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Case Number 174,2017

IN THE SUPREME COURT OF THE STATE OF DELAWARE

Robert W. Seiden Esq. in his capacity as Receiver for Southern China Livestock, Inc.,	)	
Plaintiff Below, Appellant,	)	No. 174, 2017
vs.	)	On Appeal from the Chancery Court of the State of Delaware
Shu Kaneko a/k/a Joseph Kaneko, Liqiang Song a/k/a Liquang Song a/k/a Li Song a/k/a Song Liqiang, a/k/a Li Qiang Song a/k/a Richard Lee,	)	C.A. No. 9861-VCS
Defendants Below, Appellees	)	

REPLY BRIEF OF APPELLANT ROBERT W. SEIDEN, ESQ. IN HIS CAPACITY AS RECEIVER FOR SOUTHERN CHINA LIVESTOCK, INC.

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PRELIMINARY STATEMENT

The Receiver,[1] as the Court appointed fiduciary in this matter, was appointed to, amongst other things, enforce a judgment on behalf of certain U.S. investors who lost millions when SCLI assets were misappropriated by individuals, including Kaneko, for their own personal use. SCLI then "went dark" after divesting itself of all assets and other sources of potential recovery for such investors.[2] SCLI is a Delaware company controlled by Kaneko, an asserted mastermind of the subject fraud, who also controlled and maintained signatory authority over millions of dollars in private placement money funneled through the corporate bank accounts. In his position as a control person, Kaneko stripped SCLI's assets, leaving at least $2.35 million of the funds raised from the private placement unaccounted for, several hundred thousand dollars of which were transferred to (or for the benefit of) Kaneko, to the complete detriment of creditors and investors, who were left with claims against an empty shell entity. In defense for his misdeeds, Kaneko, attempts to hide behind a so-called Release that was entered in 2013 between Kaneko and SCLI (the company that he had controlled and looted), claiming that he cannot be held liable for depleting the private placement proceeds by virtue of such Release. But, as demonstrated below and in the OB, the Release is riddled with inadequacies, and the Court already ruled in its

[1] All capitalized terms not defined herein have the meanings ascribed to them in the Receiver's opening brief (the "OB").

[2] The details of the reverse merger are contained in the FAC(A0028).

MTD Opinion that the Release is not supported by consideration and, therefore, unenforceable.

In addition, even if validly entered into (which is contested), the Receiver expressly sought to avoid the Release, if any, as a fraudulent transfer under Count 10 of the FAC (all but ignored by the lower court and Kaneko) which necessarily requires a determination as to whether there was an exchange of reasonably equivalent value in connection with entry of the Release--a factual inquiry that may not be summarily adjudicated.

In his Answering Brief, Kaneko argues that the MTD Opinion cannot be law of the case because it was not a final ruling on the merits. However, this premise is incorrect and, if true, would obviate the effect of any order on a motion to dismiss. This also ignores the binding precedent of this court which has held that rulings made at the motion to dismiss stage may be law of the case for further proceedings in the same case.

Further, Kaneko argues that new facts learned in discovery nullify the Court's ruling, citing various facts learned during discovery that purport to negate the law of the case doctrine. However, such new facts are substantially the same as the facts relied upon in connection with the MTD Opinion. In this regard, the facts cited by Kaneko that arose through discovery do not in any way challenge or change the central rationale for the MTD Opinion--that the return of the Shares

held in a custodial capacity was not consideration for the release of millions of dollars of claims against Kaneko. Kaneko did not own the Shares and the Company received no benefit (nor do the uncontested facts otherwise establishes any material benefit) from the return of the Shares. As to this, Kaneko now erroneously contends that the illegal transfer of the Shares was waived and/or ratified by virtue of its disclosure in public filings--substantially identical claims raised and rejected by the Court (and unsupported by law) in the MTD Opinion.

Even if the Court correctly determined that law of the case did not apply, which the Receiver contests, Kaneko next argues that there are no issues of material fact precluding summary judgment with regard to the validity of the Release, attempting to improperly shift the burden of proof on his defense to the Receiver's claims to the Receiver. However, both Kaneko and the Court ignore issues of fact and contradictory evidence that must be determined by a trial. For example, as noted above, neither the Court nor Kaneko even address the issue of whether the Release itself was a fraudulent conveyance which should be set aside. Consideration of the fraudulent conveyance cause of action would require a determination that the Company received reasonably equivalent value for the Release. It is long recognized that such issues of valuation (including determining the amount of any value received by SCLI and the value of the claims against Kaneko purportedly released) cannot be summarily determined and must be

decided at trial. Therefore, the MSJ Opinion should be reversed such that the Receiver is allowed to have this issue determined, rather than simply disregarded by the Court.

