

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

IN RE:)
)
PAUL KEVIN BARKAL,) CASE NO. 08-20663 JPK
) Chapter 13
Debtor.)

MEMORANDUM OF DECISION

On March 18, 2008, the debtor and the Chapter 13 Trustee, jointly, filed a Joint Motion for Turnover Against Receiver (“Joint Motion”). By order entered on April 2, 2008, the Court scheduled a preliminary pre-trial conference with respect to the Joint Motion and with respect to other contested matters involving the debtor and Martin F. Goldberg, as receiver appointed in state court proceedings in California (“Receiver”) with respect to matters relating to a judgment entered against the debtor Paul Kevin Barkal (“Barkal”) and in favor of Anna May Webb (“Webb”) in a case originally entitled *Webb v. San Diego Pain Management Clinic, a medical corporation and Kevin Barkal*, Case No. GIC757374 in the Central Division of the Superior Court of California for the County of San Diego. At that preliminary pre-trial conference, the parties and the Court jointly determined the manner in which the “core issue” with respect to the Joint Motion, certain other of the contested matters, and in relation to Adversary Proceeding Numbers 08-2027 and 08-2033 – would be determined. The procedure thus determined is stated in the Court’s Order Regarding Further Proceedings entered on April 29, 2008. As stated in that order, the contested matter arising from the Joint Motion was chosen as the vehicle by which the “core issue” in other matters presented to the Court would also be determined. The April 29, 2008 order stated the “core issue” as follows:

The extent to which proceeds of accounts receivable of the Barkal Entities or of Kevin Barkal, M.D., or corporate governance powers in relation to the Barkal Entities – now or in the future subject to the possession or control of Martin Goldberg, as Receiver appointed with respect to Case No. GIC757374 in the Superior Court of California, County of San Diego, Central Division –

constitute property of the Chapter 13 bankruptcy estate of Paul Kevin Barkal in case number 08-20663.

In part pertinent to this decision, the April 29, 2008 order provided a mechanism for the parties' submission of a stipulated record to the Court with respect to determination of the core issue, and designated deadlines for filing legal memoranda in relation to that issue.

The parties' designated record was delivered to the chambers of the Court on May 16, 2008, as memorialized by docket record entry #116 dated May 19, 2008.¹ The record is comprised of a "Joint Index of Exhibits Regarding Appointment of Receiver and Judgment-Debtor Alter Egos" ("Joint Index"), which designates 58 separate exhibits which were submitted with the Joint Index. This submission constitutes the entire record before the Court for determination of the matter addressed by this decision. Because the parties chose to submit this record to the Court pursuant to paragraph 4(a) of the April 29, 2008 order – rather than to create a record by means of an evidentiary hearing – the Court deems all materials in the submitted record to be agreed by the parties to be admissible into evidence under the Federal Rules of Evidence. Because the designated record thus constitutes the entire evidentiary record in this matter, as would be true if a record were created at an evidentiary hearing, the Court is free to draw inferences from the materials in the record, to weigh the evidence created by the record, and to determine its legal conclusions from the facts which it so determines from the record.

The Joint Index designated above was signed solely by counsel for Barkal and by counsel for Webb. Paragraph 4(a) of the April 29, 2008 order provided for the submission of the record by those parties, and in addition by the "Barkal Entities" [comprised of Surgical

¹ The designated record is voluminous, and it was for this reason that the Court directed its submission in "paper" form to the Court, rather than by means of electronic filing. The Court retains the original of the record, and as in olden days before the maintenance of records by means of a stream of electrons, the record will remain in its paper form and not be placed on the docket by means of scanning.

Leasing Company, Inc.; The San Diego Pain Management Group, Inc.; Pain Management Group, Inc.; Medical Facilities Management Group, Inc.; Torrey Pines Facilities Management Group, GP; West Coast International Pain Medicine; CV Surgical Management, Inc. and Pemcor, Inc.] Although counsel for the Barkal Entities did not sign the Joint Index, pursuant to the terms of the April 29, 2008 order, those parties are deemed to be bound by the factual record created by the designated record submission.

Legal memoranda were timely filed by Barkal, Webb and by the Barkal Entities. The core issue designated above is now before the Court for determination.

The Court has jurisdiction over the Joint Motion and the issue to which this Memorandum of Decision is addressed pursuant to 28 U.S.C. § 1334(a) and (b); 28 U.S.C. § 157(a) and (b); and N.D.Ind.L.R. 200.1(a). The matter addressed herein is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A) and (E).

The facts necessary for determination of the core issue have been very capably set forth in the “Parties and Underlying Transactions” section of the Debtor’s Brief Regarding Alter Ego Issue filed on May 30, 2008; those facts are the following:

1. Paul Kevin Barkal, the Debtor herein, filed a Petition for Relief under Chapter 13 of the United States Bankruptcy Code on March 10, 2008 (“Petition Date”).
2. Prior to the filing of his Bankruptcy Petition, Dr. Kevin Barkal (“Dr. Barkal” or “Debtor”) was sued in the Superior Court for the State of California, for the County of San Diego, Central Division, by Anna May Webb in a case entitled Webb vs. San Diego Pain Management Clinic, a Medical Corporation and Kevin Barkal, under Case No: GIC757374 (“State Court Action”). (See Exhibit 1). The State Court Action is premised on a slip and fall accident which occurred on the business premises of the San Diego Pain Management Clinic, (“SDPM”) an entity in which the Debtor has an interest.
3. On December 29, 2000, the Debtor was dismissed as a party to the State Court Action. (See Exhibit 2). The case was still pending against SDPM after the December 29, 2000, dismissal against the Debtor.
4. On January 7, 2002, SDPM, Kevin Barkal and Webb entered into a Settlement Agreement and Release wherein SDPM agreed to pay Webb the sum of \$138,000.00. (“Settlement Agreement”) (See Exhibit 3). Forty Thousand Dollars (\$40,000.00) was paid upfront by SDPM’s insurance carrier and the balance was

to be paid in forty eight (48) monthly installments of \$2,000.00 with Dr. Barkal personally guaranteeing the payment. ("Settlement") The entire case was dismissed upon the execution of the Settlement Agreement. The Settlement was not lodged in the State Court Action. SDPM made approximately ten (10) payments and failed to make any more.

