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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

THE FIRST NATIONAL BANK IN SIOUX FALLS, as Trustee for THE SEQUOIA CHARITABLE TRUST, Plaintiff, vs. WARNER BROS. ENTERTAINMENT INC., WARNER BROS. TELEVISION PRODUCTION INC., and DOES 1–10, Defendants.	**Case No. CV 09-00674 GAF (VBKx)** MEMORANDUM & ORDER REGARDING MOTION TO DISMISS

I. INTRODUCTION

This breach of contract action arises out of the alleged refusal of defendants Warner Bros. Entertainment Inc. and Warner Bros. Television Production Inc. (collectively, "Warner Brothers") to pay gross profit participation royalties to Gy Waldron, the original writer and producer of the television show entitled "The Dukes of Hazzard" ("Dukes"). Waldron previously sued Warner Brothers in this Court in 2005, but the Court dismissed Waldron's claims pursuant to 28 U.S.C. § 1367(c) after all claims over which the Court had original jurisdiction were dismissed. Waldron then proceeded with his claims against Warner Brothers in state court, but voluntarily dismissed that lawsuit after the state court granted a judgment on the pleadings with leave to amend in favor of Warner Brothers. Nearly a year-and-a-half after voluntarily dismissing the state court action, Waldron established a charitable trust in South

Dakota, to which he subsequently assigned his claims against Warner Brothers. The trustee of Waldron's trust, plaintiff The First National Bank in Sioux Falls ("First National"), a citizen of South Dakota, now proceeds against Warner Brothers in this action to recover on Waldron's claims.

The Court presently has before it Warner Brothers' motion to dismiss First National's claims for lack of subject matter jurisdiction. In sum and substance, Warner Brothers contends that Waldron's assignment of his claims to the trust was collusive because it was executed to manufacture diversity jurisdiction. First National, which carries the burden of proving that Waldron's assignment was not collusive, has failed to produce sufficient evidence to establish a legitimate nonjurisdictional purpose for the assignment. The evidence before the Court, particularly the trust agreement, which permits Waldron to retain substantial power and control over the trust, supports the conclusion that First National has failed to establish that it is the real party in interest in this lawsuit. Accordingly, Warner Brothers' motion to dismiss First National's claims for lack of subject matter jurisdiction is **GRANTED**. The Court explains its reasoning in detail below.

II. BACKGROUND

A. SUMMARY OF THE PRESENT DISPUTE[1]

Between February 1978 and July 1979, non-party Gy Waldron entered into various agreements with Warner Brothers to write and/or produce episodes of the "Dukes" television show. (Compl. ¶¶ 12–15.) The literary material that Waldron produced pursuant to those agreements constituted "works made-for-hire," meaning that Waldron did not have any intellectual property rights in the works and was entitled only to fixed compensation and a net profit participation. (Compl. ¶¶ 16–18.)

[1]The historical facts set forth in First National's complaint are relevant to the present motion only insofar as they provide a factual backdrop to the parties' dispute. Accordingly, the Court assumes the truth of those facts for purposes of this motion.

Some time in 1980, Waldron and Warner Brothers became involved in a dispute regarding Waldron's net profit participation. (Compl. ¶ 19.) The parties resolved their dispute in a settlement agreement dated November 13, 1980, pursuant to which Waldron was to receive contingent compensation equal to a percentage of the "Dukes" television show's net profits. (Compl. ¶ 20.) By 1983, however, Waldron came to believe that Warner Brothers was underreporting the "Dukes" show's profits, and in November 1983, sued Warner Brothers in state court to recover the alleged underpayments. (Compl. ¶¶ 21–22.)

Waldron and Warner Brothers settled the case on March 31, 1987 in a written settlement agreement pursuant to which Waldron received $6.2 million and the right to receive 6.5% of gross receipts in excess of $276 million from any exploitation of the "Dukes" television show, any rights therein, or any literary material on which the show was based ("1987 Settlement Agreement"). (Compl. ¶¶ 24–28.) The threshold was later increased to $293.6 million by written amendment. (Compl. ¶ 29.) In addition, Waldron and Warner Brothers agreed in the 1987 Settlement Agreement that Waldron would receive 6.5% of net profits of any spin-offs of the "Dukes" television show. (Compl. ¶ 31.) In the late 1980s, Warner Brothers' gross receipts relating to the "Dukes" show surpassed the $293.6 million threshold, triggering Waldron's right to receive 6.5% of subsequent gross receipts. (Compl. ¶ 30.)

