UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

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| IGF INSURANCE COMPANY, *et al.*,<br><br>Plaintiffs,<br><br>vs.<br><br>CONTINENTAL CASUALTY COMPANY, an Illinois Insurance Corporation,<br><br>Defendant, | ) | 1:01-cv-799-RLY-KPF |
| CONTINENTAL CASUALTY COMPANY, and 1911 CORP.,<br><br>Counterplaintiffs and Third-Party Plaintiffs,<br><br>vs.<br><br>IGF INSURANCE COMPANY, IGF HOLDINGS, INC., and SYMONS INTERNATIONAL GROUP, INC.<br><br>Counterdefendants,<br><br>and<br><br>GORAN CAPITAL, INC., GRANITE REINSURANCE COMPANY, LTD., SUPERIOR INSURANCE COMPANY, PAFCO GENERAL INSURANCE COMPANY, ALAN SYMONS, DOUGLAS SYMONS, and G. GORDON SYMONS,<br><br>Counterdefendants and Third-Party Defendants. | ) | |

**ENTRY ON (1) CONTINENTAL CASUALTY COMPANY'S AND 1911 CORP.'S MOTION FOR SUMMARY JUDGMENT ON THEIR COUNTERCLAIMS, (2) GORAN CAPITAL INC.'S AND GRANITE REINSURANCE COMPANY, LTD.'S MOTION FOR SUMMARY JUDGMENT AS TO COUNTS IV AND V OF THE AMENDED COUNTERCLAIM, AND (3) ALAN G. SYMONS' AND G. GORDON SYMONS' MOTION FOR SUMMARY JUDGMENT ON COUNTS IV AND V OF THE AMENDED COUNTERCLAIM**

In February 1998, IGF Insurance Company ("IGF"), IGF Holdings, Inc. ("IGFH"), Symons International Group, Inc. ("SIG") (collectively the "IGF Parties"), and Continental Casualty Company ("CCC"), entered into a Strategic Alliance Agreement ("SAA") whereby IGF acquired the crop insurance business of CCC. A few months after the purchase was complete, IGF began to experience financial difficulties. Three years after the purchase of CCC's crop insurance book of business, CCC exercised its right under the SAA for full payment of the purchase price. IGF was unable to pay CCC the debt it owed. Facing severe financial distress, IGF sold it crop insurance business to Acceptance Insurance Companies, Inc. ("Acceptance") on June 6, 2001.

On June 4, 2001, the IGF Parties filed suit against CCC, asserting claims for breach of contract, fraud, and breach of fiduciary duty.

On June 27, 2001, CCC and 1911 Corp. filed its Counterclaim against the IGF Parties and two affiliated companies, Goran Capital, Inc. ("Goran") and Granite Reinsurance Company, Ltd. (Barbados) ("Granite Re"). Five months later, on November 30, 2001, CCC amended its Counterclaim to add five new defendants – Pafco General Insurance Company ("Pafco"), Superior Insurance Company ("Superior"), G. Gordon

Symons, Alan G. Symons, and Douglas H. Symons – and two claims. In toto, the Amended Counterclaim alleges that the IGF Parties breached the terms of the SAA (Count I and II); IGFH breached the terms of a promissory note (Count III); and that IGF fraudulently transferred assets to Goran, SIG, Granite Re, Pafco and Superior (Count IV). Count V alleges that the Symons Family, Goran, Granite Re, Pafco, Superior, and SIG should be liable for the contractual liabilities of IGF and IGFH under an alter ego theory (Count V).

This case is now before the court on CCC's and 1911 Corp.'s Motion for Summary Judgment on Their Counterclaims; Goran Capital Inc.'s and Granite Reinsurance Company, Ltd.'s (collectively the "Corporate Counterdefendants") Motion for Summary Judgment as to Count IV and Count V of the Amended Counterclaim; and Third-Party Defendants Alan Symons' and G. Gordon Symons' (collectively the "Individual Counterdefendants") Motion for Summary Judgment.[1] For the reasons explained below, the court **GRANTS** in part, and **DENIES** in part, CCC's and 1911 Corp.'s Motion for Summary Judgment; **DENIES** Goran Capital Inc.'s and Granite Reinsurance Company, Ltd.'s Motion for Summary Judgment as to Count IV and Count V of the Amended Counterclaim; and **DENIES** Third-Party Defendants Alan Symons' and G. Gordon Symons' Motion for Summary Judgment.

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[1] Douglas Symons filed for bankruptcy on July 2, 2004. Thus, these proceedings are presently stayed against him.

## I. Factual Background[2]

### A. The Parties

1. CCC is an Illinois insurance company and is an affiliate of CNA Financial Corporation. In documents relevant to this litigation, it is often referred to as "CNA." (Amended Complaint ¶ 4).

2. 1911 Corp. is a wholly-owned subsidiary of CCC. (Amended Counterclaim ¶ 2).

3. IGF was an Indiana insurance company and the original plaintiff in this action. Following insolvency proceedings, IGF and CCC settled the claims in this case against one another. (*See* Fact # 60). Consequently, IGF is no longer a party to this action.

4. IGFH is an Indiana holding company, a wholly-owned subsidiary of SIG, and owns 100% of the stock of IGF. (Goran Ex. 2 at ¶ 24; Goran Ex. 3 at ¶ 18).

5. SIG is a holding company and performed management of its subsidiaries, which included IGF, IGFH, Pafco, and Superior. (Symons Ex. 2 at ¶ 2; Symons Ex. 1 at

[2] CCC's and 1911 Corp.'s exhibits in support of their motion for summary judgment on their counterclaims are listed in Docket # 36, while their exhibits in support of their motion for summary judgment on Plaintiffs' claims are listed in Docket # 40, and their exhibits in support of their combined response in opposition to the Individual and Corporate Counterdefendants' motions for summary judgment on Counts IV and V of CCC's and 1911 Corp.'s Counterclaim are listed in Docket # 80. Throughout this entry, the reader should assume the exhibits cited are from Docket # 36, unless otherwise specified by the court. Accordingly, references to exhibits contained in CCC's and 1911 Corp.'s motion for summary judgment on their counterclaims will be cited as ("CCC Ex.___"). References to exhibits contained within Goran's and Granite Re's motion for summary judgment will be cited as ("Goran Ex.___"). References to the exhibits filed in support of Alan and Gordon Symons' motion for summary judgment will be cited as ("Symons Ex.___").

¶ 25).

6. Goran is a holding company that owns stock in various insurance and reinsurance companies. (Goran Ex. 17 at 16). Goran owns the stock of Granite Insurance Company (a non-party), and Granite Re, and owns 73% of the shares of SIG. (*Id.* at 16-17). Goran performed the management of its subsidiaries, which included Granite Re. (Goran Ex. 3 at ¶ 26).

7. Granite Re is engaged in the reinsurance business. (Goran Ex. 1 at ¶ 21; Goran Ex. 2 at ¶ 1; Goran Ex. 9 at 229).

8. Superior and Pafco were engaged in the non-standard automobile insurance business. (Symons Ex. 1 at ¶¶ 22-23).

9. Gordon Symons, Alan Symons, and Douglas Symons (collectively the "Symons Family") owned significant stock interests (up to 100%) in Goran, SIG, Granite Re, IGF, IGFH, Superior, Pafco, and other unnamed affiliated companies. (CCC Ex. 1 at 489 and Ex. 43 attached thereto).

10. Gordon Symons was at all relevant times the Chairman of the Board of Goran and all of its subsidiaries, including all Counterdefendant Companies (known collectively as the "Companies"). He was also at all times the CEO and President of Granite Re. (CCC Ex. 3; CCC Ex. 4 at 53788).

11. Alan Symons was at various times from 1997-2001 the President and CEO of Goran; Chairman and CEO of SIG; Vice Chairman of Granite Re; President and CEO of Superior; and the President and CEO of IGF. He also served as Vice

Chairman for SIG, Pafco, Superior, IGFH and IGF and as a Granite Re director. (*See* CCC Exs. 3 and 4 at 53788; CCC Ex. 5; CCC Ex. 6 at 5937; CCC Ex. 7; CCC Ex. 38 at 1).

12. Douglas Symons was at various times the Senior Executive Vice President, COO, and Secretary of Goran; President, CEO, and COO of SIG; CEO, COO, and Secretary of Pafco; Vice Chairman, Executive Vice President, and Secretary of IGFH; CEO, Executive Vice-President, and Secretary of IGF; Vice Chairman of Granite Re; and a director of each affiliated company. (*Id*.).

### B. Sale of CCC's Crop Insurance Business to IGF

13. Prior to February 1998, CCC's crop insurance consisted of (1) crop insurance written by North American Crop Underwriters, Inc. ("NACU"); (2) crop insurance written by CNA; and (3) Multiple Peril Crop Insurance[3] ("MPCI") and Crop Hail Insurance written by Producers Lloyds Insurance Company. (Amended Complaint ¶ 15; Amended Answer and Counterclaim ¶ 15).

#### 1. The Strategic Alliance Agreement and Ancillary Agreements

14. On February 28, 1998, CCC entered into the SAA and certain Ancillary Agreements with the IGF Parties. Pursuant to the SAA and Ancillary Agreements, CCC sold its MPCI and Crop Hail books of business to IGF in return for a future

[3] MPCI is government-sponsored insurance administered through the Federal Crop Insurance Corporation ("FCIC"). Crop Hail Insurance is not government-sponsored and provides protection against any yield reduction due to hail and/or fire.

payment from the IGF Parties based upon a pre-negotiated formula – the Put Mechanism – and a share of the profits based on the actual performance of the "pooled" books of business. CCC had the option of exercising the Put Mechanism at any time after a three-year period. (*See generally*, CCC Ex. 8; CCC Ex. 9 at ¶ 3).

### 2. CCC's Share of MPCI Underwriting Gain for 2000 Crop Year

15. Pursuant to the SAA, CCC and the IGF Parties agreed to share profits or losses from the pooled insurance businesses (until the put was exercised) pursuant to the terms of four Ancillary Agreements (the "Quota Share Agreements"). (CCC Exs. 10-13). Pursuant to the Quota Share Agreements, CCC ceded to IGF 100% of the revenue and risk for the policies written on CCC paper, and IGF retroceded to CCC a portion of the pre-tax underwriting gain or loss from the "pooled" IGF and CCC MPCI and Crop Hail books of business. (*See* CCC Exs. 10-13 at § 2; CCC Ex. 9 at § 6).

16. The MPCI Crop Year for a particular year runs July 1 of the previous calendar year through June 30 of the particular calendar year, *e.g.*, the 1998 MPCI Crop Year ran from July 1, 1997 through June 30, 1998. The first cash settlement between CCC and IGF for that Crop Year would not be made until the FCIC made its first cash settlement with IGF, the Standard Reinsurance Agreement ("SRA") holder, in the following February. (CCC Ex. 9 at ¶ 7; CCC Ex. 14 at 156-57). Subsequent resettlements or "true-ups" would be made over the next two years but

the net underwriting results for MPCI generally would not vary by more than 5% from the initial settlement. (CCC Ex. 9 at ¶ 7).