5. On October 15, 2002, Webb filed an *Ex Parte* Motion to Enforce Settlement in the State Court Action wherein Webb sought to convert the Settlement Agreement into a judgment against not only SDPM, but the previously dismissed party, Kevin Barkal. (See Exhibit 5).
6. On February 13, 2003, the Court granted the Motion to Enforce Settlement and entered a judgement against SDPM and Kevin Barkal in the amount of \$151,971.21 ("Judgment").
7. On April 4, 2005, Webb filed an *Ex Parte* Application to Amend Judgement *nunc pro tunc* to add the proper Defendant, San Diego Pain Management Consultants (as opposed to San Diego Pain Management Clinic). The Court granted said Motion on April 6, 2005. (See Exhibit 7).
8. On June 13, 2005, the Court entered a Charging Order against Surgical Leasing Company, LLC and Strategic Leasing Company, LLC which, effectively, ordered that any and all interest of the Debtor in these two companies were charged with the balance of the Judgment against Kevin Barkal. This Order required any funds due and owing the Debtor by the two companies be paid to Webb toward satisfaction of the Judgment. (See Exhibit 8).
9. On June 16, 2005, the Court entered an Order assigning all rights, title and interest payments due to Debtor (i.e. commission, royalties, insurance reimbursement payments, contract payments) to Webb. (See Exhibits 9 and 10).
10. On December 19, 2005, Webb filed an *Ex Parte* Application for the Appointment of a Post Judgment Limited Receiver. On December 21, 2005, the Court entered an Order to Show Cause as to Post Judgment Limited Receiver and appointed Martin Goldberg ("Goldberg" or "Receiver") as Receiver ("Receiver Order"). (See Exhibits 11 and 12).
11. The Receiver Order, entered *ex parte*, ordered Kevin Barkal to turn over all keys, leases, books, records, books of account, ledgers, operating statements, budgets, tax bills, insurance policies and all other business records relating to the subject assets, wherever located, and in whatever mode maintained, including information contained on computers and any and all software relating thereto, as well as all banking records, statements and cancelled checks relating to Debtor Barkal from the following entities (1) Pemcor, Inc.; (2) CV Surgical Management, Inc.; (3) West Coast Interventional Pain Medicine, a medical Corporation; (4) Pain Intervention Therapy of San Diego; (5) Surgical Leasing Company, Inc.; (6) Strategic Leasing Company, LLC; (7) Surgical Leasing Company, LLC; (8) Kellett, Inc.; (9)War, Inc.; (10) San Diego Pain Management

Center, Inc.; (11) Genesee Surgery Center, LP; and (12) Beach Cities Surgery Center, LP.

12. On or about January 24, 2006, Webb petitioned the Court to Amend the Receiver Order to allow the Receiver to immediately seize all of Debtor Barkal's direct and indirect business interests, including but not limited to, bank accounts, books, records, papers and accounts for the following entities: (1) Pemcor, Inc.; (2) CV Surgical Management, Inc.; (3) West Coast Interventional Pain Medicine, a medical Corporation; (4) Pain Intervention Therapy of San Diego; (5) Surgical Leasing Company, Inc.; (6) Strategic Leasing Company, LLC; (7) Surgical Leasing Company, LLC; (8) San Diego Pain Management Center, Inc.; (9) Genesee Surgery Center, LP; and (10) Beach Cities Surgery Center, LP. (collectively "Initial Barkal Entities"). On January 24, 2006, the Court entered an Order authorizing the Receiver to seize all of Barkal's interests in the Initial Barkal Entities. (See Exhibit 13 and 14).
13. On March 3, 2006, the Court entered an Amended Second Order Amending Receiver Order which added Torrey Pines Facilities Management Group, LP., Medical Facilities Management Group, Inc., and the Pain Management Group, Inc. to the list of the Initial Barkal Entities.
14. On May 2, 2006, the Court entered an Order, at Webb's request, authorizing the Receiver to file tax returns for the Defendant, SDPM, and four of the Initial Barkal Entities. (See Exhibit 19).
15. On May 5, 2006, Webb filed her Motion for an Order to Amend the Judgment Nunc Pro Tunc and Memorandum in support of the same (collectively "Motion to Amend"). (See Exhibit 20). The Motion to Amend was set for hearing on June 23, 2006.
16. On June 26, 2006, the Court granted Webb's Motion to Amend and added the following aliases or alter ego entities to the Judgment ("Amended Judgment"):

Kevin K. Barkal;	Pemcor, Inc.;
Kevin Paul Barkal;	CV Surgical Management, Inc.;
Kevin Berkal;	West Coast Interventional Pain Medicine;
P. Kevin Barkal;	Pain Intervention Therapy of San Diego;
Paul Barkal;	Torrey Pines Facilities Management Group, G.P.;
Paul K.J. Barkal;	Medical Facilities Management Group, Inc.;
Paul K. Barkal;	The Pain Management Group, Inc.;
Paul K. Barkal, Jr.	The San Diego Pain Management Group; and
Paul Kevin J. Barkal	Surgical Leasing Company, Inc.
Paul Kevin Barkal	
Paul Kevin Barkal, Jr.	

(The "Barkal Entities") (See Exhibit 23).
17. Thereafter, the Receiver proceeded to liquidate the assets of the Debtor and the Barkal Entities.

18. Barkal and SDPM have filed an appeal in the California State Court requesting the Court set aside the Judgment based on lack of subject matter jurisdiction since the case was dismissed against Barkal prior to the State Court entering the Judgment against him. The parties stipulated the automatic stay of this Court could be lifted and thus the case is presently under submission by the Court of Appeals.

LEGAL ANALYSIS

The Court first notes that the “Issue Presented” designated on page 5 of the Debtor’s Brief Regarding Alter Ego Issue limits the scope of the matters addressed by Barkal to the Court, in contrast to the issue designated in the Court’s April 29, 2008 order. As designated by Barkal, the issue to be determined is:

To what extent do the proceeds of accounts receivable of the Barkal Entities or of Kevin Barkal, M.D., constitute property of the Chapter 13 bankruptcy estate of Paul Kevin Barkal in Case No: 08-20663?

At the preliminary pre-trial conference held on April 18, 2008, Barkal’s counsel were insistent upon including within the context of the contentions in the Joint Motion the concept of “corporate governance powers in relation to the Barkal Entities” as being a potential property interest of Barkal’s Chapter 13 bankruptcy estate. That issue has now been waived by Barkal², and the sole property interests which are now the subject for the Court’s determination are proceeds of accounts receivable of the Barkal Entities in relation to Barkal. In addition, the issue as phrased in the April 29, 2008 order – done painstakingly with the input of counsel in attendance at the hearing – was careful to delineate the context of the Barkal Entities’ interests in accounts receivable as being “now or in the future subject to the possession or control of Martin Goldberg, as Receiver appointed with respect to Case No. GIC757374 in the Superior Court of California, County of San Diego, Central Division”. While it may well not be material, in that the record establishes that apparently all accounts receivable of the Barkal Entities are in

² That is just as well: See, *Fowler v. Shadel*, 400 F.3d 1016 (7th Cir. 2005).

the present or future control of the Receiver, to the extent that any accounts receivable of the Barkal Entities are not within the control of the Receiver, those receivables do not constitute property of Barkal's Chapter 13 bankruptcy estate. As stated in the Court's designation of the issue to be presented, only those accounts receivable of the Barkal Entities subject to control of the Receiver are within the scope of the Joint Motion, and thus subject to the determination stated by this decision.

