corporation and also constituted the three partners of the Oakland company."[78] In addition, "the two companies used trucks of the same color and distributed the identical bread"; "[a]ll of the baking was done by the San Francisco company, and the Oakland company acted solely as a distributor"; "[b]oth companies were represented by the same attorney, and the records and correspondence of both companies were kept in the San Francisco office"; "[d]rivers employed by the two companies received the same rate of pay, and their paychecks issued from the San Francisco office"; "when employees of the Oakland company went on vacation, employees of the San Francisco company would be 'loaned' to the Oakland company to serve as vacation relief"; "[e]mployees of both companies were invited to a joint Christmas party"; and "when the Oakland copartnership was dissolved . . . it was taken over by the San Francisco corporation."[79]

In *Troyk v. Farmers Group, Inc.*, the court of appeals held that the trial court did not abuse its discretion in finding that various separate

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[71] Elliott v. Occidental Life Ins. Co. of Cal., 77 Cal. Rptr. 453, 454–55 (Ct. App. 1969).
[72] *Id.* at 454.
[73] *Id.*
[74] *Id.*
[75] *Id.*
[76] *Id.*
[77] *Id.* at 455.
[78] *Id.* at 454.
[79] *Id.*

entities were a "single enterprise" for purposes of liability.[80] The plaintiff brought a class action against an insurance company, its corporate attorney-in-fact, its corporate subsidiary, and the subsidiary's subsidiary, to recoup premiums that were collected in violation of the Insurance Code.[81] The appeals court noted that the insurance company and the subsidiaries shared directors, officers, employees, and equipment, and it was their collective actions that effectuated the insurance violation.[82] The two subsidiaries were also used by the insurance company as a "mere shell or conduit for the performance of the billing and forwarding functions for the class members for which [the subsidiaries] received service charges that had been omitted from, or not disclosed as part of premium in, their policies."[83] Moreover, although there was no control or ownership structure between the attorney-in-fact and the subsidiaries, the insurance company had "managerial and administrative control over" the activities of the attorney-in-fact that effectively allowed it to control the activities of both the attorney-in-fact and the subsidiaries, effectively making the two companies "sister, or at least affiliated, entities for the purpose of applying the single enterprise doctrine to [the] scheme."[84] It was "[b]y the nature of that relationship" that the court could infer sufficient control to render the companies a single enterprise.[85]

3. When a Parent Company Has Too Much Control Over Its Subsidiary

As noted above, domination and control is one relevant factor amongst many for purposes of the first prong of the alter ego doctrine.[86] In *In re Vitamins Antitrust Litigation*, the court analyzed the concept of domination and control in the context of a parent company and its subsidiaries.[87] This case dealt with personal jurisdiction over a parent corporation based on the acts of its subsidiaries specifically under Section

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[80] Troyk v. Farmers Grp., Inc., 90 Cal. Rptr. 3d 589, 619 (Ct. App. 2009).
[81] *Id.* at 597–98.
[82] *Id.* at 619–20.
[83] *Id.* at 620.
[84] *Id.*
[85] *Id.*
[86] *Id.*
[87] In re Vitamins Antitrust Litigation, 270 F. Supp. 2d 15, 22 (D.D.C. 2003).

12 of the Clayton Act.[88] The court stated that it was not conducting a "deeper inquiry" into personal jurisdiction based on the alter ego test, limiting its inquiry to "reaching a parent corporation for purposes of jurisdiction under the Clayton Act."[89] Accordingly, the factors set forth below and amended to fit the current landscape may not by themselves be sufficient to satisfy the first prong of the alter ego doctrine between a parent company and its subsidiary. Rather, these factors may be helpful to define what is meant by the single item of domination and control as it relates to the relationship between the parent and its subsidiary.[90] The factors are as follows:

> [1] Whether the subsidiary performs business activities that in a less elaborate corporate scheme the parent corporation would perform directly by its own branch offices or agents;
> [2] Whether the subsidiary and its parent are partners in worldwide business competition;
> [3] Whether the parent has the capacity to influence decisions of the subsidiary;
> [4] The part that the subsidiary corporation plays in the over-all business activity of the parent corporation;
> [5] The existence of integrated business operations and systems between the two companies;
> [6] The transfer of personnel back and forth between the parent corporation and its subsidiary;
> [7] The presentation of a common marketing image by the corporations whereby they hold themselves out to the public as a single entity;
> [8] The granting of an exclusive distributorship by the parent corporation to its subsidiary;
> [9] Whether the subsidiary pays cash for products sold or services rendered to it by the parent; and
> [10] Whether separate books, bank accounts, tax returns, financial statements and the like are kept.[91]

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[88] *Id.* at 20 (stating that "[a]ny suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found." (citing 15 U.S.C. § 22)).
[89] *Id.* at 26.
[90] *Id.* at 21.
[91] *Id.* (citing Chrysler Corp. v. Gen. Motors Corp., 589 F. Supp. 1182, 1195, 1200 (D.D.C.1984)).

Applying these criteria to the facts of the case, the court found sufficient domination or control of the parent company over its subsidiaries.[92] First, the parent company's President and Chairman essentially "ran" the subsidiary; he hired all the subsidiary's senior management, who reported directly to him, and made decisions regarding the firing of key management employees of the subsidiary.[93] The subsidiaries' management personnel received their paychecks from the parent company.[94] The subsidiaries were put in place solely to reduce the parent company's tax liability.[95] The parent company's financial decisions were based on the financial performance of the subsidiary companies and the monies needed for the subsidiaries' operations.[96] Finally, there was significant overlap between the board of directors and officers of the parent company and the board of directors and officers of its subsidiaries.[97] "Officers and directors were put into place in both [subsidiaries] merely to comply with statutory obligations," but the subsidiaries had "no corporate records other than the minutes of requisite yearly board meetings."[98] In this respect, the court noted that the parent company made "no attempt to assert that overlapping board members, officers or employees 'carefully differentiate[d] their role[s]' in the various entities, or that the subsidiaries [were] free to disregard advice from managing directors of the parent."[99] Nonetheless, in shutting down this agreement, the court noted as relevant parent corporation's sufficient control via the ability to influence and reverse the board of the subsidiary on most issues.[100]

C. *When Is One and the Same Unjust?*

The second prong of the alter ego doctrine requires a finding of a fraudulent or unjust result if, under the particular circumstances, the court were to adhere to the fiction of the separate existence of the corporation.[101] There must be some evidence of wrongdoing, i.e., "fraudulent or deceptive

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[92] *Id.* at 23.
[93] *Id.*
[94] *Id.*
[95] *Id.* at 23.
[96] *Id.* at 24.
[97] *Id.* at 22.
[98] *Id.* at 23–24.
[99] *Id.* at 24.
[100] *Id.*
[101] Wood v. Elling Corp., 572 P.2d 755, 760 (Cal. 1977).

intent," or alternatively of an injustice or inequity flowing from the recognition of the separate corporate identity.[102] "Actual fraud" is not required, but rather the doctrine "is designed to prevent what would be fraud or injustice" if the separate existence were to be upheld.[103]
The following are examples where the second prong is <u>not</u> met:

> [1] "Difficulty in enforcing a judgment or collecting a debt."[104]
> [2] A parent company contributing funds to the subsidiary "for the purpose of assisting [the subsidiary] in meeting its financial obligations and not for the purpose of perpetrating a fraud."[105]

The following are examples where the second prong is met:

> [1] Depriving a widow of the proceeds of her late husband's life insurance coverage merely because he transferred his place of employment.[106]
> [2] Allowing an individual to circumvent his tax liabilities.[107]
> [3] Permitting an individual "to secure an advantage over third persons, through the medium of the corporation, to which she would not be entitled as an individual."[108]
> [4] In the case of a corporation organized for the purposes of publishing a newspaper but without adequate financing to cover its debts, allowing an individual defendant and his business partner to receive but not pay for printing services provided by the plaintiff to the corporation.[109]

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102 Sonora Diamond Corp. v. Superior Court, 99 Cal. Rptr. 2d 824, 836–37 (Ct. App. 2000).
103 Associated Vendors, Inc. v. Oakland Meat Co., 26 Cal. Rptr. 806, 838 (Ct. App. 1962).
104 *Sonora Diamond Corp.*, 99 Cal. Rptr. 2d at 837 (first citing *Associated Vendors, Inc.*, 26 Cal. Rptr. at 816; then citing Alberto v. Diversified Group, Inc., 55 F.3d 201, 207 (5th Cir. 1995); and then citing Lowell Staats Mining Co., Inc. v. Pioneer Uravan, Inc. 878 F.2d 1259 (10th Cir.1989)).
105 *Lowell Staats Mining Co., Inc.*, 878 F.2d at 1263.
106 Elliott v. Occidental Life Ins. Co. of Cal., 77 Cal. Rptr. 453, 456 (Ct. App. 1969).
107 Prompt Staffing, Inc. v. United States, 321 F. Supp. 3d 1157, 1178 (C.D. Cal. 2018).
108 Wenban Estate, Inc., v. Hewlett, 227 P. 723, 732 (Cal. 1924).
109 Claremont Press Pub. Co. v. Barksdale, 10 Cal. Rptr. 214, 214 (Ct. App. 1960).

[5] Allowing two separate entities controlled by the same persons and having an identical name to frustrate a meritorious claim.[110]

[6] When "a business corporation reorganizes under a new name, with practically the same stockholders and directors, to carry on the former business with the design of avoiding the liabilities of the original company."[111]

[7] When a father and son made representations to an IP licensor that they both "do all the decision making" for their two businesses, which "are one and the same," and file a petition under oath to register a dba stating that the entity is "his fictitious business name."[112]

As the cases demonstrate, "[t]he essence of the alter ego doctrine is that justice be done."[113] "[I]t is not sufficient to merely show that a creditor will remain unsatisfied if the corporate veil is not pierced, and thus set up such an unhappy circumstance as proof of an 'inequitable result.'"[114] Indeed, "[i]n almost every instance where a plaintiff has attempted to invoke the doctrine he is an unsatisfied creditor."[115] "The purpose of the doctrine is not to protect every unsatisfied creditor, but rather to afford him protection" where it is inequitable for an individual to hide behind the corporate veil.[116]

D. *Whether California Recognizes Reverse Piercing*

Reverse piercing of the corporate veil is the concept of allowing third party creditors to reach corporate assets to satisfy a shareholder's personal liability.[117] In other words, reverse piercing is "seek[ing] to

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[110] Thomson v. L. C. Roney & Co., 246 P.2d 1017, 1022 (Cal. Ct. App. 1952).
[111] Talbot v. Fresno-Pac. Corp., 5 Cal. Rptr. 361, 366 (Ct. App. 1960) (citing Stanford Hotel Co. v. M. Schwind Co., 180 Cal. 348, 354 (1919)).
[112] Eleanor Licensing LLC v. Classic Recreations LLC, 230 Cal. Rptr. 3d 511, 525 (Ct. App. 2018).
[113] Mesler v. Bragg Mgmt. Co., 702 P.2d 601, 607 (Cal. 1985).
[114] Associated Vendors, Inc. v. Oakland Meat Co., 26 Cal. Rptr. 806, 816 (Ct. App. 1962).
[115] *Id.*
[116] *Id.*
[117] Postal Instant Press, Inc. v. Kaswa Corp., 77 Cal. Rptr. 3d 96, 103 (Ct. App. 2008).

satisfy the debt of an individual through the assets of an entity of which the individual is an insider."[118] This notion may also be known as "outside" or "third party" reverse piercing.[119] California has recognized it as an appropriate doctrine in the federal tax context, as well as in the context of a trust.[120] As to the former, federal courts have recognized "'reverse piercing [as] a well-established theory in the federal tax realm' that advances the policies of 'avoiding fraud and collecting delinquent federal taxes.'"[121] In the context of trusts, "the California Supreme Court has allowed alter ego claims where a trust is alleged to be a debtor's alter ego."[122] Specifically, "in *Wood v. Elling Corp.,* the California Supreme Court gave leave to amend a complaint to assert alter ego claims, concluding, '[i]f it were alleged and proven that the two trusts in question were themselves alter egos of the [defendants], those trusts would essentially drop out as independent legal entities.'"[123] Moreover, reverse piercing has been said to have "nothing to do with alter ego liability between [a parent and subsidiary] or sister companies."[124]

In 2008, the California Court of Appeal for the Fourth District, Division 3 rejected the concept of reverse piercing outside the federal tax realm.[125] However, the Fourth District, Division 3 later determined that reverse piercing is allowed in some contexts.[126] This section describes the 2008 case and the subsequent rulings for a better understanding as to whether and when reverse piercing is permitted in California.

