C.A. Nos. 04-16911; 04-16973; 04-17272

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DUX CAPITAL MANAGEMENT, et al.,

Plaintiffs, Appellees, and Cross-Appellants,

vs.

PIERRE T.M. CHEN, et al.,

Defendants, Appellants, and Cross-Appellees.

Appeal From The United States District Court
For The Northern District Of California
Honorable William Alsup, Judge Presiding
United States District Court Case No. C 03-00540 WHA
Consolidated with No. C 03-00539 WHA (master file)

COMBINED APPELLANTS' REPLY BRIEF AND CROSS-APPELLEES' ANSWERING BRIEF

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APPELLANTS' REPLY BRIEF

ARGUMENT

I. TORT LIABILITY BASED SOLELY ON LONG LIFE'S DECISION TO FILE BANKRUPTCY—DIVORCED FROM THE FILING ITSELF—CONTRADICTS THE RECORD AND THE LAW.

A. Plaintiffs Cannot Disown The Record Or Their Theory Of The Case: That Defendants Caused Long Life To File For Bankruptcy In Bad Faith For Improper Motives.

Defendants' opening brief showed three independent reasons why plaintiffs cannot prevail on what are, at bottom, claims based on an allegedly improper bankruptcy filing: The claims are preempted, they are barred by res judicata, and in any event plaintiffs lack standing to assert them.

Plaintiffs' response is to say that the propriety of the bankruptcy filing really has nothing to do with their claims. All that matters, they say, is the May 3, 2001 *decision* to file for bankruptcy. In their view, that was an entirely distinct act that caused its own separate damages, independent of the implementation of that decision by the actual filing of the bankruptcy petition. (*See, e.g.,* Combined Answering Brief and Cross-Opening Brief ("AB") 44 ("the breach of duty or tort in controversy was not dependent on the filing of a bankruptcy").)[1] Plaintiffs even go so far as to concede that the bankruptcy filing itself was in good faith—they "do not challenge the *bona fides* of the [Long Life] petition or the 'good faith' of its filing, within the meaning of bankruptcy law." (AB 49.)

It is easy to see why plaintiffs take this position—they have no choice. If, as defendants contend, bad faith in Long Life's bankruptcy filing is an integral part of plaintiffs' claims, then all three of defendants' arguments are ineluctably correct. Indeed, plaintiffs do not seriously argue otherwise. Instead, they seek to unhook the decision to file bankruptcy from the act of filing, in an effort to escape these arguments by founding their claims for relief on the decision alone.

But this isn't the theory on which plaintiffs tried the case or on which the jury decided the case, and it contradicts both common law and common sense. The decision and the filing are conceptually and legally inseparable. That is why plaintiffs' concession that the bankruptcy filing was proper is, standing alone, a sufficient basis for reversal on both preemption and res judicata grounds.

Plaintiffs' theory of the case was, and still is, that Long Life was injured by a bankruptcy *scheme* that defendants "executed . . . in stages." (AB 5;

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[1] *See also* AB 20 (loss should be measured by the difference between value of stock before the decision and after the decision "but before the filing of the petition"); AB 22 (plaintiffs' claims were based on the decision to file bankruptcy, as distinguished from the implementation of that decision).

Supplemental Excerpts of Record ("SER") 64 (complaint describes actionable conduct as "wrongful plan to put Long Life into bankruptcy"); SER 72-73 (complaint alleges that voting to file bankruptcy was "part of defendants' wrongful acts to seize control of Long Life").)[2] According to plaintiffs, Long Life was thrust into bankruptcy in bad faith and for an improper purpose as part of a scheme to "squeeze the minority out for zero value." (AB 30 (quoting district court's characterization).)

Plaintiffs' new vision of their case is a radical departure from the record. In the district court, there was no question but that the claimed impropriety *of the bankruptcy filing* was central to their claims. The examples are legion:

The Complaint. Plaintiffs' complaint is rife with allegations that defendants engaged in a bankruptcy scheme designed to eliminate plaintiffs' interest in Long Life. (Excerpts of Record ("ER") 13 (bankruptcy initiated for the improper purpose of "depriv[ing] [Dux] of the value of [its] interest[] in Long Life); ER 18 (defendants voted to put Long Life "into an unwarranted *bankruptcy proceeding orchestrated to benefit [defendants]*"); SER 64 (defendants "executed

[2] In their supplemental excerpts of record, plaintiffs cite the complaint in Civil Case No. 03-540. Civil Case No. 03-539, however, was designated the master file for this consolidated action. (SER 12.) Thus, defendants included the complaint in Civil Case No. 03-539 in their excerpts of record. The complaints are virtually identical. Moreover, both make it clear that plaintiffs' claims were, and still are, that defendants engaged in a bankruptcy *scheme*, in which they commenced bankruptcy in bad faith for an improper purpose.

a wrongful plan *to put Long Life into bankruptcy*”); SER 109 (“voting to file” bankruptcy was carried out “in bad faith” as “*part* of defendants’ wrongful acts to seize control of Long Life”); SER 97, 109 (final stage of scheme consisted of the intertwined acts of deciding to file bankruptcy, filing bankruptcy, and engaging in bad conduct during bankruptcy) (all emphasis added).)

The Final Pretrial Order. The final pretrial order stated plaintiffs’ claims to be that the “Yageo directors” proceeded “with the plan to achieve complete ownership of [Long Life], *a plan which involved putting the company into bankruptcy* to eliminate the financial interests of the minority shareholders.” (ER 157; *see also* ER 158 (“The Yageo directors of [Long Life], *in order to bring to completion the scheme to freeze out the minority shareholders*, and in complete disregard of their fiduciary duty to the corporation and the minority shareholders, ignored the demands of Dux, and *immediately filed a voluntary Chapter 11 bankruptcy*”) (all emphasis added).) It further stated plaintiffs’ theory of the case—that “*[t]he result of [the] bankruptcy* was that . . . the minority shareholder interests were eliminated, and [Long Life] was denied the opportunity to achieve the goals set forth in its business plan.” (ER 158 (emphasis added).)

Plaintiffs’ Opening Statement. Plaintiffs told the jury that defendants had engaged in a successful scheme to deprive plaintiffs of any value to their shares by cancelling the shares in bankruptcy. (*See* ER 170 (pursuing bankruptcy was part of a master plan to steal the company, and the only way to steal the company without paying others for shares was to "*put the company into bankruptcy*") (emphasis added); Appellants' Supplemental Excerpts of Record ("ASER") 8 ("They voted to put the company into bankruptcy. The bankruptcy filing was on May 9, 2001. *The result of that bankruptcy* was that . . . all the minority shareholders, all shareholders lost their share interest in the company") (emphasis added).)

Plaintiffs' Closing Argument. Plaintiffs told the jury that "[we] are coming in here and saying these people deliberately undertook *an action to freeze out the minority shareholders* of this company and steal the company for themselves, and *put it into bankruptcy* so they could come out on the other end owning it." (ASER 13 (emphasis added).)

Jury Instructions. The key jury instruction on liability also drew no distinction between decision and act. Rather, it treated them as components of a single course of conduct, describing the liability-triggering event as both the "decision to commence bankruptcy" and the "commence[ment] of bankruptcy":

> Liability in this case depends, in the first instance, upon whether the board's *decision to commence bankruptcy* proceedings was improper. If you find that it was *proper to commence bankruptcy*, then all claims against all defendants must fail.

(ER 229 (emphasis added).)[3]

The Jury's Findings. The jury found that it was the bankruptcy itself that caused damages. (ER 232-34, 254-55 (share value remained at $2 a share before and after decision to file bankruptcy, but was reduced to nothing in bankruptcy); *see* AOB 56-59.)

Plaintiffs' Answering Brief. Even in their answering brief, plaintiffs cannot avoid referring to their claims as a "scheme" consisting of interrelated components—including the decision to file *and its implementation*, with the latter resulting in the harm. (AB 5-6 (stating that complaint alleged a "complex scheme" that was "executed . . . in stages"); AB 6 (as part of the scheme, "Defendants decided to end the company's operations. They did so by taking [Long Life] into bankruptcy. In the bankruptcy, Equity Plus secured ownership of all productive assets of [Long Life]. The result was that [Long Life's] considerable value as a going concern and the holdings of its minority shareholders were destroyed").)

Related Proceedings. In related proceedings, plaintiffs represented that the decision to file was part of a "scheme" and that *it was the bankruptcy itself* that

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[3] The centerpiece of this instruction was unequivocal. It told the jury that if Long Life properly commenced bankruptcy, "then *all claims* against all defendants *must fail*." (ER 229 (emphasis added).) Thus, regardless of plaintiffs' attempt to sever the decision from the filing by conceding that the filing was in good faith, the jury must have found that it was *not* in good faith—and that finding was indispensable to the verdict.

"rendered worthless the stock in [Long Life]." (Plaintiffs' Request for Judicial Notice, filed herein on April 7, 2005 ("RJN") 55 (pleading filed in George Chen's bankruptcy in attempt to force Chen or his trustee to ratify); ER 37-39 (pleading filed in Long Life's bankruptcy arguing that scheme began before filing *and continued after it*; alleging that "[t]he Debtor and Rextron are making a mockery of the Chapter 11 process").)

Throughout this and other litigation, plaintiffs have repeatedly said that it was the bankruptcy filing—not the isolated decision to file—that caused their claimed injury. But even if there were some basis in the record for plaintiffs' about-face, defendants now demonstrate that the law does not permit the result they seek.

B. The Law Does Not Support Plaintiffs' Effort To Unhook The Decision To File Bankruptcy From The Filing Itself.

Beyond how plaintiffs tried the case and how the jury was instructed, the decision to file and the act of filing are inseparable because of the very nature of plaintiffs' claims. On the record in this case, there is no logical or legal way to separate them.