17. Crop Hail insurance follows the calendar year. CCC's and IGF's initial Crop Hail cash settlement occurred in November for a particular Crop Year and was trued up six months later. Any subsequent "true-ups" generally would not vary by more than 5%. (*Id*.).

18. When doing initial cash settlements and "true-ups," Robert Parker, the CFO of CNA Agriculture and his financial staff, and IGF's CFO and financial staff, would jointly determine the proper amount by comparing and reconciling their respective calculations. (*Id*. at ¶ 9; CCC Ex. 14 at 46-48).

19. The allocation formula used to determine the pre-tax underwriting gain or loss is set forth in Section 2(1) of the MPCI Quota Share Agreement, and provides that CCC shall "receive as its share . . . an annual reinsurance cession equal to 70% of the 'MPCI Underwriting Gain (Loss),' as defined in §§ 2(3) and 2(b). (CCC Ex. 12 at §§ 2(1), (3), (6)).

20. Based upon the results set forth in the FCIC's February 2001 RoRecap Report and the information provided by IGF's CFO, Michael Jones ("Mr. Jones"), CCC's "MPCI Proportion for the 2000 Crop Year," as calculated pursuant to § 2(6) of the MPCI Reinsurance Agreement, is 33.57% and the "MPCI Underwriting Gain (Loss)," as calculated pursuant to § 2(3), is $7,418,790. (CCC Ex. 9 at ¶¶ 9-10, 12-14). Because CCC is entitled to 70% of the "MPCI Underwriting Gain (Loss),"

pursuant to § 2(1), CCC's share of the MPCI Underwriting Gain for the 2000 Crop Year is $5,193,153, plus interest. (*Id*. at ¶ 14). Due to various charges and true-ups, that amount should be offset by $953,661.31. (*Id*. at ¶ 15).

21. CCC and IGF settled the previous Crop Years (1998-99) without incident. In February 2001, CCC and IGF settled the 2000 Crop Hail Crop Year. (CCC Ex. 9 at ¶ 16; CCC Ex. 14 at 172-74; CCC Ex. 16). However, the IGF Parties did not pay CCC its share of the MPCI Underwriting Gain for the 2000 Crop Year in March 2001, nor have the IGF Parties paid CCC any amount to date. (CCC Ex. 9 at ¶ 16).

### 3. Put Calculation

22. Section 3.8(B) of the SAA sets forth the Put Mechanism, pursuant to which CCC had the option to terminate the Quota Share Agreements and to demand payment for the sale to IGF of its share of the pooled insurance business under a pre-negotiated formula. (CCC Ex. 8 at § 3.8(b)).

23. On January 3, 2001, CCC exercised the Put Mechanism, which became effective on February 19, 2001. (CCC Ex. 9 at ¶ 18).

24. The IGF Parties were then obligated to issue to CCC a promissory note within 30 days of notice of the Put – i.e., March 21, 2001 – and to pay that Note six months later., *i.e*., September 21, 2001, in an "amount equal to 5.85 times the Average Pre-Tax Income as computed" under the SAA. (CCC Ex. 9 at ¶ 18; CCC Ex. 8 at § 3.8(B)(i)(a)-(b)). "Average Pre-Tax Income" (if the Put is exercised during the

2001 Crop Year) is the "four (4) year Olympic Average of the 1997 through 2000 Pre-Tax Incomes." (CCC Ex. 9 at § 19).

25. Pre-Tax Income for 1998 is the sum of $4,463,838 for MPCI and $(3,501,260) for Crop Hail, *i.e.*, $962,578 total. Pre-Tax Income for 1999 is the sum of $6,499,658 for MPCI and $(1,313,828) for Crop Hail, *i.e.*, $3,879,325. (CCC Ex. 9 at ¶¶ 21-23). The "Average Pre-Tax Income" under the "Olympic" formula is $4,343,108, and the amount of the Put is 5.85 times $4,343,108 or $25,407,182. (*Id*. at ¶ 24).

26. Although the IGF Parties were required to pay the promissory note within six months, to date the IGF Parties have not paid any portion of the amount due under the Put Mechanism. (*See* CCC Ex. 8 at § 3.8(B)(i)(b)).

27. The SAA provides that 90 days after the Put is exercised, the promissory note "shall bear simple interest at the rate which is equal to the 90-day T-Bill rate in effect on the date which is ninety-one (91) days subsequent to the date of the note." (*Id*.).

28. The interest due on the Put as of June 21, 2006 is 3.63% of $25,407,182 – i.e., $4,611,404. (CCC Ex. 9 at ¶ 27).

**C. NACU Promissory Note**

29. On July 7, 1998, 1911 Corp. entered into a Stock Purchase Agreement with IGFH, pursuant to which IGFH agreed to purchase 100% of the shares of NACU in exchange for $3 million in cash payable to the NACU founders (who owned 60% of NACU's stock) and the issuance of a promissory note ("NACU Promissory

Note" or "Note") in the principal amount of $1 million to 1911 Corp. (which owned the remaining 40% of NACU stock). (*See* CCC Ex. 18 (Docket # 40)).

30. Pursuant to the NACU Promissory Note, IGFH agreed to pay 1911 Corp. $1,000,000 on the "Due Date," which is defined as the "earlier of (i) the closing under the exercise of a Put Right or a Call Right under the Strategic Alliance Agreement dated February 29, 1998 . . ., or (b) July 1, 2001." (*See* CCC Ex. 18 at § 1).

31. On that same date, IGFH assigned the NACU Promissory Note to IGF. Thus, IGF "assum[ed] all of the obligations of IGFH in the [NACU Promissory] Note." (*See* CCC Ex. 17).

32. IGFH has not made any payment to date.

**D. IGF's Financial Distress**

33. Early in 2001, due to financial difficulties, IGF was brought under the supervision of the Indiana Department of Insurance ("IDOI"). Under supervision, IDOI approval was required for all transactions in excess of $10,000. (Symons Ex. 7 at 446).

34. Beginning in March 2001 and continuing through early June 2001, CCC engaged in negotiations with the IGF Parties regarding payment of the debt owed CCC. In the course of these negotiations, CCC made it clear that legal action would be instituted if the IGF Parties did not pay the debt. (CCC Ex. 9 at ¶ 28).

**E. IGF Sells the Crop Insurance Business to Acceptance**

35. In the latter part of 2000, IGF decided to pursue a sale of its business due to flat revenue projections. (Goran Ex. 17 at 229-30).

36. Willing buyers included Archer Daniels Midland ("ADM") and the Westfield Group. (*Id*. at 260-61). They each offered IGF approximately $40,000,000 to purchase its crop insurance business. (*See* CCC Exs. 38, 40, 41, 42, 44 (Docket # 80)).

37. On April 4, 2001, the FCIC informed IGF in a written notice that in less than 90 days (June 30, 2001), the FCIC was no longer going to provide reinsurance for the crop insurance contracts issued by IGF. (*Id*. at 260). Discontinuance of this reinsurance would have required IGF to go out of business. (*Id*. at 261).

38. On June 6, 2001, facing the imminent cutoff of its ability to write or issue any new business, IGF entered into an Asset Purchase Agreement with Acceptance, selling IGF's crop insurance business assets for $40,500,000. (CCC Ex. 21 at § 2.02).

39. On that same day, June 6, 2001, CCC filed a Complaint demanding payment of IGF's obligations relating to the Put Mechanism, and requesting that the sale to Acceptance be enjoined. (Complaint at ¶ 41). The Acceptance sale closed later that day.

**F. Terms of the Sale**

40. The Asset Purchase Agreement provided that $9,000,000 of the payment would be split between SIG and Goran in return for covenants not to compete; $15,000,000 would be paid to Granite Re (in present and future payments) for a reinsurance

agreement; and $16,500,000 of the purchase price would be paid to IGF for the purchase of its business. (*Id*.). The foregoing amounts were paid to each of those parties, and SIG then transferred the funds it received ($4,500,000) to Pafco and Superior. (CCC Ex. 1 at 286).

41. Alan, Gordon, and Douglas Symons received consideration of $1.00 for the non-compete agreements they executed as part of the transaction. (CCC Ex. 26 at 124-25).

42. Approximately twenty (20) IGFH[4] employees signed non-compete agreements with Acceptance, and many were awarded positions with Acceptance following the sale. (Symons Ex. 7 at 285-86). After the sale was complete, neither IGF nor IGFH had any employees. (*Id*. at 480).

43. The agreements between Acceptance on the one hand, and IGF, SIG, Goran and Granite Re on the other, were all part of the same sales transaction. (CCC Ex. 22 at 83-87; CCC Ex. 21 at § 2.02).

44. Alan Symons acted as the principal representative of IGF, IGF Holdings, SIG, Goran and Granite Re in these negotiations. (CCC Ex. 1 at 348-49; CCC Ex. 23 at 252; CCC Ex. 24 at 217; CCC Ex. 32 at 65-66).

**1. Non-Compete Agreements**

45. As noted above, at the time the parties signed the Asset Purchase Agreement, they

[4] IGF employees were actually employed by IGFH. (Symons Ex. 7 at 285).

also entered into certain other ancillary agreements. These other agreements included Non-Compete and Consulting Agreements with Goran and SIG preventing each from engaging in any crop insurance business for three (3) years. (Goran Ex. 15 at 26).

46. The IDOI questioned the reason for the non-compete agreements with Goran and SIG. (*See* CCC Ex. 51) ("If Goran and SIG primarily function as holding companies and are not directly involved in the crop business, please explain why these entities are being compensated not to compete.").

47. At the time of the sale, IGF was the only company among the Counterdefendants that was engaged in the crop insurance business. (CCC Ex. 2 at 2-3).

48. Acceptance CEO Michael McCarthy ("Mr. McCarthy") testified that Alan Symons first proposed the non-compete agreements. (Symons Ex. 13 at 58; *see also* CCC Ex. 29 at 52856).

49. Mr. McCarthy agreed to pay $9,000,000 for the non-compete agreements "[t]o secure the cash flows that Acceptance was hoping to acquire. It's important that you not have competition in retaining the relationships which generate the cash flow." (Symons Ex. 13 at 50-51). He also testified that Acceptance entered into the non-compete with SIG because Acceptance "wanted to make sure that nobody with the ability to compete would compete. . . [SIG] had the intellectual property, the know-how to potentially create a competing organization." (Goran Ex. 15 at 58).

### 2. Reinsurance Agreement

50. As part of the sale of IGF's business to Acceptance, Acceptance entered into a reinsurance agreement with Granite Re, another subsidiary of Goran, whereby Acceptance would pay Granite Re $6,000,000 immediately, and $9,000,000 over a three-year period, beginning on January 1, 2003. In return, Granite Re reinsured Acceptance for any losses on Acceptance's MPCI business that was in excess of 140% but not greater than 150% of the net premium received by Acceptance during the 2001-05 MPCI crop years. The reinsurance treaty provided further that Granite Re's total liability over the five-year term should not exceed $40,000,000, and, if that cap were reached, Acceptance would pay (in addition to the $3,000,000 annual premium) a rate of 5% of net premium for each remaining crop year. (CCC Ex. 30, Articles 6 and 11A; CCC Ex. 21 at §§ 3.11, 6.01).