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[118] Curci Investments, LLC v. Baldwin, 221 Cal. Rptr. 3d 847, 852 (Ct. App. 2017).
[119] *Postal Instant Press, Inc.*, 77 Cal. Rptr. 3d at 103.
[120] *See* United States v. Scherping, 187 F.3d 796, 803–804 (8th Cir.1999).
[121] *Postal Instant Press, Inc.*, 77 Cal. Rptr. 3d at 104 n.3 (citing *Scherping*, 187 F.3d at 803–04).
[122] In re Schwarzkopf, 626 F.3d 1032, 1038 (9th Cir. 2010) (citing Wood v. Elling Corp., 572 P.2d 755, 762 (Cal. 1977)).
[123] *Id.*
[124] Clark v. Dana Woody & Assocs., Inc., No. 09CV2931-CAB (DHB), 2013 WL 544030, at *3 (S.D. Cal. Feb. 12, 2013); Greenspan v. LADT, LLC, 121 Cal. Rptr. 3d 118 (Ct. App. 2010); Phillips, Spallas & Angstadt, LLP v. Fotouhi, 128 Cal. Rptr. 3d 320 (Ct. App. 2011).
[125] *See Postal Instant Press, Inc.*, 77 Cal. Rptr. 3d at 104–05.
[126] *See* Part II.D.ii.

1. Reverse Piercing Is Not Allowed With Respect to Corporations Outside of the Federal Tax Context

In 2008, in *Postal Instant Press, Inc. v. Kaswa Corp.,* the court of appeal held that the state does not recognize reverse piercing outside of the federal tax realm.[127] Citing to a 1967 case in the United States District Court for the Central District of California, the *Postal Instant Press* court stated, "[w]e agree with the sound reasoning and analysis of the cases rejecting outside reverse piercing of the corporate veil," as outside reverse piercing is "a complete distortion of the alter ego doctrine."[128] The court viewed "outside reverse piercing [as] a radical and problematic change in standard alter ego law."[129] The court found that "[t]raditional alter ego doctrine and reverse piercing, while having similar goals, advance those goals by addressing very different concerns."[130] The court noted that "[t]raditional piercing of the corporate veil is justified as an equitable remedy when the shareholders have abused the corporate form to evade individual liability, circumvent a statute, or accomplish a wrongful purpose."[131] However, "[t]he same abuse of the corporate form does not exist when the judgment debtor is the shareholder."[132]

The court reasoned that "[i]n that situation, the corporate form is not being used to evade a shareholder's personal liability, because the shareholder did not incur the debt through the corporate guise and misuse that guise to escape personal liability for the debt."[133] The path forward for a judgment creditor is to "enforce the judgment against the shareholder's assets, including shares in the corporation."[134] This means that "[u]pon acquiring the shares, the judgment creditor will have whatever rights the shareholder had in the corporation."[135] In this respect, the court viewed reverse piercing as an "unacceptable shortcut" to pursue other remedies

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[127] *Postal Instant Press, Inc.*, 77 Cal. Rptr. 3d at 105.
[128] *Id.* at 102–03 (citing Olympic Capital Corp. v. Newman, 276 F.Supp. 646, 658 (C.D. Cal. 1967)).
[129] *Id.* at 104.
[130] *Id.* at 104–05.
[131] *Id.* at 105.
[132] *Id.*
[133] *Id.*
[134] *Id.*
[135] *Id.*

that already exist, such as conversion and fraudulent conveyance.[136] In this respect, the court found that the "true issue" in the context of reverse piercing "is not the misuse of the corporate form to shield the shareholder from personal liability," but rather "the shareholder's transfer of personal assets to the corporation to shield the assets from collection by a creditor of the shareholder," for which judgment creditors already have protection.[137]

The court further noted that reverse piercing is problematic because it "bypasses normal judgment-collection procedures, whereby judgment creditors attach the judgment debtor's shares in the corporation and not the corporation's assets."[138] Moreover, the doctrine is also problematic "[t]o the extent that the corporation has other non-culpable shareholders, they obviously will be prejudiced if the corporation's assets can be attached directly."[139] There is no similar result in "ordinary piercing cases," where "only the assets of the particular shareholder who is determined to be the corporation's alter ego are subject to attachment."[140] The court concluded that "standard alter ego and outside reverse piercing are actually different theories, justified by different reasons, and address different issues."[141]

2. Reverse Piercing May Be Allowed in the Context of an LLC

Despite rejecting the notion of reverse piercing outside the federal tax context, the *Postal Instant Press* court still went on to state that the judgment creditor failed to meet the requirements of the doctrine even if the court were to accept it.[142] In this respect, the court noted, "Amendment of a judgment to add an alter ego is an equitable procedure . . . and before applying outside reverse piercing, 'the availability of alternative, adequate remedies must be considered by the trial court.'"[143] As a result of this language, a 2017 case followed in the same district and division where the court held that reverse piercing is in fact available in the state of

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[136] *Id.*
[137] *Id.* at 105.
[138] *Id.* at 103.
[139] *Id.*
[140] *Id.*
[141] *Id.* at 106.
[142] *Id.*
[143] *Id.* (citing Carr v. Barnabey's Hotel Corp., 28 Cal. Rptr. 2d 127 (Ct. App. 1994)); In re Phillips, 139 P.3d 639, 644–45 (Colo. 2006)).

California.[144] Specifically, in *Curci Investments, LLC v. Baldwin*, the judgment creditor contended that the facts of the case justified making reverse piercing an available remedy, while the judgment debtor "assert[ed] that *Postal Instant Press* established a broad and all-encompassing rule of no reverse piercing in California."[145] The court of appeal remanded the case to make a factual determination as to whether the LLC veil should be pierced to be added as a judgment debtor on a multimillion judgment against one of its members personally, who held a ninety-nine percent interest in the LLC.[146]

The court reasoned that *Postal Instant Press* was distinguishable from the instant case.[147] First, the court noted that the decision "was expressly limited to corporations," and that the creditor was seeking to disregard the separate status of an LLC, not a corporation.[148] Second, there was no "innocent" member of the LLC that would "be affected by reverse piercing."[149] The debtor was a 99% owner of the LLC, and his wife was the other 1%.[150] Given the principles of community property in California, i.e., that the "community estate [is] generally liable for debt incurred by either spouse before or during marriage," the wife was also liable for the debt in question.[151] In support of this reasoning, the court distinguished the language in *Postal Instant Press* citing concerns of reverse piercing where "other non-culpable shareholders" would be "prejudiced if the corporation's assets [could] be attached directly."[152]

Third, as to the concern about "bypass[ing] normal judgment collection procedures," the court noted that "a creditor does not have the same options against a member of an LLC as it has against a shareholder of a corporation." That is because "[w]hen the debtor is a shareholder, the creditor may step straight into the shoes of the debtor," i.e., "acquire the shares and, thereafter, 'have whatever rights the shareholder had in the

[144] Curci Investments, LLC v. Baldwin, 221 Cal. Rptr. 3d 847, 850 (Ct. App. 2017).
[145] *Id.*
[146] *Id.*
[147] *Id.* at 852.
[148] *Id.*
[149] *Id.*
[150] *Id.*
[151] *Id.*
[152] *Id.*

corporation,' including the right to dividends, to vote, and to sell the shares."[153] "In stark contrast, if the debtor is a member of an LLC, the creditor may only obtain a charging order against distributions made to the member."[154] Consequently, "[t]he debtor remains a member of the LLC with all the same rights to manage and control the LLC, including . . . the right to decide when distributions to members are made, if ever."[155] Finally, the court noted that it is "precisely the rare situations in which [other legal remedies, such as conversion and fraudulent transfer,] are not [available] that reverse piercing should deliver justice."[156] In this respect, "requiring a creditor wishing to invoke the doctrine to demonstrate the absence of a plain, speedy, and adequate remedy at law would protect against reverse piercing being used to bypass legal remedies."[157]
For these reasons, the court remanded the case to determine whether reverse piercing was available, without expressing any opinion as to whether the LLC's veil should actually be pierced.[158] The trial court was instructed to engage in a "fact-driven analysis," evaluating "the same factors as are employed in a traditional veil piercing case, as well as whether [the creditor] ha[d] any plain, speedy, and adequate remedy at law."[159]

Later, in 2021, in *Blizzard Energy, Inc. v. Schaefers,* the California Court of Appeal for the Second District, Division 6, did not disturb the holding or "sound analysis" in *Postal Instant Press* or *Curci Investments, LLC*.[160] At issue was whether an LLC veil could be pierced to satisfy the judgment against a husband personally where both husband and wife had an equal ownership interest in the LLC.[161] The case was remanded for further proceedings so that the trial court could weigh the competing equities that bear on the veil-piercing issue.[162] Specifically, the issue was whether the wife was "an innocent third party who would suffer substantial harm" if the creditor could accompany recovery through reverse piercing of the LLC.[163] The court reasoned that there was "no indication that she was involved in the fraud committed against" the creditor by her husband

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[153] *Id.*
[154] *Id.* at 852–53.
[155] *Id.* at 853.
[156] *Id.*
[157] *Id.*
[158] *Id.*
[159] *Id.* at 854.
[160] Blizzard Energy, Inc. v. Schaefers, 286 Cal. Rptr. 3d 658, 670 (Ct. App. 2021).
[161] *Id.* at 665.
[162] *Id.*
[163] *Id.*

and her interest in the LLC may not be community property or otherwise subject to the debts of her husband since they had separated prior to formation of the LLC.[164] As a result, the court remanded the case without offering any opinion on whether the wife qualified as an innocent third party.[165] The trial court was instructed to use its "sound discretion" to "weigh the equities to 'accomplish ultimate justice.'"[166]

Accordingly, the 2021 case *Manichaean Capital, LLC v. Exela Technologies, Inc.*, heard by the Court of Chancery of Delaware, provides useful guidance of how to examine reverse piercing.[167] While the court's application is not limited to LLCs, the considerations provide a practical analysis for reverse piercing as accepted in California.[168] The court stated that the "natural starting place" is to implement the traditional alter ego factors (described later in this article in more detail) and subsequently ask whether the owner is utilizing the corporate form to perpetuate fraud or an injustice.[169] The court lists eight additional factors that should be considered for the inquiry relating to the second element of the alter ego doctrine.[170] It is important to note that these additional factors are not all directly on point or relevant with respect to California law and should be applied with caution or otherwise amended to fit California's framework as described above.[171] The additional factors listed by the Delaware Chancery are as follows:

> [1] the degree to which allowing a reverse pierce would impair the legitimate expectations of any adversely affected shareholders who are not responsible for the conduct of the insider that gave rise to the reverse pierce claim, and the degree to which allowing a reverse pierce would establish a precedent troubling to shareholders generally;

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164 *Id.*
165 *Id.* at 676.
166 *Id.* (internal citations omitted).
167 Manichaean Capital, LLC v. Exela Technologies, Inc., 251 A.3d 694, 700 (Del. Ch. 2021).
168 *See id.*
169 *Id.* at 714.
170 *Id.* at 715.
171 *Blizzard Energy, Inc.*, 286 Cal. Rptr. 3d. at 676.

