No. S190489

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

ARNOLD GREENSPAN, as Trustee of the Andrew Meieran Family Trust,

Plaintiff and Appellant,

v.

LADT LLC, a California Limited Liability Company; LA ABC LLC, a California Limited Liability Company; BARRY SHY, an individual; and DOES 1 through 50,

Defendants and Respondents.

After a Decision By The Court Of Appeal
Second Appellate District, Division Three
2d Civil No. B222539

Appeal from the Superior Court of Los Angeles County
Case No. BC 356794, Honorable Joanne B. O'Donnell

ANSWER TO PETITION FOR REVIEW

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INTRODUCTION

The Court of Appeal's actual holdings—rather than petitioners' overstated description of them—show the absence of any basis for review.

The Court of Appeal held only that a party's participation in the underlying litigation does not *automatically* insulate him from being added as an alter ego judgment debtor under Code of Civil Procedure section 187. Rather, the analysis depends on the facts: Did the plaintiff sue him on the same cause of action that is the basis for the judgment to which he is to be added—or, as here, on an unrelated claim? Did the plaintiff know the basis for alter ego liability all along—or as here, did the plaintiff "ha[ve] no reason to suspect the existence of an alter ego relationship" or the possibility of an inequitable result? (Opn., p. 28.) The need for this kind of factual analysis is nothing new. It is, and always has been, inherent in the section 187 process.

Likewise, the Court of Appeal's holding that in motion practice one need not identify hearsay exceptions in response to hearsay objections creates no confusion or conflict. Recognizing that the need to identify exceptions depends on the procedural setting, the court properly concluded that the line of cases defining what parties must do at trial imposes a requirement that is not necessary in motion practice. In any case, here the trial court's singularly uninformative ruling and its blanket exclusion of evidence in the face of patently frivolous hearsay objections would have eliminated any need to comply with whatever exception-identification rule might exist.

The Court should deny review.

STATEMENT OF FACTS

This Statement of Facts relies on the Court of Appeal's opinion, the arbitrator's factual findings (which are binding on reviewing courts under *Advanced Micro Devices, Inc. v. Intel Corp.* (1994) 9 Cal.4th 362, 367, fn. 1), and the papers and exhibits submitted in connection with the motion to amend the judgment.

Because petitioners' first issue challenges the addition of Shy as a judgment debtor only on the basis of his participation in the underlying arbitration, the petition presupposes that there is substantial evidence of an alter ego relationship between Shy and the other petitioners. Accordingly, we present the evidence favorably to that alter-ego conclusion.

A. Shy's Single Enterprise.

1. The man in control—defendant/petitioner Barry Shy.

Shy is a real estate developer. The Court of Appeal held that the Meieran Trust presented substantial evidence to the effect that Shy controls a single enterprise consisting of the Shy Trust and several limited liability companies, including LADT LLC, LA ABC LLC, Harpro LLC and 6th St. Loft, LLC. (Opn., pp. 18-19, 22-24, 39-41; see Opn., p. 26 ["Shy has exclusive control over each of his entities"].)[1]

Shy testified that the distinction among the entities is "'irrelevant'" in terms of how they actually operate. (Opn., p. 40, quoting AA 1/100:11-13 [Appellant's Appendix, volume 1, page 100, lines 11 through 13]; see also AA 2/467:22-470:3.)

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[1] "Meieran Trust" generally refers to Arnold Greenspan, as trustee of the Andrew Meieran Family Trust, and "Shy Trust" to Moti Shai as trustee of the BR Shy Irrevocable Trust.

2. The hub of Shy's enterprise—the Shy Trust.

Shy chose his brother, Moti Shai, to serve as the trustee of the Shy Trust, but Shy exercises full control over the trust's assets. (Opn., pp. 4, 40; AA 1/126, 254:7-255:24, 268:19-269:4, 3/707:15-708:2.) These assets include 100% ownership of judgment debtor LA ABC and an entity called LABAR LLC; 100% ownership of LADT, by virtue of LA ABC's and LABAR's 100% ownership of it; and 100% ownership of Harpro and 6th St. Loft. (Opn., pp. 4, 40.) "Barry Shy, not Moti Shai, 'make[s] most of the important decisions' for those companies." (Opn., p. 40, quoting AA 1/79:7-24.)

On occasion, Shy alone makes "financial decisions for the trust," deciding whether the Shy Trust will make millions of dollars in loans. (Opn., p. 40.) The Shy Trust's "office" is just "one file in [a] drawer . . . in Barry Shy's office" and Shy has the key. (AA 5/1266:21-1267:15.)

3. Shy manages the Shy Trust's LLC assets.

a. LADT.

Shy is the manager of LADT, controls its bank accounts and runs its finances. (Opn., p. 39.) LADT has never maintained minutes. (*Ibid.*)

b. LA ABC.

Shy also manages LA ABC—a company that has "never had any employees and never prepared a financial statement." (*Ibid.*) Shy isn't sure if LA ABC "ever maintained 'books' or 'records,' but if it did, the documents would be at his home." (*Ibid.*)

Shy doesn't know if LA ABC ever had a bank account or paid any of its own bills. (*Ibid.*) "LA ABC's 'payments' to the Meieran Trust under the Purchase Agreement were made by LADT." (*Ibid.*)

c. Harpro and 6th St. Loft.

Shy manages Harpro and 6th St. Loft. (Opn., p. 40.) Harpro's business address is Shy's home address. (*Ibid.*)

B. The Underlying Dispute.

1. The Purchase Agreement.

In 1998, Shy and Andrew Meieran formed LADT for the purpose of renovating the historic Higgins Building in downtown Los Angeles. (Opn., p. 3.) LADT was jointly owned by LABAR—another Shy company—and the Meieran Trust. (*Ibid.*)

In 2004, the Meieran Trust sold its interest in LADT to LA ABC in exchange for $7.75 million and title to six commercial units in the building, valued at $3.5 million (Purchase Agreement). (Opn., pp. 3-4.)