The thrust of Barkal's argument, adopted by the Barkal Entities in their memorandum, is that the effect of judgments of the California Superior Court is to cause the property interests of each of the Barkal Entities in the accounts receivable of each of those entities to become property interests of Barkal, and thus property of his Chapter 13 bankruptcy estate within the provisions of 11 U.S.C. § 541(a). In making this argument, Barkal advances a construction of the "alter ego" collection remedy developed under the law of California by which, once imposed, property of a judgment debtor and of an "alter ego" defendant become as one for all purposes.³

³ It is important to note that in footnote 4 on page 12 of his legal memorandum, Barkal "adamantly disputes a basis for entry of the Amending Judgment under an alter ego theory". The Court takes this statement to mean that Barkal does not agree that the Barkal Entities and he are co-extensive entities. In fact, based upon the record made by the parties, in an appeal pending in California, Barkal disputes the underlying premise upon which his principal argument that accounts receivable of the Barkal Entities are in fact property of Barkal's bankruptcy estate is based. Barkal correctly notes that any request by him that this court review judgments entered by a court of the State of California is precluded by application of the *Rooker-Feldman* Doctrine [see, *Rooker v. Fidelity Trust Co.*, 44 S.Ct. 149 (1923) and *District of Columbia Court of Appeals v. Feldman*, 103 S.Ct. 1303 (1983)]. This Doctrine prevents a disappointed litigant in state court proceedings from challenging judgments of a state court collaterally in a federal court proceeding, except to the extent that a state court judgment is reviewable by the United States Supreme Court. The Court agrees with Barkal that decisions of the California Superior Court – now subject to appeal by Barkal – are not properly subject to review by this Court. Barkal notes on page 20 of his legal memorandum that "[t]his Court is bound by that determination [by the California court] and can not rewrite a different equitable remedy". Thus, as Barkal has posited the issue, the function of this Court is to determine the effect of decisions of the California Superior Court in relation to the question of whether the accounts receivable of the Barkal Entities have been determined by that court to be the property of Barkal. Interestingly enough, as stated, this is a determination which Barkal apparently disputes in his pending appeal of the state court's determination, as that determination is now affirmatively advanced by Barkal in this case.

In support of his contention, Barkal advances essentially the following arguments:

1. The effect of the “alter ego” judgments in the California Superior Court is to cause property interests of each of the separate Barkal Entities in accounts receivable to become property interests of Barkal himself, in accordance with the effect of the remedy of “alter ego” collection established by California law.

2. Webb is judicially estopped from asserting that the accounts receivable of the Barkal Entities are not, by operation of decisions of the California Superior Court, property of Barkal’s Chapter 13 estate.

3. Barkal’s Chapter 13 bankruptcy estate has an alter ego claim which causes the accounts receivable of the Barkal Entities to become property of Barkal’s Chapter 13 estate.

Turning to issue number 3 first, Barkal correctly notes that every conceivable property interest of a debtor constitutes property of a debtor’s Chapter 13 bankruptcy estate by operation of the initial provision of 11 U.S.C. § 1306(a), which incorporates into the concept of property of a Chapter 13 estate the property specified in 11 U.S.C. § 541(a); *In re Yonikus*, 996 F.2d 866 (7th Cir. 1993). Barkal is also correct in his assertion that the nature of interests incorporated into a bankruptcy estate by § 541(a) are dependent upon property interests determined under state law; *Butner v. U.S.*, 99 S.Ct. 914, 918 (1979). On pages 21-24 of his memorandum, Barkal argues that potential alter ego assets of separate entities which may be subject to actions by a bankruptcy trustee for the benefit of a debtor’s creditors somehow impact upon the issue presented to the Court. Barkal’s focus in this context is misplaced.

First, and most importantly, Barkal’s argument is nothing more than a hypothetical construct – a construct which Barkal has definitively opposed in California courts (See, footnote 2, *supra*). Barkal’s argument in this context is conceptually distinct from his contention that the California Superior Court has determined that the interests of the Barkal entities in accounts receivable are his property. In this portion of his argument, Barkal posits that it might be

determined in his Chapter 13 case that the Barkal Entities and he are alter egos. The record for the determination of the “core issue” has been set by the parties, and that record is devoid of original evidence bearing on this contention.

Viewed as the hypothetical that it is, Barkal’s citation to cases advanced in support of his contention only further demonstrate the inapplicability of this argument to the record before the court.

First, the case of *Sampsel v. Imperial Paper & Color Corp.*, 61 S.Ct. 904 (1941), cited by Barkal, is a case which involved a litigated action for the recovery by a bankruptcy estate of a fraudulent transfer. Unlike *Sampsel’s* action to avoid a fraudulent transfer, there is no action pending by the Chapter 13 Trustee in this case for recovery of a fraudulent transfer; no action pending by the Chapter 13 Trustee for determination that the assets of the Barkal Entities are assets of Barkal’s bankruptcy estate; and no action in any manner before the Court initiated by the Trustee or by the debtor to determine that assets of the Barkal Entities are in fact assets of Barkal’s Chapter 13 bankruptcy estate. *Sampsel* provides no support for any contention by Barkal.

On page 22 of his memorandum, Barkal cites to *Henderson v. Buchanan*, 52 B.R. 743 (Bankr. Nev. 1985) and to *Freehlig v. Nielson*, 44 B.R. 863 (Bankr. S.D. Fla. 1984). In these cases, a trustee’s assertions that assets of entities other than the debtor should be included in the debtor’s bankruptcy estate were sustained because the trustee asserted actions against the alleged alter egos. Again, there is no such action pending before the Court, and those cases have no materiality with respect to the issue before the Court. Moreover, Barkal’s reliance on this theory seems to the court to be disingenuous in view of his position in the California appeal

The same fate befalls the argument advanced in sub-section B on pages 23-24 of Barkal’s memorandum – that an alter ego action is an asset of his Chapter 13 bankruptcy estate. There is no action pending before this court to “collapse” the assets and liabilities of the

Barkal Entities into Barkal's bankruptcy case. The core issue in this contested matter is to be determined on the record as it is.

The bottom line is this. There is case law support for the proposition that the identity of a debtor and of non-debtor entities may have become so co-mingled and so intermixed that in the interests of fair administration to all creditors of both the debtor and the alter egos, the assets and obligations of the non-debtor entities should be considered the assets and obligations of the debtor, and vice versa⁴. There is no proceeding before this Court by the Trustee or by the debtor which seeks to reach this conclusion. The debtor has opposed this conclusion in his appeal in the California state courts. Barkal's argument in this context is nothing more than a hypothetical: he posits that if the Trustee were to pursue such an action and use as its premise the decision of the California court, then the Trustee would succeed in collapsing all assets of the Barkal Entities into Barkal's bankruptcy estate. Finally, this argument is dependent almost exclusively upon the binding determinative effect of the alter ego judgments entered in California, and as we will see, the court does not agree with Barkal's construction of the alter ego remedy employed in California with respect to Barkal.

On the theories addressed above, Barkal does not prevail.

In ascending order, Barkal next contends that Webb is judicially estopped from contending that the accounts receivable of the Barkal Entities do not constitute property of Barkal's Chapter 13 bankruptcy estate, based upon Webb's contentions in proceedings in the

⁴ While technically not part of the designated record, the court cannot help but note that while Barkal has filed an amended Schedule B which lists the assets of the Barkal Entities as assets of his bankruptcy estate, there has been no amendment of any other schedule or of the statement of financial affairs to provide information about the financial circumstances and affairs of the Barkal Entities. If Barkal and the Barkal Entities are in fact one – as Barkal's arguments as to solely property interests asserts – then they are one entity for **every** purpose... taxation, regulation by state and federal authorities, obligations to present and to future creditors. This would not seem to be a result Barkal embraces, again given his litigating position in the California appeal.

California state courts. Barkal's argument evidences a misunderstanding of the doctrine of judicial estoppel.