51. The reinsurance agreement contained several unique provisions that were not customary in the industry: (i) the required payment of a substantial, additional premium in the event of a major loss; (ii) a $9,000,000 indemnification by Granite Re if IGF breached the Asset Purchase Agreement between Acceptance and the IGF Parties; (iii) the agreement required payment of the 2001 and 2002 premium by January 1, 2001; (iv) the agreement was undated; and (v) the agreement had a five-year term without a termination clause. (*See* CCC Ex. 31 at 4-5).

52. Alan Symons stated that the likelihood that Granite Re would experience a loss in excess of 140% would happen approximately once in one hundred years. (CCC

Ex. 35 at 1; CCC Ex. 1 at 293).

53. Given the low probability of loss coupled with the cap on the maximum payout and the additional premium if the cap were reached, the premium for the Granite Re reinsurance should have been dramatically smaller than $15,000,000. (CCC Ex. 31 at 2-3). James Driscoll, a former chief actuary for the FCIC, testified that based on the low risk, the premium for the policy should have been $9,000 annually. (CCC Ex. 34 at 11). The annual premium was dramatically higher than other reinsurance policies obtained by Acceptance or IGF around that time, even though the risk on the other policies began at lower, more likely, levels, and even though the policies did not contain provisions for a large premium add-on if the limit were reached. (CCC Ex. 36).

54. The rate on line for the Granite Re/Acceptance agreement was highly unusual at 37.5%, and the payback period for the reinsurance (i.e., the number of years of future business it would take to cover the loss) was only 2.6 years if the limit of coverage was hit. (CCC Ex. 31 at 3). This pricing mechanism was "out of line with the market norm." (*Id.*).

55. The inclusion of a $9,000,000 limit for indemnification of Acceptance if the IGF Parties breached the Acceptance/IGF purchase agreement is "not the industry norm" in a MPCI stop loss reinsurance agreement. (CCC Ex. 31 at 5).

56. Mr. McCarthy testified that Acceptance entered into the reinsurance agreement because it "determined that this would fit into [their] long-term reinsurance

program." (Goran Ex. 15 at 59).

57. Mr. McCarthy also testified that Acceptance was willing to pay a sum certain for IGF's crop insurance business. The exact amounts paid for the non-competes and the reinsurance were subject to fluxuation, so long as the overall purchase price remained in the $40,000,000 range. (*Id*. at 84).

### G. IGF's Insolvency Proceedings and Settlement Agreement with CCC

58. On October 17, 2003, Sally B. McCarty, as Insurance Commissioner of the State of Indiana, filed a Verified Complaint for Rehabilitation against IGF in the Marion Circuit Court ("Circuit Court"), cause no. 49C01-0310-PL-002942 ("Marion County Proceedings"), and on the same day, the Circuit Court entered an Order of Rehabilitation. (Goran Ex. 5).

59. On July 16, 2004, the Circuit Court entered an Order of Liquidation and Related Relief and an Order Concerning Liquidation in the Marion County Proceedings. (Goran Ex. 6).

60. In January 2005, CCC and 1911 Corp. reached a settlement with IGF, and entered into the Settlement Agreement and Release ("Settlement Agreement"). (Goran Ex. 9).

61. The Settlement Agreement contained general releases which "fully and finally release and forever discharge IGF and Pafco from any and all liabilities, claims, demands, causes of action and suits that CCC [and 1911 Corp.] has of whatever kind and nature . . . in the Federal Litigation or the Insolvency Proceedings . . ."

(Goran Ex. 9 at ¶¶ 4, 6). The Settlement Agreement also provided that the parties "do not intend to, and the Settlement Agreement shall not, release" CCC's claims against the Counterdefendants in this litigation, and that a condition of the Settlement Agreement was that an Order would be entered in the Marion County Proceedings "so that CCC may continue to prosecute [this case] against all parties other than IGF and Pafco." (*See id*. at ¶¶ 2.5, 5).

62. In a contemporaneous Stipulation, the Liquidator and CCC agreed that CCC would be allowed to prosecute its claims against the Counterdefendants in this court. (CCC Ex. 59) (Docket # 80)).

63. On March 2, 2005, the Circuit Court entered an Order Approving Settlement Agreement. (Order Approving Settlement Agreement, CCC Ex. 60 (Docket # 80)).

### H. The Symons Family and its Corporate Entities

#### 1. The Financial Condition of the Symons Family Companies at the Time of the Acceptance Sale

64. Goran and SIG were both balance sheet insolvent in every year from 1999 through 2001 – i.e., their total liabilities exceeded their total assets. (*See* CCC Ex. 41 at 15-16 and exhibits thereto; CCC Ex. 2 at 5-6; CCC Ex. 42 at 4-5; CCC Ex. 43 at 5-6; CCC Ex. 44 at 3-4).

65. Goran and SIG were equitably insolvent, i.e., their current liabilities exceeded their current assets, in every year from 1998 through 2000. (*See* CCC Ex. 2 at 5-6;

CCC Ex. 41 at 16-17; CCC Ex. 44 at 3-4; CCC Ex. 45 at 3-4; CCC Ex. 46 at 3-4).

66. IGF, Superior, and Pafco were equitably insolvent in 1999, 2000, and 2001. (*See* CCC Ex. 38 at 2-3; CCC Ex. 39 at 2-3; CCC Ex. 47 at 2-3; CCC Ex. 48 at 2-3; CCC Ex. 49 at 2-3; CCC Ex. 50 at 2-3 (Docket # 40)).

67. Goran, SIG, IGF, Superior, and Pafco experienced losses from operations (mostly in the tens of millions) in every year from 1999 through 2001. (*See* CCC Ex. 38 at 4; CCC Ex. 39 at 4; CCC Ex. 41 at 19-20; CCC Ex. 42 at 6; CCC Ex. 44 at 4; CCC Ex. 47 at 4; CCC Ex. 48 at 4; CCC Ex. 49 at 4; CCC Ex. 50 at 4; CCC Ex. 51 at 3).

68. In 2001, Goran's auditors noted that Goran's financial statements were "affected by conditions and events that cast substantial doubt on the company's ability to continue as a going concern." Moreover, in 2001, SIG's auditors issued a going concern opinion which expressed doubts as to "the Company's ability to continue as a going concern given the recurring operating losses experienced by the Company over the past few years and the Company's net capital deficiency." (*See* CCC Ex. 42 at 15; CCC Ex. 43 at 3).

### 2. Corporate Formalities

69. Each of the Companies involved in this litigation had its own articles of incorporation and its own set of corporate bylaws. (Goran Ex. 1 at ¶¶ 3, 4).

70. Each Company maintained records of its respective shareholders and maintained its own minute book. (*Id*. at ¶ 9; Goran Ex. 3 at ¶ 12; Goran Ex. 2 at ¶ 12; Goran

Ex. 10 at 216-17).

71. Each Company held regular shareholder meetings, and met at least on an annual basis. (Goran Ex. 1 at ¶ 12).

72. The Board of Directors of each Company had its own separate meetings, and met at least on an annual basis. (Goran Ex. 10 at 217, 226-28; Goran Ex. 12 at 25, 27, 29-30). However, during the period November 1, 1997 and May 30, 2001, there were at least eight instances where Goran and SIG held concurrent Board of Directors' meetings. (CCC Ex. 54). During May 1, 1998 through May 30, 2001, there were at least three instances where IGF and Superior held concurrent Board of Directors' meetings. On at least one of those occasions, IGF Holdings and Superior held a concurrent Board of Directors' meeting with Pafco and IGF. (*Id.*).

73. Each Company had its own officers and directors. Each Company's officers were appointed by each Company's respective Board of Directors. (Goran Ex. 10 at 217).

74. However, the Symons Family were named directors and officers of each Company. (*See* CCC Ex. 7; *see also* Facts ## 10-12).

75. The Corporate Counterdefendants shared other officers besides the individual members of the Symons Family. For example, Earl Fonville ("Mr. Fonville") was the Treasurer and CFO of Goran, SIG, Pafco, and Superior. (*See* CCC Ex. 7). Gene Yerant ("Mr. Yerant") was an Executive Vice President of Goran and SIG and President and COO of Superior and Pafco. (*Id.*). Dennis Daggett ("Mr.

Daggett") was the CEO of IGF and IGFH. (*Id*.). Thomas Gowdy ("Mr. Gowdy") was the Vice President of IGF and IGFH. (*Id*.). David Bates was the General Counsel and Secretary of both SIG and Goran. (CCC Ex. 2 at 18 (Docket # 80)). Gregg Albacete ("Mr. Albacete") was Vice President and CIO of Superior, SIG, and Goran. (*See* CCC Ex. 7).

76. The Corporate Counterdefendants also shared directors in addition to the individual members of the Symons Family. For example, John McKeating was a director of Goran and SIG. (*Id*.). Mr. Yerant was a director of SIG, Superior, and Pafco. (*Id*.). Mr. Gowdy was a director of IGFH and IGF. (*Id*.). Mr. Daggett was a director of IGF, IGFH, Superior, and Pafco. (*Id*.). Mr. Albacete was a director of Superior, Pafco, and IGF. (*Id*.). Robert Whiting was a director of SIG and IGF. (*Id*.).

77. The Board of Directors of each Company documented its own decisions in the form of resolutions and/or written consents. (Goran Ex. 1 at ¶ 7).

78. Each Indiana Company reported annually to the Indiana Secretary of State and kept a copy of its most recent report at its principal office. (Goran Ex. 1 at ¶ 11).

79. Each Company had separate bank accounts and separate budgets. (Goran Ex. 10 at 217; Goran Ex. 13 at 29).

80. Each Company maintained appropriate accounting records and were audited annually by outside accounting firms. (Goran Ex. 3 at ¶ 11; Goran Ex. 2 at ¶ 11).

81. At all relevant times, Goran's U.S. Headquarters shared a common business

address at 4720 Kingsway Drive, Indianapolis, Indiana, 46205 with SIG, IGF, IGFH, Pafco, and Superior. (CCC Ex. 42 at 16-17; CCC Ex. 43 at 4).

82. Employees of IGF, Superior, and Pafco were on the same payroll as, and paid by, IGFH. (CCC Ex. 1 at 285-86, 478-79).

83. Alan Symons requested that Mr. Jones, IGF's CFO and Treasurer, make a representation regarding IGF's estimated underwriting gain to the FCIC that was substantially contrary to estimates that Mr. Jones had already prepared. When Mr. Jones expressed his concerns, Alan Symons left him a voicemail stating: "We are going to make this Company survive and I am going to get capital in this Company . . . On 12/31/2000 I want the UW [underwriting] gain dialed in at $31.5 [million] . . . If you are uncomfortable send it to me and I'll cover it." (CCC Ex. 14 at Ex. 7). The actual underwriting gain realized by IGF was close to Mr. Jones' estimate of $25 to $26 million. (*Id*. at 10-12, 122-23, 168-69).

