

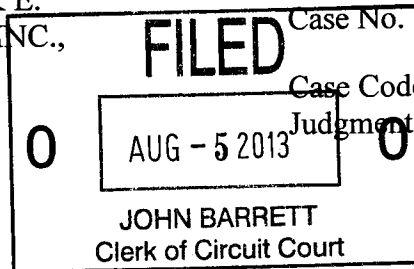
WYNDHAM PROPERTIES, LLC, and MARK E.  
CARSTENSEN CONSTRUCTION &  
DEVELOPMENT, INC. a/k/a MARK E.  
CARSTENSEN CONSTRUCTION, INC.,

Plaintiffs,

v.

KINGSTAD LAW FIRM, LLC,

Defendant.



Case No. 08-CV-18317

Case Code: 30301 / Money

Judgment Greater Than \$5,000

### PLAINTIFFS' AMENDED PRE-TRIAL REPORT

Plaintiffs, by their attorneys, Godfrey & Kahn, S.C., submit as their Pre-Trial Report the following:

**A. Facts, Issues and Theories of Liability and Defenses, and Evidentiary Issues**

**1. Facts; Issues and Theories of Liability; Defenses**

This dispute has a long and tortured history. In January 2001, the Plaintiffs sued Kingstad Law Offices, S.C., an entity owned and run by attorney David Kingstad, for failure to pay rent, late fees, interest, and build-out costs, as well as attorneys' fees and costs incurred in the efforts to collect such amounts (the "2001 Litigation"). The Plaintiffs obtained a judgment against Kingstad Law Offices, S.C. in the amount of \$100,404.80 (the "Judgment"),<sup>1</sup> and the judgment was affirmed on appeal. *Wyndham Props. LLC v. Kingstad Law Offices, S.C.*, No. 2008-Ap-2755, 2010 WL 1753300 (Wis. Ct. App. May 4, 2010) (Brennan, J.).

This litigation was commenced in 2008, at which time it was discovered that during the pendency of the 2001 litigation, and with *no* notice to the Court or opposing counsel, Attorney

<sup>1</sup> Upon return to the Circuit Court, the Plaintiffs intend to seek to update the judgment to reflect any additional late fees, interest, attorney's fees and other relief to which Plaintiffs may be entitled.

Kingstad formed a new entity, Kingstad Law Firm, LLC (the defendant in this case, sometimes referred to as “Kingstad”), and began operating the same legal practice under that entity.

Attorney Kingstad formed Kingstad Law Firm, LLC to avoid liability to Plaintiffs and, as the shareholder for both entities, continued to fund Kingstad Law Offices, S.C.’s defense in the 2001 litigation with, what was described by Judge Sankovitz as “Stalingrad” style defense tactics. By operating the practice out of Kingstad Law Firm, LLC, and by only providing Kingstad Law Offices, S.C. with assets necessary to fund the litigation, Attorney Kingstad seeks to avoid paying the Judgment.

This case simply involves whether or not Kingstad Law Firm, LLC should be held liable for the Judgment as Kingstad Law Offices, S.C.’s successor, mere continuation, or alter ego. This is a classic case in which the corporate fiction created to defraud creditors can, and should, be ignored.

Kingstad’s counterclaim is for abuse of process by the Plaintiffs in pursuing this judgment and recovery.<sup>2</sup> There is no abuse of process as there has not been a scintilla of evidence that this case is being pursued for anything other than its lawful purpose – to collect a debt.

## **2. Evidentiary Issues**

There will be multiple evidentiary issues at trial, substantially all of which were deferred by the Court until trial. The most significant issue will be a limiting the evidence to the issue at hand – whether Kingstad Law Firm, LLC should be held liable for the judgment against Kingstad Law Offices, S.C., and whether this case is being prosecuted for an improper purpose (i.e., some other purpose other than collecting money). There will be, Plaintiffs believe, an

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<sup>2</sup> Kingstad’s other “counterclaim,” violation of WIS. STAT. § 802.05, is not a cognizable counterclaim. It is the “frivolous” claim statute that applies to attorneys, not parties, and is subject to a defined motion practice, not a trial.

attempt by Defendant, through Attorney Kingstad, to re-litigate the underlying merits of the 2001 Litigation and the Judgment. That is not proper, nor relevant, to this case.