2. The complaint.

After LA ABC failed to make a payment due under the Purchase Agreement, the Meieran Trust sued LADT, LA ABC, and Shy. Its complaint alleged seven causes of action: (1) rescission of the Purchase Agreement against LA ABC and LADT; (2) breach of contract against LA ABC; (3) breach of guaranty against Shy; (4) breach of fiduciary duty against Shy; (5) accounting against all defendants; (6) conversion against all defendants; and (7) constructive trust against all defendants. (AA 4/940-957; see Opn., pp. 5, 25.)

At the time the Meieran Trust filed its complaint, it "had no reason to suspect the existence of an alter ego relationship among Shy, the trustee [of the Shy Trust], and the limited liability companies." (Opn., p. 28.)

The second cause of action for breach of the Purchase Agreement named only LA ABC, and it was the only claim under which LA ABC and LADT were held liable. (Opn., p. 5; AA 2/284-300, 3/805-806, 4/947-948.)

It alleged that LA ABC breached the Purchase Agreement by (a) failing to pay the total amount due to the Meieran Trust, (b) failing to provide the required certificate of occupancy, and (c) preventing the Meieran Trust from using parking spaces and storage space. (AA 4/947:14-28.)

The third cause of action against Shy for breach of guaranty alleged that "Shy individually guaranteed LA ABC's obligations under the Higgins Purchase Agreement to Plaintiff," citing paragraphs 4 and 6 of the agreement. (AA 4/948:25-26.) Although the complaint alleged that this clause made Shy liable to pay the purchase price, the plain language of the clause made such a reading impossible. Under Section 6, "Barry Shy, individually, agrees to guarantee all the obligations of Purchaser pursuant to Section 4; . . ." (AA 2/552); but Section 4 is an indemnity clause, unrelated to the purchase price or the other obligations that were the subject of the second cause of action for breach of contract (AA 2/550-551).[2] The Meieran Trust dismissed its breach of guaranty claim before the arbitration hearing; under JAMS rules, this dismissal was without prejudice. (AA 2/275:1-3; see Opn., p. 25.)[3]

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[2] In contrast, section 6 broadly obligated LADT to ensure performance of the *entire agreement*. As the arbitrator found in holding LADT jointly and severally liable on the contract, "section 6 of the Purchase Agreement sets forth the specific consent of LADT, LLC to *all terms of the Agreement*, and further mandates LADT, LLC to 'cooperate with the parties hereto and take all actions and execute any agreements and other documents necessary to effectuate the transactions contemplated by this Agreement.'" (AA 2/296:17-22, quoting AA 2/552, emphasis added.)

[3] During the arbitration, the Meieran Trust withdrew and dismissed with prejudice its fifth cause of action for an accounting. (AA 2/275:3-7; see Opn., p. 25.)

3. The arbitration.

Shy actively participated in the arbitration, attending every day of the two-week hearing, presenting his own defense, and appearing for LADT and LA ABC. (AA 1/40:9-11.) As he later described it, "I am the only human who 'controlled' the defense of [this] litigation at all times up until the entry of Judgment on December 1, 2008. I did so because I was a defendant individually, and because I was and am the manager of LADT and LA ABC, and thus have the right and responsibility to make decisions on behalf of those entities." (AA 3/705:11-14, footnote omitted.)

The arbitrator issued his Final Award in August 2008. (AA 2/272, 305.) He found that LA ABC had breached its obligation under the Purchase Agreement to pay $6.53 million. (AA 2/294:8-296:15, 304:9-12.) He held LADT jointly and severally liable for this breach because, as he interpreted the contract, LADT was also obligated to make the payments and also because it was equitable to hold LADT liable. (See Opn., pp. 9-10.) In reaching this result, the arbitrator stated that "the evidence is clear that Shy has exclusive control over each of his entities, and that he pays little attention to which account is used to make payments on the Purchase Agreement." (AA 2/297:8-10; see Opn., p. 10.)[4]

The arbitrator found Shy not liable on the claims against him that still remained. (Opn., p. 7.)

"[A]t no point during the arbitration did [the Meieran Trust] mention 'alter ego,' much less argue the doctrine applied. Nor did the arbitrator

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[4] The arbitrator's Interim Award had found only LA ABC liable under the Purchase Agreement. The Meieran Trust persuaded the arbitrator to find LADT jointly and severally liable. (AA 2/296:14-24.) It never sought that relief as to Shy. (AA 3/804:7-9)

refer to the doctrine in the interim or final arbitration awards." (Opn., p. 26.)

The trial court confirmed the award and entered judgment against LA ABC and LADT for $8.8 million (the award plus interest, costs and attorney's fees). (AA 1/3-4; see Opn., p. 11.)

4. The prior appeal (B213866).

LA ABC and LADT appealed from the judgment, arguing among other things that the arbitrator erred in finding LADT jointly and severally liable on the breach of contract claim. (*Greenspan v. LADT, LLC* (2010) 185 Cal.App.4th 1413, 1444 (*Greenspan I*).)

The Court of Appeal affirmed. (*Id.* at p. 1461.) It concluded that the arbitrator had permissibly based his finding of joint and several liability on section 6 of Purchase Agreement, which "'implements LADT's obligation to effectuate the transactions of the Purchase Agreement.'" (*Id.* at p. 1434.)

C. Judgment Debtor Examinations Reveal The Extent Of Shy's Financial Dealings Within His Enterprise.

During the arbitration proceeding, the Meieran Trust learned that LADT had recently received more than $47 million from the sale of condominiums in the Higgins Building. (Opn., p. 7.) But its initial efforts to collect the judgment yielded only $1.1 million. (Opn., p. 14.)