Lastly, Kaneko argues that the Receiver had no factual basis for his allegations that Kaneko had control over the Company during the time the Release was negotiated. However, Kaneko misses the point. Kaneko was already duty bound to facilitate return of the Shares that were illegally transferred in the first place—such a preexisting duty cannot be the basis for valid consideration, a fact disregarded in the MSJ Opinion. Further, contrary to Kaneko's assertions that there is no evidence that he was no longer under any fiduciary duty to the Company (and its creditors/investors) after he stepped down as an officer and director, this is not the legal standard. Kaneko's fiduciary duty continued after he stepped down from these positions regardless of his title. Additionally, there is contradictory evidence about the degree of control he had over Shu Mei Yu, Ltd. ("Shu Mei"), the BVI entity that illegally held the Shares for which Kaneko facilitated the return. Therefore, there is evidence that Kaneko held fiduciary duties on all sides of the Release—the Company's, himself individually, and the BVI entity that held the illegally transferred Shares. The issues regarding Kaneko's duties with regard to the Company and the control of the Company are in dispute and should not have been weighed by the Court and found lacking, but rather, once

there was a disputed issue of fact, the case should have proceeded to trial. In fact, Kaneko continually misstates and/or distorts the facts, continuing to selectively apply the facts he believes supports his position, ignoring or disputing other facts.[3]

For these reasons and those cited in the OB, the MSJ Opinion should be reversed, and the Receiver should be allowed to hold a trial on his claims.

[3] For example, Kaneko was the only one who signed any checks as the accounts were completely depleted (AR0040-AR0157), he controlled all aspects of SCLI (AR0018, Kan.Tr.101:1-4, 101:19), was brought into SCLI by his close friends in China (AR0007-AR0011)Kan.Tr. 58:14-20, 61:10-12, 62:7-10), was the U.S. operations (AR0014-AR0016, Kan.Tr.65:22 and 66:8-10, 67:6-11), he controlled the Shares improperly, in violation of the Lock-Up Agreement (A0422 Kan.Tr.361:2-8), investors were not provided with information regarding the stripping of the bank accounts, nor other company financial information, through SCLI going dark. (AR0161, HindsTr. 94-96).

ARGUMENT

I. The Court Should Have Determined that Its Previous Ruling that the Release was Not Supported by Consideration Was Law of the Case.

A court's ruling on a motion to dismiss can serve as law of the case to future stages of the proceeding. Kaneko argues that a ruling on a motion to dismiss cannot be law of the case, attempting to unilaterally limit the MTD Opinion by arguing that the Court made this finding based on a "limited" record and its decision was not on the merits or conclusive.[4] However, this belies the case law that clearly establishes that a ruling made on a motion to dismiss can constitute law of the case. *See Nationwide Emerging Managers, LLC v. Northpointe Holdings, LLC*, 112 A.3d 878, 895 (Del. 2015)(holding that the court's decision on a motion to dismiss was law of the case); *Porter v. Texas Commerce Bancshares, Inc.*, 1989 WL 120358, at *7 (Del. Ch. Oct. 12, 1989) (findings on the motion to dismiss would serve as law of the case going forward). In fact, in *Taylor v. Jones*, the court's previous decision was law of the case even though the previous decision was based on a *prima facie* claim. 2006 WL 1510437, at *5-6 (Del. Ch. May 25, 2006) (court's previous decision that "the facts alleged in the verified petition are

[4] Kaneko also argues that Vice Chancellor Noble *expressly* disclaimed any conclusions about the propriety of the Release, citing to FN 70 of the MTD Opinion (A0347), suggesting that Vice Chancellor Noble had reservations about the ultimate validity of the release. To the contrary, there was nothing expressly disclaimed by the Court at all--the Court never states outright that it is foregoing a final determination regarding the Release pending discovery on the matter.

sufficient to establish a *prima facie* claim for a resulting trust" was law of the case at trial). Therefore, despite assertions to the contrary, the MTD Opinion, even if based on a *prima facie* case, constitutes law of the case.