1. **The decision-making process leading to bankruptcy is central to the bankruptcy court's evaluation of the good faith of a bankruptcy filing.**

As defendants established in the opening brief, good faith is a requirement of all bankruptcies, and the scope of the good faith inquiry extends to the motives and pre-petition conduct of the debtor and its agents. *See, e.g., In re Sal Caruso Cheese, Inc.*, 107 B.R. 808 (Bankr. N.D.N.Y. 1989) (finding bad faith based, in part, on director's pre-petition breach of fiduciary duties); *In re Arnold*, 806 F.2d 937 (9th Cir. 1986) (good faith examination includes assessing debtor's motives); *In re The Bal Harbour Club, Inc.*, 316 F.3d 1192, 1194 (11th Cir. 2003) (affirming dismissal of bankruptcy petition based on pre-petition conduct, which included usurping control of board in order to commence bankruptcy). (AOB 25-26.)

Indeed, a bankruptcy court must dismiss, for cause, a petition filed for an improper purpose. *See In re City of Desert Hot Springs*, 339 F.3d 782, 792 (9th Cir. 2003) ("Good faith . . . is a requirement of all bankruptcies and without it a bankruptcy is to be dismissed for 'cause'").

Improper motives and purposes do not exist in a vacuum. Their sphere of operation is *the making of the decision to file*. If Long Life's filing was in good faith, then the decision to file—the manifestation in conduct of defendants' motive and purpose—must also have been proper.

The filing here was in good faith. Apart from plaintiffs' concession that this was the case (AB 49), the fact that the bankruptcy court allowed the case to proceed required such a finding, whether or not explicit. Plaintiffs are essentially trying to show that the bad faith that they claim was behind defendants' *decision* to file was somehow purged on the way to the bankruptcy court. It can't be done.

2. The good-faith inquiry is also designed to protect against "bankruptcy schemes" like the one plaintiffs allege.

Under the Code, bankruptcy courts have the power to "ensure that a petitioner [does] not use [bankruptcy] as 'part and parcel of a scheme'" to use the process for an improper purpose. *In re Northwest Recreational Activities, Inc.*, 4 B.R. 36, 39 (Bankr. Ga. 1980) (citing *Shapiro v. Wilgus*, 287 U.S. 348, 355, 53 S. Ct. 142, 144, 77 L. Ed. 355 (1932)); accord *In re Nancant, Inc.*, 8 B.R. 1005, 1007 (Bankr. Mass. 1981). The good-faith inquiry is the shield with which the bankruptcy court protects its "jurisdictional integrity" "from schemes of improper petitioners seeking to circumvent jurisdictional restrictions and from petitioners with demonstrable frivolous purposes absent any economic reality." *In re Northwest Recreational Activities, Inc.*, 4 B.R. at 39.

Plaintiffs allege a "bankruptcy scheme" designed to accomplish an improper purpose—in other words, an abuse of the bankruptcy process. (RJN 56; § I.A., *supra*.) That allegation is meaningless if the decision is divorced from the act, because only a wrongfully-motivated decision could transform an otherwise ordinary filing into a wrongful scheme.

3. In other contexts, California courts have made it clear that a wrongfully-motivated decision, standing alone, cannot give rise to civil liability.

Plaintiffs' attempt to sever the decision to file bankruptcy from its implementation is analogous to an attempt to sever the agreement to do a wrongful act from the wrongful act itself for purposes of a civil conspiracy claim. In that context, no liability flows from the agreement behind a contemplated wrongful act, unless and until the wrongful act is committed and damages result. *See, e.g.*, *Applied Equip. Corp. v. Litton Saudi Arabia Ltd.*, 7 Cal. 4th 503, 511, 28 Cal. Rptr. 2d 475 (1994) ("'A bare agreement among two or more persons to harm a third person cannot injure the latter unless and until acts are actually performed pursuant to the agreement. Therefore, it is the acts done and not the conspiracy to do them which should be regarded as the essence of the civil action.'") Completing the analogy, there could be no cause of action based solely on the decision to wrongfully file bankruptcy in the absence of the actual filing of the bankruptcy. It is the completion of the scheme by the bankruptcy filing, not the agreement to do it, that is the essence of any possible claim. *Cf. Lyons v. Sec. Pac. Nat'l Bank*, 40 Cal. App. 4th 1001, 1018-20, 48 Cal. Rptr. 2d 174 (1995) (no liability for conspiracy where the contemplated act is adjudged valid and legally permissible—even if there are damages and even if the motivation behind the act was malicious).

Similarly, in the context of wrongful termination, the California Supreme Court has foreclosed any claim that the decision behind the actionable harm can be a separate tort. In *Romano v. Rockwell Int'l, Inc.*, 14 Cal. 4th 479, 59 Cal. Rptr. 2d 20 (1996) (discussed in the opening brief at 62-63), an employee was threatened with termination six months before his employer actually fired him. The employer argued that the employee's claim accrued on the date it decided to fire him. The Court disagreed, holding that the claim accrued on the date of the actual termination, not the date the employer decided it would take some action in the future. *Id*. at 502-03.

The reason for this is plain. No injury occurs unless and until some event occurs to convert the possibility of harm, only latent in the decision, into a certainty. (*See* AOB 55-56; *see* § IV, *infra*.)[4]

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The answering brief's pervasive effort to reinvent plaintiffs' case by attempting to unhook decision from act is a palpable acknowledgment that the

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[4] Consistent with this notion, the jury found that Long Life's shares maintained their value until the petition was filed; it was the bankruptcy that extinguished share value, not the decision to file. (*See* AOB 55-59; *see*§ IV, *infra*.)

judgment cannot otherwise stand. But neither the record nor the law permits such a result. Accordingly, plaintiffs' claim for breach of fiduciary duty must fail under either a preemption, res judicata, or standing analysis. As defendants now demonstrate, no argument plaintiffs offer on any of these issues can forestall the inevitable—that judgment in plaintiffs' favor must be reversed.

II. FEDERAL BANKRUPTCY LAW PREEMPTS PLAINTIFFS' STATE LAW TORT CLAIMS.

Relying on a host of unequivocal authorities in this Circuit and elsewhere, defendants have demonstrated that the Bankruptcy Code preempts state law claims challenging the good faith of a decision to file for bankruptcy. (AOB 21-43.) Relegating their substantive argument against preemption to a few pages at the end of their answering brief, plaintiffs fail to grapple with these authorities in any meaningful way. Instead, they contend that preemption does not apply because (1) their claim is really about the "process of decision-making," which is a state-law issue that does not conflict with the Bankruptcy Code; (2) the species of preemption here is one of "choice of law" that defendants waived; and (3) the trustee's assignment to them saves their claims from preemption. None of these arguments has merit.[5]

A. Because The Subject Matter Of Plaintiffs' Claim—The Decision To File Bankruptcy—Is Exactly What Bankruptcy Courts Must Address At The Threshold, It Lies Exclusively Within The Jurisdiction Of The Bankruptcy Courts.

Plaintiffs contend that bankruptcy as a means of shutting down Long Life was only "incidental to the gravamen" of their tort for breach of fiduciary duty. (AB 45.) The gravamen, they claim, invokes state laws that "address the process of decision making." (AB 48.)

This argument relies on a metaphysical line between decision and act that defendants have already shown cannot be drawn in the real world. This Court's key decisions on this subject, which plaintiffs all but ignore, confirm that plaintiffs are wrong. Under *MSR Exploration, Ltd. v. Meridian Oil, Inc.*, 74 F.3d 910 (9th Cir. 1996) and *Gonzales v. Park*, 830 F.2d 1033 (9th Cir. 1987), what plaintiffs describe as a separate claim under state law is fundamental to the

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[5] For purposes of the following arguments, defendants assume that, as shown above, the decision to file bankruptcy cannot be viewed in isolation from the actual filing—the two cannot be unhooked as plaintiffs seek to do. But a contrary conclusion does not eliminate preemption. On that issue—that is, whether a claim based solely on the decision is preempted—defendants join the arguments in cross-appellee Rextron's separate answering brief.

good-faith inquiry that bankruptcy judges must implicitly or explicitly perform before allowing bankruptcy to proceed. Plaintiffs' claim must therefore be preempted to avoid "subvert[ing] the exclusive jurisdiction of federal courts by allowing state courts to create their own standards as to when a person may properly seek relief [in bankruptcy]." *Gonzales*, 830 F.2d at 1035; *see also Choy v. Redland Ins. Co.*, 103 Cal. App. 4th 789, 801, 127 Cal. Rptr. 2d 94 (2002) (rejecting claim that would require trial court to adjudicate whether decision to file for bankruptcy was in bad faith). (AOB 30-36.)

In response to the overwhelming authority that irrefutably precludes using a state-court action to attack the motives behind a bankruptcy filing, the best plaintiffs can come up with is an imperfect analogy to a fire sale. They argue that if defendants had sold Long Life's assets to Equity Plus outside of bankruptcy at the same "fire-sale" price Equity Plus supposedly paid in bankruptcy, plaintiffs would have a claim for breach of fiduciary duty under state law, and so they should have one here too. (AB 45.) But defendants *did* file for bankruptcy. The fact that they chose bankruptcy as the means to an allegedly improper end is determinative on the issue whether plaintiffs can argue claims under state tort law. They cannot.[6]

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[6] Plaintiffs' point that defendants could have sold the assets for the same "fire-sale" price achieved in bankruptcy only confirms that it was the filing of bankruptcy that caused the alleged damages—the loss flowed from the "sale," not the decision to sell.

B. Plaintiffs' Contention That Defendants Waived Preemption Does Not Withstand Scrutiny.

Because preemption is a question of subject matter jurisdiction, it may be raised at any time, even on appeal. *MSR Exploration*, 74 F.3d at 911; *Johnson v. Armored Transp. of CA, Inc.*, 813 F.2d 1041, 1043 (9th Cir. 1987).[7] (*See* AOB 38.) Nonetheless, plaintiffs attempt to avoid preemption by arguing waiver. (AB 45-46.)