The Meieran Trust conducted judgment debtor examinations by (1) deposing Shy, Moti Shai and two bank representatives; (2) serving interrogatories on Shy, LADT and LA ABC; and (3) subpoenaing bank records. (*Ibid.*) Before these examinations, the Meieran Trust "was not aware of sufficient facts to form the basis for an alter-ego claim" (AA 5/1113:5-13), and "had no practical reason or legal obligation to pursue Shy on an alter ego theory" (Opn., p. 27).

Among other things, this discovery revealed:

- Although LADT had received more than $47 million from condominium sales in the Higgins Building, its bank accounts had dwindled to just $1,000. (AA 2/423; see Opn., p. 40.)
- Shy shuffled money in and out of LADT's bank accounts for personal use by writing checks to himself. (Opn., p. 41.)
- "[I]n March and April 2005, Shy made two transfers from LADT's accounts totaling $9 million, but, at his deposition, Shy could not explain where the funds went." (Opn., p. 40.)
- "With respect to other transactions, bank records and the testimony of a California National Bank representative revealed that Shy transferred over $2 million from LADT's bank accounts to his personal accounts." (Opn., pp. 40-41.)
- "On May 9, 2005, Barry Shy signed a check transferring $3,475,000 from LADT's bank account to the Shy Trust. He was not sure if the payment was a 'reimbursement' or 'distribution.' The Shy Trust had advanced millions of dollars to LADT. Barry testified the May 9, 2005 transaction could have been approved by himself, Moti, *or* both." (Opn., p. 40, emphasis in original.)
- Even though the Shy Trust was the nominal owner of LADT, LA ABC, and LABAR, "Barry Shy, not Moti Shai, 'make[s] most of the important decisions' for those companies." (*Ibid.*; AA 1/79:7-24, 254:5-6, 268:19-269:4, 3/704-705, ¶¶ 32, 34-35.) "[O]n occasion, Barry alone made financial decisions for the trust." (Opn., p. 40.)
- According to an accounting summary prepared by Shy that the Meieran Trust obtained after it filed its complaint, Shy "deposited

$179,000 in checks into LADT's account, indicating they were '[c]ontributed by LABAR.' But Shy admitted that all of the checks did not come from LABAR." (*Ibid.*, quoting AA 1/99:21-100:11, 109.)

D. The Meieran Trust Files A Motion To Add Shy And Others As Judgment Debtors.

On August 28, 2009, relying heavily on the information it discovered during the judgment debtor examinations, the Meieran Trust filed a motion under Code of Civil Procedure section 187 (section 187) to amend the judgment to add as judgment debtors Shy, the Shy Trust, and two of Shy's companies, Harpro and 6th St. Loft (collectively Shy parties). (AA 1/6-34.) The Meieran Trust submitted 39 exhibits along with its moving papers. (AA 1/35-2/564.)

The Shy parties other than the Shy Trust filed objections to 30 of the Meieran Trust's 39 exhibits on 80 specific grounds. (AA 4/1024-1033.) Many of their objections were boilerplate—copied and pasted word-for-word so that they mirrored each other verbatim. (Compare, e.g., AA 4/1026:1-10 [objection to Exhibit 4] with AA 4/1026:12-21 [Exhibit 5 objections are a boilerplate copy].) In one case, a faulty reference to a declaration rendered the objection incorrect on its face. (Compare AA 4/1031:11-21 with AA 1/41:18-21.)

On February 5, 2010, after a hearing, the trial court denied the Meieran Trust's section 187 motion. (AA 6/1610.)

As relevant here, the trial court concluded that "notwithstanding that [the Meieran Trust] apparently did not argue the alter ego theory at the arbitration," the trust could not amend the judgment "by inserting the name of a person or entity who had been a defendant to the underlying action and who was found not liable in that action." (AA 6/1612; Opn., p. 15.)

According to the court, because the Meieran Trust had the opportunity to argue alter ego both during the arbitration (suggesting that it "could have requested leave to amend") and after the arbitration was concluded, the Meieran Trust "should have litigated against [Shy] as an alter ego in the underlying litigation." (*Ibid.*)

Although the Shy Trust filed no objections to the Meieran Trust's 39 initial exhibits, the trial court's order purported to rule on the "Shy Trusts's [*sic*] evidentiary objections"; its ruling stated only that "No. 28 is overruled; all others are sustained (1-27, 29)." (AA 6/1610; see Opn., p. 15.) The objections were not mentioned during the hearing. (Opn., p. 15.)

E. The Appeal.

On appeal, the Meieran Trust argued that the trial court erred in its legal basis for rejecting the addition of Shy as a judgment debtor. The Court of Appeal agreed, holding that "the trial court relied on the wrong reasons in denying the motion to add Barry Shy as a judgment debtor." (Opn., p. 28.) "As a result, the trial court misapplied section 187 and the alter ego doctrine and considered very little of [the Meieran Trust]'s evidence." (Opn., p. 41.)

The court observed that "[a]lthough the Shy parties disavow[ed] any reliance on res judicata or collateral estoppel in supporting the rule adopted by the trial court, their appellate brief ma[de] repeated references to the issues raised and resolved in the arbitration." (Opn., p. 25.) There could be no "principled basis for the trial court's ruling other than some kind of equitable rule that, at a minimum, borrows concepts from res judicata or collateral estoppel." (Opn., p. 24.)

The court then demonstrated, by discussing each of the claims asserted in the arbitration and its disposition, "why those doctrines are irrelevant in this case." (*Ibid.*) It concluded:

That Shy was a party to the arbitration is beside the point. The arbitration award was against LA ABC and LADT on the breach of contract claim, as was the trial court's subsequent judgment. Shy was not a party to the contract claim and did not prevail on it. Thus, under res judicata and collateral estoppel, nothing precluded [the Meieran Trust] from conducting judgment debtor examinations of Shy and his companies or from seeking to add Shy as a judgment debtor under section 187 on an alter ego theory.