84. SIG officers also pressured Mr. Jones to prepare financial statements in connection with IGF's 2000 statutory filings in a manner which made Mr. Jones "uncomfortable." (*Id*. at 10-12). Alan Symons also instructed Mr. Jones on how to account for certain transactions on IGF's financial statements. (*Id*. at 127-34). Mr. Jones resigned as IGF's Treasurer because of that discomfort. (*Id*. at 10). When Mr. Jones resigned, Dennis Daggett, IGF's President, also resigned partly because he was uncomfortable signing IGF's 2000 Annual Statement if Mr. Jones and another IGF officer, John Sheeley, were uncomfortable with IGF's numbers.

(*Id*. at 194-96; CCC Ex. 24 at 205-07).

85. Mr. Jones testified that Alan Symons gave "instructions on how to book certain items [on financial statements]." (CCC Ex. 14 at 128).

86. In an e-mail communication dated July 5, 2001, Douglas Symons instructed Mr. Fonville, CFO of SIG, to prepare wire transfers in conjunction with paying non-compete and other payments related to the Acceptance sale against Mr. Fonville's stated desire to wait for Board approval. (CCC Ex. 52).

### 3. Personal Loans and Salaries

87. In April 1999, Goran pledged trust preferred shares of SIG held by Goran's subsidiary Granite Re to guarantee personal loans from an unrelated third party to Alan Symons in the amount of $1,525,000 and to Douglas Symons in the amount of $980,000. The proceeds from those personal loans were intended for the repayment of personal loans previously made to Alan and Douglas Symons by SIG and Goran. (CCC Ex. 55 at 2-3).

88. In November 2000, Goran loaned an additional $1,000,000 collectively to Alan and Douglas Symons for the purpose of paying down their personal loans to the unrelated third party so as to release the previously pledged trust preferred shares of SIG as collateral. (*See* CCC Ex. 56 at 2-3). On April 19, 2001, Goran loaned an additional $750,000 collectively to Alan and Douglas Symons for the purpose of paying down their personal loans to the unrelated third party. (*Id*.).

89. On July 17, 2001, Goran and Granite Re loaned approximately $800,000 to

Gordon Symons to help fund a personal real estate transaction over the initial objections of Goran's board members. (*Id*.).

90. From 1999 to 2002, the Symons Family, on an aggregate basis, had millions of dollars of outstanding loans from Goran and its subsidiaries. (*See* CCC Exs. 6, 56, 60).

91. Alan Symons testified that to his knowledge, the majority of these loans had been repaid or would be repaid in the near future. (Symons Ex. 7 at 218-21).

92. From 1998 through 2002, Gordon Symons collected over $2,200,000 in salary and consulting fees from Goran, SIG, and Granite Re. (CCC Ex. 17 at 5 (Docket # 80); CCC Ex. 19 (Docket # 80)).

93. From 1998 through 2002, Alan Symons collected over $2,000,000 in salary and consulting fees from Goran, SIG, and Granite Re. (*Id*.).

94. From 1998 through 2002, Douglas Symons collected over $2,100,000 in salary and bonus from Goran and SIG. (*Id*.).

95. Symons International Group, Ltd. ("SIGL"), a private company owned by Gordon, Alan, and Douglas Symons, had an outstanding, non-interest bearing loan from Goran of $1,446,000 as of December 31, 2000. (CCC Ex. 17 at 3 (Docket # 80)). The following year, SIGL's indebtedness to Goran increased to $2,053,000. (CCC Ex. 18 (Docket # 80)). Also during 2001, Goran paid SIGL an additional $900,000 in purported consulting fees and provided an interest free loan to a wholly-owned subsidiary of SIGL in the amount of $3,340,000, which was still

outstanding as of December 31, 2001. (*Id*.).

96. SIG charged IGF approximately $1,500,000 for expenses related to the Acceptance transaction. (*See* CCC Ex. 49 (Docket # 80)).

### 4. Commingling of Assets, Liabilities, and Affairs

97. In 2001, holding companies IGF Holdings, SIG, and Goran received in excess of $43 million from the operating companies through management agreements and service contracts between entities. (CCC Ex. 47 at 51254).

98. Superior obtained a line of credit from Granite Re in the total amount of $2.5 million. As of December 31, 2001, $1,300,000 was outstanding under that line. (*See* CCC Ex. 42 at 13).

99. In 2001, Superior, Pafco, and IGF engaged in over $1,000,000 in inter-company purchases, sales, or exchange of loans, securities, real estate, mortgage loans or other investments. (*See* CCC Ex. 47 at 51254).

100. On March 1, 2001 and June 5, 2001, IGF and SIG entered into separate but related Asset Purchase Agreements. Pursuant to those Agreements, SIG acquired certain assets from IGF and then leased them back to IGF on the same date. SIG later resold those assets back to IGF for $1,041,637.28 and agreed to terminate the lease. (*See* CCC Ex. 61).

101. On November 24, 1998, Superior loaned IGF $5,500,000 and Pafco loaned to IGF an additional $2,000,000. (*See* CCC Ex. 62). On January 22, 2001, Pafco loaned IGF an additional $1,500,000, and Granite Re loaned IGF an additional

$3,000,000. (*See* CCC Ex. 63).

## II. Standard of Review

Disposition of a case on summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c). The record and all reasonable inferences therefrom must be viewed in the light most favorable to the non-moving party. *Nat'l Soffit & Escutcheons, Inc. v. Superior Sys., Inc.*, 98 F.3d 262, 264 (7th Cir. 1996).

The moving party bears the burden of demonstrating the absence of a triable issue. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The burden may be met by demonstrating "that there is an absence of evidence to support the non-moving party's case." *Id.* at 325. If the moving party meets its burden, the adverse party "may not rest upon the mere allegations or denials of the adverse party's pleading," but must present specific facts to show that there is a genuine issue of material fact. FED. R. CIV. P. 56(e); *see also Nat'l Soffit*, 98 F.3d at 265 (citing *Hughes v. Joliet Corr. Ctr.*, 931 F.2d 425, 428 (7th Cir. 1991)).

As this case is before the court on cross motions for summary judgment with respect to Counts IV and V of the Amended Counterclaim, the court evaluates each movant's motion under the requirements of Rule 56 stated above. WRIGHT, MILLER & KANE, FEDERAL PRACTICE AND PROCEDURE § 2720 at 23-24 (2d ed. 1990) ("The court must rule on each party's motion on an individual basis, determining, in each case, whether a judgment may be entered in accordance with the Rule 56 standard.").

## III. Discussion

### A. Counts I-III, Breach of Contract

#### 1. Contract Interpretation

The court has diversity jurisdiction over this matter. Thus, the court applies federal procedural law and state substantive law. *Allen v. Cedar Real Estate Group, LLP*, 236 F.3d 374, 380 (7th Cir. 2001). The parties agree that Indiana law governs the court's interpretation of the SAA and NACU Promissory Note at issue.

Resolution of Counts I-III requires the court to interpret the meaning of the parties' contract, as embodied in the SAA and NACU Promissory Note. The primary and overriding purpose when interpreting a written contract is to give effect to the parties' mutual intent at the time the contract is written. *Hutchinson, Shockey, Erley & Co. v. Evansville Vanderburgh County Bldg. Auth*., 644 N.E.2d 1228, 1231 (Ind. Ct. App. 1994). If the terms of the contract are unambiguous, the terms are conclusive of the parties' intent. *Kiltz v. Kiltz*, 708 N.E.2d 600, 602 (Ind. Ct. App. 1999), *trans. denied*. However, where the provisions of a written contract are ambiguous or uncertain, "its meaning is to be determined by extrinsic evidence and its construction is a matter for the fact finder." *Abbey Villas Dev. Corp. v. Site Contractors, Inc*., 716 N.E.2d 91, 101 (Ind. Ct. App. 1999). A contract is ambiguous if it is susceptible to more than one interpretation and reasonably intelligent minds could differ as to its meaning. *Id*. In ascertaining the parties' intent, the contract is to be read as a whole "so as not to render any words, phrases, or terms ineffective or meaningless." *Id*.

### 2. Counts I and II

Counts I and II of the Amended Counterclaim allege the IGF Parties failed to pay: (1) the Put Mechanism price owed to CCC pursuant to the SAA (Count I) and (2) CCC's share of the MPCI Underwriting Gain for the 2000 Crop Year (Count II). CCC argues that the IGF Parties are liable for the debts owed pursuant to the specific terms of the SAA. The Individual and Corporate Counterdefendants (collectively the "Counterdefendants") argue that from "a cursory reading of the SAA," only IGF is liable for those debts, not IGFH or SIG. Because IGF is no longer a party to this lawsuit pursuant to the Settlement Agreement, Counts I and II likewise should be dismissed.

With respect to Count I, the operative language is found in Section 3(8)(B) of the SAA. That Section provides, in relevant part:

> B. <u>CNA's Put Mechanisms</u>.
>
> i. <u>Put Mechanism</u>. From the 2001 Crop Year forward, CNA will have the ability to terminate the MPCI Reinsurance Agreement and the Crop Hail Agreement and receive from IGF the compensation provided for in subsection 3.8.B.i.a.
>
> a. <u>Sales Price</u>. In the event CNA shall exercise the Put Mechanism, IGFH shall be obligated to pay CNA an amount equal to 5.85 times the Average Pre-Tax Income as computed pursuant to this Section.
>
> b. <u>Sales Terms</u>. Within thirty (30) days notice of

> exercise of the Put Mechanism by CNA, IGF will execute a promissory note payable to CNA in the principal amount equal to the amount owed to CNA as specified in this subsection . . .

(CCC Ex. 8 at § 3(B)(i)(a) & (b)). Thus, IGF was obligated to pay CCC the sales/put price, while IGFH was obligated to pay CCC that same amount.

Sections 6.8 and 11.1 of the SAA shed further light on the issue of liability. These sections require each of the parties – SIG, IGFH, and IGF – "to use all reasonable best efforts to take, or cause to be taken, all actions or to do, or cause to be done, all things . . . to consummate and make effective the transactions contemplated by this Agreement and the Ancillary Agreements . . ." (*Id*. at §§ 6.8, 11.1). Section 11.1 further provides that "none of the parties hereto will take or permit to be taken any action that would be in breach of the terms of the provisions of this Agreement or that would cause any of the representations contained herein to be or to become untrue." (*Id*. at § 11.1). Thus, SIG and IGFH were obligated to ensure that IGF and IGFH fulfilled all of their obligations under the SAA, including the payment of the sales price for CCC's business pursuant to the Put Mechanism. In other words, SIG, IGFH, and IGF were jointly and severally liable under the SAA for payment to CCC. Since no payment has been made, the IGF Parties breached the SAA and MCPI Quota Share Agreement and are liable to CCC for their breach.