**B. Trial Witnesses**

**1. Attorney David Kingstad**

Attorney Kingstad will be called adversely to testify regarding all matters relating to Kingstad Law Firm, LLC and Kingstad Law Offices, S.C., including the cessation of Kingstad Law Offices, S.C.'s business, the formation of Kingstad Law Firm, LLC, the reasons for each of those decisions, the business of each of the law firms, and the "contributions" he (and he alone) decides to make to each of the companies, their capitalization, ownership and finances. Attorney Kingstad will also testify that he gave the Milwaukee County Circuit Court and opposing counsel no notice of the essential shutdown of Kingstad Law Offices, S.C., or the formation of Kingstad Law Firm, LLC.

**2. Mark Carstensen**

Mr. Carstensen, a principal of the Plaintiffs, may be called to testify regarding matters related to the prosecution of this case or the 2001 Litigation, if necessary in rebuttal. This includes the purpose in prosecuting this action to the extent Defendant is allowed to assert and argue an abuse of process or related claim at trial.

**3. Donald Connor**

Mr. Connor may be called specifically to testify regarding matters involved in the ownership and rebut the testimony of Mr. Kingstad that Mr. Kingstad shut down Kingstad Law Offices, S.C. "to avoid claims by Attorney Connor that he was entitled to a share of the business" and rebut any other testimony of Mr. Kingstad about which he has knowledge.

#### **4. Records Custodians**

A trial subpoena may be issued for the Kingstad Law Firm, LLC bank records (non-trust, of course) of Associated Bank relating to the allegations that the Plaintiffs have raised. As well, Plaintiffs will introduce any relevant, probative and non-trust bank records from the Firststar Bank n/k/a U.S. Bank for Kingstad Law Offices, S.C. and Kingstad Law Firm, LLC.

#### **5. Plaintiffs Reserve the Right to Call All Witnesses Identified by Defendant at Trial**

#### **C. Exhibits to be Offered**

1. Trial Court decision and judgment in the 2001 Litigation;
2. March 29, 2010 Deposition transcript of David G. Kingstad;
3. March 1, 2010 Affidavit of David Kingstad in Support of Defendant's Notice and Motion to Dismiss, for Summary Judgment and for Sanctions pursuant to § 802.05(2), WIS. STATS;
4. April 29, 2010 Affidavit of David Kingstad in Support of Defendant's Motion to Quash Subpoenas Duces Tecum issued by Plaintiffs;
5. Defendant's Responses to Plaintiffs' Interrogatories and Requests for Production of Documents, dated March 19, 2010 as well as Supplemental Responses which Plaintiffs may need to compel due to Defendant's refusal to respond;
6. Corporate documents, including Articles of Incorporation and proof of ownership of Kingstad Law Firm, LLC and Kingstad Law Offices, S.C.

#### **D. Portions of Designated Depositions**

1. The March 29, 2010 Supplemental Examination of David Kingstad.

#### **E. Mediation**

Mediation has not been successful.

**F. Stipulations**

Plaintiffs seek a stipulation regarding, or judicial notice of, the existence and authenticity of the Judgment, and the authenticity of exhibits.