First, the "doctrine of [judicial] estoppel is intended to protect the courts rather than the litigants", *In re Cassidy*, 892 F.2d 637, 641 (7th Cir. 1990) [rehearing and rehearing *en banc* denied February 5, 1990]. In the context of the matters before the Court, the extent of property of Barkal's bankruptcy estate under 11 U.S.C. §541(a) is far more comprehensive than the assertions in that context made by a single creditor. Barkal argues that for all purposes in his bankruptcy case, property of the Barkal Entities has been determined to be property of his bankruptcy estate by the decisions of the California Superior Court. The determination of the extent of property of a bankruptcy estate under 11 U.S.C. § 541(a) is a federal question, involving the interests of all creditors and parties-in-interest in a bankruptcy case. This court does not deem that question/issue to be affected in the context of this Chapter 13 case by the position taken by a single creditor in a separate judicial proceeding. The issue of the extent of property of a bankruptcy estate transcends the one-on-one context in which decisions relating to judicial estoppel have been made. Thus, as a matter of law, the Court does not deem judicial estoppel based upon any assertion made by Webb in state court proceedings to have any materiality to the determination of whether the accounts receivable of the Barkal Entities in fact constitute property of Barkal's Chapter 13 bankruptcy estate.

In a certain sense, Barkal's arguments fall within the parameters of *Tannon-Stokes v. Potter*, 453 F.3d 446 (7th Cir. 2006) [rehearing and rehearing *en banc* denied July 31, 2006]. In that case, the debtor, in the process of pursuing a claim against the Postal Service, filed a Chapter 7 bankruptcy case which expressly denied that she had any valuable legal claims. Following her discharge in bankruptcy, the debtor filed a suit against the Postal Service, to which the defendant raised the defense of judicial estoppel. The Seventh Circuit Court of Appeals joined six other Circuit Courts in the determination that "a debtor in bankruptcy who

denies owning an asset, including a chose in action or other legal claim, cannot realize on that concealed asset after the bankruptcy ends”; 453 F.3d 446, 448. Not to impart the deceit of Tannon-Stokes to Barkal, there is an analogy here. In his appeal in California, Barkal disavows the position taken by Webb in state court litigation that all property of the Barkal Entities has become property of Barkal, and yet he asserts in his bankruptcy case that the very assertion which he has disavowed in state court inures to his benefit in this Court. “Judicial estoppel is an equitable doctrine”, *Tannon-Stokes, supra.*, 453 F.3d 446, 448, and there is certainly a lack of equity in Barkal’s opposing it in California, and then advancing it here, assertion.

The elements of judicial estoppel have been variously described by the United States Court of Appeals for the Seventh Circuit. In *Levinson v. U.S.*, 969 F.2d 260, 264-65 (7th Cir. 1992), the Court of Appeals for the Seventh Circuit adopted a three-pronged test for judicial estoppel, as follows:

In a third variation on the same theme, Levinson argues that judicial estoppel (also known as estoppel in pais or the doctrine of inconsistent positions) forecloses the government's fraud theory. Judicial estoppel prevents a party that has taken one position in litigating a particular set of facts from later reversing its position when it is to its advantage to do so. *In re Cassidy*, 892 F.2d 637, 641 (7th Cir.), *cert. denied*, *Cassidy v. Commissioner*, 498 U.S. 812, 111 S.Ct. 48, 112 L.Ed.2d 24 (1990). It is intended to protect the courts from being manipulated by chameleonic litigants who seek to prevail, twice, on opposite theories. *Scarano v. Central R.R. Co.*, 203 F.2d 510, 513 (3d Cir.1953) (judicial estoppel prevents parties from playing “fast and loose with the courts.”) Although the doctrine is not reducible to a pat formula, we have recognized certain boundaries. First, the later position must be clearly inconsistent with the earlier position. *Cassidy*, 892 F.2d at 641. Also, the facts at issue should be the same in both cases. *Himel v. Continental Illinois Nat'l Bank & Trust Co.*, 596 F.2d 205, 210-11 (7th Cir.1979). Finally, the party to be estopped must have convinced the first court to adopt its position; a litigant is not forever bound to a losing argument. *See Astor Chauffeured Limousine Co. v. Runnfeldt Investment Corp.*, 910 F.2d 1540, 1548 (7th Cir.1990); *Cassidy*, 892 F.2d at 641.

In *U.S. v. Christian*, 342 F.3d 744, 747 (7th Cir. 2003), the United States Court of Appeals for

the Seventh Circuit adopted a four element test for judicial estoppel, as follows:

The doctrine of judicial estoppel is intended to protect the integrity of the judicial process. *New Hampshire v. Maine*, 532 U.S. 742, 749, 121 S.Ct. 1808, 149 L.Ed.2d 968 (2001). It is an equitable concept providing that a party who prevails on one ground in a lawsuit may not in another lawsuit repudiate that ground. *United States v. Hook*, 195 F.3d 299, 306 (7th Cir.1999), *cert. denied*, 529 U.S. 1082, 120 S.Ct. 1707, 146 L.Ed.2d 510 (2000). Judicial estoppel may apply when (1) the later position is clearly inconsistent with the earlier position; (2) the facts at issue are the same in both cases; (3) the party to be estopped convinced the first court to adopt its position; and (4) the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped. *Maine*, 532 U.S. at 750, 121 S.Ct. 1808; *Hook*, 195 F.3d at 306.

Because *Christian, supra.*, is the later pronouncement, the Court reviews Barkal's judicial estoppel argument under the four-pronged test of that case.

First, as established by the above-cited cases of the Seventh Circuit and others which the Court could cite, the application of the doctrine of judicial estoppel is one to be employed on a case-by-case basis, and no concrete standard can be definitely stated for its applicability to a particular case. The first prong of *Christian* – that the later position [of Webb] is clearly inconsistent with the earlier position [of Webb] – is not satisfied in this case. Barkal relies heavily on certain assertions made by Webb in presentations to the California state court for his assertion that Webb has argued that all assets of the Barkal Entities constitute assets of Barkal for all purposes. The Court, having reviewed the entire record, does not construe Webb's assertions to have been that expansive. Webb's assertions appear to the Court to fall within the assertions which one would anticipate would be made by a litigant seeking to invoke the "alter ego" collection remedy authorized by the law of California. Webb is a single litigant – she does not represent a class of creditors of either Barkal or of the Barkal Entities – and thus her assertions that the Barkal Entities were operated in such a way that they constituted nothing more than an extension of Barkal were made in the context of her seeking a remedy directed

solely to Webb. Her contention in this case – that the accounts receivable of the Barkal Entities do not constitute property of Barkal’s bankruptcy estate for all purposes – are not inconsistent with her position in the California courts.

The second prong in *Christian* – that the facts at issue be the same in both cases – is also not satisfied. The facts at issue in California with respect to Webb related to whether Webb could obtain the alter ego collection remedy with respect to the Barkal Entities. The issue before this Court is whether all of the assets and obligations of the Barkal Entities constitute the separate property and obligations of Barkal for all purposes in his bankruptcy case. These are not identical factual issues in any sense.

The third prong of *Christian* – that “the party to be estopped convinced the first court to adopt its position”, is also not satisfied. The position espoused by Barkal is that Webb induced the California court to rule that all property of the Barkal Entities is the property of Barkal for all purposes. As will become clear in the next section of this decision, the Court does not deem Webb to have convinced the California court that all property of the Barkal Entities is the property of Barkal; rather, she convinced the California court to employ the classic alter ego collection remedy provided by California law in relation to Barkal and his separate legal entities.

The fourth prong of *Christian* – focusing on Webb’s potentially deriving an unfair advantage or imposing an unfair detriment on Barkal if not estopped – is also not satisfied. Again, Barkal has taken the position in California litigation that he and the Barkal Entities are entirely separate entities. Moreover, the issue to be determined by this court is not in relation to Webb’s judgment, but rather in relation to property of a bankruptcy estate under 11 U.S.C. § 541(a). No position taken by Webb has prejudiced Barkal in the determination of the extent of his bankruptcy estate – again, as will be seen in the subsequent section of this decision.