(Opn., p. 27.)

As to the evidentiary issues, the court ruled:

- "The trial court's cryptic ruling on the objections—'No. 28 is overruled; all others are sustained . . . .'— is the type of ruling condemned in *Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 243 at pages 249-257 and footnote 7." (Opn., p. 34.)
- On the merits of the evidentiary objections, the court concluded that the trial court erred as to all but two. Indeed, "[t]he trial court incorrectly decided virtually every issue in this case, save the sustaining of two objections and taking judicial notice of some court documents." (Opn., p. 41.)
- The court held that the rule requiring hearsay exceptions to be raised below, cited by the Shy parties in their appellate briefing, "applies only to objections raised during a trial." (Opn., p. 38.) It found no authority suggesting that in motion practice "*responses* to the objections must be made in the trial court to preserve them on appeal." (Opn., p. 39, citing *Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 522-527, emphasis in original.)

In a petition for rehearing, the Shy parties argued that the Meieran Trust actually *had* sued Shy for breach of the Purchase Agreement, by way of its third cause of action for breach of guaranty. (Petition for Rehearing, pp. 2, 5.) As noted above, while the Meieran Trust did plead that claim, there was no basis for it in the Purchase Agreement, and the Meieran Trust dismissed it without prejudice before the arbitration hearing. More to the point, no such argument—indeed, not even the factual basis for it—appeared in the respondents' brief.[5] The Court of Appeal denied the petition.

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[5] The lone reference to the guaranty provision is a passing reference in the respondents' brief's statement of facts: "In the purchase and sale agreement, Shy and Meieran each agreed to limited personal guarantees of parts of the purchase agreement. (3 AA 700: 22-23.)" (RB 5.)

REASONS WHY THE COURT SHOULD DENY REVIEW

I.

THE PETITION PRESENTS NO IMPORTANT QUESTION ABOUT THE SCOPE OF CODE OF CIVIL PROCEDURE SECTION 187.

A. The Court Of Appeal's Opinion Does Not Present The Issue Shy Identifies For Review.

Petitioner urges the Court to grant review to consider whether "a party who has already prevailed" in a case is automatically disqualified, as a matter of law, from being added as a judgment debtor under section 187. (Petition for Review (PFR) 1.) But Shy's formulation of the issue leaves the incorrect impression that Shy prevailed on the underlying second cause of action for breach of contract—the only claim relevant to Meieran Trust's section 187 motion (see PFR 18, fn. 6), and that the Court of Appeal ordered that he must be joined. Neither is correct.

1. Shy did not prevail on the claim to which the Meieran Trust seeks to add him.

Shy was never named as a defendant on that claim. (AA 2/284-300, 3/805-806, 4/947:8-948:18; see Opn., pp. 2, 15, 27.) And even when the Meieran Trust asked the arbitrator to expand his interim award to include LADT as well as LA ABC, it did not seek to include Shy. (AA 4/947:8-948:18; Opn., p. 9; see also Opn., p. 15 [Shy "fails to understand that the judgment is based on the claim that *LA ABC and LADT* breached the Purchase Agreement," emphasis added].) Accordingly, the entire premise of the petition fails.

Shy seeks to avoid this dispositive fact by citing the Meieran Trust's claim against him for breach of the guaranty obligations Shy undertook in

the Purchase Agreement (PFR 17-18 & fn. 6, citing AA 4/948:24-25, 949:5-6), which the Meieran Trust dismissed before the arbitration (Opn., p. 25; AA 2/275). But Shy never raised an argument below that this claim was the same as the Meieran Trust's breach of contract claim against LA ABC, nor did he even provide more than a passing reference to the breach of guaranty claim in his Court of Appeal brief. He cannot raise this argument now for the first time. (*Associated Builders & Contractors, Inc. v. San Francisco Airports Com.* (1999) 21 Cal.4th 352, 379, 381; Cal. Rules of Court, rule 8.500(c).)

In any event, Shy's attempt to equate this claim to the Meieran Trust's breach of contract claim against LA ABC utterly fails. The breach of contract claim against LA ABC was solely based on its failure to pay the purchase price under the Purchase Agreement—both the monetary amount and the physical space. (AA 4/947:14-15; see AA 2/296:14-15; *Greenspan I*, *supra*, 185 Cal.App.4th at p. 1430.) The Meieran Trust urged the arbitrator to find LADT also liable on the basis of its agreement to "take all actions and execute any agreements and other documents necessary *to effectuate the transactions contemplated by this Agreement, including, without limitation*, the transactions set forth in Section 1.04 and Section 4, as necessary," and the arbitrator did just that. (AA 2/552, emphasis added, 3/804:7-9; see AA 2/296:17-22.)

Shy's guaranty obligations, in contrast, were significantly narrower: "Barry Shy, individually, agrees to guarantee all the obligations of Purchaser *pursuant to Section 4*." (AA 2/552, emphasis added.) Section 4 involves only an indemnity against third-party claims. (AA 2/550-551.)[6]

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[6] In their rehearing petition in the Court of Appeal, petitioners claimed that the court erred in holding that Shy had not been sued for breach of contract, since "plaintiff sued Shy for breaching guarantee provisions of

(continued...)

2. The Court of Appeal did not mandate that Shy be added as a judgment debtor.

The trial court refused to add Shy as an additional judgment debtor solely on the basis of his participation in the arbitration. (See AA 6/1612 [trial court concluding there was no authority that allowed it "to amend a judgment by inserting the name of a person or entity who had been a defendant to the underlying action and who was found not liable in that action"].) In reversing, the Court of Appeal held that prior participation in litigation does not—standing alone and as a matter of law—*automatically* disqualify a party from being added as an alter ego through a section 187 motion. (See Opn., p. 2.)