1. Plaintiffs invoke the rule that "a preemption argument that affects the choice of forum rather than the choice of law is not waivable." *Gilchrist v. Jim Slemons Imports, Inc.*, 803 F.2d 1488, 1497 (9th Cir. 1986), citing *International Longshoreman's Ass'n. v. Davis*, 476 U.S. 380, 381-90, 106 S. Ct. 1904, 1907-12, 90 L. Ed. 2d 389 (1966); AB 45. They then contend, without any attempt to demonstrate why, that this case falls within the choice-of-law species of preemption and that defendants waived the issue by failing to timely raise it. (AB 45-47.) Not so.

For one thing, while plaintiffs assume preemption was not raised during trial, in fact it was. Counsel argued, following the close of evidence and prior to

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[7] Plaintiffs try to distinguish *Johnson* because it did not involve bankruptcy. (AB 46.) They miss the point for which defendants cited *Johnson*—that when preemption implicates subject matter jurisdiction, it may be raised at any time, *regardless* of the statutory scheme at issue.

closing argument, that the bankruptcy court was the only forum with jurisdiction over this case. (ASER 11-12.) For another, this case is all about forum—the exclusive jurisdiction *of the bankruptcy court* to determine whether a filing is in good faith and whether the bankruptcy process is being abused. *See Gonzales*, 830 F.2d at 1036 (state court judgment finding abuse of process properly set aside by the bankruptcy court); *see MSR Exploration*, 74 F.3d at 916 (the proper choice of forum for matters touching bankruptcy petitions is "the bankruptcy court itself"). (*See* AOB 23-24.)

2. Plaintiffs claim that there are no cases "where a preemption by the Bankruptcy Code was raised untimely but was nonetheless upheld because it went to subject matter jurisdiction." (AB 46.) But why would there be? Since a party can raise subject matter jurisdiction and so-called "choice of forum" preemption at any time, there is no issue of timeliness for which a party would need to urge an exception.[8]

3. Plaintiffs complain that it would be unfair to preempt their claim because if defendants had raised the issue earlier, plaintiffs could have re-framed

[8] In *Gonzales v. Parks,* 830 F.2d 1033, the issue of preemption apparently arose for the first time on appeal since the debtors had defaulted in the state court action and the bankruptcy court had vacated the judgment against them on a different ground. This Court resolved the issue without seeing the need to discuss timeliness, obviously because there is no timeliness issue with respect to jurisdictional questions.

their case to "eliminate the preemption bar." (AB 46-47.) But artful pleading cannot defeat the inevitable. A court either has jurisdiction or it does not. Here, it does not.

C. The Assignment Cannot Save Plaintiffs' Claims, Which Arise Under The Code And Are Preempted As A Matter Of Law.

In an apparent attempt to distinguish the subject matter of their tort claim from the subject matter of Long Life's bankruptcy and thereby avoid preemption, plaintiffs insist that the bankruptcy court carved out and approved the assignment of all claims arising pre-petition. (AB 49.) In their view, "the bankruptcy court's action ended the exclusive jurisdiction of that court over an asset of the estate," namely plaintiffs' claim for breach of fiduciary duty. (*Id*.)

This is not the law. Approved or not, an assignment cannot confer subject matter jurisdiction on the district court in contravention of Congress' intent to grant the bankruptcy courts exclusive jurisdiction over claims challenging the decision to file for bankruptcy. *Ins. Corp. of Ireland, Ltd. v. Compagnie Des Bauxites De Guinee*, 456 U.S. 694, 701-02, 102 S. Ct. 2099, 2103-04, 72 L. Ed. 2d 492 (1982) ("no action of the parties can confer subject-matter jurisdiction upon a federal court"). (*See* AOB 39-41.) That the assignment attempted to limit potential claims to pre-petition conduct does not mean that *all* pre-petition conduct was fair game; under the law, bad faith conduct underlying the filing of a petition may only be urged in bankruptcy. In the end, the assignment was like a quitclaim—plaintiffs got whatever was there. That turned out to be nothing. (AOB 41.)

Plaintiffs respond to the quitclaim analogy by contending that "[t]he fact that the assignment did not guarantee the validity of the claims assigned is hardly evidence that the claims were preempted or were otherwise invalid." (AB 49.) This inversion of defendants' argument misses the point. It is not that the lack of a guarantee of validity establishes preemption; rather, it is that one cannot defeat preemption and create subject matter jurisdiction simply by assigning away a claim that, as a matter of law, must be resolved in bankruptcy. (AOB 39-41.) Just as a quitclaim deed to real property from someone who holds no title confers no title on the grantee, so here the assignment of a claim from a trustee who had no power to make the assignment conveyed no claim to the assignee.

Nor do plaintiffs attempt to rebut defendants' explication of the assignment's critical terms, which further undercut plaintiffs' attempt to rely on it. The assignment states that it *does not include* claims "arising under the Bankruptcy Code." (ER 99; *see* AOB 40.) Since plaintiffs' claims directly implicate 11 U.S.C. § 1112(b) and the prerequisite good-faith inquiry, they necessarily arise "under the Bankruptcy Code." Not only could they not legally be assigned for the purpose of litigating them in a forum other than the bankruptcy court, but in addition the trustee *did not in fact assign them*.[9]

III. RES JUDICATA BARS PLAINTIFFS' CLAIMS.

In their opening brief, defendants established that the order confirming Long Life's reorganization bars plaintiffs' claims for breach of fiduciary duty under the doctrine of res judicata. (AOB 44-54.) Plaintiffs attempt to circumvent the operation of res judicata by arguing that (1) the res judicata defense is itself barred by res judicata, (2) res judicata does not apply because their damages judgment does not impact the enforcement of the reorganization plan, and (3) the reservation and assignment of their breach of fiduciary duty claim removes the preclusive effect of the confirmation order. (AB 37.) None of these arguments saves the judgment from the operation of res judicata.

A. Defendants' Failure To Appeal The Order Approving The Assignment Is Irrelevant To The Question Of Whether The Assignment Included Plaintiffs' Claims.

Plaintiffs argue that any challenge to the assignment of claims could only be made by an appeal of the bankruptcy order approving the assignment, so the order

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[9] *See also* § III.C., *infra*, which further discusses the assignment in the context of defendants' res judicata argument.

itself presents a res judicata bar to defendants' res judicata argument. (AB 37.) This begs the question of whether plaintiffs' claims were, in fact, assigned. Defendants have shown that no such assignment could be made as a matter of law and that, in any event, the claims were excluded by the express language of the assignment. (*See* AOB 39-41; § II.C., *supra*.) Defendants therefore do not, and need not, challenge the validity of the assignment instrument. Rather, the dispute is over what the assignment accomplished. That being the case, the fact that the bankruptcy court approved the assignment is irrelevant, as is the fact that defendants did not appeal the order.

B. Plaintiffs' Claims Pertain Directly To The Reorganization Plan, So The Order Confirming The Plan Is Res Judicata.

Plaintiffs dispute the application of res judicata on the basis that their claims do not pertain to the reorganization plan and so their judgment does not "impair, destroy, challenge, or invalidate the enforceability of or effectiveness" of the reorganization plan. (AB 38-39.) Plaintiffs once again rely on a false distinction between the decision to file bankruptcy and the implementation of that decision: They argue that their claims do not pertain to the plan, but rather "to state-law breaches of fiduciary duty that culminated in an improper corporate board decision." (AB 39.) But the culmination of defendants' alleged conduct was *not* the "corporate board decision." It was the actual filing—which, if plaintiffs' breach-of-duty claims had any merit, would have been improper and in bad faith.

The argument that plaintiffs' claims do not pertain to the plan must be rejected for additional reasons. *First*, assuming arguendo plaintiffs' claims had merit, they were assets of Long Life's bankruptcy estate. See 11 U.S.C. § 541(a). The plan provided for the administration of its assets and their distribution to creditors (ER 60); thus the claims should have been disclosed to creditors and provided for in the plan. *Second*, the plan provided for the allowance of claims against Long Life by defendants Rextron and Equity Plus. (ER 56, 59-60.) Any counterclaims should have been asserted as offsets at the time the plan was confirmed. In short, plaintiffs' breach-of-fiduciary-duty claims, if meritorious, "pertain to the plan" by the very nature and function of a reorganization plan.

The situation here is indistinguishable from that in *Kelly v. South Bay Bank (In re Kelley)*, 199 B.R. 698 (B.A.P. 9th Cir. 1996), where the debtors' plan provided for a bank's claim, as the Long Life plan provided for Equity Plus and Rextron's claims. After confirmation, the debtors objected to the bank's claim. The bankruptcy court denied the objection on res judicata grounds, and the Ninth Circuit Bankruptcy Appellate Panel affirmed on the same grounds: failure to raise their counterclaim prior to confirmation was res judicata, notwithstanding a general reservation of rights. *Id.* at 704.

So here, because the trustee could have brought a claim or counterclaim for breach of fiduciary duty but did not, any such claim is merged in the confirmation order. (See AOB 46-49.) An attempt to assert such a claim as a separate state-law tort is by definition a collateral attack on—and therefore "pertains to"—the reorganization plan and the order confirming it, and is barred by res judicata.

C. The Bankruptcy Process Did Not Preserve Plaintiffs' Claims For Litigation Outside That Process.

Defendants showed in their opening brief why neither the confirmed plan nor the assignment can save the claims from the preclusive effect of res judicata. (AOB 51-54.) Plaintiffs respond by contending that a blanket reservation in a bankruptcy plan is enough to preserve a claim from preclusion. (AB 40.) They also point to other so-called "indicia" to support this conclusion. (AB 42-44.) Their contentions fail.