On August 5, 2005, Warner Brothers released in theaters "The Dukes of Hazzard" motion picture. (Compl. ¶ 33.) The motion picture was later released on home video and shown on free and pay television worldwide. (Id.) On March 13, 2007, Warner Brothers released a second motion picture, "The Dukes of Hazzard: The Beginning," on home video. (Compl. ¶ 39.) The present dispute regards Warner Brothers' apparent refusal to pay Waldron 6.5% of the gross receipts generated by the "Dukes" motion pictures. (Compl. ¶¶ 35–41.)

B. PROCEDURAL HISTORY

This lawsuit is not the first time this Court has been presented with the allegation that Warner Brothers refuses to pay the 6.5% gross-profit-participation amount in connection with the "Dukes" motion pictures. On April 25, 2005, in Moonrunners Ltd. P'ship et al. v. Time Warner Inc. et al., CV 05-01362 GAF (VBKx), Waldron filed a counterclaim against Warner Brothers in which he asserted similar allegations and claims as those which First National's complaint sets forth in this action, though Waldron's claims pertained only to the first motion picture, given that the second motion picture had not yet been released. (See Defs.' Req. Jud. Not., Ex. B [Waldron Countercl.].)[2] The Court dismissed Waldron's counterclaim on August 30, 2005 pursuant to 28 U.S.C. § 1367(c) because all of the claims over which the Court had original jurisdiction had been dismissed by the other parties to the lawsuit. (See 8/30/2005 Order (CV 05-01362, Docket No. 69) at 1–2.)

As a result, Waldron filed suit against Warner Brothers in state court on September 8, 2005, putting forth essentially the same allegations and claims as those which he presented in the earlier federal court action, and which First National now presents in this lawsuit. (See Defs.' Req. Jud. Not., Ex. C [Waldron Orig. State Court Compl.].) After the parties litigated the case for over a year, Warner Brothers filed a motion for judgment on the pleadings on February 23, 2007. (See Defs.' Req. Jud. Not., Ex. D [Motion].) The state court judge granted Warner Brothers' motion with leave to amend on the ground that Waldron had not sufficiently established that he owned the rights to exploit the first "Dukes" motion picture. (See Defs.' Req. Jud. Not., Ex. E [4/27/2007 State Court Order at 1–2].) Waldron filed a first amended complaint within the allotted time, but voluntarily dismissed the lawsuit the following day because his counsel could no longer proceed with the litigation as a result of having to care for an ailing family member. (Toberoff Decl. ¶¶ 9–10; Waldron Decl. ¶ 3; see

[2]Warner Brothers' request for judicial notice is **GRANTED** pursuant to Rule 201(d) of the Federal Rules of Evidence.

Defs.' Req. Jud. Not., Exs. F–G.) Subsequently, Waldron experienced his own health problems, suffering a major heart attack in February 2008 and undergoing two cardiac surgeries shortly thereafter. (Waldron Decl. ¶ 4.)

C. THE CREATION OF THE SEQUOIA TRUST

Waldron's health problems caused him to reassess his estate plan and to redo his will. (Id.) On December 11, 2008, Waldron and his wife[3] established the "Sequoia Charitable Trust" ("Sequoia Trust" or "Trust") in South Dakota pursuant to a written Trust Agreement "to follow through on [their] long-time goal . . . to leave a material portion of [their] estate to charity." (Waldron Decl. ¶ 5; see Toberoff Decl., Ex. A [Trust Agreement].) The Trust Agreement lists First National as the original trustee of the Trust. (Toberoff Decl., Ex. A [Trust Agreement § 5.1] at Bates 14.) Four days later, on December 15, 2008, Waldron deposited $500,000 in cash into the Trust and designated two beneficiaries: the St. Aidan's Episcopalian Church in Malibu, California and "Art of the Brain," a non-profit organization dedicated to brain-cancer research that is affiliated with the University of California, Los Angeles. (Waldron Decl. ¶ 6.)

On January 14, 2009, just over one month after creating the Sequoia Trust, Waldron assigned his claims against Warner Brothers to the Trust. (Waldron Decl. ¶ 10; see Toberoff Decl., Ex. C [Assignment of Claims].) Five days later, on January 19, 2009, Waldron's counsel, Marc Toberoff, entered into a contingency-fee retainer agreement with First National in connection with the present lawsuit. (See Toberoff Decl., Ex. I [Toberoff Letter] at 81.) On January 28, 2009, First National filed the present lawsuit. (See Compl. at 17.)