The opinion's wording is crucial. The Court of Appeal did *not* find that Shy *must* be added as an alter ego as a matter of law, as Shy's petition implies. The court held only that "it would not *always* be inequitable to add as a judgment debtor a party who prevailed in an arbitration"; rather, as with any alter ego determination and any determination under section 187, liability "depend[s] on the facts of the case." (Opn., p. 2, emphasis added; see also Opn., pp. 20-23; *Zoran v. Chen* (2010) 185 Cal.App.4th 799, 811 [conditions under which alter ego liability is imposed necessarily vary according to the circumstances in each case].) The court then remanded for the trial court to weigh the facts under the correct legal standards. (Opn., pp. 39, 41-42.)

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[6] (...continued)
that agreement and then dismissed the claim just before the arbitration hearing." (Petition for Rehearing, p. 2.) But the Court of Appeal *did* acknowledge that claim. (Opn., pp. 5, 25.) It had no occasion to note the distinction between that claim and the claim against LADT because petitioners never raised the issue.

B. The Court Of Appeal Broke No New Ground—Its Ruling Applied The Principles That All Cases Endorse Under Section 187.

Shy says that "[a]t issue in this case is under what circumstances a final judgment may be amended by a postjudgment motion under Code of Civil Procedure section 187." (PFR 11.) But those "circumstances" are well settled, and nothing in this case suggests any reason for the Court to revisit them.

1. A party who, like Shy, participates in the underlying litigation is not automatically disqualified *as a matter of law* from being added as a judgment debtor through section 187; rather, each case must be taken on its facts.

In order to even present the legal issue Shy raises—whether a plaintiff should be precluded from bringing an alter ego claim through section 187 against a person who has been named in the underlying action and prevailed on other claims—Shy must concede the presence of substantial evidence that he is the alter ego of the judgment debtors. (See PFR 1.) Otherwise, the question he poses would be irrelevant, and there would be no further analysis.

In any event, a mere sampling of the alter ego facts presented (see SOF §§ A, C, *ante*) and confirmed by the Court of Appeal (Opn., pp. 22-23) demonstrate that the Meieran Trust may well be able to show that Shy is, in fact, the alter ego of the judgment debtors (see *Associated Vendors, Inc. v. Oakland Meat Co.* (1962) 210 Cal.App.2d 825, 838-840 [listing common alter ego factors]). No alter ego factor alone governs, but the trial court must weigh the evidence together, using the correct legal standards as directed on remand, and determine alter ego, finally viewing

the case through the correct lens. (Opn., pp. 39, 40-41.) This will include a factual determination of whether—despite Shy's participation in the underlying arbitration and no-liability on unrelated claims—it would be inequitable to allow him to run his enterprise in a manner aimed at depriving the Meieran Trust of the ability to enforce its judgment. (See *Automotriz etc. De California v. Resnick* (1957) 47 Cal.2d 792, 797 [it is inequitable for owners to "'set up such a flimsy organization to escape personal liability'" and "'financial responsibility to creditors'"].)

Section 187 has long been available to parties seeking to add additional judgment debtors postjudgment on the basis that they are alter egos of the original judgment debtors. (*Dow Jones Co. v. Avenel* (1984) 151 Cal.App.3d 144, 148-149; see also *Hall, Goodhue, Haisley & Barker, Inc. v. Marconi Conf. Center Bd.* (1996) 41 Cal.App.4th 1551, 1554-1555 (*Hall*) [section 187 applies to judgments confirming arbitration awards].) Courts describe this as "an equitable procedure" in which a court is "merely inserting the correct name of the real defendant." (*McClellan v. Northridge Park Townhome Owners Assn.* (2001) 89 Cal.App.4th 746, 752.)

Under the section 187 procedure, "the plaintiff does not sue to gain further relief, but merely to receive the relief granted in the first suit." (Comment, *Res Judicata and Collateral Estoppel Beneath the Corporate Veil* (1978) 66 Cal. L.Rev. 1093, 1100.) "Simply put, section 187 recognizes 'the inherent authority of a court to make its records speak the truth.'" (Opn., 19, quoting *Mirabito v. San Francisco Dairy Co.* (1935) 8 Cal.App.2d 54, 57.)

The only additional requirement for adding alter egos under section 187 is that the new judgment debtor must have been "virtually represented" in the underlying proceeding. (Opn., pp. 18-19, 27 ["section 187 mandates that at least one alter ego individual or entity be a

party to the earlier litigation"]; see also *McClellan*, *supra*, 89 Cal.App.4th at p. 752.) This requires "control" of the litigation, exercised "personally or through a representative," and is a function of whether the interests of the alter ego were sufficiently aligned with those of the judgment debtor that his actual representation would not have made a difference. (*NEC Electronics Inc. v. Hurt* (1989) 208 Cal.App.3d 772, 778-779; *Mirabito, supra*, 8 Cal.App.2d at p. 60.)

The Court of Appeal's actual holding—that Shy's prior participation in the litigation did not automatically disqualify him from being added as an alter-ego judgment debtor under section 187—does not depart from or conflict with these requirements, which the Court of Appeal unequivocally confirmed as being essential to adding an alter ego judgment debtor. (Opn., pp. 2, 16-19.) The Court of Appeal did nothing more than make clear that a party's participation in the underlying litigation is not, by itself, dispositive one way or the other on the question of whether he can later be added as the alter ego of another party/judgment debtor.

Additionally, the court reasoned that "Shy's status as a party to the arbitration furthered the purpose of section 187 by meeting the control and virtual representation requirements as to the proposed judgment debtors." (Opn., pp. 27-28.) "Shy's interests [at trial] were the same as those of his trust and companies; there were no relevant conflicts within the alleged single enterprise." (Opn., p. 19.)