1. A general reservation, without some specificity, cannot defeat res judicata.

Specificity in a reservation of rights clause is essential to save a claim from res judicata. (AOB 51.) The opening brief did not address the degree of specificity required because there is no such issue here—the confirmation order is devoid of *any* specificity. It contains only a blanket reservation: "All claims, defenses, causes of action, and objections to claims are reserved. . . ." (ER 81.) Under the principles outlined in *D & K Properties Crystal Lake v. Mutual Life Ins. Co.*, 112 F.3d 257, 261 (7th Cir. 1997) and *In re Kelley*, 199 B.R. at 704, the reservation here is inadequate to defeat the operation of res judicata. (AOB 51-53.)

Plaintiffs point to a line of cases purportedly rejecting the specificity requirement established in *In re Kelly* and *D & K*. (AB 40-41.) That is not what these cases hold—they do not eliminate the specificity requirement, but rather apply it to the facts of the case at hand. The question in these cases is not whether the reservation is general or specific, but rather whether it is specific enough.

For instance, in *Alary Corp. v. Sims* (*In re Assoc. Vintage Group, Inc.*), 283 B.R. 549 (B.A.P. 9th Cir. 2002), the confirmation order reserved all "'claims, defenses, powers and interests'" of the debtor "'for the purposes of objecting to the allowance of claims'" and "avoiding transfers of property or interests in property." *Id.* at 553. Rejecting a creditor's argument that the order was not "sufficiently specific in its reservation of rights," the court stated that "[a] plan, as here, may provide that *particular causes of action, or categories of causes of action*," may be preserved depending on the facts and circumstances of the case. *Id*. at 563-64 (emphasis added). Because the language of the reservation expressly reserved *types* of claims—avoidance actions and claims under 11 U.S.C. § 502(d)—the court concluded that the language was specific enough to escape preclusion. *Id.* And far from rejecting *Kelly*, as plaintiffs claim (AB 40), the opinion goes out of its way to indicate that *In re Kelley* "square[s] with the principles of res judicata stated in the [*Restatement*]." *In re Assoc. Vintage Group*, 283 B.R. at 554, 561.

None of the other cases plaintiffs cite stands for the proposition that a general reservation—without any specificity at all—is enough to save a claim from preclusion. Rather, they too support the proposition that a reservation must identify with *some* specificity what claims it intends to preserve. *See*, *e.g.*, *Fleet Nat'l Bank v. Gray* (*In re Bankvest Capital Corp.*), 375 F.3d 51, 59 (1st Cir. 2004) (specificity sufficient where plan retained claims of a given type or category); *P.A. Bergner & Co. v. Bank One, Milwaukee, N.A.*, 140 F.3d 1111 (7th Cir. 1998) (explaining that specificity means that "plans unequivocally retain claims *of a given type*," not that every single claim be listed (emphasis added)); *Cohen v. TIC Fin. Sys.* (*In re Ampace Corporation*), 279 B.R. 145, 160-61 (D. Del. 2002) (holding that reservation "indicating the *type* or category of claims to be preserved should be sufficiently specific"); *In re I. Appel Corp.*, 300 B.R. 564, 568 (S.D.N.Y. 2003) (adopting holding in *In re Ampace*, 279 B.R. at 160-61). Some of the cases do distinguish the reservation language at issue in *D & K* and *In re Kelley*—as, for instance, involving "provisions of a far more general nature," *In re Bankvest Capital Corp.*, 375 F.3d at 59—but they do not reject the notion that some specificity is necessary.

Here, the reservation states that "[a]ll claims, defenses, causes of action, and objections to claims are reserved for the benefit of the estate and may be asserted by the Disbursing Agent." (ER 81.) It is hard to imagine more general language. It contains no indication of what type or category of claims it intends to reserve. It casts such a broad net as to be virtually meaningless—it might just as well have simply said "everything." The language does not pass muster even under *In re Assoc. Vintage Group* and the other cases plaintiffs cite, which require at least some specificity.

2. "Retained Claims," as defined in the confirmation order, does not include plaintiffs' claims.

Under the confirmation plan, claims Long Life possessed as of the date the bankruptcy petition was filed are "Retained Claims" that are not "waived or relinquished under the Plan or by virtue of its Confirmation." (ER 62.) Plaintiffs contend that their corporate governance claims accrued on May 3—i.e., before the filing date—and that they were therefore "retained" claims under the language of the plan and cannot be affected by res judicata. (AB 42; ER 57 (plan defines Retained Claims as including "all claims that Debtor had as of the filing date").)

To begin with, what claims were *retained* by the trustee has no bearing on what claims were *assigned* to plaintiffs. Plaintiffs' assigned claims are defined by the terms of the assignment, not the confirmation plan. The assignment specifically excluded claims arising under the Code and claims that could not be assigned as a matter of law. (ER 99-104.) Plaintiffs' claims come under both these exclusions. (AOB 53-54.)

In any event, the retained claims cannot possibly include attacks on the propriety of the bankruptcy filing itself. Otherwise, even though the good-faith prerequisite was satisfied and the plan confirmed, a party could nonetheless bring a subsequent suit alleging that the bankruptcy was initiated in bad faith. That would be a collateral attack on the good faith determination of the bankruptcy court and as a matter of law impermissible. And, as a matter of logic, it cannot be that a confirmed plan carries the means of its own destruction through the mechanism of a "Retained Claim" that allows a later attack on the good faith of a bankruptcy.[10]

Moreover, to allow a claim based on the propriety of the bankruptcy filing is inconsistent with what occurred here. A trustee has the duty to report on various issues, including "mismanagement," and also to report "cause[s] of action available to the estate." 11 U.S.C. § 1106. Here, the trustee reported that the bankruptcy was in the best interests of the parties. (ER 95.) Nowhere in his report did he suggest there might be a cause of action challenging the board's decision to file bankruptcy.

[10] Plaintiffs do not, and cannot, claim otherwise. Indeed, their inability to do so underscores why it is so indispensable to their appeal that they unhook the decision to file from the filing itself. Once they acknowledge that both decision and filing are essential components of their case, they must also acknowledge that their action is an impermissible collateral attack.

While theoretically there could have been some claims "retained" by the trustee when the court confirmed the plan, a claim attacking the good faith of the board's decision to file bankruptcy cannot be one of them.

3. Plaintiffs' attempt to find evidence of an intent to reserve their claims is too little, too late.

In an attempt to give weight to their argument that their claims were "retained," plaintiffs round up purported evidence to support this conclusion. (AB 42-44.) It does not do the job.

a. The letter agreement.

While their argument is not entirely clear, plaintiffs appear to be saying that in addressing claims subject to assignment, the letter agreement between them and the trustee identified defendants as "targets" of those claims and that this is a strong "indicium" that the bankruptcy court and the trustee intended to preserve the particular claims at issue in this litigation. (AB 43; ER 99-101 (letter agreement).) But there is nothing about identifying "targets" in a letter agreement that indicates an intent to allow plaintiffs to challenge the *initiation* of the bankruptcy.

Moreover, because it assigned claims on an "as is," "no warranties," basis, the letter was nothing more than a quitclaim. (ER 99.) Indeed, both the letter agreement and the court's approval of it were careful to make no guarantee of the validity of any claim, and expressly stated that the letter agreement did not reach claims arising under the Code or that were not assignable as a matter of law. (ER 99-104.)

b. The trustee's report.

Plaintiffs also make much of the trustee's report, which states that "[]Davis/Dux, Rextron, and Equity Plus[] will retain whatever rights they may have against one another and can litigate their disputes after consummation of the sale." (ER 87.) Plaintiffs seek to infer from this that the trustee understood that *Long Life's* claims would be litigated "outside of the bankruptcy context." (AB 43.) But the trustee's recognition that nondebtor parties may have claims against one another says nothing about a claim by *the debtor* challenging the decision to initiate bankruptcy.

Moreover, as mentioned, the trustee has an affirmative duty to report any and all misconduct, "mismanagement" and "causes of action" belonging to the estate, 11 U.S.C. § 1106—but nowhere does the trustee's report state that Long Life has a breach of fiduciary duty claim based on a wrongful decision to file bankruptcy. (*See* ER 84-95.) Even if plaintiffs were right that a claim based only on the decision to file is viable, such a claim would have been an asset of the bankruptcy estate that the trustee would have been statutorily required to report. One cannot properly infer from the report that the trustee intended to preserve a breach of fiduciary duty claim.

c. Rextron's objection.

Plaintiffs point to Rextron's objection to the assignment as evidence of "the parties' knowledge of the likely targets of the corporate governance claims and the nature of the claims." (AB 44.) But Rextron prevailed below and is not a party to defendants' appeal (it is only a party to plaintiffs' cross-appeal). Plaintiffs' attempt to turn Rextron's objection into evidence of the other parties' intent is unreasonable. Regardless, the objection does not suggest any intention to preserve a particular claim. Quite the contrary, defendants expressed doubt that any claims even existed. They warned that plaintiffs would use the assignment as a license to unleash "scorched earth" litigation to pursue even "non-existent" and "imagined" claims. (SER 129, 133.) That the objection fell on deaf ears does not now lend credence to the validity of, or intent to reserve, claims that are still "non-existent" and only "imagined."

IV. PLAINTIFFS LACK STANDING TO ASSERT A DAMAGES CLAIM AS LONG LIFE'S ASSIGNEES BECAUSE NO CAUSE OF ACTION ACCRUED BEFORE THE BANKRUPTCY FILING.

Defendants have demonstrated that the jury's verdict, considered in light of the district court's corrective instruction, established that Long Life sustained no pre-petition damages. Since plaintiffs acquired by assignment only Long Life's pre-petition causes of action, they have no standing to claim damages. (AOB 54-60.)

In response, plaintiffs argue that: (1) defendants failed to timely raise the standing issue; (2) damages were sustained on May 3, before the bankruptcy filing; (3) the jury assessed damages as of May 3; and (4) the damages were not speculative. None of these arguments has merit.

A. Plaintiffs' Waiver Argument Is Meritless.

Plaintiffs make two distinct waiver arguments. (AB 29.)