For the reasons stated above, the court determines that Barkal’s argument concerning judicial estoppel of Webb fails.

Finally, we come to the crux of the core issue addressed to the Court. Barkal's assertions revolve around the order entered on June 26, 2006 by the Superior Court of California, County of San Diego, Central Division, in Case Number GIC757374, which states the following:

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAND DIEGO, CENTRAL DIVISION

ANNA MAY WEBB,)	Case No. GIC757374
)	
Plaintiff,)	
v.)	ORDER AMENDING JUDGMENT
)	
SAN DIEGO PAIN MANAGEMENT)	Date: June 23, 2006
CLINIC, A MEDICAL CORPORATION;)	Time: 10:30 a.m.
KEVIN BARKAL, M.D.,)	Dept.: 72
)	Judge: Hon. Kevin A. Enright
Defendants.)	

The Motion of Plaintiff/Judgment Creditor Anna May Webb (hereinafter Creditor "Webb") for an Order amending the judgment *nunc pro tunc* against Defendants/Judgment Debtors San Diego Pain Management Clinic, A Medical Corporation, and Kevin Barkal, M.D. (hereinafter "Debtors") to add aliases and alter ego entities to the judgment, came before this Court on the above date and time, the Honorable Kevin A. Enright, presiding. Creditor Webb appeared through her counsel of record, _____ (illegible) Hong. Debtors did not appear. Upon reviewing the pleadings and records on file in this matter, hearing oral argument and good cause appearing therefor: IT IS HEREBY ORDERED that Creditor Anna May Webb's motion is granted. The Judgment entered on February 13, 2003, is amended *nunc pro tunc* to add the following aliases and alter ego entities:

Kevin K. Barkal; Kevin Paul Barkal; Kevin Berkal; P. Kevin Barkal; Paul Barkal; Paul K.J. Barkal; Paul K. Barkal; Paul K. Barkal, Jr. Paul Kevin J. Barkal Paul Kevin Barkal Paul Kevin Barkal, Jr.;	Pemcor, Inc.; CV Surgical Management, Inc.; West Coast Interventional Pain Medicine; Pain Intervention Therapy of San Diego; Torrey Pines Facilities Management Group, G.P.; Medical Facilities Management Group, Inc.; The Pain Management Group, Inc.; The San Diego Pain Management Group; and Surgical Leasing Company, Inc.
--	--

IT IS HEREBY FURTHER ORDERED that Receiver Martin Goldberg's post-judgment receiver orders are also hereby amended to allow him to pursue all of the

above additional entities to aid in the enforcement of this Court's judgment.

IT IS SO ORDERED.

Dated: JUN 26 2006

KEVIN A. ENRIGHT
JUDGE OF THE SUPERIOR COURT

(Parties' stipulated Exhibit 23)

Barkal's principal contention is that this order determined that property of the Barkal Entities is property of Paul Kevin Barkal for the purposes of determination of property of Barkal's bankruptcy estate pursuant to 11 U.S.C. § 541(a)(1) ⁵.

We will put aside momentarily the sole material issue with respect to Barkal's assertions: the extent of property of Barkal's bankruptcy estate pursuant to 11 U.S.C. § 541(a), which is an issue exclusively for determination by this court as a matter of federal law. That issue is to be determined in light of property interests determined under state law, and certainly if a debtor has been determined previously in a final judgment of a state court to have an interest in property, then that final judgment determination is binding on the federal court with respect to issues of determination of a debtor's property interests under state law. What has escaped the parties is the issue of collateral estoppel by operation of the prior judgment, no matter what that judgment may have held. Barkal has advanced his arguments to the Court as if the above-quoted judgment were final, and thus a valid premise for the invocation of collateral estoppel in relation to his property interests to be included under 11 U.S.C. § 541(a). However, Barkal has not favored this Court with the applicable law of the State of California as to utilization of the doctrine of collateral estoppel, particularly with respect to whether a judgment on appeal – which the above-quoted judgment is – can constitute a final judgment for the

⁵ On page 14 of his memorandum, Barkal raises the issue of the identity of the alter-ego obligants determined by the foregoing judgment. The court deems the June 26, 2006 judgment to be unambiguous: all of the designated entities, including the Barkal Entities, were determined to be alter-egos of Barkal. To the extent, if any, that Webb contends otherwise in this court, Webb's argument is noted and denied.

purposes of the invocation of that doctrine. Barkal has simply assumed that the judgment is final, and that his property interests are determined by it. Webb, in her memorandum, appears to have assumed that the judgment is final, and she has therefore waived any argument that the determination of property interests in the judgment cannot be deemed determinative. But despite waiver and lack of presentation of the issue, under California law, a judgment which is pending appeal cannot be a predicate for collateral estoppel, or issue determination; *Brown v. Cambell*, 100 Cal. 635, 35 P. 433 (1893); *Sandoval v. The Superior Court of Kings County, et al.*, 140 Cal. App. 3d 932, 190 Cal. Rptr. 29 (1983). Footnote 4 of Barkal's memorandum states that the June 26 judgment is being appealed. This decision could stop here, in that Barkal's argument depends on the final determinative force of the June 26, 2006 judgement, a finality which that judgment lacks. But we'll continue. As framed by the parties, the issue to be addressed by the Court is to be determined by the effect of the June 26, 2006 order, as if that order were a final judgment.

Webb obtained a judgment against Barkal. Webb sought to enforce that judgment. In the enforcement of that judgment, the record establishes that Webb invoked remedies provided by California law with respect to alter ego collection. While as one might expect, California law as enunciated by California Courts of Appeal is not entirely consistent – an unfortunate circumstance with any system of appellate courts – the ultimate path of California law is clear to the Court, as stated by the California Supreme Court.

Most of the law cited by the parties with respect to the alter ego concepts of California law is that stated in opinions of the courts of appeal of California. As is true in all states, the law of a state is decreed by its supreme court, and while inferior appellate courts' decisions may be instructive in elucidating the higher court's opinions and in determining issues not yet addressed by the higher court, it is the supreme court of a state which controls that state's law. The pronouncements of the Supreme Court of California with respect to issues before the Court

are the controlling precedents of California law.

We turn first to the case of *Wenban Estate, Inc. v. Hewlett, et al.*, 193 Cal. 675, 227 P. 723 (1924). In that case, the Supreme Court of California stated:

While it is the general rule that a corporation is an entity separate and distinct from its stockholders, with separate, distinct liabilities and obligations, nevertheless there is a well-recognized and firmly settled exception to this general rule, that, when necessary to redress fraud, protect the rights of third persons, or prevent a palpable injustice, the law and equity will intervene and cast aside the legal fiction of independent corporate existence, as distinguished from those who hold and own the corporate capital stock, and deal with the corporation and stockholders as identical entities with identical duties and obligations.

Accordingly, it has been held that upon a sufficient showing that a corporation is but the instrumentality through which an individual, who is the sole owner of all of the corporate capital stock, for convenience transacts his business, equity, looking to the substance rather than the form of the relation, and the law as well, will hold such corporation obligated for the acts of the sole owner of the corporation to the same extent and just as he would be bound in the absence of the existence of the corporation. (*Llewellyn Iron Works v. Abbott Kinney Co.*, 172 Cal. 210 [155 Pac. 986]; *Commercial Security Co. v. Modesto Drug Co.*, 43 Cal. App. 162 [184 Pac. 964]; *Minifie v. Rowley*, 187 Cal. 481 [202 Pac. 673].)