As the Court of Appeal concluded, the Meieran Trust "had no practical reason or legal obligation to pursue Shy on an alter ego theory" until after the judgment debtor proceedings because "the discovery concerning alter ego issues, in the form of judgment debtor proceedings, occurred *after* the judgment was obtained." (Opn., pp. 27-28, emphasis in original.) Indeed, prior to filing its section 187 motion, the Meieran Trust

"had no reason to suspect the existence of an alter ego relationship among Shy" and his enterprise. (Opn., p. 28.) Therefore, it was not required to raise the issue during trial. (See *Allied Fire Protection v. Diede Const., Inc.* (2005) 127 Cal.App.4th 150, 155 [claim is not barred if new rights are acquired after the complaint is filed]; accord, Opn., pp. 24-25.)

The Meieran Trust properly sought to add Shy to the judgment after conducting judgment debtor examinations, because that was the point in time at which it discovered that, as a factual matter, Shy and his enterprise "were one and the same." (See *Tokio Marine & Fire Ins. Corp. v. Western Pacific Roofing Corp.* (1999) 75 Cal.App.4th 110, 116 (*Tokio Marine*); see also *Jogani v. Jogani* (2006) 141 Cal.App.4th 158, 172 [purpose of judgment debtor examinations is "to leave no stone unturned in the search for assets which might be used to satisfy the judgment," internal quotation marks and citation omitted].)

This is how courts have long determined liability under section 187 and the alter ego doctrine. The opinion did nothing to change the standard.

2. Shy's new materiality argument fails.

In his Court of Appeal brief, Shy argued that adding him as an alter ego would be inappropriate under section 187 because it would "undeniably effectuate a fundamental change *in the arbitration award*." (RB 16-17, emphasis added.) The Meieran Trust showed that *Hall*, *supra*, expressly holds that section 187 applies to judgments confirming arbitration awards because such judgments "'may be enforced like any other civil judgment.'" (ARB 9-10, quoting 41 Cal.App.4th at p. 1555.)

Once again, the petition urges a new argument, stating that "modifying the judgment to add Shy as a judgment debtor to a final judgment in which he previously had no liability will 'enlarge' the scope of the *judgment* and 'materially alter[]' Shy's rights with respect to that

judgment." (PFR 17, emphasis added, quoting *Rochin v. Pat Johnson Manufacturing Co.* (1998) 67 Cal.App.4th 1228, 1237; see PFR 19 [Shy arguing that the Court of Appeal's opinion improperly "expand(s) the scope of section 187"].)

Shy cannot make this argument for the first time in his petition. (See *Associated Builders & Contractors, Inc.*, *supra*, 21 Cal.4th at pp. 379, 381; Cal. Rules of Court, rule 8.500(c).) Beyond this, taken literally the argument runs counter to over 75 years of section 187 law, since adding an alter ego judgment debtor under *any* circumstances *necessarily* "enlarges" the scope of the judgment and "alters" *that* person's rights.

Section 187 has long contemplated that as part of the alter ego determination the trial court will consider and balance the equities. Applying the principles of section 187 conventionally, the Court of Appeal did nothing more than recognize that a party's participation in the underlying litigation is something the trial court must weigh in the balance, rather than relying on that fact to the exclusion of everything else. (Opn., pp. 2, 24-28.)

3. The petitioners attempt to create a conflict where none exists.

The petition argues that "an irreconcilable conflict has developed in the case law regarding the constraints—or lack thereof—on using section 187 posttrial motion procedure." (PFR 2-3.) But the petition identifies no such conflict as to any issue *in this case*. At most, it identifies a conflict that concerns an issue not present here: whether a court can grant a section 187 motion *without proof of alter ego*, as apparently occurred in *Carr v. Barnabey's Hotel Corp.* (1994) 23 Cal.App.4th 14 (*Carr*) and *In re Levander* (9th Cir. 1999) 180 F.3d 1114 (*Levander*). Here, as the Court of

Appeal recognized and as petitioners do not dispute, there was more than ample proof.

Shy doesn't cite any particular line of cases in the Court of Appeal. Rather, he relies on a few scattered quotations from unrelated cases to argue that "[s]ome Courts of Appeal have been cautious about adding new judgment debtors under the section 187 posttrial motion procedure," while other courts give the "greatest liberality" in adding judgment debtors through section 187. (PFR 3.) But the two cases that represent the supposedly "conservative" view addressed issues—the need for virtual representation, which implicates due process concerns and so-called "reverse piercing"—that have nothing to do with the issue Shy presents in his petition: The effect of prior participation on a section 187 motion.

In *Motores De Mexicali v. Superior Court* (1958) 51 Cal.2d 172, 174, the alleged alter egos "in no way participated in the defense of the [underlying] action." Here, Shy's participation provides exactly the element that *Motores* found missing. (The petition raises no such issue as to the other petitioners.)

In *Postal Instant Press, Inc. v. Kaswa Corp.* (2008) 162 Cal.App.4th 1510, 1518-1524, the court rejected a new application of existing doctrine for policy reasons that do not apply here. There, an individual transferred personal assets to a corporation to shield them from collection by a creditor; the court refused to allow outside reverse piercing, which would have allowed the creditor to go after the corporation. (*Id.* at p. 1523.) This may reflect a "conservative" view, but not in any way that implicates the present facts. As the Court of Appeal correctly noted, "[t]his case does not involve outside reverse piercing." (Opn., p. 24.)

The supposedly "liberal" wing likewise involves an issue not present here. *Carr*, *supra*, 23 Cal.App.4th 14, and *Levander*, *supra*, 180 F.3d 1114,

both stand for the proposition that a court may add third party judgment debtors even without alter ego proof if necessary to prevent "conduct that amounted to a fraud on the court" (*id.* at p. 1122). The petition correctly notes (PFR 16) that *Tokio Marine*, *supra*, 75 Cal.App.4th at p. 116, rejects *Carr* and *Levander* and holds that section 187 cannot be used to add judgment debtors who are not alter egos. But the present case provides no basis for addressing this conflict, because there is no such issue here: Not only did the Meieran Trust offer substantial—indeed, overwhelming—evidence of alter ego, but as explained above the petition necessarily assumes its presence. (See p. 16, *ante*.)