[3]For purposes of ease and convenience, and because the Court may reasonably presume that Waldron's interests are presently aligned with those of his wife, whenever applicable, the Court's use of "Waldron" in this Order in connection with the Trust refers to both Waldron and his wife.

III. DISCUSSION

A. RULE 12(b)(1) LEGAL STANDARD

"When subject matter jurisdiction is challenged under Federal Rule of Procedure 12(b)(1), the plaintiff has the burden of proving jurisdiction in order to survive the motion." Tosco Corp. v. Cmtys. for a Better Env't, 236 F.3d 495, 499 (9th Cir. 2001) (citing Stock W., Inc. v. Confederated Tribes of the Colville Reservation, 873 F.2d 1221, 1225 (9th Cir. 1989)); see also Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377 (1994); McNutt v. Gen. Motors Acceptance Corp. of Ind., 298 U.S. 178, 188–89 (1936). Thus, when the basis for challenging subject matter jurisdiction is the federal anticollusion statute, 28 U.S.C. § 1359, the plaintiff bears the burden of proving the absence of impropriety or collusion. See Nike, Inc. v. Comercial Iberica de Exclusivas Deportivas, S.A., 20 F.3d 987, 993 n.10 (9th Cir. 1994); see also Dweck v. Japan CBM Corp., 877 F.2d 790, 792 (9th Cir. 1989). To defeat a motion to dismiss for lack of subject matter jurisdiction, the plaintiff must "make a prima facie showing of facts to support the district court's exercise of jurisdiction." Nike, Inc., 20 F.3d at 993 n.10. Accordingly, the plaintiff need not prove jurisdiction by a preponderance of the evidence at the motion to dismiss stage. See Haisten v. Grass Valley Med. Reimbursement Fund, Ltd., 784 F.2d 1392, 1396 & n.1 (9th Cir. 1986) (discussing personal jurisdiction and applying preponderance-of-the-evidence standard on appeal from summary judgment).

On a Rule 12(b)(1) motion, the parties may submit, and the court may consider, affidavits and other evidence that lies outside the pleadings. Ass'n of Am. Med. Colls. v. United States, 217 F.3d 770, 778–79 (9th Cir. 2000); see also McNutt, 298 U.S. at 189 ("If [the plaintiff's] allegations of jurisdictional facts are challenged by his adversary in any appropriate manner, he must support them by competent proof."). "Where the jurisdictional issue is separable from the merits of the case, the judge may consider the evidence presented with respect to the jurisdictional issue and rule on that issue, resolving factual disputes if necessary." Thornhill Publ'g Co. v. Gen. Tel. &

Elecs. Corp., 594 F.2d 730, 733 (9th Cir. 1979). Under such circumstances, "[n]o presumptive truthfulness attaches to [the] plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of [the] jurisdictional claims." Id. (internal quotation marks omitted).

B. SECTION 1359 LEGAL FRAMEWORK

Under the federal anticollusion statute, "a district court shall not have jurisdiction of a civil action in which any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court." 28 U.S.C. § 1359. The statute "is aimed at preventing parties from manufacturing diversity jurisdiction to inappropriately channel ordinary business litigation into the federal courts." Yokeno v. Mafnas, 973 F.2d 803, 809 (9th Cir. 1992) (citing Kramer v. Caribbean Mills, Inc., 394 U.S. 823, 828–29 (1969)). In essence, § 1359 is a means of enforcing the jurisdictional principle that "the 'citizens' upon whose diversity a plaintiff grounds jurisdiction must be real and substantial parties to the controversy." Navarro Sav. Ass'n v. Lee, 446 U.S. 458, 460–61 (1980).

Since § 1359's enactment in 1948, a number of factors have emerged from the cases that have interpreted and applied the statute which the Court may now use to guide its inquiry regarding the propriety of Waldron's assignment. Those factors include: (1) whether the assignment was partial or complete; (2) whether there is an opportunity for manipulation by the assignor; (3) whether there was a legitimate, nonjurisdictional reason for the assignment; (4) whether the assignee had a preexisting interest in the outcome of the litigation; (5) whether the assignment was timed to coincide with the commencement of the litigation; (6) whether the assignment was supported by adequate consideration; and (7) whether the assignor admitted that her motive in executing the assignment was to create jurisdiction. Kramer, 394 U.S. at 827–28; Attorneys Trust v. Videotape Computer Prods. Inc., 93 F.3d 593, 595–97 (9th Cir. 1996); Airlines Reporting Corp. v. S & N Travel, Inc., 58 F.3d 857, 863 (2d Cir. 1995); Yokeno, 973 F.2d at 810; Dweck, 877 F.2d at 792–93. These factors are not

exclusive, and the Court may consider "the totality of circumstances surrounding the assignment." Yokeno, 973 F.2d at 810.