In addition, even assuming that the MTD Opinion represents a preliminary decision only, there are no new material facts that change the rulings in the MTD, as Kaneko erroneously argues. Here, the underlying facts that gave rise to the Court's ruling that the Release was not supported by consideration have not changed. First, the MTD Opinion holds that the Release is not supported by consideration because the Shares were not owned by Kaneko.[5] There is no new evidence that changes this--all evidence uncovered in discovery supports that the Shares were not owned by Kaneko and were transferred to Kaneko illegally in violation of the Lock-Up Agreement.[6] Further, in the MTD Opinion, the Court held that Kaneko failed to provide any reason why the return of the Shares would remedy the reduction in SCLI's share value, further supporting that the Release was not backed by consideration.[7] No facts uncovered in discovery show that the

[5] A0350 (MTD Opinion).
[6] *See* A0403 (Kan.Tr.153:18–20) (stating that Kaneko never received shares in SCLI or Expedite 4); A0404 (Kan.Tr. 156:8–13) (stating that the purpose of Shu Mei was to hold shares on behalf of the main shareholders); A0449 (LewisTr. 88:11-15) (stating that it was Lewis' recollection that Kaneko did not personally have any shares in his name).
[7] A0349-A0350 (MTD Opinion).

return of the Shares would remedy the reduction in SCLI's share value.[8] Finally, the Court ruled in the MTD Opinion that because the economic interest of the Shares was at all times held by Song in a custodial capacity, not SCLI, there was no benefit to SCLI supporting that the release lacked consideration.[9] There are no facts uncovered in discovery that support that there was a benefit to SCLI in having the Shares held in a custodial capacity.[10] Therefore, there is no basis for Kaneko's contention that discovery changed the material facts that form the basis of the Court's opinion that the Release was not supported by consideration.[11]

Without focusing on any of the three rulings above, Kaneko cites a laundry list of random information learned from discovery to support his flawed argument that law of the case does not apply. Answering Brief at 28-29. Kaneko cites

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[8] To the contrary, the deposition testimony shows that the Shares likely did not have any value. *See* (AR0037)(LewisTr. 99:3–100:24)(noting that the shares did not have any value and explicitly seeking payment of a bonus rather than receipt of equity for services). *See also* A0450 (LewisTr. 107:24-108:14) (stating that the Shares were to be held by Yino International Capital)).

[9] A0337 (MTD Opinion).

[10] *See* A0350 (MTD Opinion), determining that the Shares were held by Song in a custodial capacity on behalf of the Jiangxi Shareholders.

[11] The decision in *Advanced Litig., LLC v. Herzka*, cited by Kaneko, actually supports the Receiver's position. 2006 WL 4782445, at *5-6 (Del. Ch. Aug. 10, 2006). There, the court determined that law of the case applies to legal issues, not factual questions. There is no greater legal issue here than whether the Release was supported by consideration—a decision that the Court correctly decided in its MTD Opinion. As described above, the legal findings by the Court that the Shares were not owned by Kaneko and the Company received no benefit from the return of the shares held in a custodial capacity, therefore, fall squarely within the law of the case doctrine.

Lewis's deposition testimony discussing his engagement with the Company as a new fact that supports there was consideration supporting the Release. How much Lewis was paid (by SCLI) and that he was owed a substantial sum from the Company that would only be paid back if he was able to facilitate the return of the Shares (return of which was never completed), do not affect the MTD ruling that return of the Shares would not benefit the Company and that the Shares were not even held by Kaneko—such that there was no consideration supporting the Release. Even if a benefit from the transfer, which is contested, as discussed below, there was no determination as to the value of any such benefit and whether the value constituted reasonably equivalent value for the exchange--all contested fact issues not ripe for summary determination.

Similarly, Kaneko points to Hinds' deposition testimony discussing allegations in 2011 and 2012 of Kaneko's wrongdoing and related emails without providing any specific citation relating to a material fact relevant to the determination of the issues herein.[12] Irrespective, these facts do not change the Court's MTD Opinion that the Release is not supported by consideration.