**G. Proposed Jury Instructions, Proposed Verdict Form and Motions *In Limine***

**1. Jury Instructions**

50	Preliminary Instructions: Before Trial
61	Notetaking Permitted
100	Opening
110	Remarks and Arguments of Counsel
115	Objections of Counsel
180	Five-Sixths Verdict
190	Closing: Short Form
200	Burden of Proof: Ordinary
215	Credibility of Witnesses; Weight of Evidence
2620	Abuse of Process

Attached Special Instruction for Disregarding Corporate Entity

**2. Verdict Form**

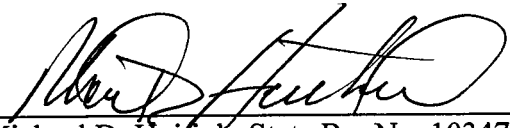
*See attached.*

**3. Motions *In Limine***

The motions *in limine* in this matter were previously filed, argued, and substantially resolved by the Court.

Dated at Milwaukee, Wisconsin, this 5th day of August, 2013.

GODFREY & KAHN, S.C.

By:   
Michael D. Huitink, State Bar No. 1034742

ATTORNEYS FOR PLAINTIFFS, WYNDHAM  
PROPERTIES, LLC, and MARK E. CARSTENSEN  
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## **SPECIAL INSTRUCTION: DISREGARDING THE CORPORATE FICTION**

In this case, Plaintiffs seek to hold Kingstad Law Firm, LLC liable for the corporate debt of Kingstad Law Offices, S.C., specifically for the judgment entered in the 2001 Litigation. They claim that under the facts of this case, Kingstad Law Firm, LLC should not be treated separately from Kingstad Law Offices, S.C. under the law, and should therefore be held liable for that judgment.

As a general rule, a corporation or a limited liability company is treated as a separate person under the law. As such, generally the corporation's liabilities or debts belong only to it, and other people or corporations cannot be held liable for those liabilities or debts. This is known as the "corporate fiction" or the "corporate veil" that shields those other people or companies from liability.<sup>1</sup>

Under Wisconsin law, there are several exceptions to recognizing this "corporate fiction or veil" which allow other people or companies to be held liable for a corporate liability or debt. Plaintiffs in this case have the burden of establishing that those exceptions apply.

One such exception exists when a successor company is formed fraudulently to escape liability for the predecessor company's debts to a creditor.<sup>2</sup> Under such circumstances, the law will ignore the corporate fiction and allow the creditor to collect the debt from the successor corporation.

Another exception exists when the current company is a "mere continuation" of the prior company. This occurs when the present company, although transformed by a merger, consolidation, or otherwise, has substantially the same identity as the prior the successor

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<sup>1</sup> *Fish v. Amdsted Indus., Inc.*, 126 Wis.2d 293, 298, 376 N.W.2d 820 (1985).

<sup>2</sup> *Fish v. Amdsted Indus., Inc.*, 126 Wis.2d 293, 298, 376 N.W.2d 820 (1985).

company, even though it does not have the same name or form of organization.<sup>3</sup> A key factor in this analysis is common identity of the officers, directors, and stockholders of the two companies. If it can be determined that, despite business transformations, the defendant company is substantially the same as the prior company, it can be held liable for the prior companies liabilities.

Finally, in some circumstances, a defendant-corporation may be held liable for the debt of another corporation if it is found to be the “alter ego” of that corporation, in which case the corporate veil between them may be pierced, and one held liable for the obligations of another.<sup>4</sup>

To be found to be an “alter ego” three things must exist:

- (1) The defendant must control the other corporation so that the other corporation has no separate mind, will or evidence of its own;
- (2) Such control must have been used by the defendants to commit a fraud or wrong, to cause a violation of a statutory or other positive legal duty, and
- (3) these things must proximately cause the injury or unjust loss complained of.<sup>5</sup>

No fraud is necessary to satisfy this test.<sup>6</sup> Rather, if there is an “attempt to do corporate business without providing any sufficient basis of financial responsibilities to creditors” there is “an abuse of the separate entity,” two corporations may be found to be alter egos, and the corporate veil between them may be pierced. Piercing the corporate veil between two corporations (holding

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<sup>3</sup> *Tifet v. Forage King Industries, Inc.*, 108 Wis.2d 72, 322 N.W.2d 14 (Wis. 1982).