[2] the degree to which the corporate entity whose disregard is sought has exercised dominion and control over the insider who is subject to the claim by the party seeking a reverse pierce;
[3] the degree to which the injury alleged by the person seeking a reverse pierce is related to the corporate entity's dominion and control of the insider, or to that person's reasonable reliance upon a lack of separate entity status between the insider and the corporate entity;
[4] the degree to which the public convenience, as articulated by [state law], would be served by allowing a reverse pierce;
[5] the extent and severity of the wrongful conduct, if any, engaged in by the corporate entity whose disregard is sought by the insider;
[6] the possibility that the person seeking the reverse pierce is himself guilty of wrongful conduct sufficient to bar him from obtaining equitable relief;
[7] the extent to which the reverse pierce will harm innocent third-party creditors of the entity the plaintiff seeks to reach; and
[8] the extent to which other claims or remedies are practically available to the creditor at law or in equity to recover the debt.[172]

III. THE PROCEDURAL SIDE: PURSUING ALTER EGO LIABILITY

A claim against a defendant, based on the alter ego theory, is not itself a claim for substantive relief, e.g., breach of contract or to set aside a fraudulent conveyance, but rather, procedural, i.e., to disregard the corporate entity as a distinct defendant and to hold the alter ego individuals liable on the obligations of the corporation where the corporate form is being used by the individuals to escape personal liability, sanction a fraud, or promote injustice.[173] "An alter ego defendant has no separate primary liability to the plaintiff."[174] Instead, a plaintiff's claim against the alter ego defendant is "identical with that claimed by plaintiff against the already-named defendant."[175] For this reason, "courts have followed a liberal policy of applying the *alter ego* doctrine where the equities and justice of the situation appear to call for it rather than restricting it to the technical niceties depending upon pleading and procedure."[176] "[W]here a defendant is charged with liability his denial thereof is sufficient to establish such

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[172] *Manichaean Capital, LLC*, 251 A.3d at 700.
[173] Hennessey's Tavern, Inc. v. American Air Filter Co., 251 Cal. Rptr. 859, 863 (Ct. App. 1988).
[174] *Id.*
[175] *Id.*
[176] First Western Bank & Trust Co. v. Bookasta, 73 Cal. Rptr. 657 (Ct. App. 1968) (emphasis preserved).

liability upon the principle of *alter ego* even though the complaint is devoid of such an allegation."[177] Accordingly, the doctrine may be pled in the original complaint or in an amended complaint at the time of trial or post-judgment.[178] This section analyzes the procedural aspect of the alter ego doctrine, and the effect of using the doctrine during different phases of litigation.

A. *How to Adequately Plead Alter Ego Liability in the Complaint*

In *Leek v. Cooper*, the court noted, "To recover on an alter ego theory, a plaintiff need not use the words 'alter ego,' but must allege sufficient facts to show a unity of interest and ownership, and an unjust result if the corporation is treated as the sole actor."[179] "An allegation that a person owns all of the corporate stock and makes all of the management decisions is insufficient to cause the court to disregard the corporate entity."[180] While the complaint does not have to be based on fraud and the remedy sought may not be related to fraud, the complaint must "set[] forth additional facts of improper domination of the corporation as a basis for judgment against the individuals."[181] Where the complaint adequately alleges alter ego liability, such allegations can be used to support jurisdiction over a foreign third-party or, in other words, an individual, out-of-state stockholder.[182]

In *First Western Bank & Trust Co. v. Bookasta*, the plaintiff's allegations in the complaint were "adequate and sufficient to state a cause of action . . . on the alter ego theory" and thus, the plaintiff was "entitled to an opportunity to present evidence in support of the facts alleged."[183] There, the plaintiff pled that the individuals:

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[177] *Id.* (citing Auer v. Frank, 38 Cal. Rptr. 684 (Ct. App. 1964)).
[178] *First Western Bank & Trust Co.*, 73 Cal. Rptr. at 658; Baize v. Eastridge Companies, LLC, 47 Cal. Rptr. 3d 763, 765 (Ct. App. 2006); Mesler v. Bragg Mgmt. Co., 702 P.2d 601, 603 (Cal. 1985).
[179] Leek v. Cooper, 125 Cal. Rptr. 3d 56, 65 (Ct. App. 2011) (citing Vasey v. Cal. Dance Co., 139 Cal. Rptr. 72, 76 (Ct. App. 1977).
[180] *Leek,* 125 Cal. Rptr. 3d at 65 (citing Meadows v. Emett & Chandler, 222 P.2d 145, 147 (Cal. Ct. App. 1950).
[181] *First Western Bank & Trust Co.*, 73 Cal. Rptr. at 659.
[182] Sheard v. Superior Court, 114 Cal. Rptr. 743, 745 (Ct. App. 1974); In re Boon Global Limited, 923 F.3d 643, 650 (9th Cir. 2019).
[183] *First Western Bank & Trust Co*., 73 Cal. Rptr. at 660.

> '[D]ominated' the affairs of the corporation; that a 'unity of interest and ownership' existed between respondent and the corporation; that the corporation is a 'mere shell and naked framework' for individual manipulations; that its income was diverted to the use of the individuals and respondent; that the corporation was, in effect, inadequately capitalized; that the corporation failed to issue stock and to abide by the formalities of corporate existence; that the corporation is and has been insolvent; and that adherence to the fiction of separate corporate existence would, under the circumstances, promote injustice. Assuming these facts can be proved, each of the several shareholders of [the corporation], regardless of the size of their respective interests, may be held liable as principals or partners under the Alter ego principle.[184]

However, in *Leek v. Cooper*, the allegations in the complaint did not establish alter ego liability.[185] In finding that alter ego liability was not adequately pled, the court examined the "pertinent allegations" in the complaint, which it described as follows:

> (1) [T]hat the plaintiffs were employed by Auburn Honda and Jay Cooper; (2) that Auburn Honda is a corporation; (3) that 'Defendant Cooper is the sole owner of Auburn Honda, owning all of its stock and making all of its business decisions personally[;]' and (4) that all defendants were 'the agents, servants and employees of their co-defendants, and in doing the things hereinafter alleged were acting within the scope and authority as such agents, servants and employees and with the permission and consent of their co-defendants. All of said acts of each of the Defendants were authorized by or ratified by their co-defendants.'[186]

The court reasoned that "[t]hese allegations neither specifically alleged alter ego liability, nor alleged facts showing a unity of interest and inequitable result from treatment of the corporation as the sole actor."[187]

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[184] *Id.* (citing Riddle v. Leuschner, 335 P.2d 107, 110–11 (Cal. 1959)).
[185] *Leek*, 125 Cal. Rptr. 3d at 68.
[186] *Id.*
[187] *Id.*

Contrarily, in *Zoran Corp. v. Chen*, the allegations in the complaint were sufficient to establish alter ego liability.[188]

> A central theory of the complaint was that [an individual] represented that he directly controlled and dominated the defendant companies, and that for each of them there was 'a unity of interest and ownership' such that any 'individuality and separateness' between [the individual] and the company had ceased and the company was the alter ego of [the individual].[189]

The plaintiff further claimed, "that adherence to the fiction of the entity as distinct from [the individual] 'would permit an abuse of the corporate privilege and would sanction fraud in the form of [the individual's] misrepresentations made on behalf of himself and [the entity], which fraud resulted in substantial damage to [the plaintiff].'"[190]

1. Gathering Alter Ego Allegations to Include in the Complaint

In *Greenspan v. LADT LLC*, the court noted, "[I]f before filing suit, the plaintiff reasonably believes that an alter ego relationship exists among various individuals and companies, the complaint should probably include alter ego allegations and name the alleged alter egos as defendants."[191] This could prove to be important where, for some unfair reason, a small business may not have sufficient funds to cover a judgment, or where a larger company is on the verge of bankruptcy or otherwise going out of business. First, plaintiff's counsel should conduct general internet research on an entity and its principals to determine how they represent themselves to the public and engage in dealings, including reviewing filings with the Secretary of State. This is also a useful first step to determine if corporate formalities with respect to state-required filings or payment to the Franchise Tax Board have been met. Second, counsel should conduct an initial client interview whereby the doctrine is explained to the client to establish their understanding of the issues at hand

[188] *Zoran Corp. v. Chen*, 110 Cal. Rptr. 3d 597, 601 (Ct. App. 2010).
[189] *Id.*
[190] *Id.*
[191] Greenspan v. LADT, LLC, 121 Cal. Rptr. 3d 118, 142 (Ct. App. 2010).

and ask the client factual questions addressing the various elements of the first prong. Some examples of questions to ask the client are as follows:

[1] Whether the client witnessed corporate funds, office spaces, assets, employees, or property being used for non-corporate purposes;
[2] Whether the company shares any of its funds, office spaces, assets, employees, or property with another individual, company, or entity;
[3] Whether the company has its own bank account or shares a bank account with another individual, company, or entity;
[4] Whether the company owners, directors, or officers serve in a similar capacity for another company or entity;
[5] Ways in which the client witnessed the corporate credit card(s) being used;
[6] Description of tasks employees were performing specifically for the benefit of the company versus for other purposes;
[7] Whether corporate contracts were in the name of the company or another individual, company, or entity;
[8] Description of the company's recording keeping practices and organization of business records;
[9] Whether the client is aware of any tax or other legal compliance issues;
[10] Whether the company has satisfied or has been able to satisfy its corporate debts and liabilities;
[11] Whether the client has ever heard or heard of company principals making statements about their control or influence over the company, the context of the statements, and the outcome; and
[12] Whether the client is generally aware of any shady business, management, or other company practices.