In addition, without any specific details or cites to the record, Kaneko conclusively points to retainer letters between the Company and others, documents

[12] A0450 (Lewis Tr. 109:11-21). When asked if the Settlement had been disclosed to investors, Lewis replied, "I don't believe so." A0461 (Lewis Tr. 173:4-7); A0465 (HindsTr.153:8-11).

concerning Lewis's investigation of Kaneko and the board minutes for SCLI as a basis to change the MTD Opinion without explaining how any of these facts change the MTD Opinion that the Release is not supported by consideration because the return of the Shares had no value to the Company and the Shares were not held by Kaneko. These "new" facts are not material and do not affect the Court's explicit ruling that the shares were not owned by Kaneko, had no value to the Company, and were being held in a representative capacity only.[13]

Finally, Kaneko's Answering Brief brushes aside the binding case of *Nationwide Emerging Managers, LLC v. Northpointe Holdings, LLC*, stating that the Receiver only cites it because, like here, that case dealt with a change in the judge.[14] 112 A.3d 878 (Del. 2015). However, *Nationwide* is directly on point. In *Nationwide*, this Court reversed the Chancery Court when a new judge revisited an

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[13] A0349-A0350.

[14] *Odyssey*, cited by Kaneko, is inapposite. That case stands for the unenlightening proposition to rebut *Nationwide* that the "law of the case" doctrine "comes into play [] only when a prior decision actually or necessarily decides an issue." *Odyssey Partners v. Fleming Co.*, 1998 WL 155543, at *1 (Del. Ch. Mar. 27, 1998). This standard is amply satisfied here, as Vice Chancellor Nobles' ventured far beyond "mere analysis" of the claim, unambiguously holding that "the Release is invalid due to lack of consideration." *Seiden v. Kaneko*, 2015 WL 7289338, at *5 (Del. Ch. Nov. 3, 2015). This express finding could not be clearer; the above quote comes from section B of the opinion, appropriately titled "The Release Fails for Lack of Consideration". *Id*. Further, "[p]arties must not be entrapped by varying philosophies of different judges of the same Court in the case" unless there previous judge's conclusions were "obviously incorrect." *Id.* Such is not the case here. The MTD Opinion was not in error and soundly based on Delaware law and should not be disturbed. *Frank G.W. v. Carol M.W.*, 457 A.2d 715, 719 (Del. 1983).

issue that had been decided by the previous judge. This Court did so because it determined that the original finding was law of the case because the primary factual basis for the first ruling did not change. *Id.* at 895. In *Nationwide*, the first judge found that the conduct alleged in the complaint, even if proven, could not sustain a breach of contract claim. *Id*. After discovery and a two-week trial, that ruling was found to be law of the case. *Id*. at 896. This court determined that "[u]nder the 'law of the case doctrine,' a court's legal ruling at an earlier stage of proceedings controls later stages of those proceedings, provided the facts underlying the ruling do not change." *Id.* at 894–95. Here, like in *Nationwide*, there were no new material facts that would change Vice Chancellor Noble's ruling that the conduct Kaneko alleged gave rise to the Release--the return of the Shares--could not be consideration where the shares were not owned by Kaneko and the Company received no benefit from the return of the Shares held in a custodial capacity. The cases are nearly identical, and this Court's holding in *Nationwide* compels a finding that the earlier determination that the Release was not supported by consideration should be upheld.

II. The Receiver Raised Disputed Issues of Material Fact, and, Therefore, the Court Should have Denied Kaneko's Summary Judgment Motion

As more fully detailed in the OB, the Court ignored multiple disputed issues of fact in its MSJ Opinion. Like the Court, Kaneko, too, brushes aside these factual disputes in his Answering Brief. However, the Court is not permitted to weigh the evidence, even where it is "skeptical" that one party will ultimately prevail, but rather must determine, drawing all inferences in favor of the non-moving party, that there are no issues of material fact. *Telxon, Corp. v. Meyerson*, 802 A.2d 257, 262 (Del. 2002). Here, the Court improperly weighed the evidence and disregarded the facts it did not find persuasive, and shifted the burden to prove what amounts to an affirmative defense regarding the Release to the Receiver, rather than requiring Kaneko to sustain his burden and determining if/that there were facts in dispute that should be considered at trial.[15]