There is no factual dispute concerning the amount of money owed to CCC for the Put pursuant to § 3(8)(B) of the SAA. The IGF Parties are liable to CCC in the amount of

$25,407,182, plus interest in the amount of $4,611,404 as of June 2006. CCC's Motion for Summary Judgment on Count I of its Amended Counterclaim is therefore **GRANTED** in the amount of $25,407,182, plus interest in the amount of $4,611,404 (as of June 2006).

With respect to Count II, the obligation to pay CCC its share of the underwriting gain arises out of one of the Ancillary Agreements to the SAA, namely the MPCI Quota Share Agreement, which was expressly between CCC and "IGF Insurance Company and its Affiliated Companies" – i.e., SIG and IGFH. (CCC Ex. 8 at App. C, § 9). As the MPCI Quota Share Agreement is a part of the SAA, Sections 6.8 and 11.1 of the SAA apply with full force. (*See* CCC Ex. 8 at § 11.14; CCC Ex. 12 at § 21). Thus, because the IGF Parties did not pay CCC for the underwriting gain for the 2000 MPCI Crop Year, the IGF Parties breached the MPCI Quota Share Agreement.

Again, there is no factual dispute as to the amount owed to CCC as its share of the 2000 MPCI Underwriting Gain. Pursuant to Sections 2(1), 2(3), and 2(6) of the MPCI Quota Share Agreement, and the numbers provided by the FCIC through its RoRecap Reports and by IGF itself, the IGF Parties are liable to CCC in the amount of $5,193,153, less an offset of $953,661.31, plus interest. CCC's Motion for Summary Judgment on Count II of its Amended Counterclaim is therefore **GRANTED** in the amount of $4,239,491.69, plus interest.

### 3. Count III

Count III of the Amended Counterclaim alleges that IGFH failed to pay 1911 Corp. monies due and owing under the NACU Promissory Note. The Counterdefendants raise two arguments in support of their respective positions. Those arguments are addressed below.

The Counterdefendants argue that only IGF is liable for the NACU Promissory Note because IGFH assigned its interest in the Note to IGF. 1911 Corp. responds that it did not consent to the assignment and therefore, IGFH remains liable on the Note.

1911 Corp.'s consent to the assignment was necessary in order to relieve IGFH of liability on the Note. *See Navin v. New Colonial Hotel*, 90 N.E.2d 128, 130-31 (Ind. 1950) (quoting *Crane Ice Cream Co. v. Terminal Freezing & Heating Co.*, 1925, 128 A. 280, 283) ("Any one . . . who owes money cannot by any act of his own, or by any act in agreement with any other person than his creditor or the one to whom his performance is due, cast off his own liability and substitute another's liability. If this were not true, obligors could free themselves of their own obligations by the simple expedient of assigning them.")). Although the Stock Purchase Agreement (pursuant to which IGFH purchased 100% of the shares of NACU), the Note, and the Asset Purchase Agreement (which contained the assignment at issue) were executed on the same day – July 7, 1998 – there is no evidence in the record from which the court can conclusively determine that 1911 Corp. was aware of and consented to IGFH's assignment of the Note to IGF. 1911 Corp. was not a party to the Asset Purchase Agreement nor a party to the assignment.

Whether all three documents, including the assignment, were executed at the same place and time, such that 1911 Corp. would have knowledge of the assignment, is not known. The court therefore finds a genuine issue of fact exists as to whether 1911 Corp. consented to the assignment. CCC's Motion for Summary Judgment on Count III of its Amended Counterclaim is therefore **DENIED**.

### 4. The Release

Next, the Counterdefendants argue that the January 2005 Settlement Agreement reached between CCC and 1911 Corp. and IGF and Pafco precludes CCC's and 1911 Corp.'s recovery on Counts I-III. In support of their position, they cite to the portion of Section 4.6 of the Settlement Agreement, which provides, in pertinent part:

> 4.6 **General Release by CCC.** In consideration of the terms, conditions and mutual release contained in the Settlement Agreement, and subject to the terms of the next sentence in this paragraph, CCC, on its own behalf and on behalf of its predecessors, successors . . . hereby fully and finally release and forever discharge IGF and Pafco . . . from any and all liabilities, claims, demands, causes of action and suits that CCC has . . . against IGF and Pafco in the Federal Litigation or the Insolvency Proceedings. . .

The Counterdefendants neglect to cite to the next sentence in that paragraph (as required by its beginning clause), which provides that CCC only released its claims against IGF and Pafco:

> Notwithstanding anything in this Settlement Agreement to the contrary, (a) the foregoing release does not apply to any person or entity other than IGF or Pafco, or to any claim other than a claim against IGF or Pafco, and (b) it is the intent of the Parties that this Release shall not operate to effect a Release of any claim of CCC against [IGFH], SIG, Goran,

> Granite Re, Superior, Gordon Symons, Alan Symons, or Douglas Symons, whether such claim is direct, indirect, derivative, or based on any liability of or obligation owing by IGF or Pafco.

(Individual Counterdefendants Ex. 7 at § 4.6). This clear and unambiguous statement that IGFH and SIG are not released from liability is expressly repeated in Sections 2.5 and 5 of the Settlement Agreement between CCC, IGF, and Pafco, in the contemporaneous Stipulation of the Parties, and in the Orders entered in the Marion County Proceedings and this court. (*Id.*; *see also* CCC Exs. 59-60 (Docket # 80)). Therefore, the release does not preclude CCC's and 1911 Corp.'s recovery against IGFH and SIG on Counts I-III of the Amended Counterclaim.

### B. Standing to Bring Counts IV and V

Counts IV and V of the Amended Counterclaim are based upon IGF's sale of its crop insurance business to Acceptance. In Count IV, CCC and 1911 Corp. allege that the Individual Counterdefendants fraudulently transferred the majority of the proceeds from that sale to Counterdefendants SIG, Goran, and Granite Re solely to divert IGF's assets from IGF, rendering it unable to pay its creditors, CCC and 1911 Corp. In Count V of the Amended Counterclaim, CCC and 1911 Corp. allege that the Individual and Corporate Counterdefendants were alter egos of one another, left IGF in a state where it was not sufficiently capitalized to meet its obligations to CCC and 1911 Corp. and should therefore be liable for the debt owed to CCC and 1911 Corp. CCC and 1911 Corp., the Individual Counterdefendants, and the Corporate Counterdefendants move for summary judgment on these claims. The parties raise a number of arguments in support of their respective positions. They are addressed below.

### 1. Waiver

The Counterdefendants argue that CCC and 1911 Corp. no longer have standing to raise its fraudulent transfer and alter ego claims. This is because, they argue, once IGF entered into liquidation, the party with the power to assert that claim was the IDOI Commissioner, who was appointed Liquidator pursuant to statute. *See* Ind. Code § 27-9-3-7. CCC and 1911 Corp. argue that the Counterdefendants have waived this argument because they failed to plead lack of standing as an affirmative defense in their respective Answers.

FED. R. CIV. P. 8(c) provides that "a party shall set forth affirmatively [various enumerated defenses] and any other matter constituting an avoidance or affirmative defense." Standing is not one of the enumerated defenses. Thus, if standing is an affirmative defense, it must be one of the "any other" defenses. The appropriate analysis for determining whether a defense falls within the ambit of the "any other" defense is not well-settled, particularly with respect to diversity cases. *Brunswick Leasing Corp. v. Wis. Cent., Ltd.*, 136 F.3d 521, 530 (7th Cir. 1998). In *Sundstrand Corp. v. Standard Kollsman Indus., Inc.*, 488 F.2d 807, 813 (7th Cir. 1973), a diversity case, the court reasoned that where the defense is not listed in Rule 8(c), the court should look to state law. *Id.* Under that approach, a defense is an affirmative defense if the defendant has the burden of proof. *Id.* Indiana law provides that the defendant has the burden of proof on the issue of standing, as Indiana courts hold that it is an affirmative defense. *20th Century Fiberglass v. Indiana State Bd. of Tax Commr's*, 683 N.E.2d 1376, 1377 (Ind. Tax Ct. 1997) ("[A] challenge to standing is an affirmative defense."); *see also Family Dev., Ltd. v. Steuben County Waste Watchers, Inc.*, 749 N.E.2d 1243, 1255 (Ind. Ct. App. 2001) ("Because FDL failed to challenge Waste Watchers' standing during the administrative proceedings, it has waived this issue on appeal."); *Shewmaker v. Etter*, 644 N.E.2d 922, 926 (Ind. Ct. App. 1994) (standing is an affirmative defense).

That said, the court looks to federal law to determine the issue of waiver. *Bank Leumi Le-Israel, B.M. v. Lee*, 928 F.2d 232, 235 n. 2 (7th Cir. 1991) (citation omitted) ("Although the allocation of the burden of proof is determined by state law, in diversity cases the burden of pleading is determined by Rule 8 rather than state law."). Seventh Circuit case law holds that "a delay in asserting an affirmative defense waives the defense only if the plaintiff was harmed as a result." *Curtis v. Timberlake*, 436 F.3d 709, 711 (7th Cir. 2005) (citing *Williams v. Lampe*, 399 F.3d 867, 870-71 (7th Cir. 2005) (per curium); *Carter v. United States*, 333 F.3d 791, 796 (7th Cir. 2003)).

Here, CCC and 1911 Corp. allege that the Counterdefendants' failure to raise lack of standing as an affirmative defense has prejudiced CCC and 1911 Corp. "by rendering it unable to take discovery on the subject." (CCC's and 1911 Corp.'s Response at 30). The issue of standing turns largely on the proceedings involving the IDOI. CCC and 1911 Corp. were fully involved in those proceedings and had access to the record in that matter. Thus, CCC's and 1911 Corp. were not harmed by the delay. Accordingly, the court rejects CCC and 1911 Corp.'s waiver argument.

The court now turns to the merits of the parties' standing arguments.

### 2. General vs. Personal Claims

The Indiana Insurance Code provides that the Commissioner of the IDOI, upon entry of an order of liquidation, is "vested by operation of law with the title to all of the property, contracts, and rights of action" of the insolvent insurer. *See* Ind. Code § 27-9-3-7(b). Thus, the IDOI Commissioner essentially steps into the shoes of the insolvent insurance company – in this case, IGF. *In re Rehabilitation of Centaur Ins. Co.*, 632 N.E.2d 1015, 1017 (Ill. 1994) ("Director as rehabilitator of an insolvent insurance company has only those rights the company had as of the date of rehabilitation, and, while the creditors are the beneficiaries of his actions, the Director is not authorized to assert creditors' claims on behalf of the creditors."). *See also Bennett v. Liberty Nat'l Fire Ins. Co.*, 968 F.2d 969, 972 & n.4 (9th Cir. 1992) (liquidator stands in the shoes of insolvent insurance company)). The dispute over standing arises from the fact that the Indiana Insurance Code gives the Liquidator the power to "exercise and enforce all the rights, remedies, and powers of any *creditor*." Ind. Code § 27-9-3-9(b)(19) (emphasis added). Thus, argue the Counterdefendants, only the Liquidator had the power to bring the fraudulent transfer and alter ego claims on behalf of IGF's creditors, CCC and 1911 Corp.