Ultimately, in any § 1359 inquiry, "[t]he objective fact of who really is the party in interest is the most important thing to be determined." Attorneys Trust, 93 F.3d at 596. Thus, "the main focus [of the inquiry] is usually upon the reality of the transaction itself." Id. at 597. If the evidence indicates that an assignment was executed for purposes of collection only, i.e., solely to permit "recovery on a money debt by litigation," Westinghouse Credit Corp. v. Shelton, 645 F.2d 869, 871 (10th Cir. 1981), the assignment will almost always be held to be collusive. See Attorneys Trust, 93 F.3d at 597 (citing cases); see, e.g., Kramer, 394 U.S. at 827–28. A plaintiff cannot invoke federal courts' diversity jurisdiction, and will not be considered a real party in interest for purposes of determining diversity of citizenship, if the plaintiff is a "mere conduit for a remedy owing to others, advancing no specific interests of its own." Airlines Reporting, 58 F.3d at 859.

C. APPLICATION OF RELEVANT FACTORS

1. OPPORTUNITY FOR MANIPULATION

Although the parties dedicate much attention to the question whether Waldron's assignment was "complete" or "partial," the issue is ultimately a non-starter because "even when there is a complete assignment, collusion may be found" if "there is an excellent opportunity for manipulation." Attorneys Trust, 93 F.3d at 596–97. Thus, the Court begins its analysis with what it deems to be the most important factor in this case—the substantial amount of power over the administration of the Sequoia Trust that Waldron is presently able to exercise.

Despite his attestations to the contrary, Waldron has retained a great deal of control over the Sequoia Trust. Section 1.4 of the Trust Agreement establishes that the Sequoia Trust is irrevocable:

> This Trust Agreement shall be irrevocable and nonamendable. The Settlors shall not have any power to revoke or modify its terms, to change the beneficiaries other than as provided in Section 1.3 . . . , or to appropriate

> any portion of Trust income or principal for either of their own use or benefit or for that of their Family Members.

(Toberoff Decl., Ex. A [Trust Agreement § 1.4] at 6 (emphasis added).) This declaration of irrevocability, however, does not preclude "the modification, termination, combination, or division of a Trust as permitted under the laws of the jurisdiction in which the Trust is being administered or the provisions of Article [12]."[4] (Id. [§ 1.4] at 6–7.) Thus, the Court must determine whether the rules regarding the termination of charitable trusts under South Dakota law might provide Waldron a means of manipulating the Sequoia Trust, notwithstanding the declaration of irrevocability.[5]

South Dakota law defines "trustor" as "a person who transfers property in trust, [including] a person who furnishes the property transferred to a trust even if the trust is created by another person." S.D. Codified Laws § 55-3-44. Thus, as a settlor of the Sequoia Trust and as the assignor of the claims at issue here, Waldron is a "trustor" under South Dakota law. Under section 55-3-24 of the South Dakota Codified Laws, "[a]n irrevocable trust may be modified or terminated upon the consent of all of the beneficiaries if continuance of the trust on its existing terms is not necessary to carry out a material purpose." Id. § 55-3-24. Moreover, "[w]hether or not continuance of the trust on its existing terms is necessary to carry out a material purpose, an irrevocable trust may be modified or terminated upon the consent of the trustor and all of the beneficiaries." Id. "Upon termination of a trust under [section 55-3-24], the trustee shall distribute the trust property in accordance with the trustor's probable intention or in any other manner as agreed by all the beneficiaries." Id. As a general rule, modification or termination based upon the mutual consent of the trustor and

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[4]Various passages of the Trust Agreement, including the quoted passage, appear to erroneously refer to article 13 or specific provisions thereunder. (See, e.g., Toberoff Decl., Ex. A [Trust Agreement § 3.6] at 9.) Whenever appropriate, the Court presumes that those provisions are actually referring to article 12, entitled "Modification and Termination," which sets forth the manner in which First National, as trustee, can terminate the Trust. (See id. [art. 12] at 28–29.)