The preceding questions provide a roadmap for interviewing one's client, but the decision to include alter ego allegations in the complaint will depend on a totality of the answers.[192] Just as one cannot conclusively establish the first prong of the doctrine based on the existence of a single factor, plaintiffs' attorneys are cautioned against pursuing alter ego liability based on, for example, a one-time or random use of a company

[192] S.G. Borello & Sons, Inc. v. Dep't of Indus. Relations, 769 P.2d 399, 399 (Cal. 1989).

employee to perform a non-corporate task, unless there is still reason to believe that such conduct points to unity of interest and ownership.

2. Conducting Alter Ego Discovery and Navigating Privacy Concerns

A plaintiff seeking to assert claims against an entity is entitled to discovery to pursue alter ego theories of liability.[193] The discovery statute states that "any party may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action or to the determination of any motion made in that action, if the matter either is itself admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence."[194] Under the statute, "[d]iscovery may relate to the claim or defense of the party seeking discovery or of any other party to the action."[195] "The scope of permissible discovery is one of reason, logic, and common sense."[196] Though most are unaware, "fishing expeditions *are* permissible in some cases."[197] Accordingly, a plaintiff pursuing alter ego liability may utilize various discovery mechanisms to gather evidence, including interrogatories, inspection or documents requests, admissions, and depositions.[198] However, this does not mean that requests can be overbroad or burdensome.[199] Discovery requests must be reasonable, and counsel must narrowly tailor them to the specific issues at hand with temporal limitations.[200]

Often, when plaintiffs' attorneys seek discovery into financial records for purposes of alter ego liability, defense counsel objects on privacy grounds.[201] These objections are not invalid or improper per se,

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[193] Warburton/Buttner v. Superior Court, 127 Cal. Rptr. 2d 706, 720–22 (Ct. App. 2002).
[194] CAL. CIV. PROC. CODE § 2017.010.
[195] *Id.*
[196] Lipton v. Superior Court, 56 Cal. Rptr. 2d 341, 347 (Ct. App. 1996).
[197] Gonzalez v. Superior Court, 39 Cal. Rptr. 2d 896, 901 (Ct. App. 1995).
[198] *See id.*
[199] CAL. CIV. PROC. CODE § 2031.280.
[200] *Id.*
[201] Order Granting Plaintiff's Motion to Compel, 2008 WL 2811968 (N.D. Cal. 2008) (defendants argue that plaintiff's requests are excessively broad and violate defendant's privacy rights).

but rather become problematic when they create evasive responses or the defense counsel uses them to withhold documents without trying to reach any sort of agreement with the plaintiff's attorney.[202] Defense counsel should assert the objections; seek a stipulated protective order, such as the County of Los Angeles Model Stipulation and Protective Order;[203] and attempt to narrow the scope of the requests or otherwise allow the discovery to be conducted in phases.[204] Subject to these parameters, assuming the parties can reach an agreement, the defense should produce relevant documents.[205] When defense counsel refuses to produce documents or otherwise reach a reasonable agreement, the plaintiff's counsel should consider filing a motion to compel further responses and request an order from the court for the defense to produce sufficient documents and records to enable plaintiff's counsel to investigate and draw alter ego conclusions. It may also behoove plaintiff's counsel to agree to the defense's request for the parties to enter into a stipulated protective order for sensitive or financial records. Such an agreement, while not per se necessary, will allow the plaintiff's counsel to show the court on a motion to compel that the plaintiff attempted to assuage the defense's privacy concerns in that the "confidential information is carefully shielded from disclosure except to those who have a legitimate need to know."[206]

Moreover, the standard on plaintiff's motion to compel will depend on whether the plaintiff is seeking the financial records of an individual or a nonhuman entity.[207] That is because unlike individuals, who have a constitutional right of privacy against serious invasions,[208] "corporations do not have a right to privacy protected by the California Constitution."[209] For individuals, the right of privacy in the California Constitution (Art. I, § 1) "protects the individual's *reasonable* expectation of privacy against a *serious* invasion."[210] The framework for evaluating

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[202] Katherine Gallo, *Why These Objections Are Garbage*, KATHERINE GALLO ESQ. (Oct. 8, 2019), https://www.resolvingdiscoverydisputes.com/request-for-production-of-documents/document-production-code-compliant-demand/why-these-objections-are-garbage/.
[203] *Los Angeles Model Stipulation and Protective Order*, L.A. SUPERIOR COURT, https://www.lacourt.org/division/civil/pdf/formprotectiveorder1confidential_1.pdf (last visited Feb. 11, 2024).
[204] Gallo, *supra* note 202.
[205] CAL. CIV. PROC. CODE § 2031.010.
[206] Pioneer Elecs. Inc. v. Superior Court, 150 P.3d 198, 204 (Cal. 2007).
[207] SCC Acquisitions, Inc. v. Superior Court, 196 Cal. Rptr. 3d 533, 545 (Ct. App. 2015).
[208] Hill v. Nat'l Collegiate Athletic Ass'n, 865 P.2d 633 (Cal. 1994).
[209] *SCC Acquisitions*, 196 Cal. Rptr. 3d at 545.
[210] Puerto v. Superior Court, 70 Cal. Rptr. 3d 701, 707 (Ct. App. 2008).

potential invasions of an individual's privacy rights has two parts.[211] First, the party asserting a privacy right must establish a legally protected privacy interest, an objectively reasonable expectation of privacy under the circumstances, and a serious threatened intrusion.[212] In California, there is a clear longstanding right to privacy of financial documents.[213] The party seeking information may raise in response whatever legitimate and important countervailing interests disclosure serves, while the party seeking protection may identify feasible alternatives that serve the same interests or protective measures that would diminish the loss of privacy.[214] "Only obvious invasions of interests fundamental to personal autonomy must be supported by a compelling interest."[215] It is up to the court to then balance these competing considerations.[216]

In the case of a nonhuman entity, the analysis does not follow the same framework since corporations do not have a constitutional right to privacy.[217] "The corporate right to privacy is a lesser right than that held by human beings and is not considered a fundamental right."[218] As a result, "the issue presented in determining whether [a party's] requests for production infringe that right is resolved by a balancing test."[219] The court must balance "[t]he discovery's relevance to the subject matter of the pending dispute and whether the discovery 'appears reasonably calculated to lead to the discovery of admissible evidence' […] against the corporate right of privacy."[220] The plaintiff's counsel should remind the court that

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[211] *Hill*, 865 P.2d at 706–07.
[212] County of Los Angeles v. Superior Court, 280 Cal. Rptr. 3d 85 (Ct. App. 2021).
[213] Valley Bank of Nevada v. Superior Court, 542 P.2d 977, 978 (Cal. 1975); *see also* Burrows v. Superior Court, 529 P.2d 590, 593 (Cal. 1974) ("A bank customer's reasonable expectation is that, absent compulsion by legal process, the matters he reveals to the bank will be utilized by the bank only for internal banking purposes."); *see, e.g.,* CAL. GOV'T CODE, § 7460 (2021).
[214] *Hill*, 865 P.2d at 663.
[215] Williams v. Superior Court, 398 P.3d 69, 87 (Cal. 2017).
[216] *Hill*, 865 P.2d at 648.
[217] SCC Acquisitions, Inc. v. Superior Court, 196 Cal. Rptr. 3d 533, 545 (Ct. App. 2015).
[218] *Id.*
[219] *Id.*
[220] *Id.* (quoting Hecht, Solberg, Robinson, Goldberg & Bagley LLP v. Superior Court, 40 Cal. Rptr. 3d 446, 457 (Ct. App. 2006)).

any "[d]oubts about relevance generally are resolved in favor of permitting discovery."[221]

If the defense wants to show a strong corporate right of privacy similar to the individual right of privacy, this may be counterproductive in the face of alter ego liability because the law has "develop[ed] in the direction that the strength of the privacy right being asserted by a nonhuman entity depends on the circumstances."[222] It is "the nature and purposes of the corporate entity and the nature of the interest sought to be protected [that] will determine the question whether under given facts the corporation per se has a protectible privacy interest."[223] In this respect, "[t]wo critical factors are the strength of the nexus between the artificial entity and human beings and the context in which the controversy arises."[224] In other words, the corporate entity must show a strong nexus between itself and an individual that will result in a serious invasion of the right of privacy.[225] However, the defense counsel must be careful in making this argument, so as not to add fuel to the plaintiff's fire. Evidence of a strong connection could ultimately support the plaintiff's position under the alter ego doctrine that there exists a unity of interest and ownership.

Finally, in the event the plaintiff's counsel pursues a motion to compel, it is recommended, where appropriate depending on the context of the litigation and conduct of counsel and the parties thus far, that sanctions are sought for an unmeritorious objection to discovery or insubstantial justification for the defense's refusal to produce full and complete records.[226] As noted above, if the defense refuses to produce documents despite the plaintiff's attorney agreeing to a stipulated protective order or to narrow the scope of the requests or to conduct the discovery in phases, this will give credence to the argument that the defense acted without substantial justification and further support the plaintiff's request for sanctions.[227]

[221] *Id.*
[222] Ameri-Med. Corp. v. Workers' Comp. Appeals Bd., 50 Cal. Rptr. 2d 366, 384 (Ct. App. 1996).
[223] *Id.* (quoting United States v. Hubbard, 650 F.2d 293, 306 (D.C. Cir.1980)).
[224] *Id.*
[225] *Id.*
[226] CAL. CIV. PROC. CODE § 2023.010 (West 2024).
[227] *Id.*

B. *Effect on Dispositive Motions and Trial When Alter Ego Is Not Alleged in the Complaint*

When the complaint is devoid of alter ego allegations, so long as there is no prejudice, surprise, or misinformation conveyed to the defendant, the trial court may allow the plaintiff to use the doctrine to assert liability at the time of trial.[228] For example, *In Pan Pacific Sash & Door Co. v. Greendale Park, Inc.,* even though no alter ego allegations appeared in the complaint, the court of appeals found no reversible error where the plaintiffs admitted alter ego evidence at the time of trial over the defendant's objection.[229] The plaintiffs apprised the defendants in advance of trial that they intended to rely on the doctrine.[230] Despite acknowledging that the plaintiff's complaint was deficient, the court concluded that the plaintiffs did not mislead the defendants to the defendants' prejudice by any variance between the pleading and the proof.[231]

Later, in *Marr v. Postal Union Life Ins. Co.*, the court held that because the appellant was not surprised or misled by the presentation of the alter ego theory at trial, "the variance, if any, between the allegations of the complaint and the proof [was not] considered as a material variance."[232] Again, in *Gordon v. Aztec Brewing Co.,* in response to the argument that no alter ego relationship was pleaded and therefore it was not before the trial court, the California Supreme Court reasoned that "even if the pleadings were to be considered deficient in this respect, it [was] clear that the defendant ha[d] not been misled to its prejudice by any variance between pleadings and proof" because "[f]rom the beginning of the proceedings it was prepared to maintain, and did maintain throughout the trial, that the liabilities of the partnership could not be fastened upon the corporation."[233]

However, when the complaint is devoid of alter ego allegations, the plaintiff cannot use the doctrine to assert liability against the individual

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[228] Pan Pacific Sash & Door Co. v. Greendale Park, Inc., 333 P.2d 802, 803–804 (Cal. Ct. App. 1958).
[229] *Id.*
[230] *Id.*
[231] *Id.*
[232] Marr v. Postal Union Life Ins. Co., 105 P.2d 649, 681 (Cal. Ct. App. 1940).
[233] Gordon v. Aztec Brewing Co., 203 P.2d 522, 522 (Cal. 1949).