Thus proof that an individual owns all of the stock of a corporation and that the corporation is in truth and in fact but the corporate double of the owner of the stock, will, in conjunction with a further showing that as a result of the double relationship fraud or injustice will inure to a third person, suffice to dissipate the separate identity of the corporation. (*Minifie v. Rowley, supra.*) In such a situation, where, as here, the rights of third persons are involved, the law will have no compunction in holding the contract of the owner of the corporation dealing with the corporate assets, to be the contract of the corporation. (*Porter v. Lassen County Land Co.*, 127 Cal. 261 [59 Pac. 563]; *Schuyler v. Pantages*, 54 Cal. App. 83 [201 Pac. 137]; *Swartz v. Burr*, 43 Cal. App. 442 [185 Pac. 411].) (emphasis supplied)

193 Cal. 675, 696-697. As the foregoing demonstrates, the concept of an alter ego remedy “hold(s) such corporation obligated for the acts of the sole owner of the corporation to the same extent and just as he would be bound in the absence of the existence of the corporation”

(emphasis supplied). There is no concept in this case of assets of a corporation becoming the individual property of the shareholder/debtor. Rather, the concept is one in which the corporation, as a separate entity, will be held to be liable to the same extent as the owner/judgment debtor.

The concept that the alter ego doctrine in California is a remedy, rather than a concept of property law, was acknowledged in *D. N. & E. Walter & Co., v. Zuckerman*, 214 Cal. 418, 420, 6 P.2d 251 (1931) as follows:

We think the trial court was in error in its conclusion on the undisputed facts. The corporation was distinctly a one-man corporation. It was Goldberg's *alter ego*, completely owned, dominated and controlled by him. This was also true as to the business formerly conducted by him under the same name. To all intents and purposes Goldberg at all times involved herein continued to transact business under the name of "Home Builders Supply Co." The separateness of the person and the corporation would of course be recognized if no inequitable results would follow. But where, as here, an inequitable result would follow the two should be considered as one, and the doctrine of *Minifie v. Rowley*, 187 Cal. 481 [202 Pac. 673], and *Wenban Estates, Inc., v. Hewlett*, 193 Cal. 675 [227 Pac. 723], would apply.

Again, there is no concept that property of a separate corporate entity in any manner becomes coextensive with property of the corporation's principal. Rather, the corporate entity becomes a collection target for a judgment plaintiff in the enforcement of a remedy directed toward recovery in a specific case under a specific set of circumstances.

In *Katenkamp v. The Superior Court of Santa Barbara County*, 16 Cal.2d 696, 70–701 108 P.2d 1 (1940), the following was stated:

Furthermore, while a corporation is usually regarded as an entity separate and distinct from its stockholders, both law and equity will, whenever necessary to circumvent fraud or protect the rights of third persons disregard this distinct existence and treat them as identical. (*Wenban Estate v. Hewlett*, 193 Cal. 675 [227 Pac. 723]; *Wood Estate Co. v. Chanslor*, 209 Cal. 241 [286 Pac. 1001]; *Clark v. Millsap*, 197 Cal. 765 [242 Pac. 918]; *Hotaling v. Hotaling*, 193 Cal. 368 [224 Pac. 455, 56 A. L. R. 734]; *Minifie v. Rowley*, 187 Cal. 481 [202 Pac. 673]; *Erkenbrecher v. Grant*, 187 Cal. 7

[200 Pac. 641]; *Stanford Hotel Co. v. M. Schwind Co.*, 180 Cal. 348 [181 Pac. 780]; 6A Cal. Jur. 75.) In the present case the injunction against the Union Realty Company is in effect against William J. Knapp, its sole shareholder, and contempt proceedings may properly be brought against him. (emphasis supplied)

Although in the slightly different context of an injunction proceeding, the implication is clear: the alter ego principle is a remedy with respect to a specific set of circumstances in relation to conduct concerning a specific creditor. It is not a general proposition that decrees the comingling of property of separate corporate entities and of an individual, and the obligations of separate corporate entities and of an individual, into one amalgam.

The most recent statement of the alter ego doctrine discovered by the Court's research is *Mesler v. Bragg Management Co.*, 39 Cal.3d 290, 702 P.2d 601 (1985), in which the California Supreme Court discussed the alter ego doctrine as follows:

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. (6 Witkin, Summary of Cal. Law (8th ed. 1974) Corporations, § 5, p. 4318.) In certain circumstances the court will disregard the corporate entity and will hold the individual shareholders liable for the actions of the corporation: "As the separate personality of the corporation is a statutory privilege, it must be used for legitimate business purposes and must not be perverted. When it is abused it will be disregarded and the corporation looked at as a collection or association of individuals, so that the corporation will be liable for acts of the stockholders or the stockholders liable for acts done in the name of the corporation." (Comment, *Corporations: Disregarding Corporate Entity: One Man Company* (1925) 13 Cal.L.Rev. 235, 237.)

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. There are, nevertheless, two general requirements: "(1) that there be such unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist and (2) that, if the acts are treated as those of the corporation alone, an inequitable result will follow." (*Automotriz etc. de California v. Resnick* (1957) 47 Cal.2d 792, 796 [306 P.2d 1, 63 A.L.R.2d 1042].) And "only a difference in wording is used in stating the same concept where the entity sought to be held liable is another corporation instead of an

individual.” (*McLoughlin v. L. Bloom Sons Co., Inc.* (1962) 206 Cal.App.2d 848, 851 [24 Cal.Rptr. 311].)

However - and this is where the court in *Fuls* went astray - when a court disregards the corporate entity, it does not dissolve the corporation. “It is often said that the court will disregard the 'fiction' of the corporate entity, or will 'pierce the corporate veil.' Some writers have criticized this statement, contending that the corporate entity is not a fiction, and that the doctrine merely limits the exercise of the corporate privilege to prevent its abuse.” (6 Witkin, *op. cit. supra*, § 5, at p. 4317; see, e.g., Comment, *supra*, 13 Cal.L.Rev. at p. 237.)

In *Kohn v. Kohn* (1950) 95 Cal.App.2d 708 [214 P.2d 71], a marriage dissolution case, the question was whether the husband's corporation was the alter ego of the husband so that its income should have been included in the determination of his liability. The court explained the alter ego doctrine: “The issue is not so much whether, for all purposes, the corporation is the 'alter ego' of its stockholders or officers, nor whether the very purpose of the organization of the corporation was to defraud the individual who is now in court complaining, as it is an issue of whether in the particular case presented and for the purposes of such case justice and equity can best be accomplished and fraud and unfairness defeated by a disregard of the distinct entity of the corporate form.” (*Id.* at p. 718.) “In the instant case there may well have been various business reasons sufficient to justify and support the formation or continuation of the corporation on the part of defendant. For such purposes the [corporation] still stands.” (*Id.*, at p. 719.) However, to the extent the purpose of the corporation was to fraudulently deprive the wife of a fair property settlement, the corporate entity would be disregarded: “The law of this state is that the separate corporate entity will not be honored where to do so would be to defeat the rights and equities of third persons.” (*Id.*, at p. 720; see also *McLoughlin v. L. Bloom Sons Co., Inc.*, *supra*, 206 Cal.App.2d 848, 854 [bypassing the corporate entity to reach an alter ego corporation for the sole purpose of avoiding an injustice, otherwise the corporations remain separate].)