First, plaintiffs contend that they would not be real parties in interest if the assignment of Long Life's claim was ineffective, and that this was an argument defendants had to raise before trial. (AB 29.) But this isn't defendants' argument. They do not contend that the assignment was ineffective or failed. Rather, they challenge the *scope* of the assignment—whether it included, or even could have included, a claim for breach of fiduciary duty predicated on a wrongfully-motivated decision to file for bankruptcy. And defendants' standing/accrual argument turns on whether plaintiffs convinced the jury that, as assignees, they sustained pre-petition damages, not on whether the assignment was valid. (*See* § IV.B., *infra*.)

Second, plaintiffs claim that defendants waived the standing issue by failing to raise it in a timely Rule 50(a) motion. (AB 29.) However, in this case's unusual procedural posture, no Rule 50(a) motion was required—or, indeed, even possible. In essence, defendants' argument is that the judgment in this case is not supported *by the jury's verdict*, in particular the jury's finding that shares had value on May 9 that was only destroyed in bankruptcy. (*See* AOB 56-59; § IV.B., *infra*.) Whether a judgment is supported by jury findings is not the same issue as whether the judgment is supported by sufficient evidence. The latter is the proper subject of a 50(a) motion, but the former is not, as this Court has made clear. *See Pierce v. S. Pac. Transp. Co.*, 823 F.2d 1366, 1369 (9th Cir. 1987) (motion for directed verdict is not required to preserve question whether judgment is supported by special verdict); *Zhang v. Am. Gems Seafoods, Inc.*, 339 F.3d 1020, 1033 (9th Cir. 2003) (the question in *Pierce* was whether the jury's factual findings required judgment for plaintiff or defendants).

Moreover, defendants could not have raised their standing issue any earlier, because the argument turns on the jury's finding rather than on the sufficiency of damages evidence, until the jury made its finding the issue did not even exist.

B. Contrary To Plaintiffs' Argument, The Jury Did Not Find Any Damages As Of May 3. Rather, It Found That Damages Resulted From The Bankruptcy.

According to plaintiffs, the jury found that on May 3, the date defendants decided on bankruptcy, Long Life's shares lost value and Long Life suffered immediate injury. (AB 34-35.)

This just isn't so. After receiving a corrective instruction that was designed to remedy an inconsistent verdict, the jury found that the common shares maintained their value of $2 a share "as of the company's petition to commence bankruptcy proceedings on May 9, 2001." (ER 232.) There is *no* finding of earlier damage. There is no evidence of it, either. Plaintiffs identify none, relying instead on their ipse dixit conclusion that a third party "would obviously pay less" for the shares following defendants' decision to file bankruptcy. (AB 31.)[11]

Plaintiffs fault defendants for relying on the corrective instruction, which set up the before-and-after-bankruptcy comparison. (AB 34, *see* AOB 57.) Instead, plaintiffs argue, the instruction must be read with the original instruction. (AB 34.) "[W]hen that is done," plaintiffs claim, "it is evident that the instructions as a whole

[11] The conclusion is not at all obvious. Dux, for example, had from May 3 until July 25 when its settlement with George Chen was finalized to rescind its agreement to release its $150,000 claim in order acquire these supposedly worthless shares. It nevertheless closed the deal.

properly limited the [Long Life] Claim." (*Id*.) What plaintiffs mean by this cryptic pronouncement is anyone's guess, since they do not explain what they think is "evident." But no matter, because the original and corrective instructions cannot be reconciled; the correction necessarily superseded the original.

The original instruction did ask the jury to turn the clock back to May 3, insofar as it referred to "the date of the decision to commence bankruptcy proceedings." (ER 230.) However, the jury produced inconsistent findings that the shares had no value prior to bankruptcy but that nonetheless the bankruptcy filing caused $400,000 in damages. (ER 237-39.) In contrast, the corrective instruction explicitly called for a comparison of stock value immediately before and after the bankruptcy filing. (ER 254-55 (special verdict asks jury to determine "what value, if any, the stock had immediately before the bankruptcy proceedings commenced . . . because it is a before and after comparison").) There is no way to read this as any kind of amendment or clarification of the original instruction. It changed the rules of the game, and the result was a verdict that Long Life suffered no damage until the bankruptcy filing.

C. Plaintiffs' Repeated Insistence That Damages Were Not Speculative As Of May 3 Cannot Change The Reality: There Were No Damages As Of That Date.

Defendants' opening brief established that until the bankruptcy was commenced, any damage to Long Life's stock was speculative. (AOB 61.) Plaintiffs' claim that damages were not speculative is built on the supposition that the board's decision on May 3 was "effectively irreversible," and that the May 3 decision caused harm. (AB 34-36.) It may or may not have been unlikely that the board would reverse course, but there was no evidence that the decision was irreversible. And plaintiffs' contention does not answer the fact that there was no evidence of damages as of May 3, nor any finding on the subject. A board resolution is just that—a resolution. It still needs to be carried out. Until that happens, anything is possible, and there is no evidence to the contrary.

In response to defendants' demonstration that no cause of action accrued before the bankruptcy filing, plaintiffs cite a solitary California decision that has nothing to do with this case, *Schrader v. Scott*, 8 Cal. App. 4th 1679, 11 Cal. Rptr. 2d 433 (1992). (AB 35-36.) *Schrader* is not a damages case; it concerns a question of statutory interpretation. It was decided shortly after the California Supreme Court resolved a long-running issue in California concerning the tolling provision in California's statute of limitations for legal malpractice.

The statute provides that it is tolled until the plaintiff suffers "actual injury."[12] A line of cases held that this meant the harm had to have become irremediable, but the California Supreme Court rejected this approach in *Laird v. Blacker*, 2 Cal. 4th 606, 7 Cal. Rptr. 2d 550 (1992). There, the court held that tolling ended when the plaintiff suffered "appreciable and actual harm." *Id*. at 611. *Schrader*, decided just three months later, held that the plaintiff's reliance on the irremediable-harm line of cases was "fatally undercut" by *Laird*. *Schrader*, 8 Cal. 4th at 1685.

These cases do not turn on whether damage is "speculative" or not. Indeed, contrary to plaintiffs' brief (AB 35), *Schrader* does not even use the term to describe the claims in the case before it.[13] And neither decision treats "speculative" as the opposite of "irremediable." The issue is not concrete injury versus speculative injury, but "appreciable harm" versus "irremediable harm." *Both* represent harm, and the point of *Laird* and *Schrader* is that there could be actual harm long before the direct result of the malpractice (adverse judgment in *Laird*, tax

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[12] California Code of Civil Procedure Section 340.6 provides that the legal malpractice statute of limitations "shall be tolled during the time that any of the following exist: [¶] (1) The plaintiff has not sustained actual injury . . . ." *Schrader* applied this statute's tolling provision to the accountant malpractice case before it.

[13] The term appears in the court's description of *Laird* in which the Supreme Court rejected the plaintiff's argument that her damages from a dismissal for lack of prosecution were speculative until she completed her appeal. *Schrader*, 8 Cal. App. 4th at 1685, discussing *Laird*, 2 Cal. 4th at 615.

liability in *Schrader*) became irremediable (such as by final affirmance of the judgment or tax liability).

Here, there is no evidence of *any* harm before the bankruptcy filing—just plaintiffs' speculation. That brings the case precisely within *Romano v. Rockwell Int'l, Inc.*, *supra* (§ I.B.3), in which the California Supreme Court rejected a claim that the decision to terminate an employee, as opposed to the actual termination, caused damage.

CROSS-APPELLEES' ANSWERING BRIEF

V. THE JUDGMENT MUST BE AFFIRMED AS TO CROSS-APPELLEE PIERRE CHEN BECAUSE PLAINTIFFS HAVE WAIVED ANY CHALLENGE TO THE VERDICT AND JUDGMENT IN HIS FAVOR.

Pierre Chen was the president of Yageo Corporation who authorized investment in Long Life early on before it was incorporated. (AB 11-12.) The jury found in favor of Pierre Chen. (ER 233.)

Nowhere in their brief do plaintiffs raise any issue challenging the verdict and judgment in favor of Pierre Chen. Any issue as to Pierre Chen is therefore waived. *See Independent Towers of Wash. v. State of Wash.*, 350 F.3d 925, 929 (9th Cir. 2003) (court will not consider any issues not "actually argued" in an appellant's opening brief); *see Greenwood v. Fed. Aviation Admin.*, 28 F.3d 971, 977 (9th Cir. 1994) (court will "review only issues argued specifically and distinctly in party's opening brief"); *see TRW, Inc. v. Andrews*, 534 U.S. 19, 34, 122 S. Ct. 441, 451 151 L. Ed. 2d 339 (2001).

For this reason, whatever other actions the Court may take in this appeal, it should either explicitly affirm the judgment as to Pierre Chen or dismiss any purported appeal as to him.

VI. THE DISTRICT COURT PROPERLY EXCLUDED THE PREFERRED SHARES FROM THE DAMAGES CALCULATION WITH RESPECT TO THE ASSIGNED CORPORATE CLAIMS.

The original judgment on plaintiffs' claims as assignees was approximately $2.7 million. (ER 268.) The district court arrived at this total by multiplying the $2-per-share loss that the jury found by 1,346,153 common shares. (ER 266.) The court did not include preferred shares in this calculation, because there was no evidence of their value. (*Id*.) The court later reduced the judgment by $1.4 million to eliminate the inclusion of 700,000 shares held by Rextron because at the time of the claimed damage (May 3) those were preferred shares; Rextron did not convert them to common shares until May 8. (ER 319; *see* ER 280 (plaintiffs' counsel explains May 8 is date shares were converted).)

Plaintiffs contend (1) that preferred shares should have been part of the damages calculation because they had at least the value of the common shares, and (2) that in any event, the 700,000 preferred shares that Rextron converted to common shares on May 8 should have been included. (AB 51.) Neither argument withstands scrutiny.