defendant in opposition to a motion for summary judgment.[234] That is "[b]ecause summary judgment review is defined by the issues raised in the pleadings."[235] In *Leek v. Cooper*, the individual defendant moved for summary judgment on the basis that the plaintiffs could not prevail on their claims "because only an employer may be liable for discrimination or violation or the Family Rights Act," and the corporation, not the individual defendant, was the employer.[236] In response, the plaintiffs argued, in part, that he "was liable under an alter ego theory" and there was a triable issue of material fact as to alter ego liability.[237] The court of appeals reasoned that before determining whether the defendant's evidence on summary judgment was sufficient, it needed to "determine whether the complaint adequately alleged that [he] was liable to plaintiffs on an alter ego theory."[238] That is because the defendant only needed to produce evidence that he could not be held liable as an alter ego if the allegations in the complaint "were adequate to apprise [him] that he was being held accountable as an alter ego."[239] Because the plaintiff did not adequately plead the alter ego theory of liability in their complaint, the court found that the individual defendant "had no obligation to adduce evidence to negate an alter ego theory in his motion for summary judgment, and the trial court properly granted the motion."[240]

However, the court's ruling in *Leek* does not mean that plaintiffs who fail to plead alter ego liability in the complaint have absolutely no recourse when faced with a motion for summary judgment.[241] In such instances, the plaintiff may file a motion to amend the complaint. In the case of the plaintiffs in *Leek*, the court noted that "[b]ecause the facts they claimed to be undisputed were insufficient to state a claim of alter ego, it [was] not reasonably possible that they could amend their complaints to allege the theory, and the trial court did not abuse its discretion in denying leave to amend."[242] Contrarily, in *Mesler v. Bragg Management Co.*, the California Supreme Court reversed the trial court's order denying the plaintiff's motion to amend the complaint to assert alter ego liability, a mechanism the plaintiff employed to defeat the motions for summary judgment.[243] The court noted that the trial court "apparently based its

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[234] Leek v. Cooper, 125 Cal. Rptr. 3d 56, 65 (Ct. App. 2011).
[235] Zoran Corp. v. Chen, 110 Cal. Rptr. 3d 597, 603 (Ct. App. 2010).
[236] *Leek*, 125 Cal. Rptr. 3d at 65.
[237] *Id.*
[238] *Id.*
[239] *Id.*
[240] *Id.* at 68.
[241] *Id.* at 60.
[242] *Id.* at 61.
[243] Mesler v. Bragg Mgmt. Co., 702 P.2d 601, 610 (Cal. 1985).

ruling on its reluctance to 'destroy the plaintiff's time of trial,' yet it was plaintiff who desired to amend regardless of any resulting postponement."[244] In addition, there was no surprise to defendant because "there had been much discovery on the issue" before the motions for summary judgment.[245] The court found that the "plaintiff was clearly prejudiced by [the trial court's] ruling, since his entire theory opposing summary judgment revolved around the relationship between" the defendants.[246]

Finally, in *Zoran Corp. v. Chen*, the alter ego allegations in the complaint were sufficiently pled so as to enable the plaintiff to rely on the doctrine to establish liability in opposition to the defendant's motion for summary judgment or, alternatively, summary adjudication.[247] The court of appeals reversed the trial court's order granting summary judgment.[248] The court of appeals stated that there was a triable issue of material fact as to alter ego liability because the plaintiff's evidence "reveal[ed] a businessman with heavy influence on the decisions made by executives of several companies."[249] The court noted that it could not infer unity of interest "as a matter of law" between the individual and the defendant companies, and it could not say on the record that the plaintiff would not be able to make the requisite showing at the time of trial.[250]

C. *Evidence Required on a Motion to Amend the Judgment to Add an Alter Ego*

Code of Civil Procedure § 187 "grants every court the power and authority to carry its jurisdiction into effect."[251] "This includes the authority to amend a judgment to add an alter ego of an original judgment debtor, and thereby make the additional judgment debtor liable on the

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[244] *Id.* at 604.
[245] *Id.*
[246] *Id.*
[247] Zoran Corp. v. Chen, 110 Cal. Rptr. 3d 597, 601 (Ct. App. 2010).
[248] *Id.*
[249] *Id.* at 610.
[250] *Id.*
[251] Highland Springs Conf. & Training Ctr. v. City of Banning, 199 Cal. Rptr. 3d 226, 235 (Ct. App. 2016) (citing NEC Elecs. Inc. v. Hurt, 256 Cal. Rptr. 441, 444 (Ct. App. 1989)).

judgment."[252] Where the trial court amends a judgment "to add an alter ego of an original judgment debtor," this is "an equitable procedure based on the theory that the court is not amending the judgment to add a new defendant but is merely inserting the correct name of the real defendant."[253] While the:

> standards for the application of alter ego principles are high, and the imposition of [alter ego] liability . . . is to be exercised reluctantly and cautiously' . . . '[t]he greatest liberality is to be encouraged in allowing judgments to be amended to add the real defendant or alter ego of the original judgment debtor, in order to see that justice is done.[254]

Such an amendment does not add to or enlarge the judgment, but merely adds the correct name of the judgment debtor.[255] A party may also amend a judgment entered on an arbitration award to add the alter ego defendant.[256]

Unreasonable delay or lack of due diligence in bringing a § 187 motion, without more, is not a proper basis for the trial court to deny the motion. In *Highland Springs Conference & Training Center v. City of Banning.,* the court reasoned that "[b]arring an alter ego claim based solely on the plaintiff's unreasonable delay in asserting the claim allows the alleged alter ego defendant to avail itself of the defense of laches without showing it was prejudiced by the delay" and this was "contrary to the settled requirements of laches."[257] The court further reasoned:

> the denial of a motion to amend a judgment to add an alter ego defendant based solely on the moving party's unreasonable delay in filing the motion allows the court to create, by judicial fiat, a de facto limitations period on

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[252] *Id.* (citing Toho–Towa Co. v. Morgan Creek Prod., Inc., 159 Cal. Rptr. 3d 469, 478 (Ct. App. 2013)).
[253] *Id.* at 242 (quoting McClellan v. Northridge Park Townhome Owners Ass'n, 107 Cal. Rptr. 2d 702, 706 (Ct. App. 2001)).
[254] *Id.* (citing Mesler v. Bragg Mgmt. Co., 702 P.2d 601, 610 (Cal. 1985); Carr v. Barnabey's Hotel Corp., 28 Cal. Rptr. 2d 127, 131 (Ct. App. 1994); Greenspan v. LADT, LLC, 121 Cal. Rptr. 3d 118, 135 (Ct. App. 2010); Wells Fargo Bank, N.A. v. Weinberg, 173 Cal. Rptr. 3d 113, 118 (Ct. App. 2014)).
[255] Thomson v. L. C. Roney & Co., 246 P.2d 1017, 1020 (Cal. Ct. App. 1952).
[256] Greenspan v. LADT, LLC, 121 Cal. Rptr. 3d 118, 134–35 (Ct. App. 2010).
[257] *Highland Springs*, 199 Cal. Rptr. 3d at 240.

> a section 187 motion to amend a judgment, even though no limitations period applies to the motion.[258]

A § 187 motion "may be made 'at any time so that the judgment will properly designate the real defendants.'"[259] It is reversible error for a trial court to deny a plaintiff's request for leave to amend the judgment because such motions are liberally granted by courts in the absence of prejudice to the other side.[260] In *Highland Springs Conference & Training Center v. City of Banning* the court of appeals found that the judgment-debtor's evidence was insufficient to show prejudice and in turn justify the trial court's denial of the plaintiff's motion to amend the judgment.[261] "It was not enough for [the defendant] to simply assert, without specifics or supporting evidence, that it no longer had the same resources it had before the real estate market 'collapsed' in 2008 and that other unspecified 'circumstances [had] materially changed.'"[262] The defendant "did not show that any evidence relevant to its defense to the motion had been lost or destroyed or that any witnesses were no longer available."[263] Given that there was no prejudice, the court of appeals remanded the case to the trial court to determine whether the plaintiff's evidence of alter ego was sufficient to amend the judgment.[264]

On a § 187 motion to amend the judgment, "[t]he court is not required to hold an evidentiary hearing . . . but may rule on the motion based solely on declarations and other written evidence."[265] The trial court must exercise sound discretion in making its decision, which "will not be disturbed on appeal if there is a legal basis for the decision and substantial evidence supports it."[266] For example, in *Baize v. Eastridge Companies, LLC*, the court of appeals upheld the trial court's amendment of the

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[258] *Id.* at 241.
[259] *Id.* (quoting Wells Fargo Bank, N.A. v. Weinberg, 173 Cal. Rptr. 3d 113, 118 (Ct. App. 2014)).
[260] *Id.*
[261] *Id.* at 238.
[262] *Id.*
[263] *Id.*
[264] *Id.* at 243.
[265] *Id.* at 235 (citing Wells Fargo Bank, N.A. v. Weinberg, 173 Cal. Rptr. 3d 113 (Ct. App. 2014)).
[266] *Id.* at 235 (citing People ex rel. Harris v. Sarpas, 172 Cal. Rptr. 3d 25 (Ct. App. 2014)).

judgment, finding no abuse of discretion based on the facts used by the trial court to justify adding the alter ego.[267] The trial court expressly indicated its finding was based on "shared employees, the same offices, and the same attorneys," and that the "within the [] family of entities, accounting entries were made to shift revenue profits freely for the tax and corporate benefit of the entities and their owners."[268] In addition, the trial court had evidence before it that the entities were sharing a developer, further suggesting that the entities were "one and the same."[269]

Moreover, for the trial court to properly grant the motion, in addition to proving the two substantive alter ego requirements, "due process requires a finding that the additional judgment debtor controlled the litigation in its capacity as alter ego, and was thus 'virtually represented' in the lawsuit."[270] "Control of the litigation sufficient to overcome due process objections may consist of a combination of factors, usually including the financing of the litigation, the hiring of attorneys, and control over the course of the litigation."[271] It "clearly" requires "some active defense of the underlying claim . . ."[272]

Control may be shown where the corporation and the alter ego utilize the same counsel and witnesses and have a joint defense in the underlying litigation. In *Misik v. D'Arco*, the plaintiff obtained a judgment against the defendant-corporation, Sayrahan Group, LLC for breach of contract.[273] Although the defendant-shareholder was not liable for the underlying breach of contract, the plaintiff then moved to add the defendant-shareholder to the judgment as the corporation's alter ego.[274] During the judgment-debtor examination of the corporation, many facts came to light suggesting that the corporation and its principal were one in the same, and that the corporation itself could not satisfy the judgment.[275] The plaintiff then moved to add the principal as a judgment debtor because it was the alter ego.[276] The court of appeals found the plaintiff's evidence