The essence of the alter ego doctrine is that justice be done. “What the formula comes down to, once shorn of verbiage about control, instrumentality, agency, and corporate entity, is that liability is imposed to reach an equitable result.” (Latty, *Subsidiaries and Affiliated Corporations* (1936) p. 191.) Thus the corporate form will be disregarded only in narrowly defined circumstances and only when the ends of justice so require.

To apply the alter ego theory as the federal district court did

in *Fuls* misinterprets the doctrine and ignores the policies behind it. It is not that a corporation will be held liable for the acts of another corporation because there is really only one corporation. Rather, it is that under certain circumstances a hole will be drilled in the wall of limited liability erected by the corporate form; for all purposes other than that for which the hole was drilled, the wall still stands. When it is claimed that a parent corporation should be liable because it is the alter ego of its subsidiary, equity commands that the corporate wall be breached. Yet the wall remains: the parent is liable through the acts of the subsidiary, but as a separate entity. A judgment obtained against a corporation and its alter ego is enforceable against both separately. Thus, when the plaintiff settles with only the subsidiary, the parent's liability continues. To hold otherwise would be to defeat the policy of promoting justice that lies behind the alter ego doctrine. (emphasis supplied)

The most telling points in this discussion are that the application of the alter ego doctrine “will depend on the circumstances of each particular case”; that “liability is imposed to reach an equitable result” in a particular circumstance; and most importantly, the concept that the implementation of the alter-ego remedy leaves the separate structure of the alter-ego defendant intact, and merely allows a plaintiff to reach the separate assets of that defendant because that defendant is deemed to be jointly liable with the judgment debtor for the debt of that debtor under the particular circumstances of the case at issue. The foregoing discussion is clear in its pronouncement that the application of the alter ego doctrine does not result in ignoring separate corporate existence for all purposes, or in the determination that property of a corporation becomes property of an individual judgment debtor for the purposes of satisfying a judgment, or for any other purpose. Rather, in a particular circumstance, the assets of a separate corporate entity become a collection target because that separate entity has been made a joint judgment debtor for a judgment entered against a totally separate defendant.

We now turn to the various pronouncements of the appellate courts of California.

In *Mindware S.A. v. Canara Technologies, Inc.*, 2004 WL 2898161 (Cal. App. 4 Dist.),

the following was stated:

The application of the alter ego doctrine is an equitable remedy, dependent on the circumstances of each case. “Because it is founded on equitable principle, application of the alter ego ‘is not made to depend upon prior decisions involving factual situations which appear to be similar.... It is the general rule that the conditions under which a corporate entity may be disregarded vary according to the circumstances of the each case. [Citations.] Whether the evidence has established that the corporate veil should be ignored is primarily a question of fact which should not be disturbed when supported by substantial evidence.” (*Las Palmas Associates v. Las Palmas Center Associates*, *supra*, 235 Cal.App.3d at p. 1248.) (emphasis supplied)

Again, the alter ego doctrine is applied on a case-by-case basis with respect to the particular circumstances of a case, and its application does not determine that property of an alter ego defendant constitutes property of the original personal judgment debtor.

In *Arnold v. Brown*, 27 Cal. App.3d 386, 393-394, 103 Cal.Rptr. 775 (1972), the following was stated:

It is a fundamental rule that “[t]he conditions under which the corporate entity may be disregarded, or the corporation be regarded as the *alter ego* of the stockholders, necessarily vary according to the circumstances in each case inasmuch as the doctrine is essentially an equitable one and for that reason is particularly within the province of the trial court. Only general rules may be laid down for guidance” (*Stark v. Coker*, 20 Cal.2d 839, 846 [129 P.2d 390]; *H. A. S. Loan Service, Inc. v. McColgan*, 21 Cal.2d 518, 523 [133 P.2d 391, 145 A.L.R. 349]; *Automotriz etc. De California v. Resnick*, 47 Cal.2d 792, 796 [306 P.2d 1, 63 A.L.R.2d 1042]). The two basic requirements are: 1) that there be such unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist; and 2) that, if the acts are treated as those of the corporation alone, an inequitable result will follow (*Automotriz etc. De California v. Resnick*, *supra*, p. 796; *Stark v. Coker*, *supra*, p. 846; *Watson v. Commonwealth Ins. Co.*, 8 Cal.2d 61, 68 [63 P.2d 295]; *Minifie v. Rowley*, 187 Cal. 481, 487 [202 P. 673]). With respect to the second requirement, it is sufficient that it appear that recognition of the acts as those of a corporation only will produce inequitable results (*Stark v. Coker*, *supra*, p. 846; *Watson v. Commonwealth*, *supra*, p. 68). (6) The general rule is thus stated as follows: “Before a corporation's acts and obligations can be legally recognized as those of a particular person, and vice versa,

it must be made to appear that 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 such person and corporation has ceased, and that the facts are such that an adherence to the fiction of the separate existence of the corporation would, under the particular circumstances, sanction a fraud or promote injustice.” (*Talbot v. Fresno-Pacific Corp.*, 181 Cal.App.2d 425, 431 [5 Cal.Rptr. 361]; *Temple v. Bodega Bay Fisheries, Inc.*, 180 Cal.App.2d 279, 283 [4 Cal.Rptr. 300]). (emphasis supplied)

The determination of alter ego is made with respect to the circumstances of each case, and that determination does not affect a transfer of property interests of alter egos to another entity for all purposes.

The procedure employed by Webb was specifically addressed in *NEC Electronics, Inc. v. Hurt*, 208 Cal. App.3d 772, 778-789, 256 Cal.Rptr. 441 (1989) as follows:

Judgments are often amended to add additional judgment debtors on the grounds that a person or entity is the alter ego of the original judgment debtor. (*Farenbaugh & Son v. Belmont Construction, Inc.* (1987) 194 Cal.App.3d 1023, 1029, 240 Cal.Rptr. 78; *Mirabito v. San Francisco Dairy Co.* (1935) 8 Cal.App.2d 54, 60, 47 P.2d 530.) 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. (*Mirabito v. San Francisco Dairy Co.*, *supra*, 8 Cal.App.2d at 57, 47 P.2d 530; *Thomson v. L.C. Roney & Co., Inc.* (1952) 112 Cal.App.2d 420, 428-429, 246 P.2d 1017.) “Such a procedure is an appropriate and complete method by which to bind new individual defendants where it can be demonstrated that in their capacity as alter ego of the corporation they in fact had control of the previous litigation, and thus were virtually represented in the lawsuit.” (1A Ballantine & Sterling, California Corporation Laws (4th ed.) § 299.04, p. 14-45.) In other words, “[i]f the claim of individual liability is made at some later stage in the action, the judgment can be made individually binding on a person associated with the corporation only if the individual to be charged, personally or through a representative, had control of the litigation and occasion to conduct it with a diligence corresponding to the risk of personal liability that was involved.” (Rest.2d, Judgments, § 59, p. 102.) (emphasis supplied)

As made clear by the foregoing, the addition of alter ego judgment debtors does not cause a merging of property and liabilities of the original judgment debtor and the added alter egos;

rather, the addition of the alter egos makes the separate property of those alter ego defendants subject to satisfaction of a judgment originally entered against another.