[15] Additionally, the Court in its MSJ Opinion also ignored that Kaneko's allegation that he was released from claims against him is an affirmative defense and the burden of proving that the release was valid and supported by consideration is on Kaneko—not the Receiver. Therefore, it is not as Kaneko argues, that the *Receiver* must establish by clear and convincing evidence that the Release was supported by consideration, but rather Kaneko has the burden of establishing such a defense. *See Del. Ch. R.* 8(c); *see also First State Staffing Plus, Inc. v. Montgomery Mut. Ins. Co.*, No. CIV.A. 2100-S, 2005 WL 2173993, at *10 (Del. Ch. Sept. 6, 2005) ("Because the purported release is an affirmative defense of [defendant], it bears the burden of proof on that issue.").

a. The Court did not Consider Whether the Release Itself was a Fraudulent Conveyance Which Should be Undone

The Receiver alleges in Count 10 of the FAC that the Release itself was a fraudulent transfer that was not supported by reasonably equivalent value.[16] In its MSJ Opinion, the Court did not in any way address these allegations, nor the claim to avoid the Release pursuant to Count 10.[17] Kaneko also failed to address in his Answering Brief whether the Release itself should be avoided as a fraudulent conveyance where Kaneko did not provide fair value for the exchange. Given that the Court did not rule on this issue, it is reversible error and a breach of basic due process for the Court to dismiss the FAC without any determination as to the underlying claim to avoid the Release. This is particularly significant given the Court's statement that, but for the Release, the FAC claims are potentially valid.[18]

In addition, it has been long recognized that whether adequate value has been exchanged to support a contract is a question of fact which is not suitable for summary. *Gottlieb v. Heyden Chem. Corp.*, 91 A.2d 57 (Del. 1952); *In re Terry Mfg. Co., Inc.*, 358 B.R. 429, 434 (Bankr. M.D. Ala. 2006) (internal quotations and

[16] A0061; OB pp. 26, 39.

[17] *See* OB pp. 9, 26, 39. In its MSJ Opinion, the Court makes one sweeping statement that "[i]f the Release is valid and applies to the conduct alleged in the FAC, then any factual disputes that may exist regarding Kaneko's conduct are irrelevant because the claims would be barred as a matter of law." (A1521). Assuming such a broad and sweeping statement was meant to apply to Count 10 in the first place, for the reasons stated herein, a fraudulent transfer of the Release is not something that can be decided upon a motion for summary judgment and cannot be barred as a matter of law. Nor does the record support such a finding.

[18] A1535.

citation omitted) ("Whether the payments were made in exchange for [assets of] 'reasonably equivalent value' is necessarily a factual issue . . . [and the] Court is hesitant to decide such matters at the summary judgment stage of litigation."); *see also Tidwell v. Gilbert*, 1997 WL 33419261, at *2 (Bankr. M.D. Ga. Mar. 3, 1997) (on summary judgment, declining to decide the issue of whether a transfer was made for reasonably equivalent value); *In re Erlewine*, 349 F.3d 205, 209 (5th Cir. 2003) ("As to the particular issue of whether a debtor has received reasonably equivalent value under §548, we have recognized that the question of reasonable equivalence is usually a question of fact, or is at least fact-intensive."); *See also*, *Michelson v. Duncan*, 407 A.2d 211, 223 (Del. 1979) (determining, for example, that where there is a claim of corporate waste,[19] whether consideration exists to support a contract is an issue of fact that cannot be determined on a motion for summary judgment).[20]

In *Gottlieb*, directors of the company signed option contracts, permitting them to purchase options at below-market prices in exchange for their labor. The "presence or absence of consideration which has a value reasonably related to the value of the concessions made by the corporation" was an issue that had to be

[19] Plaintiff brought a claim for corporate waste but the lower court did not address it in its MSJ Opinion. *See* A0063-A0064.

[20] The Court did no valuation analysis whatsoever and, instead, summarily determined that because the Company needed the Shares and did not have them, "there can be no bona fide dispute that the Company considered the return of the Shares to be valuable consideration." A1531.