<sup>4</sup> *Consumer's Co-op. of Walworth County v. Olsen*, 142 Wis.2d 465, 419 N.W.2d 211 (1988)

<sup>5</sup> *Goeben v. DCS Development, Inc.*, 2013 WL 3242145 (Wis. App. 2013).

<sup>6</sup> *Id.*



them to be “alter egos”) is proper if “the corporate form is used to evade an obligation, to gain an unjust advantage or to commit and injustice.”<sup>7</sup>

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<sup>7</sup> *Wiebke v. Richardson & Sons, Inc.*, 83 Wis.2d 359, 265 N.W.2d 571 (1978),

STATE OF WISCONSIN

CIRCUIT COURT  
BRANCH 41

MILWAUKEE COUNTY

WYNDHAM PROPERTIES, LLC, and MARK E.  
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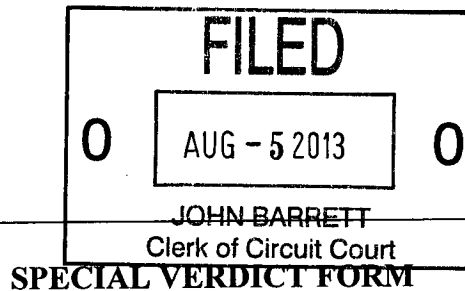
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v.

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Defendant.



We, the jury, impaneled and sworn for the trial in the above-entitled action, do answer the questions submitted as follows:

1. Is Kingstad Law Firm, LLC liable for the Judgment against Kingstad Law Offices, S.C.?

\_\_\_\_\_  
Yes

\_\_\_\_\_  
No

*If you answered "Yes," please stop and answer no further questions.*

*If you answered "No," please proceed to the next question.*

2. Did Plaintiffs commit an Abuse of Process by prosecuting this case against Kingstad Law Firm, LLC for an improper purpose?

\_\_\_\_\_  
Yes

\_\_\_\_\_  
No

*If you answered "No" to this question, stop and answer no more questions.*

*If you answered "Yes," proceed to the next question.*

3. Did Kingstad Law Firm, LLC suffer any damages as a result of this Abuse of Process?

\_\_\_\_\_  
Yes

\_\_\_\_\_  
No

*If you answered "No" to this question, stop and answer no more questions.*

*If you answered "Yes," proceed to the next question.*

4. What amount of money, if any, will fairly and reasonably compensate Kingstad Law Firm, LLC for such damages?

\$ \_\_\_\_\_

9862226.1

STATE OF WISCONSIN : CIRCUIT COURT : MILWAUKEE COUNTY  
CIVIL DIVISION

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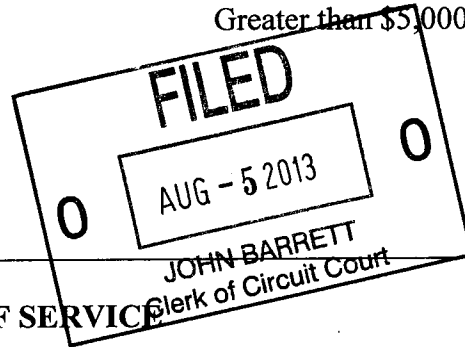
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Case No. 2008CV18317

Code No. 30301 (Money Judgment  
Greater than \$5,000)



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**CERTIFICATE OF SERVICE**

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I, Tammy J. Raymond, certify that, under penalty of perjury under the laws of the State of Wisconsin, on the 5th day of August, 2013, I caused to be served a copy of **PLAINTIFFS' AMENDED PRETRIAL REPORT** in the above-captioned matter upon counsel listed below via email and first class mail:

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Kingstad Law Firm LLC  
8081 W. Layton Ave., Ste. C  
Greenfield, WI 53220

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Tammy J. Raymond, Legal Assistant to  
Atty. Michael D. Huitink