A. With Respect To The Assigned Corporate Claims, The Pretrial Order, As Modified By The District Court, Did Not Include A Claim For Lost Share Value For Preferred Shares.

In the pretrial order, the damages plaintiffs sought on their assigned corporate claims were "[d]iminution of value of company as going concern, including goodwill." (ER 160.) These diminution-of-value damages were distinct from the damages Dux sought as a minority shareholder.[14] In *that* capacity, Dux sought the "[r]easonable value of [Long Life] shares lost." (ER 159.) The district court approved the joint pretrial order, which stated that it was "binding on all parties." (ER 167-68.)

1. Defendants never agreed that the calculation of damages on plaintiffs' claims as assignees could include any value for preferred shares.

Plaintiffs contend that they could have used expert testimony to show the diminution in value of Long Life as a going concern, but that instead the parties agreed at trial that the loss would instead be measured by the value of the company's stock. (AB 50.) Not so.

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[14] Dux's separate claim was dismissed because the district court found that Dux lacked standing as a shareholder. (ER 259-61.)

Plaintiffs planned to offer the so-called expert opinion testimony of plaintiff Jerry Davis and non-party expert Chris Tripoli, but defendants successfully moved in limine to exclude the testimony. (CR 175, 177; ASER 3-5 (order granting motions).) Thus, plaintiffs' only evidence of damages on the assigned claims was excluded in an order that they have not challenged on appeal.

Since this ruling left defendants expecting a nonsuit on the assigned corporate claims, it is hardly likely that they would have agreed to an approach that would have resurrected them. Nor did they. Rather, the idea of using lost stock value as a measure of damages on the *assigned* claims came *sua sponte* from the district court, which, by injecting this new issue, impliedly modified the pretrial conference order. This happened during discussions on the special verdict form. The district court stated that it would solve plaintiffs' apparent lack of a coherent damages theory by asking the jury to determine the per-share value of shares in Question 2 of the verdict form, addressing the common shares that were the subject of the transfer agreement between George Chen and Dux; the court would then "do the math" with respect to the assigned claims. (ASER 10; *see* ER 211 (transfer agreement), 232 (special verdict).) The damage calculation was thus limited to the loss of *common share value only*. (ER 315; ER 232.) The parties did not object to this modification of the relief requested. (ER 315.) But defendants' counsel never agreed that *all* shares could be used in measuring damages; the discussion between court and counsel and the result of the discussion evident in the verdict form make clear that counsel yielded only on the point that the court-created measure of damages would include all common shares.

Plaintiffs did not seek to expand the scope of damages to include preferred shares before the case went to the jury. Rather, they argued post-verdict that "if the jury had been asked to make such a finding," it would have found "that the common shares and the preferred shares were at least equal in value." (ER 280.) But the jury was never asked to make that finding.

Now, on appeal, plaintiffs seek to reach back and change their theory of damages. They should not be permitted to do so. Pretrial orders may only be modified "to prevent manifest injustice." Fed. R. Civ. Pro. 16(e). As this Court has made clear, the pretrial order is designed to "simplify issues and avoid unnecessary proof." *Byrd v. Guess*, 137 F.3d 1126, 1132 (9th Cir. 1998) (internal citations and quotations omitted). "[D]isregard of these principles would bring back the days of trial by ambush." *Id.* (internal citations and quotations omitted). It is far too late in the game for plaintiffs to change their theory of damages to include preferred shares. *Morro v. City of Birmingham*, 117 F.3d 508, 516 n.3 (11th Cir. 1997) (factual and legal issues may be waived if not included in final pretrial). The loss of common shares was all the relief plaintiffs agreed to take, and they cannot now ask for more. Plaintiffs' attempt to expand the measure of damages is a "complete afterthought" that must be denied. *Assoc. Press v. Cook*, 513 F.2d 1300, 1303 (10th Cir. 1975).

2. The Court should reject plaintiffs' belated effort to establish preferred share value to fill the vacuum created by their lack of evidence at trial.

Plaintiffs contend that under California law, all types of shares are created equal, and that under Long Life's Articles, a common and a preferred share represented equal equity stakes in the company. (AB 52-53.) Thus, they contend, common and preferred shares must have been at least equal in value, particularly since preferred shares had certain procedural and financial benefits that common shares did not. (*Id*.) This ostensibly "common sense" approach should not obscure the fact that the issue was not addressed at trial. Had it been, defendants might have been able to marshal evidence—such as expert opinion—as to whether the value was the same and whether the value of the preferred stock, given its superior position in bankruptcy, would have declined to the same extent.

The pretrial conference order did not identify lost share value as the measure of damages on the assigned claims. Even as modified by the district court, it did not include preferred shares as a basis of damages. The jury found only that common shares had a value of $2 per share. Plaintiffs' attempt to have this court infer a $2 value for preferred shares—that is, to make a factual finding that the jury was not asked to make, and that defendants had no opportunity to rebut—should be rejected.

B. Rextron's 700,000 Shares Were Properly Excluded From The Damages Calculation.

Assuming the Court agrees with the district court that injury occurred on May 3 when the board decided on bankruptcy, it should also agree that Rextron's 700,000 shares converted on May 8 to common shares should be excluded from the calculation of damages.[15] While plaintiffs are correct that the amount of damages could have been increased or decreased by post-decision events (AB 54-55), any increase must find its source in further injury to the corporation. A shareholder's decision to convert its shares is a neutral act. It does not flow from existing injury, and it does not cause or add to any injury the corporation may have suffered from the May 3 decision. It therefore cannot support an enhancement of damages.

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[15] Plaintiffs state that in their 50(b) motion, defendants "note[d] that" the claims "accrued on May 3, 2001." (AB 51.) This gives the false impression that defendants conceded that plaintiffs' claims accrued on May 3. Defendants made no such concession. They only assumed the May 3 accrual date for purposes of an alternative argument. (SER 405-06.)

VII. THE DISTRICT COURT CORRECTLY RULED THAT DUX LACKED STANDING AS A MINORITY SHAREHOLDER.

The district court concluded that Dux could not recover for the loss in value of the shares it received in settlement from George Chen, because it did not yet own the shares when the loss accrued. (ER 259-63.) That is, Dux had no standing to claim damages on the shares.

Plaintiffs agree that Dux did not own any Long Life shares until over two months after the bankruptcy filing, when the Dux/Chen settlement agreement was confirmed by the San Francisco Superior Court on July 25, 2001. (AB 15-16.) But they contend that the absence of ownership did not deprive Dux of standing. (AB 56.) Their tactic is to attempt to convert what is clearly a standing issue into one involving real-party-in-interest status. It doesn't work.

A. Dux Has No Viable Claim As A Minority Shareholder Given Its Theory Of Injury To The Whole Body Of Long Life Shares.

Under California law, minority shareholders have no individual right of action when they suffer a loss that is common to all shareholders of the corporation. For example, in *Nelson v. Anderson*, 72 Cal. App. 4th 111, 124, 84 Cal. Rptr. 2d 753 (1999), the reviewing court explained that an individual shareholder must allege a violation of "some special duty owed [it] . . . independent of [its] status as a shareholder." *Id.* at 124 (internal quotations omitted). That is, the individual shareholder may bring an individual claim "only if the stock of the individual plaintiff . . . is the only stock affected adversely. . . . When the injury is to the 'whole body of stock,' the action must be derivative"— that is, on behalf of the corporation. *Id.* at 127; *see also Schuster v. Gardner*, 127 Cal. App. 4th 305, 313-14, 25 Cal. Rptr. 3d 468 (2005) (shareholder lacked standing to bring direct action for breach of fiduciary duty on the ground that management wrongdoing decreased value of his shares where loss in value was "merely incidental" to alleged harm inflicted on corporation and all shareholders); *O'Hare v. Marine Electric Co.*, 229 Cal. App. 2d 33, 36, 39 Cal. Rptr. 799 (1964) (individual may not maintain action in his own right for loss in value of corporation's stock).

Here, plaintiffs recovered damages for the loss in value of all common shares through bankruptcy, and in their cross-appeal they contend that all preferred shares should be added to the mix. (ER 266 (district court awards damages based on $2-per-share loss found by jury times total number of common shares); ASER 8 (plaintiffs' opening statement: "all shareholders lost their share interest in the company"); AB 51 (plaintiffs claim preferred shares should not have been excluded from calculation).) In essence, their theory of recovery is that the alleged breach of fiduciary by Long Life's officers and directors–culminating in Long Life's bankruptcy filing–rendered *all* of Long Life's shares valueless. They cannot get around their theory that bankruptcy rendered *all* the shares valueless by simply alleging a scheme against minority shareholders. *See Nelson*, 72 Cal. App. 4th at 124-25 (rejecting plaintiff's argument that she could proceed with shareholder suit even if there were injury to the corporation, where acts alleged to have caused her injury amounted to misfeasance in managing corporate business, causing business to fail).

In short, even if Dux had been an actual shareholder during the crucial period of May 3-9, it would have no individual claim as a minority shareholder in the first instance. Under plaintiffs' own theory of injury, whatever cause of action may exist lies only with Long Life.

B. Plaintiffs' Attempt To Change The Nature Of The Inquiry Does Not Withstand Scrutiny.

Plaintiffs' position appears to be that George Chen may have been the real party in interest at the time loss was incurred, but that Dux was the real party in interest by the time of judgment because only Dux actually suffered the loss. (AB 56, 66.) Framing the issue this way allows plaintiffs to argue that it involves only a waivable defense that defendants did not timely urge. But the issue *is* one of standing and it *is* jurisdictional.