The Liquidator's power to bring claims on behalf of creditors only extends to general claims, not personal claims.

> A cause of action is 'personal' if the claimant himself is harmed and no other claimant or creditor has an interest in the cause. But allegations that could be asserted by any creditor could be brought by the trustee as a representative of all creditors. If the liability is to all creditors of the corporation without regard to the personal dealings between such officers and such creditors, it is a general claim.

*Koch Refining v. Farmers Union Central Exchange, Inc.*, 831 F.2d 1339, 1348-49 (7th Cir. 1987).[5] *See also Boedeker v. Rogers*, 746 N.E.2d 625, 639 (Ohio Ct. App. 2000) (identical provision of Ohio Revised Code – Section 3903.21(a)(19)) – gave liquidator power to bring general claims on behalf of creditors and policyholders of insolvent company in order to preserve estate's assets, but did not give liquidator power to bring personal claims of creditors). In determining whether a claim is general or personal, "a court must look to the injury for which relief is sought and consider whether it is peculiar and personal to the claimant or general and common to the corporation and creditors." *Koch*, 831 F.2d at 1349; *see also In re Schimmelpenninck*, 183 F.3d 347, 359-60 (5th Cir. 1999) (same).

With respect to the fraudulent transfer claim, CCC and 1911 Corp. allege that the proceeds from IGF's sale to Acceptance were diverted from IGF to Goran, SIG, and Granite Re in order to hinder, delay and defraud IGF's creditors, CCC and 1911 Corp. CCC and 1911 Corp. contend that the claim is personal to them because they brought the claim two years before IGF went into liquidation, and they seek only those amounts due

[5] As noted by CCC and 1911 Corp., there are no Indiana cases interpreting the meaning of Ind. Code § 27-9-3-9(b)(19). The court therefore turns to bankruptcy law to help answer questions of insurance liquidation law. *See, e.g., Pine Top Ins. Co. v. Bank of Am. Nat'l Trust & Sav. Ass'n*, 969 F.2d 321, 324 (7th Cir. 1992).

and owing to them as a result of the breach of the SAA. The allegations of their Amended Counterclaim, however, reflect that IGF was the entity injured as a result of the transfer of the sale proceeds to Goran, SIG, and Granite Re, and that CCC and 1911 Corp. were injured indirectly as a result – i.e., not paid for the debt owed by the IGF Parties. *See* Amended Counterclaim at ¶ 79 (The Acceptance payments to Goran and SIG for the "valueless" non-competes "were agreed to and made solely to divert money from IGF that properly belonged to IGF. . ."); *see also id*. at ¶ 80 (The Acceptance payment to Granite Re for the purchase of reinsurance had no value and "was done solely to divert IGF's assets from IGF . . ."). Thus, only the Liquidator had the power to bring that claim for the benefit of IGF's creditors. *See Boedeker*, 746 N.E.2d at 638-29 (quoting *Cotten v. Republic Nat'l Bank of Dallas*, 395 S.W.2d (Tex. Civ. App. 1965) ("Certainly a receiver for an insolvent insurance corporation . . . has the right to maintain a suit which is necessary to preserve the corporation's assets and to recover assets of which the corporation has been wrongfully deprived through fraud.")); *see also In re Integrated Agri, Inc.*, 313 B.R. 419, 427 (C.D. Ill. 2004) ("A creditor who had the right to bring, outside of bankruptcy, a [fraudulent transfer] claim to recover prepetition transfers fraudulently made by the debtor, has no standing to commence or continue the suit during the bankruptcy case, until and unless the trustee relinquishes the Section 544(b) claim or the trustee no longer has a viable cause of action."); *Sparano v. Southland Corp.*, 1995 WL 470267, at *8 (N.D. Ill. Aug. 4, 1995) ("[T]he commencement of a bankruptcy action gives the trustee the exclusive right to pursue fraudulently conveyed assets . . .");

*Klingman v. Levinson*, 158 B.R. 109, 113 (Bankr. N.D. Ill. 1993) (same); *In re GPR Holdings, L.L.C.*, 318 B.R. 384, 389 (Bankr. N.D. Tex. 2004) (claims under the Texas Uniform Fraudulent Transfer Act belonged to the debtor's bankruptcy estate; thus, plaintiffs lacked standing to pursue them).

The same analysis applies to CCC's and 1911 Corp.'s alter ego claim. *See Koch*, 831 F.2d at 1346 (finding that Indiana law provided that a trustee could bring an alter ego claim on behalf of the debtor corporation as allegations asserted direct injury to the corporation; therefore claim was a general claim); *see also In re Schimmelpenninck*, 183 F.3d at 361 (finding that creditor's alter ego claim was general claim). In CCC's and 1911 Corp.'s Amended Counterclaim, they allege that the Individual and Corporate Counterdefendants jointly dominated IGF to the extent that they controlled the sale of IGF's assets to Acceptance and the funneling of the sale proceeds to the Counterdefendants, and left IGF in a state where it was undercapitalized to meet its obligations to CCC and 1911 Corp. Like their fraudulent transfer claim, CCC and 1911 Corp. contend this claim is personal because it seeks to hold the Counterdefendants directly liable for the direct contractual debts owed to CCC by SIG, IGF, and IGFH arising out of their breach of the SAA. However, CCC's and 1911 Corp.'s alter ego claim against the Counterdefendants is based on the injury to IGF inflicted by the Counterdefendants' misuse of the corporate form to their advantage. *See* Amended Counterclaim at ¶ 90 (the Counterdefendants "left IGF in a state where it was not sufficiently capitalized to meet its obligations to CCC and 1911 Corp."). Accordingly, only the Liquidator had standing to pursue that claim. *See Koch*, 831 F.2d at 1349; *In re Schimmelpennick*, 183 F.3d at 359-60.

**3. Release or Abandonment**

CCC and 1911 Corp. may still pursue their fraudulent transfer and alter ego claims if the Liquidator effectively abandoned or assigned its interest in those claims to CCC and 1911 Corp. *See Koch*, 831 F.2d at 1346-47 ("The trustee may abandon an action to a third party, and that party may then pursue it."); *Klingman*, 158 B.R. at 113 ("The trustee's exclusive right to maintain a fraudulent conveyance cause of action expires and creditors may step in (or resume actions) when the trustee no longer has a viable cause of action."). The Counterdefendants assert that because there was no formal "abandonment" or assignment by the Liquidator of CCC's and 1911's claims, their claims are forever extinguished.

The Indiana Insurance Code expressly provides liquidators with the power to abandon claims, but does not contain any formal abandonment, assignment, or exhaustion requirement. *See* Ind. Code § 27-9-3-9(b)(12). That said, in order for this court to find in CCC's and 1911 Corp.'s favor on this issue, there must be documentary evidence which expressly and unequivocally provides that the Liquidator abandoned, assigned, or relinquished its right to pursue CCC's and 1911 Corp.'s fraudulent transfer and alter ego claims and consented to CCC's and 1911 Corp.'s prosecution of the same. CCC and 1911 Corp. cite the court to three documents in support of their position. They are discussed below.

CCC and 1911 Corp. initially direct the court's attention to the Settlement Agreement entered into between CCC and 1911 Corp. and the Liquidator. As noted in Section I of this opinion, the Settlement Agreement was approved by the Circuit Court of Marion County on March 2, 2005, and provided:

> The Parties do not intend to, and this Settlement Agreement shall not, release, waive, or discharge any claim, of any kind whatsoever, that CCC has, had, or may in the future have against the other parties to the Federal Litigation, namely, IGF Holdings, Inc. ("Holdings"), Symons International Group, Inc. ("SIG"), Goran Capital, Inc. ("Goran"), Granite Reinsurance Co., Ltd. (Barbados) ("Granite Re"), Superior Insurance Company ("Superior"), Gordon Symons, Alan Symons, and/or Douglas Symons, whether such claim is direct, indirect, or derivative in nature. It is CCC's intent to continue to prosecute the Federal Litigation against all parties in that litigation other than the Parties to this Settlement Agreement, including all claims presently made against such other persons.

(Goran Ex. 9 at § 2.5). The language of the CCC Release itself expressly states that the "release does not apply to any person or entity other than IGF or Pafco, or to any claim other than a claim against IGF or Pafco," and then repeats virtually the same language as set forth above in Section 2.5. (*Id*. at § 4.6). The Settlement Agreement further provided:

> The obligations of the Parties hereto pursuant to this Agreement are subject to the fulfillment of the following conditions: (1) an Order is entered in the IGF Rehabilitation/Liquidation Proceeding which modifies the injunction contained in the July 16, 2004, IGF Order of Liquidation and Related Relief (paragraph 9) so that CCC may continue to prosecute the Federal Litigation against all parties other than IGF and Pafco …

(*Id*. at § 5). The parties further agreed "to permit CCC to prosecute fully the Federal Litigation against [IGFH], SIG, Goran, Granite Re, Superior, Gordon Symons, Alan Symons, and Douglas Symons." (*Id*. at § 4.4).

Second, they cite the court to a Stipulation between the Liquidator and CCC and 1911 Corp., which was filed in the liquidation proceedings concurrent with the execution of the Settlement Agreement. In that document, the Liquidator and CCC and 1911 Corp. agreed and consented:

> to permit CCC and its affiliate, 1911 Corp., to prosecute their claims against IGF[H], Inc., Symons International Group, Inc., Goran Capital, Inc., Granite Reinsurance Company, Ltd. (Barbados), Superior Insurance Company, Alan G. Symons, Douglas H. Symons, and G. Gordon Symons, in the actions currently pending in the U.S. District Court for the Southern District of Indiana, encaptioned IGF Insurance et al. v. Continental Casualty Co., Nos. IP 01-0799 and IP 01-0809, and any subsequent actions relating thereto (the "Federal Litigation").

(CCC Ex. 59 (Docket # 80)).

Finally, CCC and 1911 Corp. point the court to the Marion Circuit Court's March 17, 2005, Order modifying the automatic stay provision of the Order of Liquidation that permitted CCC and 1911 Corp. to:

> prosecut[e] and obtain( ) a final judgment with respect to their claims against IGF Holdings, Inc., Symons International Group, Inc., Alan G. Symons, Douglas H. Symons, G. Gordon Symons, Goran Capital, Inc., Granite Reinsurance Company, Ltd. (Barbados) and Superior Insurance Company, in the actions currently pending in the United States District Court for the Southern District of Indiana … No. IP 01-0799.

(CCC Ex. 60 (Docket # 80)).

Although these documents specifically provided for CCC's and 1911 Corp.'s right to continue to prosecute their claims against the Counterdefendants without interference from the Liquidator, they do not specifically state that the Liquidator is abandoning its right to pursue Counts IV and V of CCC's and 1911 Corp.'s Amended Counterclaim –

CCC's and 1911 Corp.'s fraudulent transfer and alter ego claims – and releasing those claims back to CCC and 1911 Corp. Without such language, the court cannot rule as a matter of law for either party. For this reason, the court finds a material issue of fact remains as to whether the Liquidator intended to abandon its right to pursue CCC and 1911 Corp.'s fraudulent transfer and alter ego claims and allow CCC and 1911 Corp. to prosecute those claims against the Counterdefendants herein.