There accordingly is no relevant conflict at all, much less one so significant as to require this Court's intervention. The Court of Appeal's opinion did nothing more than reaffirm what was already settled: Section 187 alter-ego liability depends upon the facts of each case.

4. The Court of Appeal correctly held that preclusion principles do not bar the Meieran Trust's claims.

Shy has alternated between arguing that the preclusion doctrine (a) bars the Meieran Trust's alter ego claim against him, and (b) is irrelevant to the analysis. (Compare AA 3/679:9-680:1 [arguing the final judgment precludes the balance of the relief the Meieran Trust seeks under section 187] with RB 17 [preclusion is not the basis of Shy's argument on appeal] and PFR 19 [the "court's res judicata analysis is irrelevant"].)

But as the Court of Appeal recognized, preclusion principles provide the only principled basis upon which the trial court could have barred the alter ego claim against Shy *as a matter of law*. The court could not "think of a principled basis for the trial court's ruling other than some kind of equitable rule that, at a minimum, borrows concepts from res judicata or collateral estoppel." (Opn., p. 24.)

In reversing the trial court, the Court of Appeal concluded that "under res judicata and collateral estoppel, nothing precluded [the Meieran Trust] from conducting judgment debtor examinations of Shy and his companies or from seeking to add Shy as a judgment debtor under section 187 on an alter ego theory." (Opn., p. 27.) "That Shy was a party to the arbitration is beside the point. The arbitration award was against LA ABC and LADT on the breach of contract claim, as was the trial court's subsequent judgment. Shy was not a party to the contract claim and did not prevail on it." (*Ibid.*)

The situation might be different if the Meieran Trust had urged alter-ego liability for Shy in the arbitration, but that never happened. The Meieran Trust did not mention "alter ego" in the arbitration, much less argue that the doctrine applied; the arbitrator did not refer to the doctrine in the interim or final arbitration awards; and, in ruling on the Meieran Trust's section 187 motion, the trial court itself observed that the Meieran Trust "'apparently did not argue the alter ego theory at the arbitration,'" leading the Court of Appeal to conclude that "in denying the motion to amend, the trial court did not base its decision on the arbitrator's resolution of any alter ego allegations." (Opn., p. 26.)

Indeed, even if the Meieran Trust sued for *direct* liability under the Purchase Agreement for LA ABC's failure to pay the purchase price and had prevailed, that fact alone would not permit application of res judicata, because an alter ego finding is entirely distinct. (See *Brenelli Amedeo, S.P.A. v. Bakara Furniture, Inc.* (1994) 29 Cal.App.4th 1828, 1841 [under primary rights analysis postjudgment proceeding to enforce judgment against shareholders as alter egos not barred because "although both suits . . . involve(d) some of the same factual matters and concern(ed)

the same contractual obligation," the court held that "their purpose and outcome (we)re not the same"].)

As the Court of Appeal correctly observed, adding Shy "as a judgment debtor would not constitute a finding that he breached the companies' contract but would instead serve to remedy his alleged disregard of the companies' separate existence." (Opn., pp. 2-3; see *Allied Fire Protection v. Diede Const., Inc.*, *supra*, 127 Cal.App.4th at p. 155 [res judicata does not bar a claim that could have been litigated if new rights are acquired after the complaint is filed].) The court concluded that the Meieran Trust's section 187 motion was "simply a means of satisfying a judgment against the [entities in Shy's single enterprise] that ignored each other's separate existence in conducting business." (Opn., p. 27.)

There is nothing new or groundbreaking about this conclusion, and nothing that merits review.

II.

THE PETITION PRESENTS NO IMPORTANT QUESTION REGARDING THE PROCEDURE FOR ADDRESSING HEARSAY OBJECTIONS IN MOTION PROCEEDINGS.

In the Court of Appeal, petitioners relied on the trial-based rule that the proponent of evidence can waive its right to rely on a hearsay exception if it fails to raise the exception in response to the objection. (RB 44-45, citing *Shaw v. County of Santa Cruz* (2008) 170 Cal.App.4th 229, 282.) The Court of Appeal rejected this argument, holding that the rule "applies only to objections raised during a trial." (Opn., p. 38.) The court correctly analogized a section 187 motion to a summary judgment motion, finding no authority to suggest that in motion practice "*responses* to the objections must be made in the trial court to preserve them on appeal." (Opn., p. 39,

emphasis in original, citing Code Civ. Proc., § 437c; Cal. Rules of Court, rules 3.1352 & 3.1354; *Reid v. Google, Inc.*, *supra*, 50 Cal.4th at pp. 522-527.)

A. Petitioners Identify No Basis For Review.

Petitioners correctly state that "[t]here is no previous case law" on this issue. (PFR 20.) But it does not follow that there is any "inconsistency" or "confusion" in the law (PFR 4, 22) such that review is "necessary to secure uniformity of decision or to settle an important question of law" (Cal. Rules of Court, rule 8.500(b)(1)). Just the opposite: That the question has never arisen before likely means that neither trial nor appellate courts have needed any guidance on the matter.