[5]Both sides agree that the Trust is currently being administered under, and is therefore governed by, South Dakota law. (Mot. at 19; Opp. at 18–19.)

beneficiaries need not be approved by a court to become effective. See Restatement (Third) of Trusts § 65(2) & cmt. a (2003) ("If the beneficiaries can compel termination or modification of a trust under this Section, it is not necessary that they obtain a court decree directing or authorizing termination or establishing the modification."). South Dakota law is in accord with this principle; a court must approve a modification or termination effected pursuant to section 55-3-24 only "[u]pon petition by a trustor, trustee, or beneficiary." S.D. Codified Laws § 55-3-25.

In the present action, the Trust Agreement places in Waldron's control the selection and retention of beneficiaries:

> Either Settlor at any time during their respective lifetimes may add or delete one or more beneficiaries, provided that any such beneficiary so added is a Qualified Charitable Recipient, and may change the percentages of income and principal which any beneficiary is entitled to receive under this Agreement and further provided that such changes shall be binding on Trustee only after Trustee receives written notice of any such change from the Settlors or the surviving Settlor.

(Toberoff Decl., Ex. A [Trust Agreement § 1.3] at 6.) Thus, in effect, Waldron has full control over the very beneficiaries whose consent he must obtain under South Dakota law to modify or terminate the Trust. Further, Waldron's ability to remove beneficiaries, combined with the absence of a provision requiring him to appoint any beneficiaries, means that Waldron unilaterally can bring about a resulting trust and cause the trust assets to revert to him.[6]

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[6] "A resulting trust is a reversionary, equitable interest implied by law in property that is held by a transferee, in whole or in part, as trustee for the transferor or the transferor's successors in interest." Restatement (Third) of Trusts § 7. The Restatement (Third) of Trusts teaches that

> [w]here the owner of property makes a donative transfer and manifests an intention that the transferee is to hold the property in trust but the intended trust fails in whole or in part, . . . the transferee holds the trust estate or the appropriate portion or interest therein on resulting trust for the transferor or the transferor's successors in interest, unless (a) the transferor manifested an intention that a resulting trust should not arise, or (b) the trust fails for illegality and the policy against permitting unjust enrichment of a transferee is outweighed by the policy against giving relief to one who has entered into an illegal transaction.

Id. § 8.

In an effort to downplay the likelihood that Waldron would ever cause the Trust to fail and to persuade the Court that any such attempt would be futile, First National argues that the doctrine of cy pres would prevent the trust assets from reverting to Waldron. Yet in raising this argument, First National conveniently ignores the fact that South Dakota law would require Waldron to consent to the application of cy pres. See S.D. Codified Laws § 55-9-4.[7] Thus, cy pres does not prevent Waldron from removing all Trust beneficiaries for the purpose of giving rise to a resulting trust and causing the Trust's assets to revert to him. See Restatement (Third) of Trusts, supra, § 8 cmt. g ("[I]f the settlor has provided no other purpose and has directed that cy pres not be applied, the trustee holds the trust estate, or an appropriate portion thereof or interests therein, upon resulting trust ***for the settlor or the settlor's successors in interest***." (emphasis added)).

Moreover, in addition to granting Waldron the power to appoint and remove beneficiaries, the Trust Agreement also permits him to appoint the initial members of an "Investment Committee" and "to fill any vacancies . . . as they arise," provided that Waldron does not appoint himself, a family member, or a subordinate to any such committee. (Id. [§ 4.1(j)(1)] at 12.) Waldron similarly has "the power to designate those who will fill vacancies on such committee which may arise in the future, and to alter or revoke any such future designation." (Id.) There is no limit on the number of

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[7]Section 55-9-4, which codifies the cy pres doctrine, provides in full:

> Whenever it shall appear to the circuit court for the proper county that the purpose and object of such charity is imperfectly expressed, or the method of administration is not indicated or is incomplete or imperfect, or that the fulfillment of the special purpose expressed in a trust for charitable or public purpose is or becomes impracticable, impossible, inexpedient or unlawful, such court shall upon the application of any trustee of the trust, or any interested party or the attorney general of this state, and upon such notice as said court may direct, make an order directing that such trust shall be administered or expended in such manner as in the judgment of said court will, as nearly as can be, accomplish the general purposes of the instrument and the object and intention of the donor without regard to, and free from any, specific restriction, limitation or direction contained therein, ***provided, however, that no such order shall be made without the consent of the donor of said trust if he is then living and mentally competent***.