**B. Count IV, Fraudulent Transfer**

**1. Individual Liability**

The Individual Counterdefendants maintain that they cannot be held liable under Indiana's Uniform Fraudulent Transfer Act ("IUFTA") because they do not qualify as "transferees" of the purported assets, or persons for whose benefit the transfer was made. *See* Ind. Code § 32-18-2-18(b). The IUFTA does not define the term "transferee." Black's Law Dictionary defines a "transferee" as "[h]e to whom a transfer [of property] is made." BLACK'S LAW DICTIONARY 1497 (6th ed. 1990). It is undisputed that the Individual Counterdefendants were not direct beneficiaries of the Acceptance transaction. In order to prevail, then, CCC and 1911 Corp. must show that the transfer of assets was made for the Individual Counterdefendants' personal benefit under the theory that the Individual Counterdefendants personally participated in the fraud.

The issue of whether an officer or director of a "first transferee" who is found to have personally participated in the fraud can be held personally liable under the IUFTA is an issue of first impression in Indiana. In *DFS Sec. Healthcare Receivables Trust v.*

*Caregivers Great Lakes, Inc.*, 384 F.3d 338, 348 (7th Cir. 2004), the Seventh Circuit had occasion to analyze the issue, and indicated that "there is good reason to believe [the Indiana common law rule holding that an officer or shareholder of a corporation can be held personally liable if he personally participates in the fraud] would apply." *Id*. at 347. The Court reasoned:

> First, Indiana seems to treat claims under the IUFTA as a type of fraud claim. *See, e.g., Fire Police City County Federal Credit Union v. Eagle*, 771 N.E.2d 1188, 1191 (Ind. Ct. App. 2002) (treating a claim under Ind. Code § 32-2-7-15 as a fraud claim); Bruce Markell, *The Indiana Uniform Fraudulent Transfer Act Introduction*, 28 Ind. L.Rev. 1195, 1200 (1995) ("Indiana statutes require a finding that fraud existed in connection with a transaction challenged as a fraudulent transfer.") Second, the IUFTA itself expressly incorporates principles of common law fraud by reference. Ind. Code § 32-18-2-20. Finally, at least one other court has applied similar common law to find the president of a corporation personally liable under another state's version of the UFTA, despite the fact that he was not a 'first transferee.' *See Firstar Bank, N.A. v. Faul*, No. 00-C-4061, 2001 WL 1636430, at * 7 (N.D. Ill. Dec. 20, 2001).

*Id*. Because the *DFS* Court was certifying two other issues to the Indiana Supreme Court, "in an abundance of caution," it elected to certify that question as well. *Id*. at 349. Unfortunately, the case settled before the Indiana Supreme Court had the opportunity to address the issue.

The Individual Counterdefendants urge the court to ignore the *DFS* case on grounds that the language providing for individual liability under the IUFTA is mere dicta, and point the court to *APS Sports Collectibles, Inc. v. Sports Time, Inc.*, 299 F.3d 624 (7th Cir. 2002). In that case, the Seventh Circuit rejected the plaintiff's attempt to hold officers of a closely held corporation personally liable for an allegedly fraudulent transfer under Illinois's version of the UFTA. *Id*. at 630. In reaching that conclusion, the Court found nothing in the plain language of the Illinois UFTA that provided for that result. *Id*. The Court did not address the issue raised in this case – i.e., whether common law fraud can be applied to a plaintiff's UFTA claim. Moreover, the Court did not preclude the assertion of personal liability under an alter ego/veil piercing theory of liability. *See id*. at 631 (rejecting plaintiff's piercing the corporate veil claim on grounds that the plaintiff failed to develop a legal and factual basis to support it). Thus, *Sports Time* does not preclude CCC and 1911 Corp. from developing a similar argument. *See DFS*, 384 F.3d at 348 ("Liability for officers or shareholders of a 'first transferee' who personally participated in the fraud is a substitute for 'veil piercing,' not an extension of who can be a transferee under the [I]UFTA.").

Having so found, the court must now address whether there are facts from which a reasonable juror could find that the Individual Counterdefendants personally participated in the allegedly fraudulent transaction at issue in this case.

It is undisputed that Alan Symons represented all of the Corporate Counterdefendants during the negotiations with Acceptance for the sale of IGF's crop insurance business. Gordon Symons was the CEO and President of Granite Re. To the extent that Alan and Gordon Symons controlled the affairs of the Corporate Counterdefendants involved in the transaction for their own personal gain, (*see* Section III.B.4 of this opinion), a reasonable jury could conclude that they personally participated in the fraud.

### 2. Merits of Count IV

The parties cross-move for summary judgment on CCC's and 1911 Corp.'s fraudulent transfer claim. CCC and 1911 Corp. bring their claim under two sections of the IUFTA, Ind. Code §§ 32-18-2-14, 15. The IUFTA defines a transfer as fraudulent regardless of when the claim arose if the debtor made the transfer "with actual intent to hinder, delay, or defraud any creditor of the debtor" or if the debtor did not "receiv[e] a reasonably equivalent value in exchange for the transfer." Ind. Code § 32-2-18-14.[6] Moreover, where, as here, a creditor's claim arose before the transfer, a transfer is fraudulent if the debtor did not receive reasonably equivalent value in exchange for the transfer, and the debtor was insolvent at the time or became insolvent as a result of the transfer. Ind. Code § 32-18-2-15.[7] The question of fraudulent intent is generally deemed a question of fact. *Greenfield v. Arden Seven Penn Partners, L.P.*, 757 N.E.2d 699, 703

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[6] Section 32-18-2-14 provides:
A transfer made or an obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation: (1) with actual intent to hinder, delay, or defraud any creditor of the debtor; or (2) without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor: (A) was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or (B) intended to incur or believed or reasonably should have believed that the debtor would incur debts beyond the debtor's ability to pay as the debts became due.

[7] Section 32-18-2-15 provides:
A transfer made or an obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if: (1) the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation; and (2) the debtor:
(A) was insolvent at that time; or (B) became insolvent as a result of the transfer or obligation.

(Ind. Ct. App. 2001), *reh'g denied, trans. denied*, 774 N.E.2d 515 (Ind. 2002). Fraudulent intent may be inferred from various factors or "badges of fraud" present in a transaction. *Id*. The factors include:

> (1) transfer of property by a debtor during the pendency of a suit; (2) transfer of property that renders the debtor insolvent or greatly reduces his estate; (3) a series of contemporaneous transactions which strip a debtor of all property available for execution; (4) secret or hurried transactions not in the usual mode of doing business; (5) any transaction conducted in a manner differing from customary methods; (6) a transaction whereby the debtor retains benefits over the transferred property; (7) little or no consideration in return for the transfer; and (8) a transfer of property between family members.

*Otte v. Otte*, 655 N.E.2d 76, 81 (Ind. Ct. App. 1995), *trans. denied*. "As no single indicium constitutes a showing of fraudulent intent per se, the facts must be taken together to determine how many badges of fraud exist and if together they amount to a pattern of fraudulent intent." *Greenfield*, 757 N.E.2d at 703-04.

A creditor who seeks to have a transfer set aside as fraudulent bears the burden of proving that such transfer was made with fraudulent intent. *Id*. Lack of consideration, standing alone, is insufficient to support a charge of fraud. *Id*. Rather, fraudulent intent is inferred from the various badges of fraud present in a given transaction. *Id*. (citing *Diss v. Agri Bus. Intern., Inc.*, 670 N.E.2d 97, 99-100 (Ind. Ct. App. 1996)).

#### a. IUFTA Claim Under Section 32-18-2-14

CCC's claim for the sales price of $25,407,182 and 1911 Corp.'s claim for $1,000,000 in the Note both arose on January 3, 2001, when CCC exercised the Put, and both became a debt of the IGF Parties on March 21, 2001, when the Put became effective.

CCC's claim of $5,193,153 for its share of the 2000 MPCI Underwriting Gain arose and became a debt of the IGF Parties in February 2001, when the FCIC issued its RoRecap Report allocating the gain between the SRA-holder (IGF) and the FCIC.

At and prior to the time that IGF transferred substantially all of its crop insurance assets to Acceptance, IGF lacked sufficient funds to pay the debt it owed CCC and 1911 Corp. CCC and 1911 Corp. contend that had IGF received the $40,500,000 for the sale of its crop insurance business, it would have had sufficient funds to pay the debt. Instead, allege CCC and 1911 Corp., the IGF Parties orchestrated a payment structure to siphon funds from IGF to insiders and related parties with the actual intent to hinder, delay, and defraud IGF's creditors.

CCC and 1911 Corp. contend that six of the eight badges of fraud are present in this case. They are discussed below.

**1. Legal Action Was Pending**

First, CCC and 1911 Corp. allege that the IGF Parties knew or reasonably should have known that at the time of the sales transaction with Acceptance, their failure to pay the debt owed to CCC and 1911 Corp. would result in imminent legal action. *See United States .v Smith*, 950 F.Supp. 1395, 1404-05 (N.D. Ind. 1996) (finding fraudulent intent in part because the defendant "reasonably should have known that his [acts] would be an invitation to legal action") (internal citation omitted). Beginning in March 2001 and continuing through early June 2001, CCC and the IGF Parties engaged in negotiations regarding the debt owed CCC, and CCC made it clear that legal action would be instituted if IGF did not pay. On June 6, 2001, CCC filed its Complaint demanding payment of IGF's obligations relating to the Put Mechanism, and requesting that IGF's sale to Acceptance be enjoined. Thus, argue CCC and 1911 Corp., litigation was not merely probable at the time of the transaction, it had already commenced. *See Commercial Credit Counseling Servs., Inc. v. W.W. Grainger, Inc.*, 840 N.E.2d 843, 852 (Ind. Ct. App. 2006) (finding fraudulent intent in part because the transfer was made just prior to and during litigation).

The Counterdefendants respond that at the time IGF sold its crop insurance business to Acceptance, IGF received notification from the FCIC that it would discontinue providing reinsurance for IGF's crop insurance business. The FCIC's action effectively put IGF out of business, and rendered IGF's crop insurance business worthless as of June 30, 2001. Thus, the Counterdefendants' position is that IGF's motivation to sell its business to Acceptance on the eve of litigation with CCC and 1911 Corp. was fueled by the FCIC's action.

### 2. IGF Was Insolvent

At and prior to the sale of IGF's assets to Acceptance, IGF was insolvent. This factor is undisputed.

### 3. The Transaction Differed From Customary Methods

CCC and 1911 Corp. contend that the manner in which the Counterdefendants structured payment for the transaction differed from customary methods. Specifically, they contend that Acceptance's payments to SIG, Goran, and Granite Re should have been paid directly to IGF.