tried. The court held that the value of this labor and whether it was a "fair exchange" gave the court "no alternative" but to take evidence. *Gottleib*, 91 A.2d at 58-59. Here, the Court never addressed whether the consideration for the Release, *i.e.* the return of the Shares, which were held in a custodial capacity and of no value to the Company, was sufficient consideration for a release of millions of dollars of claims for fraud and misappropriation of corporate assets. In this regard, there must be factual determination as to the amount of value received and given up through the Release. This determination of value would necessarily require a review of the claims released, which clearly are asserted into the millions as supported by the bank statements and other financials submitted as part of the record herein--these claims have not been estimated or valued, despite significant documentary evidence and testimony entered into the record regarding the diversion of millions of dollars from SCLI, as compared to the value of what was provided by Kaneko to the Company. Here, there was either no value provided by Kaneko, or, if some value is placed on return of the Shares held in a custodial role (which is contested), there is certainly no uncontested evidence determining what that value was (assuming any value was provided at all), nor was there any uncontested evidence regarding the value given up by SCLI and/or any determination that the exchange was reasonably equivalent value. These valuation

issues present issue of material of fact which, under the case law, cannot be decided on a motion for summary judgment.

b. Kaneko Had A Duty to Return the Illegally Transferred Shares at the Time of the Release

Despite assertions to the contrary, it is well recognized that a party is required to return property wrongfully held. "A commitment to honor a pre-existing obligation works neither benefit nor detriment [necessary to count as valid consideration]; therefore, a promise to fulfill a pre-existing duty [] cannot support a binding contract because consideration for the promise is lacking." *James J. Gory Mech. Contracting, Inc. v. BPG Residential Partners V, LLC*, 2011 WL 6935279, at *2 (Del. Ch. Dec. 30, 2011). *See also Seidel v. Lee*, 954 F. Supp. 810, 817 (D. Del. 1996) ("It is a well-settled principle that an enforceable contract cannot be based upon a duty which one is already legally obligated to perform."). Moreover, the return of property transferred illegally cannot form the predicate for consideration. *See Deli v. Hasselmo*, 542 N.W.2d 649, 656-57 (Minn. Ct. App. 1996) (plaintiff had a preexisting obligation to return stolen videotape and therefore return of tape could not be consideration); *U.S. v. Mardirosian*, 602 F.3d 1, 7-8 (1st Cir. 2010) (return of stolen paintings not consideration). Nor is Kaneko correct with his new argument that the transfer of Shares was somehow proper or any issues waived because the transfer in violation of the Lock-Up Agreement was disclosed in public filings. *See Genger v. TR Inv'rs, LLC*, 26 A.3d 180, 195 (Del.

2011) (ratification of an unauthorized act must arise from a positive and voluntary act).

In addition, Kaneko also argues that there is no evidence that he was under any fiduciary duty to the Company (and its creditors/investors) after he stepped down as an officer and director. Putting aside factual issues regarding Kaneko's continuing control and fiduciary duties, this is not the legal standard. Rather, Kaneko's fiduciary duties to SCLI continued long after he stepped down as CFO and director of SCLI, supporting that when Kaneko signed the Release in 2013 he was essentially on both sides of it—with continuing fiduciary duties to SCLI and in his individual capacity. *Beard Research v. Kates, Inc*., 8 A.3d 573, 601-602 (Del. Ch. 2010) (finding former key employee liable for breaches of fiduciary duty after resignation when he used information from former employer for benefit of new employer); *Comedy Cottage, Inc. v. Berk,* 495 N.E.2d 1006, 1012 (Ill. App. 1986) ("resignation of an officer will not sever his liability for transactions completed after termination which began during the officer's employment or which are founded on information acquired during the employment relationship.") Accordingly, even assuming Kaneko was not in a control positon at the time of the signing of the Release, he nonetheless maintained fiduciary duties and cannot use his new role as a shield to a claim for breach of fiduciary duty as asserted in the FAC.

During the time of the Release in 2013 Kaneko argued, and the Court accepted, that the Company had a full board and other officers and directors that were in control. However, this is contrary to Kaneko's own testimony. Although it is true that the Chinese entity had a full board—as Kaneko testified, in the U.S., he was "everything".[21] In addition, Kaneko testified that he incorporated SCL International and was appointed to run the U.S. operations by his "circle of friends" in China.[22] Because Kaneko had a continuing duty to the Company, he cannot hide by his resignation as a cloak to shelter him from his bad acts—he is not permitted to usurp a corporate opportunity for his own benefit.