S.D. Codified Laws § 55-9-4 (emphasis added).

times Waldron may exercise these powers. (Id.)

Waldron has "chosen to defer the appointment of the initial members of the Investment Committee." (Id. [§ 4.1(k)] at 12; see also Waldron Decl. ¶ 12.) Nevertheless, if and when Waldron creates an Investment Committee, "[t]he Trustee ***shall*** follow the written directions of the Investment Committee . . . with respect to the retention, purchase, sale or encumbrance of Trust property." (Id. [Trust Agreement § 4.1] at 9 (emphasis added).) The Investment Committee will also have the power to remove and replace the Trust Protector (id. [§§ 7.2, 7.4(b)] at 17), who in turn has the power "to remove any Trustee, with or without cause" (id. [§ 5.3] at 14). The Trust Protector and the Investment Committee also have the initial ability to appoint a successor Trustee. (Id. [§ 5.4] at 14–15.) These provisions permit Waldron to indirectly dictate or influence the administration of the Sequoia Trust. The structure of the Trust therefore plainly creates an opportunity for manipulation by Waldron.

First National does not present a single persuasive argument in support of its position that the Trust Agreement does not create an opportunity for manipulation of the Trust. First National emphasizes that section 1.4 of the Trust Agreement specifies that the Sequoia Trust is "irrevocable," and that Waldron cannot unilaterally modify the Trust Agreement pursuant to that section. (See Toberoff Decl., Ex. A [Trust Agreement § 1.4] at 6.) But as explained above, the structure of the Trust Agreement, and especially Waldron's ability to cause a resulting trust by removing all beneficiaries, permit Waldron to accomplish indirectly what section 1.4 purports to prevent.

Likewise, even if, as First National suggests, sections 3.6, 3.7, and 12.1(b) require that all assets be distributed to the beneficiaries or to organizations described in sections 170(c), 2055(a), and 2522(a) of the Internal Revenue Code upon termination of the Trust (see id. [§§ 3.6–3.7; 12.1(b)] at 9, 28), Waldron and the beneficiaries whom he appoints may at any time agree to modify the Trust Agreement and provide for some other mode of distribution. Thus, despite the express averments of irrevocability in the Trust Agreement and the inclusion of provisions that ostensibly preclude Waldron from

using the Trust for his personal benefit, Waldron's retention of substantial control over fundamental aspects of the Trust's operations creates an "excellent opportunity for manipulation" of the Trust by Waldron.

Finally, because the Trust has been set up in such a way as to permit Waldron to bring about a resulting trust, First National's contention that Waldron does not have a pecuniary interest in the Trust or the litigation is dubious. Even if Waldron does not have a direct financial interest in the Trust, his ability to cause a resulting trust and to veto any potential application of cy pres necessarily means that he has a financial stake in the Trust, albeit one that he must trigger. Furthermore, Waldron's retention of a $167,595 payment he received from Warner Brothers on April 23, 2009, and his apparent intent to retain future payments of distributions that Warner Brothers would have made irrespective of the present lawsuit (see Sommer Reply Decl., Ex. 1 [Waldron Depo. Tr.] at 5–8), establish that Waldron continues to have a direct financial interest under the 1987 Settlement Agreement.[8]

Accordingly, for the reasons set forth in detail above, the Court concludes that Waldron's retention of substantial direct and indirect control over the Trust casts a looming shadow of doubt over First National's contention that the Trust is the real party in interest in this lawsuit. Waldron's power over the Trust strongly suggests that his assignment of claims was primarily for purposes of collection, i.e., to permit the Trust to attempt to recover damages in this Court, where Waldron is himself unable to proceed.