1. Standing and real-party-in-interest are separate and distinct principles.

As this Court has recognized, although standing and real-party-in-interest are related doctrines, they are analytically distinct: "Rule 17(a) means only that the [plaintiffs] have a real interest in the [property at issue]. Rule 17(a) does not give them standing; 'real party in interest' is very different from standing."[16] *Kent v. N. CA Regional Office of the Amer. Friends Servs. Comm.*, 497 F.2d 1325, 1329 (9th Cir. 1974); *see also Zurich Ins. Co. v. Logitrans, Inc.*, 297 F.3d 528, 532 (6th Cir. 2002) (distinguishing standing from real party in interest, collecting cases noting that plaintiff must satisfy both in order to pursue claim); *Gonzalez v. Reno*, 86 F. Supp. 2d 1167, 1182-83 (S.D. Fla. 2000) (noting that standing and real party in interest are conceptually distinct, and holding that plaintiff must both have standing and be real party in interest to pursue action).

Standing, as opposed to a real-party-in-interest inquiry, requires that the merits of the case be examined in order to establish injury in fact. *See, e.g.*, *Live Entertainment*, *Inc. v. Digex, Inc.*, 300 F. Supp. 2d 1273, 1278 (S.D. Fla. 2003).

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[16] Rule 17(a) provides in pertinent part: "Every action shall be prosecuted in the name of the real party in interest. . . . No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder, or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest."

Here, the district court examined the merits and concluded that Dux lacked standing. Because Dux did not own Long Life shares during the critical period of May 3-9—a fact that plaintiffs do not and cannot challenge—it had no power to assert shareholder rights for any injury occurring then, and could not legally be injured by any violation of shareholder rights. *See Stephenson v. Drever*, 16 Cal. 4th 1167, 1174, 69 Cal. Rptr. 2d 764 (1997) (legal title passes to the buyer of an executory agreement to purchase stocks only when there is delivery).

2. Latent defect construction cases provide no guidance.

As a first step in constructing their argument, plaintiffs equate an agreement to convey stock to an assignment of claims. (AB 61-62.) Presumably they mean to suggest that since Chen could have sued had he not conveyed his shares, the right to sue should be viewed as part of what was conveyed. But there was no assignment, and it cannot be deemed part of the package just to cure Dux's standing problem.

Plaintiffs then argue that even absent an assignment, Dux's ownership of the property at the time of suit makes it the real party in interest on the claim. (AB 62.) In support of this principle, plaintiffs turn to *Siegel v. Anderson Homes, Inc.*, 118 Cal. App. 4th 994, 13 Cal. Rptr. 3d 462 (2004). *Siegel* does not help them.

Siegel concerned the question of when a latent construction defect claim accrues—does it accrue when the structure suffers physical damage, or when the current owner suffers a compensable economic injury? *Id.* at 994-95. The previous owner in *Siegel* never suffered any harm from the latent defects, even though the property had already been damaged. It was the subsequent owner who first became aware of and suffered harm from the defects. The court concluded that, in latent defect cases, a cause of action accrues when an owner suffers appreciable harm. *Id.* at 995. At that point, the owner—whether the original owner or a successor—has standing to sue.

Plaintiffs want to equate Dux to that owner: There was, they seem to argue, something akin to a "latent defect" in the shares Chen was going to convey. But this is not a latent defect case. There is no former owner who, unaware of any problem, perfected the sale of damaged property. This case more closely resembles a buyer and seller in escrow. If damage to the property, and thus to the seller, should actually occur during escrow (before title and ownership have passed to the seller), under *Siegel* only the seller would suffer harm, and unless he assigned his claim, he would be the only person with standing to sue for the harm. *Id*. at 1001-02. If the seller chose not to sue and the buyer proceeded to close on the property—fully aware of the pre-existing property damage—the buyer would not be magically vested with standing to sue in place of the seller.

Here, as the district court recognized, Dux was fully aware that Long Life had filed for bankruptcy. (ER 141.) Yet Dux pressed ahead with the executory contract, closing the deal on July 25 following the superior court's good faith settlement determination. (ER 210-17; AB 16.) Dux therefore knowingly "purchased" a defective piece of "property," and cannot now claim that it owns the right to sue for a harm the original owner—George Chen—suffered.

3. Dux's claim was dismissed for lack of standing, not because Dux was the wrong party to file suit.

Defendants objected to Dux's lack of standing, not to the fact that Dux was not a real party in interest under Rule 17(a). Moreover, the district court's ruling rested on standing, which was also the primary reason the court declined to entertain Dux's rule 60(b) motion. (ER 261; SER 453.)

As this case is not a construction defect case, but rather involves the transfer of stock, it is governed by *Stephenson*, 16 Cal. 4th 1167, and its principles should be applied here, as they were below. In *Stephenson*, a buy-sell agreement gave a closely-held corporation the right and obligation to repurchase the shares of a minority shareholder-employee on termination of his employment. However, the corporation could not actually acquire the stock until the stock's value was assessed and a fair price established. The contract did not address who maintained legal ownership of shares during the period between employment termination and consummation of the repurchase. Following his termination, the employee filed an action asserting breach of fiduciary duties owed to him as minority shareholder. The trial court sustained a demurrer on the ground that "on the face of the contract defendants' fiduciary duty to plaintiff by reason of his status as a shareholder ceased" on the effective date for the valuation of his shares. *Id.* at 1172.

The California Supreme Court disagreed. It held that even though during the post-employment period the corporation had an absolute right to acquire the shares, "legal title to [employee's] shares had not passed to [corporation] and [employee] remain[ed] a shareholder of record of the corporation with all the rights appurtenant to that status." *Id*. at 1174-75.

In the present case, Chen agreed to transfer his shares to Dux as part of a settlement. However, the consummation of the transfer was subject to at least two contingencies: the other shareholders' declining their right of first refusal, and a court's determination of the transaction's good faith. (AB 15-16; ER 210-17.) As in *Stephenson*, any right to the shares *could not* pass to Dux until, at the very least, both of these uncertain contingencies were removed. *Cf. E. Coalinga Oil Fields Corp. v. Robinson*, 86 Cal. App. 2d 153, 194 P.2d 554 (1948) (under probate law, executrix was without power to make absolute sale without prior order of court or subsequent confirmation of sale by court; her acts did not vest defendant with title in stock). In the interim, Chen remained the shareholder "with all rights appurtenant to that status." *Stephenson*, 16 Cal. 4th at 1174-75; *see also Pac. Lumber Co. v. Superior Court*, 226 Cal. App. 3d 371, 276 Cal. Rptr. 425 (1990) (only owners of company stock may maintain action).

Stephenson demonstrates that an absolute *right* to acquire shares is insufficient to establish shareholder status. Dux didn't even have that much. The district court agreed, and plaintiffs offer no argument to the contrary.

VIII. THE DISTRICT COURT PROPERLY DECLINED TO ENTERTAIN DUX'S RULE 60(b) MOTION.

Plaintiffs filed a Rule 60(b) motion for relief from judgment after defendants filed their appeal. (ER 323-24; SER 441-52.) Plaintiffs contended that they had "ascertained the true nature" of Dux's minority shareholder standing problem, and their goal was to secure George Chen's ratification of Dux litigating in his place. (AB 65.) When the district court declined to entertain the motion, plaintiffs filed their Second Cross-Appeal. (SER 453, 459.) Defendants moved to dismiss it for lack of jurisdiction and addressed its merits when plaintiffs attempted to correct course with a limited motion for remand.[17] On January 5, 2005, the Court denied both motions without prejudice as to jurisdictional issues.

A. This Court Lacks Jurisdiction Over The Second Cross-Appeal.

The filing of a notice of appeal divests a district court of jurisdiction. *Gould v. Mut. Life Ins. Co. of N.Y.*, 790 F.2d 769, 772 (9th Cir. 1986). However,

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[17] Defendants' motion to dismiss the Second Cross Appeal (04-17272) was filed in this Court on November 24, 2004, plaintiffs' response on December 10, 2004, and defendants' reply on December 23, 2004.

this Court has held that a district court may entertain and decide a motion for relief from judgment under Federal Rule of Civil Procedure 60(b) after a notice of appeal has been filed so long as certain procedures are followed:

> The proper procedure, once an appeal has been taken is to "'ask the district court whether it wishes to entertain the motion, or to grant it, and then move this court, if appropriate, for remand of the case.'" [Citations.] If that route is not taken, an appeal of the denial of the motion to vacate is subject to dismissal.

Id.

The Second Cross-Appeal should be dismissed for lack of jurisdiction, because an order declining to entertain a motion for relief from judgment when an appeal is pending is nonappealable. *See, e.g.*, *Crateo, Inc. v. Intermark, Inc.*, 536 F.2d 862, 869 (9th Cir. 1976); *Defenders of Wildlife v. Bernal*, 204 F.3d 920, 930 (9th Cir. 1999); *Gould*, 790 F.2d at 772; *Scott v. Younger*, 739 F.2d 1464, 1466 (9th Cir. 1984). Indeed, plaintiffs acknowledge that fact, and simply ask this Court to deem the appeal a motion for limited remand, as the Court did under similar circumstances in *Crateo* and *Gould.* (*See* attachment to Civil Appeals Docketing Statement, p. 3 ("plaintiffs acknowledge that the District Court's denial of the request to entertain is not separately appealable" and assume Court will construe their appeal as a motion for remand).) Unless or until the Court does so, there is no jurisdiction to address the issue raised by the Second Cross-Appeal. In any event, this Court should not permit plaintiffs to return to the district court and attempt to reopen the judgment. The district court plainly saw no good reason to entertain their belated 60(b) motion. (SER 453.) Plaintiffs' decision to appeal what they acknowledge is a nonappealable order, despite *Gould's* explicit instructions as to the proper procedure, should weigh heavily against requiring the district court to do so.

B. Remand Is Unwarranted And, In Any Event, Would Be Futile.

1. Dux knew it was not the actual owner of Long Life's shares and did nothing to ensure its standing.

According to Dux, it is unfair to deny it a procedural remedy when it, rather than George Chen, has suffered the alleged loss. (AB 56, 66.) But, as shown above, Dux did not suffer the alleged loss—only Chen, the actual owner of the shares, did. (§ VII, *supra*.)