Moreover, regardless of his own testimony, the facts are clear that Kaneko controlled the U.S. operations well into 2012: a) he was the only person who signed checks and made transfer out of the Bank Accounts until they were drained to 0,[23] b) the last significant transfers out of the Bank Accounts were from himself to himself[24] c) he continued as the *only* U.S. officer with regard to SCL International until *he* signed the dissolution papers in March, 2012, a fact never

[21] A0382-A0384 (Kan.Tr. 65:22,66:8-10,67:6-11).
[22] AR0007-AR0011 (Kan.Tr. 58:14-20, 61:10-12, 62:7-10).
[23] *See* A1165, A1199, A1257 (showing zero balances in corporate accounts), A1319 (Kaneko signs certificate of dissolution for SCL International), AR0040, AR0047. Although He was appointed and had signature authority on the Bank Accounts there is no evidence that he authorized any transfers.
[24] *Id.*

addressed by Kaneko in his MSJ or Answering Brief[25], and d) Lewis testified that, in August 2011, he was required to contact Kaneko to obtain information and bank statements regarding SCLI information, demonstrating that Kaneko continued to exert control over this information.[26]

Lastly, not only did Kaneko have control over and have a fiduciary duty to SCLI in 2013 when the Release was signed, evidence shows that Kaneko may have been in control of Shu Mei, the entity that held the Shares illegally in violation of the Lock Up Agreement.[27] Lewis testified that he reached out to Kaneko because of his role with Shu Mei and his ability to get back the Shares.[28] Lewis believed that Kaneko was the person that could facilitate return of the shares in 2013 and believed Kaneko was the one who could ensure that the company holding the Shares was still in good standing the in BVI so that it would be able to legally sign

[25] AR0014-AR0016(Kan.Tr.65:22 and 66:8-10, 67:6-11)(Kaneko is "everything" when he forms SCLI, including CEO, CFO, and president).
[26] A0422 (Kan.Tr.361:2-8) (where Kaneko admits that he had the relationships to facilitate the return of shares); AR0038 (LewisTr.129:9-23).
[27] The Lock Up Agreement states that the any holder must "refrain from selling any of the Lockup Shares, as defined below, for a period of eighteen (18) months from the Closing of the Offering." *See* exhibit 10.8 to Aril 1, 2010 8-K filed with the SEC. Kaneko argues that the transfer of the shares to Shu Mei was acceptable because the transfer agreement says it is subject to the Lockup Agreement. This does not mean the transfer of the shares is lawful. Further, the transfer agreement was signed only by a director of Shu Mei and by Song—there is no indication that the other shareholders signed off on this transfer or agreed that the transfer of the Shares should serve as an exception to the Lockup Agreement.
[28] A0457 (LewisTr.154:9–155:9).

paperwork transferring the Shares to Management.[29] Kaneko claims not to remember if he had any involvement in Shu Mei; however, he had certainly had knowledge of this company.[30] Accordingly, for the reasons stated above and as the Receiver discusses at length in the OB, the lower court erred in not recognizing the significant material facts supporting that Kaneko was on all sides of this Release (or at a minimum, dispute the foregoing)—he controlled and/or maintained a fiduciary duty to the Company after he stepped down as CFO and director, and there are issues of material fact as to the control he had over Shu Mei, the entity that held the Shares.

[29] A0445 (LewisTr.72:2-9).

[30] A0404-A0408 (Kan.Tr. 156-159)(explaining that he believed the company was a BVI entity formed to hold the Shares sometime in 2010 and has the same name as his mother in law but that he does not remember if he was involved in the company or if he was an officer or director).

CONCLUSION

The lower Court erred in reexamining the ruling that the Release was not supported by consideration where no evidence was presented in discovery that undermined the prior material findings that SCLI could receive no benefit from the return of the Shares which were held in a custodial capacity and were not owned by SCLI. This Court's own precedent holds that where a ruling an issue of law is made in a motion to dismiss and no new facts are presented which change the earlier finding, such finding should not be disturbed.

Even if this Court does not agree that the ruling that the Release was not supported by consideration is law of the case, the Court should have reexamined the validity of the Release during the summary judgment stage. Yet, the Court completely ignored the Receiver's claim that the Release was a fraudulent transfer not supported by reasonably equivalent value, an issue that cannot be decided on summary judgment. Further, the Court improperly disregarded disputed issues of material fact presented by the Receiver when it determined that the Release was valid. Therefore, this Court should overrule the Court and allow the Receiver to bring this matter to trial.

WHEREFORE, for the reasons stated above, the Receiver respectfully requests that this Court reverse the MSJ Opinion and issue such further orders as consistent with such ruling.

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