2. PRESUMPTION OF COLLUSIVENESS

As the foregoing analysis reveals, Waldron maintains an extremely close

[8]During his deposition, Waldron and his counsel made clear that Waldron retained the $167,595 payment and intends to retain any future amounts paid by Warner Brothers that Warner Brothers would have paid irrespective of the present lawsuit, i.e., that are unrelated to the gross receipts of the "Dukes" motion pictures. (Sommer Reply Decl., Ex 1 [Waldron Depo. Tr.] at 5–8.) However, Waldron now states in his declaration that he accepted the $167,595 payment "because this amount was voluntarily paid for the year ending December 31, 2008, prior to the Assignment." (Waldron Decl. ¶ 11 (emphasis omitted).) The Court is not persuaded by Waldron's backtracking, nor does Waldron's new explanation make any sense from a practical standpoint.

relationship with the Trust because he wields substantial direct and indirect control over the Trust and, in effect, has the ability to unilaterally cause the Trust to fail. The Ninth Circuit and other courts of appeals have previously recognized that "[c]ertain kinds of diversity-creating assignments warrant particularly close scrutiny" and are presumptively collusive. Yokeno, 973 F.2d at 809–10 (citing Dweck, 877 F.2d at 792); accord Airlines Reporting, 58 F.3d at 862. In particular, a presumption of collusiveness is often applied where, as here, there is a close relationship between the assignee and the assignor. See, e.g., Nike, Inc., 20 F.3d at 991 (assignment between subsidiary and its parent corporation); Yokeno, 973 F.2d at 810 (assignment between a corporation and its director). Because of the close relationship between Waldron and the Trust, the Court concludes that application of a presumption of collusiveness is wholly appropriate under present circumstances.

To overcome the presumption of collusiveness, First National must show a legitimate, nonjurisdictional reason for the transfer. See Airlines Reporting, 58 F.3d at 863 ("legitimate business reason"); Yokeno, 973 F.2d at 810 (same); Dweck, 877 F.2d at 792 (same).[9] "Simply articulating a business reason is insufficient; the burden of proof is with the party asserting diversity to establish that the reason [for the assignment] is legitimate and not pretextual." Yokeno, 973 F.2d at 810 (citing Dweck, 877 F.2d at 792). Moreover, the presumption of collusiveness is "heightened where a jurisdictional motive is apparent." Id. at 811. To overcome this heightened presumption, First National "must show more than simply a colorable or plausible" nonjurisdictional reason for the assignment, and must produce "sufficiently compelling" proof "that the assignment would have been made absent the purpose of gaining a federal forum." Id.

Here, in support of First National's opposition to the motion to dismiss,

[9]Although the cases speak in terms of "legitimate business reasons," they essentially are referring to legitimate, independent, nonjurisdictional reasons for assignments that are not pretexts to manufacturing diversity jurisdiction.

Waldron states in his declaration that the impetus for his creation of the Sequoia Trust was the serious heart attack he suffered in February 2008 and the subsequent surgeries he underwent, and his "long-time goal" of donating a material portion of his estate to charity. (Waldron Decl. ¶¶ 4–5.) Waldron further avers that he assigned his purported claims to the Trust because his failing health precludes him from undergoing the rigors of litigation against Warner Brothers. (Waldron Decl. ¶ 8.) On their face, these reasons seem plausible; however, in view of the totality of the circumstances as evidenced by the materials before the Court, First National's purported reasons for the transfer are not sufficient to overcome the heightened presumption of collusiveness.

First, it is clear that the Trust does not have a preexisting interest in the present litigation. The Trust was not even created until December 11, 2008, more than 18 months after Waldron voluntarily dismissed his state court lawsuit against Warner Brothers. (See Waldron Decl. ¶¶ 3, 5.)

Further, the timing of the assignment and the initiation of the present lawsuit is suspect. Waldron assigned to the Trust his purported claims against Warner Brothers on January 14, 2009, just over one month after creating the Trust. (Waldron Decl. ¶ 8; see Toberoff Decl., Ex. C [Assignment of Claims] at 37.) First National's counsel, who also represented Waldron in Waldron's earlier lawsuits against Warner Brothers, entered into a contingency-fee retainer agreement with First National five days later on January 19, 2009. (See Toberoff Decl., Ex. I [Toberoff Letter] at 81.) Less than two weeks later, on January 28, 2009, First National filed the present lawsuit. These facts suggest that "the assignment was timed to coincide with [the] commencement of litigation," and that Waldron's underlying motive in executing the assignment was to create diversity jurisdiction.[10] Attorneys Trust, 93 F.3d at 595.