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[267] Baize v. Eastridge Companies, LLC, 47 Cal. Rptr. 3d 763 (Ct. App. 2006).
[268] *Id.* at 770.
[269] *Id.* at 771.
[270] *Id.* at 770 (citing NEC Elecs. Inc. v. Hurt, 256 Cal. Rptr. 441 (Ct. App. 1989); Highland Springs Conf. & Training Ctr. v. City of Banning, 199 Cal. Rptr. 3d 226 (Ct. App. 2016).
[271] *NEC Elecs. Inc.*, 256 Cal. Rptr. at 446 (citing 1A Ballantine & Sterling, Cal. Corporation Laws (4th ed.) § 299.04, pp. 14-45-14-46, fn. Omitted).
[272] *Id.* (citing Minton v. Cavaney, 364 P.2d 473, 474–76 (Cal. 1961)).
[273] Misik v. D'Arco, 130 Cal. Rptr. 3d 123, 126 (2011).
[274] *Id.*
[275] *Id.* at 127.
[276] *Id.*

that the defendant-shareholder controlled the litigation, and was thus, virtually represented in the lawsuit to be sufficient.[277] Specifically, the plaintiff presented evidence that the defendant-shareholder, who was also an attorney,

> filed answers to the complaint on behalf of himself and on behalf of Sayrahan; the same attorney, Steven Rein, represented Sayrahan and D'Arco in trial and in postjudgment proceedings; Sayrahan and D'Arco submitted a joint defense; and D'Arco testified at trial as a witness on his own behalf and on behalf of Sayrahan.[278]

Although another defendant had his own counsel, the court reasoned that such "would not preclude the court from making a finding that D'Arco [the defendant-shareholder] controlled the litigation as the alter ego of Sayrahan."[279] The court noted that "[t]he trial court may also make a factual finding regarding this issue."[280]

The opportunity to litigate and control is unlikely to be found where no active defense by the party in question took place, and the interests of the corporation and its alter ego are not the same in the underlying litigation.[281] In *NEC Electronics Inc. v. Hurt*, the plaintiff, "NEC Electronics Inc. ("NEC") filed a motion to amend its judgment against Ph Components ("Ph")," but the appellate court reversed the trial court's order amending the judgment to name the defendant-shareholder.[282] When the plaintiff filed suit against Ph to recover amounts due for sold goods, neither the CFO, who was served with suit as the company's agent, nor the company's sole shareholder were personally named in the lawsuit.[283] The court of appeals reasoned that there was no control because "Ph believed it had a defense to the NEC action but nevertheless let the matter proceed uncontested because it planned to file a chapter 11 bankruptcy petition."[284] This meant that "Ph, having been

[277] *Id.* at 128.
[278] *Id.* at 130–31.
[279] *Id.* at 131.
[280] *Id.*
[281] NEC Elecs. Inc. v. Hurt, 256 Cal. Rptr. 441, 445–46 (Ct. App. 1989).
[282] *Id.* at 442.
[283] *Id.*
[284] *Id.* at 445.

sued in its corporate capacity, simply had no incentive to defend the NEC lawsuit because Ph was on the verge of bankruptcy."[285] The court reasoned that "[t]his situation contrasts with the usual scenario where the interests of the corporate defendant and its alter ego are similar so that the trial strategy of the corporate defendant effectively represents the interests of the alter ego."[286]

The plaintiff argued that the shareholder "had an opportunity to present a defense in the original action," but the court found that such position "ignore[d] . . . realities."[287] The court reasoned that the shareholder "was not named as a party, had no risk of personal liability and therefore was not required to intervene."[288] Given their differing interests, the court could not say that Hurt had "occasion to conduct the litigation with a diligence corresponding to the risk of personal liability that was involved or that Hurt was virtually represented in the lawsuit."[289] Consequently, the shareholder also did not have control over "the defense of the litigation."[290] Indeed, given Ph's failure to defend, "[t]here was no defense for [the shareholder] to control."[291] "After Ph filed its general denial, no further proceedings were conducted," as "[n]either party conducted any discovery," and "[m]ost importantly, Ph did not appear at trial."[292] The court further noted that "efforts to satisfy Ph's creditors . . . [were] part of Ph's general attempts to avoid bankruptcy," and therefore "certainly [did] not constitute control of the defense of the underlying action."[293] The shareholder simply being "aware" of the action was also insufficient, as "every chief executive officer of a corporation is cognizant of claims asserted against the corporation."[294] The court noted, however, that the shareholder even "delegated responsibility for the claim to [the CFO]" in order to "attempt to satisfy the creditors of Ph but [they] were never actively involved in defending the NEC lawsuit."[295] The court concluded that "there was insufficient evidence to show that [the shareholder] had an opportunity to litigate the underlying action between

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[285] *Id.*
[286] *Id.*
[287] *Id.*
[288] *Id.* (citing Motores De Mexicali, S.A. v. Superior Ct., 331 P.2d 1, 3–4 (Cal. 1958)).
[289] *Id.*
[290] *Id.*
[291] *Id.*
[292] *Id.*
[293] *Id.* at 445–46.
[294] *Id.* at 446.
[295] *Id.*

NEC and Ph and also insufficient evidence to prove that [he] controlled the defense of that action."[296]

1. Conducting Judgment Debtor Discovery to Add the Alter Ego to the Judgment

California Code of Civil Procedure §§ 708.010 and 708.130 set forth discovery mechanisms that a creditor may employ to enforce a money judgment.[297] This includes written interrogatories, document or inspection requests, examination proceedings, and depositions.[298] This procedure is referred to as "judgment debtor discovery."[299]

Following judgment debtor discovery, the creditor should file a motion to amend the judgment to add as judgment debtors the alleged alter ego(s).[300] In this motion, the moving party must make arguments regarding the alleged alter ego's control of the litigation and virtual representation.[301] In this respect, the pertinent consideration is one of due process, which "guarantees that any person against whom a claim is asserted in a judicial proceeding shall have the opportunity to be heard and to present his defenses."[302] Therefore, it is important to seek information on this issue during the discovery process.

In addition, as with any motion asking the court to make substantive decisions, the moving party should ensure that the evidence presented to the court is not objectionable.[303] Common objections include, but are not limited to, authentication of documents, hearsay, relevance, noncompliance with court procedures, argumentative (not fact), and overbroad or vague evidence.[304] It is important to ensure that evidentiary objections are kept in mind during the discovery process to alleviate or

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[296] *Id.*
[297] CAL. CIV. PROC. CODE §§ 708.010, 708.130 (West 2024).
[298] *Id.*
[299] Greenspan v. LADT, LLC, 121 Cal. Rptr. 3d 118, 133 (Ct. App. 2010).
[300] *Id.*
[301] *Id.* at 135.
[302] *Id.* (citing Motores De Mexicali, S.A. v. Superior Ct., 331 P.2d 1, 3 (Cal. 1958)).
[303] *Id.* at 147–48.
[304] *Id.*

overcome any potential issues at this stage.[305] This is because the same Evidence Codes that apply throughout the case continue to apply when enforcing the judgment.[306]

Moreover, upon receipt of the trial court's ruling on objections, if not already done, the parties should consider asking the trial court to state more than just the objection is "sustained."[307] This is particularly important in the case of an appeal.[308] As California courts have recognized, the trial court simply stating that an objection is sustained without providing the relevant basis is the "type of ruling [that is] condemned," as it is "hardly a ruling" and does "not provide any meaningful basis for review."[309]

D. *Asserting Alter Ego Liability in a Separate Complaint without Offending the Statute of Limitations*

"As an alternative to filing a section 187 motion to add a judgment debtor to a judgment, the judgment creditor may file an independent action on the judgment, alleging that the proposed judgment debtor was an alter ego of an original judgment debtor."[310] Where a separate complaint is filed, the "statutes of limitations on substantive causes of action do not apply to proceedings to declare alter ego."[311] The new complaint can move forward regardless of the statute of limitations on the substantive claims for which judgment was entered because "[a] money judgment is enforceable for an initial period of 10 years following entry of the judgment and may be renewed."[312] The result is that "[b]y adding an alter ego defendant, the court is not entering a new judgment, but merely

[305] *Id.*
[306] *Id.*
[307] *Id.* at 146.
[308] *Id.*
[309] *Id.* (quoting Nazir v. United Airlines, Inc., 100 Cal. Rptr. 3d 296, 308 (Ct. App. 2009).
[310] Highland Springs Conf. & Training Ctr. v. City of Banning, 199 Cal. Rptr. 3d 226, 242–43 (Cal. Ct. App. 2016).
[311] Lopez v. Escamilla, 262 Cal. Rptr. 3d 152, 154 (Ct. App. 2020) (citing Taylor v. Newton, 257 P.2d 68, 71 (Cal. Ct. App. 1953)).
[312] *Lopez*, 262 Cal. Rptr. 3d at 153–54 (citing CAL. CIV. PROC. CODE §§ 683.020 and 683.110 et seq.)

inserting the correct name of the real defendant," which "may be done at any time."[313]

In *Lopez v. Escamilla*, the plaintiff recovered a judgment for fraud, negligent misrepresentation, and breach of fiduciary duty against a corporation.[314] Six years later, the plaintiff brought a separate action against the corporation's shareholder in which she alleged that the shareholder was the corporation's alter ego.[315] The shareholder answered the complaint, and then moved for a judgment on the pleadings.[316] "The motion was based on the theory that the only proper procedure for naming a person an alter ego is by motion in the original action."[317] The defendant-shareholder did "not contest that the complaint states facts sufficient to support a finding that he is the alter ego of the corporation."[318] Rather, the defendant-shareholder "claimed that a request to find a person an alter ego is not a cause of action and that a separate lawsuit is barred by limitations."[319] The defendant-shareholder cited to case law holding that "an alter ego defendant has no separate primary liability to plaintiff, and a claim against an alter ego defendant is not itself a claim for substantive relief."[320] The trial court granted the motion, but the appellate court then reversed its ruling.[321]

The court of appeals found that "[i]t does not matter whether the petition alleging [the defendant] is an alter ego of the corporation is labeled a complaint or a motion, or whether the petition is assigned a case number different from the underlying action."[322] Citing to Civil Code § 3528, the court noted that "[t]he law respects form less than substance."[323]

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[313] *Id.* at 154 (first citing NEC Elecs. Inc. v. Hurt, 256 Cal. Rptr. 441, 444 (Ct. App. 1989); and then citing Wells Fargo Bank, N.A. v. Weinberg, 173 Cal. Rptr. 3d 113, 118 (Ct. App. 2014)).
[314] *Id.* at 153.
[315] *Id.*
[316] *Id.*
[317] *Id.*
[318] *Id.*
[319] *Id.*
[320] *Id.* (citing Hennessey's Tavern, Inc. v. American Air Filter Co., 251 Cal. Rptr. 859 (1988)).
[321] *Id.*
[322] *Id.*
[323] *Id.* (citing CAL. CIV. CODE, § 3528 (2023)).

Therefore, to recover under the alter ego theory of liability, "[e]ither a complaint or a motion is sufficient."[324] Either way, the plaintiff will need to satisfy the due process requirements for adding a debtor to the judgment as an alter ego, as described above. If the plaintiff is not able to meet the substantive due process requirements for adding the individual as an alter ego to the judgment and the statute of limitations on the substantive claims has run, had the plaintiff's counsel had sufficient knowledge of an alter ego relationship at the time of the original filing, then he or she may be liable for professional negligence if recovery against the corporate debtor itself is not feasible.