The foregoing principle was also addressed in *The People v. Clauson, et al.*, 231 Cal. App.2d 374, 378-379, 41 Cal.Rptr. 691 (1964) as follows:

It is firmly established in this state that when there is a unity of ownership and interest in a corporate entity, and when giving substance to such an entity which in fact has none, works a fraud or injustice on third persons, the separate entity will be disregarded and the individuals operating it will be looked upon as the actual owners. (Minifie v. Rowley, 187 Cal. 481, 202 P. 673; Gordon v. Aztec Brewing Co., 33 Cal.2d 514, 203 P.2d 522; Automotriz etc. De California v. Resnick, 47 Cal.2d 792, 306 P.2d 1, 63 A.L.R.2d 1042.)

The usual application of the doctrine is found in contract and tort cases. However, the application of the doctrine to the field of taxation has long been recognized by the federal courts as a necessary concomitant of the privilege of incorporation. (Eisner v. Macomber, 252 U.S. 189, 213, 40 S.Ct. 189, 64 L.Ed. 521; Higgins v. Smith, 308 U.S. 473, 477, 60 S.Ct. 355, 84 L.Ed. 406.) These latter cases hold that prevention of the use of the corporate form to circumvent the revenue and tax laws is the question which is uppermost in the mind of the court.

The application of the doctrine of alter ego is often phrased in terms of 'disregarding the corporate entity.' (Stark v. Coker, 20 Cal.2d 839, 846, 129 P.2d 390; Katenkamp v. Superior Court, 16 Cal.2d 696, 700, 108 P.2d 1; Shea v. Leonis, 14 Cal.2d 666, 669, 96 P.2d 332.) However, it is clear from an analysis of the cases so holding that the courts do not in fact disregard the corporate entity. To do so would ignore the fact of the corporations' otherwise legal existence. Rather, the courts, in order to avoid an abuse of the corporate privilege, 'look through the forms and behind the corporate entities involved to deal with the situation as justice may require.' (Stone v. Eacho, 4 Cir., 127 F.2d 284, 288.) As one commentator has euphemistically noted, 'If the corporation has not really been functioning as a self-serving business organization should function, but has been acting as a jutistic monkey to help pull the stockholders income-chestnuts out of the ... fire then the court will deal with the stockholder-cat as though it was the corporation-monkey's paw. The results of the interrelated activities will be imputed to the stockholder even though it is admitted that the corporation exists and has acted in its corporate capacity.' 'Disregarding the Corporate Entity in Tax Cases,' 22 Taxes 457, 458.) (emphasis supplied)

The fact that the addition of an alter ego defendant merely adds a source of collection resources, and does not equate property of the alter ego with property of the original judgment debtor, was stated in *Carr v. Barnabey's Hotel Corp.*, 23 Cal. App.4th 14, 21-22, 28 Cal.Rptr.2d 127 (1994), as follows:

Amendment of a judgment to add an alter ego "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. [Citations.] 'Such a procedure is an appropriate and complete method by which to bind new ... defendants where it can be demonstrated that in their capacity as alter ego of the corporation they in fact had control of the previous litigation, and thus were virtually represented in the lawsuit.' [Citation.]" (*NEC Electronics Inc. v. Hurt*, *supra*, 208 Cal.App.3d at p. 778, 256 Cal.Rptr. 441.)

The principle that the alter ego remedy employed by Webb is a collection remedy, applicable to a specific set of circumstances in relation to a judgment plaintiff, was established in *In re Levander*, 180 F.3d 1114 (9th Cir. 1999), in which the Court specifically addressed the attempted addition of a judgment debtor under California's alter ego doctrine, and determined that the attempt fell within the provisions of Fed.R.Civ.P. 69(a), i.e., an action to enforce the collection of a debt.

The rationale of the California alter ego remedy is perhaps most cogently explained in *Thomson v. L. C. Roney & Co., Inc.*, 112 Cal. App.2d 420, 427-428, 236 P.2d 1017 (1952) as follows:

Where injustice would result from a strict adherence to the doctrine of separate corporate existence, a court will look behind the corporate structure to determine the identity of the party who should be charged with a corporation's liability. *D. N. & E. Walter & Co. v. Zuckerman*, 214 Cal. 418, 420, 6 P.2d 251, 79 A.L.R. 329. Since the separate personality of a corporation is but a statutory privilege it must not be employed as a cloak for the evasion of obligations. The conditions which must be present before the corporate veil will be pierced are outlined in *Minifie v. Rowley*, 187 Cal. 481, 487, 202 P. 673, 676, where the court points out that before the obligations of a corporation can be regarded as those of another person, the following circumstances

must appear: 'First, that 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 and corporation has ceased; second, that the facts are such that an adherence to the fiction of the separate existence of the corporation would, under the particular circumstances, sanction a fraud or promote injustice.' The second requirement suggested in *Minifie v. Rowley*, supra, is further refined in the following expression: ' ... where the recognition of the fiction of separate corporate existence would foster an injustice or further a fraud the courts will refuse to recognize it. (Citing cases.) It is not necessary that the plaintiff prove actual fraud. It is enough if the recognition of the two entities as separate would result in an injustice. (Citing cases.) Here confusion would be promoted and an unjust result be accomplished if the maintenance of the two entities controlled by the same persons and having an identical name were permitted to frustrate a meritorious claim.' *Gordon v. Aztec Brewing Co.*, 33 Cal.2d 514, 522-523, 203 P.2d 522, 527. (emphasis supplied)

The doctrine is one which imposes liability on another entity, thus making that entity's separate assets subject to collection for a debt originally owed by other than the determined alter ego.

The judgment entered on June 26, 2006, by the Superior Court of California, County of San Diego, Central Division, did nothing more than implement the traditional California alter ego remedy by adding the Barkal Entities as alter egos for the purposes of collection, thus essentially making those entities jointly liable for Barkal's debt. The effect of this order was not to collapse the Barkal Entities into Barkal, and the judgment did not determine that the property of those entities should be considered to be the property of Barkal. There is nothing in the record before this court which establishes that the June 26, 2006 judgment, even if it were a final judgment, somehow determined that the separate property of the Barkal Entities became property of Paul Kevin Barkal.

CONCLUSION

Based upon the findings of fact and conclusions of law stated above, the Court determines that the accounts receivable of the Barkal Entities are not property of the Chapter 13 bankruptcy estate of the debtor Paul Kevin Barkal. Because the Joint Motion is premised

upon the concept that the accounts receivable of the Barkal Entities are property of the Chapter 13 estate of Paul Kevin Barkal, the Joint Motion must be denied.

IT IS ORDERED, ADJUDGED AND DECREED that the Joint Motion for Turnover Against Receiver filed by the Chapter 13 Trustee and the debtor, jointly, on March 18, 2008, is denied.⁶

Dated at Hammond, Indiana on July 14, 2008.

/s/ J. Philip Klingeberger
J. Philip Klingeberger, Judge
United States Bankruptcy Court

Distribution:
Debtor, Attorney for Debtor
Trustee, US Trustee
Attorneys of Record

⁶ The determination made by this Memorandum of Decision will constitute the law of the case with respect to the issue determined hereby which is implicated in other contested matters and adversary proceedings in Barkal's case. The Court will enter a separate order scheduling a preliminary pre-trial conference with respect to those matters.