[10]The cases cited by First National in its opposition papers do not compel a contrary conclusion and merely reinforce the notion that the factors used to determine collusiveness can have varying importance depending on the facts of a particular case. For example, in Reinhart Oil & Gas, Inc. v. Excel Directional Techs., LLC, 463 F. Supp. 2d 1240 (D. Colo. 2006), the district court held that, in view of the strong arguments raised by both sides in that case, the fact that the assignment at issue occurred on the day before

In addition, Warner Brothers' contention that Waldron's assignment of claims is essentially an attempt at forum shopping are well-taken when one considers the nature of First National's claims and the pertinent litigation history. First National's claims are identical to the claims Waldron asserted in this Court in Moonrunners Ltd. P'ship et al. v. Time Warner Inc. et al., CV 05-01362 GAF (VBKx), and in the Los Angeles Superior Court in Waldron et al. v. Warner Bros. Entm't Inc. et al., LASC BC339554, because First National seeks to recover damages for Warner Brothers' alleged breach of the 1987 Settlement Agreement in connection with the "Dukes" motion pictures. (See Defs.' Req. Jud. Not., Exs. B–C.) Even if the Court assumes that Waldron abandoned the state court action because of his counsel's inability to proceed with the suit and that Waldron is no longer able to proceed as a plaintiff because of health problems, these facts do not explain adequately why First National filed this lawsuit in the same Court that declined to exercise jurisdiction over the claims nearly four years ago, and not in state court before the judge who presided over claims for well over a year-and-a-half. Common sense suggests that the reason why First National commenced this action in this Court was to avoid returning to the state court judge who already once dismissed Waldron's claims. If First National were not forum shopping and did not seek to litigate anew issues on which a state court judge has already ruled in Warner Brothers' favor, it would have filed this lawsuit in state court. These circumstances therefore strongly militate in favor of finding that the purpose of Waldron's assignment was pretextual.

Finally, First National places a great deal of emphasis on the $500,000 that Waldron transferred to the Trust on December 15, 2008 (Waldron Decl. ¶ 6). In sum and substance, First National contends that the $500,000 transfer is proof positive that

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the plaintiff filed its complaint "does not militate strongly in favor of or against a finding of collusiveness." Id. at 1258–59. Similarly, in Mother Bertha Music, Inc. v. Trio Music Co., 717 F. Supp. 157 (S.D.N.Y. 1989), the district court held that an assignment that occurred on the same day was not collusive because, among other things, diversity of citizenship likely would have existed absent the assignment. Id. at 160. These cases are inapposite here because the circumstances in this case are markedly different.

Waldron did not assign his claims against WB to the trust to manufacture diversity jurisdiction, because the transfer is "irrevocable" and therefore exhibits Waldron's "genuine charitable intent." (Opp. at 20.) As stated above, however, the purported irrevocability of the Trust and Waldron's transfers thereto is highly suspect in view of the broad powers Waldron has retained pursuant to the Trust Agreement. Furthermore, First National's reliance on the $500,000 gift in support of its position that the Trust was created to benefit qualified charities is misguided because the point itself is ultimately irrelevant. That the Trust is valid and was created for a lawful reason does not mean that the assignment at issue was noncollusive, just as a finding that the assignment was collusive would not invalidate the Trust. The question simply is whether the purpose of Waldron's assignment was to permit the Trust to recover damages in a forum in which Waldron himself is unable to proceed; as explained above, Waldron has failed to produce sufficient evidence to rebut the presumption that it was.[11]

Accordingly, Warner Brothers' motion to dismiss is **GRANTED**. The Court's decision, of course, does not deprive First National of its ability to proceed against Warner Brothers, but only serves to prevent this Court from having to expend its scarce time and resources to adjudicate an ordinary state law dispute between citizens of the same state that belongs in state court.

IV. CONCLUSION

For the foregoing reasons, the Court concludes, under the totality of circumstances and based on the evidence before it, that First National has failed to produce sufficiently compelling evidence to carry its burden of proving that Waldron's assignment of claims was not collusive and was not intended to manufacture diversity jurisdiction. The present lawsuit is therefore precisely the type of "ordinary business litigation the federal anti-collusion statute is aimed at keeping out of the federal courts."

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[11]Because a donative transfer need not be supported by consideration, see S.D. Codified Laws 43-36-1; In re Estate of Fiksdal, 388 N.W.2d 133, 135 (S.D. 1986), the Court has no occasion to consider whether there was a lack of consideration in exchange for Waldron's assignment.

Nike, Inc., 20 F.3d at 993. Accordingly, pursuant to 28 U.S.C. § 1359, Warner Brothers' Rule 12(b)(1) motion to dismiss is **GRANTED**. First National must litigate its claims in state court.

IT IS SO ORDERED.

DATED: July 9, 2009

Judge Gary Allen Feess
United States District Court