E. *Settling with the Corporation and Subsequently Pursuing Liability Against the Alter Ego*

Code of Civil Procedure § 877, enacted in 1957, "abrogates the common law rule that settlement with one alleged tortfeasor bars action against any others claimed liable for the same injury."[325] In the context of alter ego liability, the statute may apply to prevent settlement with one party from barring subsequent liability against the alter ego.[326]

In *Mesler v. Bragg Management Co.*, the California Supreme Court concluded that "under the circumstances," Code of Civil Procedure § 877 applied and release of the alleged tortfeasor did not "preclude suit against its claimed alter ego."[327] There, while inspecting a dozer, the

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[324] *Id.*

[325] Mesler v. Bragg Mgmt. Co., 702 P.2d 601, 602 (Cal. 1985). The California Code of Civil Procedure § 877 states, "Where a release, dismissal with or without prejudice, or a covenant not to sue or not to enforce judgment is given in good faith before verdict or judgment to one or more of a number of tortfeasors claimed to be liable for the same tort, or to one or more other co-obligors mutually subject to contribution rights, it shall have the following effect: (a) It shall not discharge any other such party from liability unless its terms so provide, but it shall reduce the claims against the others in the amount stipulated by the release, the dismissal or the covenant, or in the amount of the consideration paid for it, whichever is the greater. (b) It shall discharge the party to whom it is given from all liability for any contribution to any other parties. (c) This section shall not apply to co-obligors who have expressly agreed in writing to an apportionment of liability for losses or claims among themselves. (d) This section shall not apply to a release, dismissal with or without prejudice, or a covenant not to sue or not to enforce judgment given to a co-obligor on an alleged contract debt where the contract was made prior to January 1, 1988." CAL. CIV. PROC. CODE § 877.

[326] *Mesler*, 702 P.2d at 602.

[327] *Id.*

plaintiff stumbled in the darkness and slipped, causing his right arm to thrust into the dozer's engine fan and subsequently required one-third of his arm to be amputated.[328] The plaintiff filed suit against his employer at the time of the accident, the entity that owned the premises on which the accident occurred, the corporation that sold the dozer to his employer, the manufacturer of the dozer, and the company that owned the dozer before his employer.[329] His claims included strict products liability, negligence in design, manufacture, marketing distribution, installation, inspection, purchase, maintenance, and handling of the dozer, and negligence in maintenance of the workplace.[330] In opposition to a summary judgment motion, the plaintiff argued that his employer and the company that previously owned the dozer were alter egos.[331] The trial court denied summary judgment.[332] Thereafter, the plaintiff discovered that both entities were the wholly owned subsidiaries of another entity, and added the parent company as Doe 1.[333] The parent company moved for "summary judgment on the ground that it had no connection whatever with the dozer, the workplace, or plaintiff."[334] In response, "[t]he trial court stated that plaintiff appeared to rely on an alter ego theory to hold [the parent company] liable, and that although much discovery had been conducted on the issue an alter ego theory had not been pleaded."[335] Thereafter, the court denied the plaintiff's request to amend the pleadings and granted summary judgment to the parent company.[336] On appeal, the parent company argued that the summary judgment issue was moot because, during the pendency of the appeal, the plaintiff settled with one of the subsidiaries.[337] In response, the plaintiff relied on § 877.[338] The defendant contended, however, "[S]ection 877 does not apply to alter ego situations," arguing that "an alter ego claim rests on the theory that two distinct entities are really one, and thus settlement with one must ipso facto encompass the

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[328] *Id.*
[329] *Id.* at 603.
[330] *Id.*
[331] *Id.*
[332] *Id.*
[333] *Id.*
[334] *Id.*
[335] *Id.*
[336] *Id.*
[337] *Id.*
[338] *Id.*

other."[339] The defendant maintained that § 877 applied "only to joint tortfeasors, not to a parent corporation held liable for the torts of its subsidiary on an alter ego rationale."[340]

In its ruling, the court of appeals described the alter ego doctrine as, "the parent corporation is liable for the acts of its subsidiary under the alter ego doctrine because justice requires that the corporate wall be breached."[341] Thereafter, the court drew an analogy to principal-agent liability, stating that "[t]he principal is held vicariously liable not because it was necessarily at fault, but because justice requires that the enterprise be responsible for the risks of conducting its business."[342] At this point, the rule was already "clear in California that [S]ection 877 applies to principal-agent liability."[343] The court pointed out that "[i]t has been argued that because liability of the principal is wholly dependent on liability of the agent, dismissal of the agent removes the basis of the principal's responsibility."[344] "However, it does not follow that because judgment in favor of the agent exonerates the principal, release of the agent has the same effect."[345] While "[a] judgment in favor of the agent means that under our system of law the plaintiff should not recover under the circumstances presented," "[a] settlement has no such implication; it means simply that the parties have agreed to resolve their problems outside the courtroom."[346] As a result, "liability of the principal—or parent corporation in the alter ego situation —has not been disproved."[347] Indeed, "[t]he liability of the principal (or parent) is not affected by the route the agent (or subsidiary) chooses to take in disposing of the action."[348]
Moreover, in enforcing its holding, the court further relied on "[a]n examination of the various policies underlying the contribution legislation."[349] It pointed to three interests at work in § 877: (1) "First . . . is maximization of recovery to the injured party for the amount of his injury to the extent fault of others has contributed to it"; (2) "[s]econd is

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[339] *Id.* at 605.
[340] *Id.*
[341] *Id.* at 608.
[342] *Id.*
[343] *Id.*
[344] *Id.* at 609.
[345] *Id.*
[346] *Id.*
[347] *Id.*
[348] *Id.*
[349] *Id.*

encouragement of settlement of the injured party's claim"; and (3) "[t]hird is the equitable apportionment of liability among the tortfeasors."[350] Regarding the first interest, the court reasoned that in interpreting the statute "to allow the plaintiff full recovery to the extent that others are responsible for his injuries,"[351] the "policy would be violated if a corporation alleged to be liable as the alter ego of its subsidiary were to be dismissed because the subsidiary has settled with the plaintiff, especially if the plaintiff has accepted a modest settlement because the subsidiary is undercapitalized."[352] The court believed "[t]he [l]egislature could not have intended that a settlement with one defendant which partially compensates the plaintiff for injuries sustained would effectively block the road to complete recovery."[353] In such instance, "[r]elease of the employer after settlement with the employee would accomplish such a road block and frustrate the purposes of the statute."[354]

Regarding the second interest, the court noted that the "goal of the contribution statute is the early and final settlement of claims."[355] The court conceded that "[a] potential problem could arise in vicarious liability situations because the contribution statutes preserve the right of full indemnity."[356] However, it concluded that "to the extent such a right exists, '[i]n light of the clear legislative expression, . . . [it] must assume that this contingency was foreseen, and that this result was felt desirable.'"[357] In addition, "in the alter ego arena, where the corporations involved have comparable control, it is unlikely that the parent will sue the subsidiary for indemnity unless to do so would be in the best interests of both corporations."[358] Lastly, the court "noted that in many cases the parent and subsidiary will be represented by the same counsel, as is the situation in

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[350] *Id.* (citing Sears, Roebuck & Co. v. Int'l Harvester Co., 147 Cal. Rptr. 262, 264 (Ct. App. 1987)).
[351] *Id.*
[352] *Id.*
[353] *Id.*
[354] *Id.* (citing Mayhugh v. County of Orange, 190 Cal. Rptr. 537, 539 (Ct. App. 1983)).
[355] *Id.*
[356] *Id.*
[357] *Id.* at 610 (citing Ritter v. Technicolor Corp., 103 Cal. Rptr. 686, 688 (Ct. App. 1972)).
[358] *Id.*

the case at bar, or by separate counsel working in close collaboration."[359] Therefore, "the easiest method for avoiding indemnity problems is to include both corporations in the settlement."[360]

Concerning the third interest, the court described the policy as reducing the plaintiff's recovery "by the amount of consideration paid by the settling defendant, not by the proportion of that defendant's liability."[361] Accordingly, "[i]f [the court allows] the subsidiary to settle for a modest share of the plaintiff's liability and this settlement covers the parent as well, the remaining defendants will have a proportionately greater sum to pay."[362] The court reasoned that "[t]he low settlement, not made in bad faith because, for example, the subsidiary is undercapitalized, may indeed be unfair if the more affluent parent corporation is included in its terms."[363] Because "the remaining defendants cannot attack a settlement unless it was made in bad faith, the rule would be inequitable to the nonsettlors."[364]

Finally, the court noted that holding otherwise could result in unfair results for the plaintiff, stating: "not realizing that the parent would also be part of the agreement, the plaintiff would base his settlement on the financial capabilities of the only other party to the agreement, the subsidiary."[365] This means that "[t] he amount the plaintiff would receive would likely be disproportionately low if the settlement discharged the parent as well as the subsidiary."[366] Moreover, to protect the corporations, the court set forth a "simple" solution: "both parties could and should participate in the negotiations" so that every party's identity is "fully disclosed" and "an agreement fair to all can be reached."[367] Based on all of the above, the court held that "the trial court abused its discretion in refusing to allow plaintiff to amend his pleadings" for the purpose of proceeding against the parent company where its alter ego subsidiary reached a settlement of the action.[368]

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[359] *Id.*
[360] *Id.*
[361] *Id.*
[362] *Id.*
[363] *Id.*
[364] *Id.*
[365] *Id.*
[366] *Id.*
[367] *Id.*
[368] *Id.*

IV. PROPOSAL TO CODIFY THE ALTER EGO DOCTRINE IN CALIFORNIA

Although the alter ego doctrine was first recognized in California in the early 1900s[369] and has made its way through the judiciary nearly a thousand times since then, the state legislature has not codified the doctrine or otherwise enacted rules relevant to its application. In addition, while other states, such as Nevada,[370] South Dakota,[371] Mississippi,[372] Tennessee,[373] and Ohio,[374] have passed alter ego laws, the statutes lack any real detail or are otherwise very limited in application. For example, the Nevada statutes simply set forth the two elements and indicate that the determination is a question of law for the court.[375] The South Dakota, Mississippi, and Tennessee statutes only clarify the rule in the context of a trust and set forth factors that cannot be considered, alone or in combination, in determining whether an individual or settlor is an alter ego of the trust.[376] The Ohio statute limits its reference to the doctrine to silicosis, mixed dust disease, or asbestos claims.[377] Not one state in the nation has codified the doctrine in a way that presents, clarifies, or elaborates on its substantive and procedural aspects. Instead, these matters are dispersed throughout case law dating back over a decade. This effectively buries the complexities of the doctrine and hinders a straightforward presentation of its many aspects, impeding understanding of its application. Therefore, this article advocates for the California legislature to codify the alter ego doctrine in a manner that covers the matters set forth herein.