Dux could have avoided the loss it contends it suffered. The 2001 settlement agreement on which Dux based its claim to standing required a state-court good-faith determination in order for the transfer of Chen's 200,000 shares to be valid and enforceable. (ER 210-17.) Within just two weeks of the settlement, and over two months before the good-faith hearing, Long Life entered bankruptcy. At that juncture, Dux could have rescinded the settlement agreement for frustration of purpose. *See Dorn v. Goetz*, 85 Cal. App. 2d 407, 410, 193 P.2d 121 (1948).

During the confirmation process, it could have raised the issue of the effect of Long Life's bankruptcy on the agreement. Or it could have demanded that George Chen assign all his claims against defendants as a condition to proceeding with the transaction. Dux did none of these things. Rather, it made a conscious choice to proceed on a shareholder action even though it had not actually owned George Chen's shares at the time the alleged tort was committed on May 3, 2001. (*See* AB 15-16 (settlement with Chen including transfer of shares contingent on good faith determination, which did not occur until July 25, 2001).)

If it was not clear from the start that Dux had a problem, it was certainly clear by the time Dux concluded its case-in-chief. At that point, defendants raised the issue that Dux lacked standing to pursue direct shareholder action, arguing that Dux failed to produce evidence of stock ownership and that Dux's shareholder action must therefore be dismissed. (ER 193-94, 200, 256.)

Dux did not respond by seeking relief under Rule 17(a), or by seeking an assignment of whatever rights Chen might have had. Instead, it acknowledged that the agreement conferred only a "right to own" shares in Long Life. (ER 194-96.) It then went on to argue that, although it was not the actual owner of the shares, it was a "beneficial owner" and that this was good enough for standing. (ER 195, 201-02.)

There was no mistake here. Dux *never* considered itself the actual owner of the shares, but rather only a *beneficial* owner with a right to own in the future—a position it now abandons on appeal, substituting its real-party-in-interest approach. But the right to future ownership is entirely distinct from present ownership as regards standing to bring a direct shareholder suit. *See generally Stephenson*, 16 Cal. 4th at 1174. The district court expressed doubts as to whether beneficial ownership was enough to confer standing, and it warned that Dux might need something more than the settlement agreement to demonstrate standing. (ER 916.)

Dux again did nothing. It did not approach George Chen to execute an assignment, nor attempt to get him to ratify any claim. It never argued that it made an honest mistake in bringing suit in its own name. It never asked to be allowed to join or substitute Chen. And it never asked leave to seek Chen's ratification to cure the potential defects in standing.

Dux had every opportunity to protect its alleged claim in this case. It controlled the terms of the settlement agreement. It controlled whether to consummate such an agreement in the face of Long Life's bankruptcy. It knew it was not the actual shareholder from the beginning of its case. Despite all this, Dux waited until after final judgment was entered and defendants had taken an appeal—and now blames *defendants* for "leading the lower court into error." (AB 66.) This unsupported, unexplained charge does not mask Dux's own lack of diligence in discerning and securing its position. Its lack of diligence should not be rewarded by allowing it to reopen the judgment and meddle with its finality.

Automated Info. Processing, Inc. v. Genesys Solutions Group, Inc., 164 F.R.D. 1, 3 (E.D.N.Y 1995) ("justice would not be served if the plaintiffs were rewarded for their failures, oversights and misrepresentations by permitting an amendment of their pleadings").

Dux, not defendants, "must bear the consequences of waiting to address the court's rulings post-judgment." *Briehl v. General Motors Corp.*, 172 F.3d 623, 629 (8th Cir. 1999) (affirming trial court's denial of post-dismissal motion to amend complaint).

2. Remand would be futile because Dux cannot satisfy the requirements of Rule 17.

a. Dux did not simply make an honest mistake, which is what Rule 17(a) is meant to remedy.

Rule 17(a) serves a very limited purpose.[18] The 1966 Advisory Comment warns that "[t]he provision [regarding dismissal] should not be misunderstood or distorted. It is intended to prevent forfeiture when determination of the proper party to sue is difficult or when an understandable mistake has been made." Fed. R. Civ. P., 17(a), Advisory Committee Notes. Accordingly, the language quoted above is applicable only when a plaintiff brings an action in his own name "as the result of

[18] *See* footnote 16, *supra*, for relevant text.

an understandable mistake." *Wieburg v. GTE Southwest, Inc.*, 272 F.3d 302, 308 (5th Cir. 2001) (emphasis added); *see also, e.g.*, *Del Re v. Prudential Lines, Inc.*, 669 F.2d 93, 96 (2d Cir. 1982) (rule does not create new substantive rights, but applies only when wrong party named by mistake or confusion). Accordingly, a plaintiff who is not the real party in interest and who seeks to avoid dismissal must show (a) that he sued in his own name on the basis of an understandable mistake, and (b) that he did not have a reasonable time to correct the pleading deficiency. *Wieburg*, 272 F.3d at 308.

As shown above (§ VIII.B.1), Dux's predicament is not the result of an understandable mistake. Rather, it is the outcome of Dux's conscious choice to proceed in the face of clear knowledge that it did not own the shares when loss allegedly accrued. (*See* SER 453 (in declining to entertain Rule 60(b) motion, court notes plaintiffs never sought relief).) Accordingly, Dux cannot avail itself of the remedy of ratification under Rule 17(a). *Del Re*, 669 F.2d at 96-97 (Rule 17(a) inappropriate because, in part, "[n]o difficulty, confusion or mistake ever existed in the present case regarding the identity of the party in whose name the suit must be brought"); *Live Entertainment, Inc. v Digex, Inc.*, 300 F. Supp. 2d at 1277 (record demonstrated that case did not involve honest or understandable mistake warranting Rule 17 substitution); *James v. Trustmark Nat'l Bank*, 298 B.R. 270, 272 (N.D.

Miss. 2003) (Rule 17 inapplicable because plaintiff never alleged that action was brought by mistake).

b. Applying Rule 17(a) here would distort its purpose.

Rule 17 cannot be used to create new substantive rights—such as allowing a beneficial owner to bring a direct shareholder action, as Dux seeks to do. *See Feist v. Consolidated Freightways Corp.*, 100 F. Supp. 2d 273, 276 (E.D. Pa. 1999) ("Rule 17(a) should not be applied blindly" "in every case"); *Del Re*, 669 F.2d at 96 (purpose of Rule 17(a) is "not to create new substantive rights"); *Intown Properties Management, Inc. v. Wheaton Van Lines, Inc.*, 271 F.3d 164 (4th Cir. 2001) (committee notes to Rule 17(a) caution that rule "'should not be misunderstood or distorted'").

Rule 17 is supposed to be a simple procedural cure for an honest mistake. To allow Dux to use it as a means of obtaining standing to pursue a direct shareholder action, despite its nonshareholder status at the relevant time, would distort the entire purpose and function of the rule. For instance, in *United States v. CMA, Inc.*, 890 F.2d 1070, 1074 (9th Cir. 1989), the plaintiffs filed suit aware of the fact that they lacked standing under the relevant statute. In an attempt to remedy this defect, they had the party with standing execute an assignment of claims; however, by the time the assignment was executed, the limitations period had run. *Id.* at 1074-75. The plaintiffs claimed that Rule 17(a) applied so as to make the assignment relate back to the date of the original complaint. In rejecting this application of Rule 17(a), the Court stated that "Rule 17(a) is the codification of the salutary principle that an action should not be forfeited because of an honest mistake; it is not a provision to be distorted by parties to circumvent the limitations period." *Id.* at 1075. Similarly, in the absence of an honest mistake, the rule should also not be used to circumvent the requirement that a direct shareholder action be brought by an actual shareholder.

The district court has made clear how it would rule on the Rule 60(b) motion. (SER 453.) Further, Dux has so far failed in its effort to secure George Chen's ratification—George Chen and his trustee in bankruptcy have already refused to ratify Dux's claim, and their position has been upheld by the bankruptcy court overseeing Chen's bankruptcy. (RJN 94-95.) Under the circumstances, remand in this case would be no simple, quick fix. Indeed, plaintiffs' description of all outcomes that might or might not come to pass if the case is remanded and judgment re-opened, of other proceedings that have spun off from this litigation that they contend should be combined with this litigation, and of possible future appeals (AB 67-69), is a textbook argument in support of the policy favoring the finality of judgments. It only serves to underscore why the litigation in the district court should be deemed concluded. As this Court stated in *Rodgers v. Watt*, 722 F.2d 456 (9th Cir. 1984) "[T]here is a compelling interest in the finality of judgments which should not be lightly disregarded." *Id*. at 459. Only "extraordinary circumstances" justify disturbing such finality. *Ackermann v. United States*, 340 U.S. 193, 199, 71 S. Ct. 209, 212, 95 L. Ed. 207 (1950); *Ashford v. Steuart*, 657 F.2d 1053, 1055 (9th Cir. 1981). No such extraordinary circumstances exist here. Dux's motion for remand, if the court considers it at all, should be denied.

CONCLUSION

For the foregoing reasons, the judgment in favor of cross-appellee Pierre Chen must be affirmed, and the judgment adverse to defendants, appellants, and cross-appellees Yageo Corporation, Yageo Holding (Bermuda) Limited, An-Erh Chen, Yan Sheng Chan, and Cheng-Ling Lee must be reversed with directions for entry of judgment in favor of those defendants.

DATED: June __, 2005

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CERTIFICATE OF COMPLIANCE—PROPORTIONATE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and Ninth Circuit Rule 32-1, I certify that this **COMBINED APPELLANTS' REPLY BRIEF AND CROSS-APPELLEES' ANSWERING BRIEF** is proportionately spaced, has a typeface of 14 points or more, and contains **13,732** words.

DATED: June __, 2005

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