Petitioners argue that under *Gruendl v. Oewel Partnership, Inc.* (1997) 55 Cal.App.4th 654, 660-661, a motion under section 187 by its "very nature" presents "questions of fact." (PFR 4, 21-22.) That's true, but petitioners don't explain why this matters. Many motions involve factual determinations, and hearsay objections and exceptions can arise in virtually any kind of motion. If fact-finding is the determinant, then petitioners are essentially asking the Court to create a regime in which every motion that triggers hearsay objections will require a double set of briefs, one to address substantive issues and another to argue evidentiary matters. It could even require lawyers, on pain of waiver, to insist on arguing evidentiary objections at motion hearings, reviving a problem that *Reid v. Google, Inc.*, *supra*, 50 Cal.4th 512 put to rest. (*Gruendl* itself involved no such issue. The question there was only whether the trial court was required, on timely request, to issue a statement of decision. (55 Cal.App.4th at p. 656.))

There is no reason for the Court to entertain such a notion. The Court of Appeal correctly recognized that the relevant distinction is not

between deciding questions of fact and questions of law, but rather between trials and motions.

At trial, it is reasonable to expect counsel to specify applicable hearsay exceptions, especially in front of a jury. The court must act quickly. It rarely has the ability to consider the issue in chambers, and so is entitled to counsel's on-the-spot guidance in order to resolve objections quickly. But motion practice is a wholly different animal. The court receives everything in advance, has no trial management concerns, and can consider objections in detail in the solitude of chambers.

B. Regardless Of The Governing Rule, The Court Of Appeal Correctly Reversed The Trial Court's Palpably Erroneous Ruling.

1. The trial court's ruling was an abuse of discretion on its face.

The Meieran Trust supported its section 187 motion with 39 exhibits (AA 1/35-2/564); the Shy parties raised a total of 80 objections to 30 of the exhibits (AA 4/1024-1033). Far from just sustaining objections to "several" of these exhibits (PFR 8), the trial court's one-sentence ruling excluded almost everything: "Shy Trusts's [*sic*] evidentiary objections are ruled on as follows: No. 28 is overruled; all others are sustained (1-27, 29)." (AA 6/1610.) The result was that the trial court found no evidence supporting alter ego, whereas the Court of Appeal recognized that there was overwhelming evidence.

The Court of Appeal observed that this was the type of "cryptic ruling" "condemned" in *Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 249-257 & fn. 7, because "it could not provide any meaningful basis for review" (Opn., p. 34, quoting *Nazir*, at p. 255). Apart from the trial court's legal errors, its one-sentence ruling left the Court of

Appeal with "no doubt about the disposition on appeal"; the prejudicial result was "patent." (Opn., pp. 39, 41.)

2. Even if the trial rule regarding hearsay exceptions did apply, here the proffered evidence fully satisfied the underlying rationale of that rule.

Even if petitioners were right about applying a trial rule to motion practice, the Court of Appeal's opinion makes clear why it would be inappropriate to apply such a rule here.

Everything before the trial court, including counsel declarations and briefing, made the applicable hearsay exceptions as obvious as they could possibly be. The declarations demonstrated that the vast majority of evidence consisted of Shy's testimony or documents produced by Shy during the course of arbitration. (AA 1/37-42, 44-46, 48-50.) This was also apparent on the face of many of the documents themselves. (See, e.g., AA 1/56, 75, 84, 252, 2/425, 496, 507.)

Everyone understood that Shy was a party to the arbitration and to the section 187 motion. The limited evidence that the trial court did admit clearly established that Shy was in control of the entire enterprise and was the only person authorized to speak on the entities' behalf. (See, e.g., AA 1/21:17-30:9, 3/705:11-14; Opn., pp. 26-28.) That was a more than adequate foundation for application of the party admission exception to the hearsay rule. In fact, the foundation was so strong that the exception was both obvious and irrefutable—on appeal, petitioners did not even try to argue otherwise.

The Meieran Trust also laid a sufficient foundation for the bank records obtained during judgment debtor examinations. It is clear on the face of these documents that they effectuated banking transactions, and the bank representatives established each requirement of the business records

exception to the hearsay rule. (See Evid. Code, §§ 1271, 1562.) For instance, the majority of these records were accompanied by a sworn declaration by a bank representative attesting that the documents were true and correct copies of records "prepared by personnel of Citibank N.A. and/or its affiliates and suppliers in the ordinary course of business at or near the time of the acts, conditions or events recorded." (AA 2/310.)

Accordingly, even though the Meieran Trust did not articulate the applicable exceptions to the hearsay rule, on the face of the evidence the exceptions were obvious and the objections meritless. It would be unreasonable to require a party, on pain of waiver, to tell the trial court something that any experienced trial judge should instantly recognize.

CONCLUSION

Nothing in the Court of Appeal's opinion provides any basis for review. The Court should deny the petition.

Dated: March 1, 2011

Respectfully submitted,

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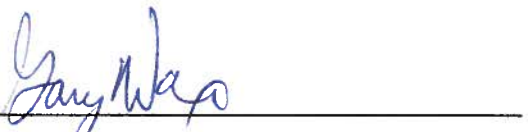
By 
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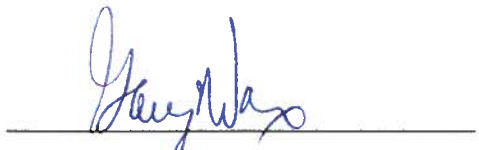
CERTIFICATION

Pursuant to California Rules of Court, rule 8.504(d)(1), I certify that this **ANSWER TO PETITION FOR REVIEW** contains **7,652** words, not including the tables of contents and authorities, the caption page, signature blocks, or this Certification page.

DATED: March 1, 2011



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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 5900 Wilshire Boulevard, 12th Floor, Los Angeles, California 90036.

On March 1, 2011, I served the foregoing document described as: **ANSWER TO PETITION FOR REVIEW** on the interested parties in this action by serving:

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(√) **By Envelope** - by placing () the original (√) a true copy thereof enclosed in sealed envelopes addressed as above and delivering such envelopes:

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Executed on **March 1, 2011**, at Los Angeles, California.

(√) (State) I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Leslie Juarez