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[369] *See, e.g.*, Relley v. Campbell, 66 P. 220 (Cal. 1901); Rutz v. Obear, 115 P. 67 (Cal. Ct. App. 1911); Deming v. Maas, 123 P. 204 (Cal. Ct. App. 1912); U.S. Farm Land Co. v. Bennett, 203 P. 794 (Cal. Ct. App. 1921).
[370] NEV. REV. STAT. § 86.376 (2022); NEV. REV. STAT. § 78.747 (2022).
[371] S.D. CODIFIED LAWS § 55-1-32 (through 2012).
[372] MISS. CODE § 91-8-1107 (2016).
[373] TENN. CODE ANN. § 35-15-1104 (2014).
[374] OHIO REV. CODE ANN. § 2307.92 (2015).
[375] NEV. REV. STAT. § 86.376 (2022); NEV. REV. STAT. § 78.747 (2022).
[376] S.D. CODIFIED LAWS § 55-1-32 (through 2012); TENN. CODE ANN. § 35-15-1104 (2014).
[377] OHIO REV. CODE § 2307.902 (2004); OHIO REV. CODE § 2307.98 (2004).

Indeed, there have been many instances throughout history where the judiciary created common law, such as a doctrine or theory of liability, that was subsequently codified or expanded upon by the legislature through a series of related rules. In the 1976 case *Tarasoff v. Regents of the University of California*, the California Supreme Court ruled that therapists have a duty to exercise reasonable care by warning foreseeable victims if they reasonably believe that their patient poses a serious risk of violence to that third party.[378] Thereafter, in 1985, the California legislature codified the *Tarasoff* rule and, throughout the years, continued to amend and add to the law to clarify the legal duty.[379] In 1974, the California Supreme Court in *People v. Ceballos* alluded to an exception to the common law rule prohibiting use of deadly force solely to protect property, recognizing that deadly force might be justified "where the property was a dwelling house in some circumstances."[380] Later, in 1984, the legislature enacted Penal Code § 198.5, which is now known as the Castle Doctrine.[381] This law creates a rebuttable presumption of reasonable fear of death or great bodily injury when an intruder forcibly enters one's home, shifting the burden of requiring an individual to prove his or her reasonable fear to the intruder.[382] Another example is the doctrine of res judicata, which "describes a set of rules that determine the preclusive effects of a final judgement on the merits."[383] This "California doctrine . . . is largely the product of judge-made law."[384] "Although the basic res judicata doctrine has never been codified," the legislature has passed various statutes to "help define the rules"; such as authorizing successive actions on the same contract, stipulating an action remains pending until final determination on appeal, providing that a declaratory relief judgment does not prevent a party from obtaining additional relief based on the same facts, outlining the various effects of a final judgment, and defining compulsory cross-complaints.[385]

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[378] Tarasoff v. Regents of the University of California, 551 P.2d 334, 340 (Cal. 1976).
[379] CAL. CIV. CODE § 43.92 (1985–2022).
[380] People v. Ceballos, 526 P.2d 241, 249 (Cal. 1974).
[381] Connoryee29, *California Penal Code 198.5 a.k.a. the Castle Doctrine, and the Unprotected Victims of Domestic Violence*, FOUNDS. OF LAW AND SOC'Y (Aug. 6, 2021), https://foundationsoflawandsociety.wordpress.com/2021/08/06/california-penal-code-198-5-a-k-a-the-castle-doctrine-and-the-unprotected-victims-of-domestic-violence/.
[382] *Id.*
[383] Walter W. Heiser, *California's Unpredictable Res Judicata (Claim Preclusion) Doctrine*, 35 SAN DIEGO L. REV. 559, 559 (1998).
[384] *Id.* at 560.
[385] *Id.*

A recent California case that provides guidance with respect to the topic at hand relates to the distinction between independent contractors and employees. In the 1989 case, *S.G. Borello & Sons, Inc.*, the California Supreme Court established the *Borello* test, a multi-factor balancing test to determine a hiring entity's level of control over a worker and reach a conclusion as to whether the worker classifies as an employee or an independent contractor.[386] Under this test, all factors should be considered collectively and no single factor is determinative.[387] In other words, this test was a fact-specific inquiry based on a totality of the circumstances.[388] Fast-forward to 2018, in *Dynamex Operations West, Inc. v. Superior Court*, the California Supreme Court held that workers are presumed to be employees under California's wage order, placing the burden on the hiring entity to establish otherwise, subject to the ABC test.[389] The ABC test requires the hiring entity to establish three elements to defeat the presumption that a worker is an employee subject to the state's wage orders.[390]

Following the *Dynamex* decision, in September 2019, Governor Gavin Newsom signed into law California Assembly Bill 5 (AB-5).[391] However, after significant backlash against AB-5 for being overbroad, including opposition from independent contractors themselves, the legislature amended AB-5 by enacting California Assembly Bill 2257 (AB-2257), which created new exceptions to the ABC test described in AB-5 or otherwise modified some of the original ones.[392] Following these assembly bills, the codification and elaboration of judicial precedent

[386] S.G. Borello & Sons, Inc. v. Dep't of Indus. Relations, 769 P.2d 399, 399 (Cal. 1989).
[387] *Id.*
[388] *Id.*
[389] Dynamex Operations West, Inc., v. Superior Court, 416 P.3d 1, 35 (Cal. 2018).
[390] *Id.*
[391] Assemb. B. 5, 2019–2020 Leg., Reg. Sess. (Cal. 2019) (enacted); *see also* Rebecca Lake, *California Assembly Bill 5 (AB5): What's In It and What It Means*, INVESTOPEDIA, https://www.investopedia.com/california-assembly-bill-5-ab5-4773201 (last updated June 10, 2024).
[392] Assemb. B. 2257, 2019–2020 Leg., Reg. Sess. (Cal. 2020) (enacted); *see also* Gregory D. Valenza, *AB 2257 – CA's "Improved" Independent Contractor Law, Explained*, SHAW LAW GROUP PC, https://shawlawgroup.com/2020/09/ab-2257-cas-improved-independent-contractor-law-explained/.

relating to classification appears in California Labor Code (Labor Code) §§ 2775–2787 (titled Workers Status: Employees).[393] Referring specifically to both the *Borello* and *Dynamex* cases, the Labor Code sets forth the ABC test from the *Dynamex* decision and provides grounds for using the *Borello* test over the ABC test.[394] The Labor Code also enumerates various exceptions to the ABC test, including the business-to-business exemption;[395] agency and service provider relationship;[396] professional services contract;[397] single-engagement event contract;[398] various types of occupations;[399] subcontractor in the construction industry;[400] aggregator and research subject relationship;[401] and a motor club and third-party contract.[402] Under each of these exceptions, the legislature provided definitions and additional or different factors.[403] The legislature was as specific as possible in the various contexts regarding applicable definitions and factors.[404] The Labor Code further sets forth the legislature's expectations regarding retroactivity[405] and prosecution.[406]

The proposal and passage of this legislation sparked a flurry of action by small business owners who were unaware of the judicial precedent relating to proper classification.[407] It instigated a heightened level of awareness in the business community that previously did not exist or was otherwise minimized or ignored. Business owners scrambled to

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[393] CAL. LAB. CODE §§ 2775–2787 (West 2020).
[394] *Id.* § 2775.
[395] *Id.* § 2776.
[396] *Id.* § 2777.
[397] *Id.* § 2778.
[398] *Id.* § 2779.
[399] *Id.* §§ 2780 & 2783.
[400] *Id.* § 2781.
[401] *Id.* § 2782.
[402] CAL. LAB. CODE § 2784.
[403] *See, e.g.*, *id.*
[404] *See, e.g.*, *id.*
[405] CAL. LAB. CODE § 2785.
[406] CAL. LAB. CODE § 2786.
[407] Margot Roosevelt, *New California Labor Law AB 5 Is Already Changing How Businesses Treat Workers*, L.A. TIMES (Feb. 14, 2020, 6:00 AM), https://www.latimes.com/business/story/2020-02-14/la-fi-california-independent-contractor-small-business-ab5; Adam Wiskind, *AB5: Worker Reclassification May Impact Your Small Business Value*, LINKEDIN (Sept. 20, 2019), https://www.linkedin.com/pulse/ab5-worker-reclassification-may-impact-your-small-business-wiskind/; Bruce Willey, *Why Entrepreneurs Should Be More Worried About Uber Than AB5*, ENTREPRENEUR (Jan. 6, 2020), https://www.entrepreneur.com/business-news/why-entrepreneurs-should-be-more-worried-about-uber-than-ab5/343737.

ensure compliance with the law by re-classifying workers or otherwise ensuring all requirements for independent contractor classification were followed to a tee. Accordingly, AB–5 and AB–2257 are good examples of the California legislature taking the time to codify and elaborate on a judicially-created doctrine, thereby promoting more knowledgeable and responsible business practices. Codification of common law on proper classification of workers serves as the author's motivating example for the legislature to take similar action with respect to the alter ego doctrine.

Specifically, as to the substantive side of the doctrine, the alter ego doctrine should be codified by setting forth the prerequisite of ownership, element one factors, element two standard, and any exceptions or items that should not be considered. Where applicable, the proposed statute should define terminology, such as "adequate capitalization," and elaborate on additional factors or requirements applicable to elements or terms. For example, as to the second element, the law should identify factors for determining whether there would be an inequitable or unjust result. In addition, the proposed statute should set forth additional rules that would pertain to a parent/subsidiary relationship, similar to those described in connection with the Clayton Act, and to a sister enterprises situation. Moreover, the proposed law should elaborate on the concept of reverse piercing and the instances in which it may be allowed or is prohibited, and the additional factors that must be taken into consideration in those circumstances. This would include spelling out an "innocent person" rule, and potentially defining what it means to be one, or least setting forth factors for consideration of innocence.

As to the procedural side, since the many ways to pursue the doctrine are currently scattered throughout case law, there should be a statute that sets forth all the ways in which the doctrine may be broached to impose liability. Such a statute would list that the doctrine can be asserted at the outset of the case in the complaint, in the middle of the case through an amended complaint or during trial, in an amended judgment, or in a separate action. In this respect, while Code of Civil Procedure § 187 is written broadly to allow the court to carry its jurisdiction into effect, the case law on enforcing a judgment against an alter ego is very particular. Notions of due process require control of the litigation and virtual representation to hold an alter ego responsible for the judgment. This is a very specific standard that should be included in the proposed law.

The author acknowledges that the proposal in this article is no small or easy task for the legislature. However, the legislature has the resources and expertise to codify the doctrine in a way that is comprehensive and effective, and to amend the law where it misses the mark or is otherwise inadvertently over or under inclusive. In addition, the benefits of transparency and understanding created by such an undertaking are deemed to outweigh any burdens that may be associated with such a task. Codification would provide clear guidance to courts and practitioners about the doctrine's scope and application, which will in turn promote consistency in application of the doctrine throughout the state. Finally, just as AB-5 and its progeny created more cognizant and responsible business practices, codifying the alter ego doctrine will have the likely effect of promoting cognizance and accountability in the business community.

V. CONCLUSION

Drafting legislation to codify the alter ego doctrine may be a complex and challenging task, especially in light of all the rules and intricacies of the doctrine. Legislative drafters should aim to write clear, concise, and unambiguous language that can be easily understood by both legal and non-legal audiences. The language must also be precise and accurate to avoid unintended consequences, and clear and unambiguous to avoid confusion and misinterpretation. Nonetheless, this is an important undertaking that can help promote a more transparent understanding of the doctrine's scope and application, as well as better business practices, especially amongst small business owners. Until the legislature can complete this task, this article serves to provide guidance to courts and practitioners of the substantive and procedural aspects of the doctrine.