Acceptance paid SIG and Goran $9,000,000 for covenants not to compete. Generally, noncompetition agreements ancillary to the sale of a business are legitimate and valid only to the extent necessary to preserve a business's goodwill for the buyer. *Kladis v. Nick's Patio, Inc.*, 735 N.E.2d 1216, 1220 (Ind. Ct. App. 2000). "Goodwill" is an intangible asset that ensures that established customers will continue to patronize the business when transferred to a new owner. *Id*.

Here, IGF was the only Counterdefendant that was engaged in the crop insurance business or possessed any goodwill in that business. IGF's employees and officers possessed specialized knowledge of the crop insurance business and posed a competitive threat if they engaged in competition with Acceptance, the purchaser of the business. Thus, Acceptance hired these persons and each entered into a non-compete and retention agreement with IGF. This, argues CCC and 1911 Corp., was sufficient to protect Acceptance from any threat of competition by the seller of the business, IGF. Yet, Acceptance entered into a non-compete agreement with SIG and Goran, non-operating holding companies. As SIG and Goran were not involved in the crop insurance business, CCC and 1911 Corp. argue, the non-competition agreements were not exchanged for reasonably equivalent value and were therefore a sham. Indeed, the IDOI questioned the transaction.

CCC and 1911 Corp. make a similar argument with respect to Acceptance's payment (spanning five years) of $15,000,000 to Granite Re for a reinsurance agreement. The reinsurance agreement covered retained loss in excess of 140% but less than 150% of Acceptance's net premium income. The likelihood that a retained loss ratio of 140% or higher would be experienced by Acceptance was remote. Alan Symons noted that the reinsurance agreement may be implicated once in a hundred years. The low probability of loss, coupled with a maximum cap on exposure and the payment of substantial additional premium if the cap were ever reached, warranted a price much lower than $15,000,000. James Driscoll, CCC's and 1911 Corp.'s expert, opined that the price should have been $9,000 annually. Thus, the policy was dramatically overpriced, and differed from customary methods.

The reinsurance agreement differed from customary methods in other respects, including (1) the signature page did not contain a date for either signature; (2) a five-year contract term without a termination clause is contrary to industry norm; (3) the agreement required payment in advance of two crop years; (4) the agreement did not include many usual and customary terms, such as an estimate of anticipated net premium income and statement of the rate. Furthermore, the agreement required the payment of an additional premium of 5% of the total net premium income in the unlikely event of a loss. Finally, the reinsurance agreement also contained a $9,000,000 indemnification provision that related not to reinsurance, but to indemnity if IGF breached the Asset Purchase Agreement with Acceptance.

The Counterdefendants respond that the sale of IGF's crop insurance business to

Acceptance was negotiated at arms-length. The non-competition agreements and the reinsurance agreement were assets which Acceptance sought to acquire, and did acquire, for valuable consideration. Thus, although the terms of the agreements may not be the industry norm, the terms were negotiated between the parties, and ultimately found to be acceptable by Acceptance.

#### 4. The Transfer Reduced IGF's Assets Available for Execution

IGF received $16,500,000 for the sale to Acceptance – less than half (approximately 40%) of the total amount that Acceptance paid to obtain IGF's crop insurance business. Thus, CCC and 1911 Corp. argue, IGF greatly reduced its worth by selling its single most valuable asset and receiving only 40% of the agreed proceeds.

#### 5. IGF Received Little or No Consideration in Return for the Transfer

CCC and 1911 Corp. again cite to the fact that IGF received only 40% of the purchase price paid by Acceptance. *See Smith*, 950 F.Supp. at 1405 (finding fraudulent intent in part because debtor received inadequate consideration for transfer of property). IGF should have received, and could have received, $40,500,000 absent the fraudulent transfer. Indeed, ADM and the Westfield Group offered nearly the same amount for IGF's assets.

The Counterdefendants respond that CCC and 1911 Corp. failed to present evidence of the actual value of IGF's crop insurance business. They assert that IGF's assets were worth considerably less than $16,500,000 as evidenced by the fact that the

FCIC informed them 90 days prior to the sale that it would discontinue providing it reinsurance for its crop book of business. Thus, the actual value paid by Acceptance included more than just IGF's crop insurance business. It also included the value Acceptance paid for the non-compete agreements as well as the reinsurance agreement.

### 6. The Transaction Was Between Family Members

Finally, CCC and 1911 Corp. contend that the payment structure of IGF's crop insurance business allowed the Symons Family to retain access to the funds, since Gordon, Alan and Douglas Symons were the principal officers and directors, as well as principal shareholders, of IGF, IGFH, SIG, Goran, Pafco, and Superior, and legally and factually controlled each corporation.

The Counterdefendants respond that the transactions were not between "family members." The proceeds from the non-competes were received by SIG and Goran, and the reinsurance agreement was signed by Granite Re. The family members collected, at most, $1.00 from the June 2001 sale.

### 7. Conclusion

As is evident from the discussion above, the parties make equally compelling arguments as to why the evidence supports their respective positions. While CCC and 1911 Corp. point to the fact that monies were diverted from IGF to Symons Family related entities, the Counterdefendants point to the testimony of Mr. McCarthy, Acceptance's CEO, which casts doubt as to the fraudulent character of the transaction. Accordingly, the court finds there exists a genuine issue of material fact as to whether the

Counterdefendants structured IGF's sale to Acceptance with the actual intent to hinder, delay, or defraud CCC and 1911 Corp.

#### b. IUFTA Claim Under Section 32-18-2-15

The same factors which counsel for or against a finding of fraudulent transfer under Section 14 above apply to the court's analysis of CCC's and 1911 Corp.'s Section 15 argument. First, IGF was insolvent at the time it sold its crop insurance business to Acceptance, and was a creditor of CCC and 1911 Corp. Second, there is a question of fact as to whether IGF received reasonably equivalent value in exchange for the sale of its crop insurance business. Accordingly, and for the reasons stated above, the court finds a material issue of fact as to whether the Counterdefendants structured the Acceptance deal with the actual intent to funnel assets away from its creditors, CCC and 1911 Corp.

#### c. Conclusion

For all of the reasons stated above, the court **DENIES** CCC's and 1911 Corp.'s Motion for Summary Judgment on Count IV of its Amended Counterclaim, **DENIES** the Individual Defendants' Motion for Summary Judgment on Count IV of CCC's and 1911 Corp.'s Amended Counterclaim, and **DENIES** the Corporate Counterdefendants' Motion for Summary Judgment on Count IV of CCC's and 1911 Corp.'s Amended Counterclaim.

### D. Count V, Alter Ego/Piercing the Corporate Veil

The parties cross-move for summary judgment on CCC's and 1911 Corp.'s alter ego claim. In short, they allege that the Individual Counterdefendants and Corporate Counterdefendants IGFH, SIG and Goran "dominated IGF to the extent that they controlled the sale of IGF's assets and the funneling of the proceeds of th[e] sale [to Acceptance] among the various entities controlled by the Individual Counterdefendants." (Amended Counterclaim ¶ 88). In this manner, the Counterdefendants "left IGF in a state where it was not sufficiently capitalized to meet its obligations to CCC and 1911 Corporation." (*Id*. at ¶ 90). Because the Individual and Corporate Counterdefendants are alter egos of one another, CCC and 1911 Corp. request that the court pierce the corporate veil and hold them liable for the debt owed to CCC and 1911 Corp. (*Id*. at Claim for Relief).

As a general rule, Indiana courts are reluctant to disregard a corporate entity and extend the liabilities of one corporation and its affiliates, shareholders and/or officers; however, they may do so to prevent fraud or injustice to a third party. *See Winkler v. V.G. Reed & Sons, Inc.*, 638 N.E.2d 1228, 1232 (Ind. 1994); *see also Greater Hammond Comm. Servs., Inc. v. Mutka*, 735 N.E.2d 780, 784 (Ind. 2000); *Aronson v. Price*, 644 N.E.2d 864, 867 (Ind. 1995). "When a court exercises its equitable power to pierce the corporate veil, it engages in a highly fact-sensitive inquiry." *Winkler*, 638 N.E.2d at 1232. The legal fiction of a corporate entity "may be disregarded where one corporation is organized and controlled and its affairs so conducted that it is a mere instrumentality or adjunct of another corporation." *Smith v. McLeod Dist., Inc.*, 744 N.E.2d 459, 462 (Ind. Ct. App. 2000). Indiana courts also refuse to recognize corporations as separate entities where the facts show that several corporations are acting as the same entity. *Id*.

The plaintiff bears the burden of proof with respect to this issue. In considering whether the plaintiff has met that burden, the court considers whether the plaintiff has presented evidence showing:

> (1) undercapitalization; (2) absence of corporate records; (3) fraudulent representation by corporation shareholders or directors; (4) use of the corporation to promote fraud, injustice or illegal activities; (5) payment by the corporation of individual obligations; (6) commingling of assets and affairs; (7) failure to observe required corporate formalities; or (8) other shareholder acts or conduct ignoring, controlling, or manipulating the corporate form.

*Aronson*, 644 N.E.2d at 867.

However, in a case such as this, where a plaintiff also seeks to pierce the corporate veil in order to hold one corporation liable for another corporation's debt, the eight *Aronson* factors are not exhaustive. *Oliver v. Pinnacle Homes, Inc.*, 769 N.E.2d 1188, 1192 (Ind. Ct. App. 2002); *Fairfield Dev., Inc. v. Georgetown Woods*, 768 N.E.2d 463, 469 (Ind. Ct. App. 2002). Rather, in addition to the *Aronson* factors, Indiana courts may also consider whether the two corporations have (1) similar corporate names; (2) common principal corporate officers, directors, and employees; (3) similar business purposes; and (4) the same offices, telephone number, and business cards. *Id.* (citing *Smith v. McLeod Distrib., Inc.*, 744 N.E.2d at 462). The court addresses the applicable factors below.

### 1. The Symons Family's Relationship with the Companies

The Symons Family collectively owned or controlled over 50% of the outstanding common stock of Goran, which, in turn, owned 73% of the outstanding shares of SIG and 100% of the shares of Granite Re. SIG, in turn, owned 100% of the stock of IGFH, Pafco, and Superior. And IGFH owned 100% of the stock of IGF.

In addition, Gordon Symons was at all relevant times the Chairman of the Board of Goran and all of its subsidiaries, including all the Counterdefendants, and Douglas and Alan Symons were directors of each of those corporations. As such, the Symons Family had a strong influence on the boards of directors, particularly the five- and six-member boardships of the Corporate Counterdefendants. (*See* CCC Ex. 7).

The Symons Family were also involved in the operations of the Symons Family Companies and occupied the most senior officer positions at each corporation. At various times throughout the period January 1, 2000 until September 18, 2001, the Symons Family occupied the President, CEO, COO, Executive Vice President, and Secretary positions at Goran; the President, CEO, COO, and Vice Chairman positions at SIG; the President, CEO, and Vice President positions at Granite Re; the President, CEO, Executive Vice President, Vice Chairman, and Secretary positions at IGFH; the CEO, COO, Vice Chairman, and Secretary positions at Pafco; the President, CEO, COO, Executive Vice President, Vice Chairman, and Secretary positions at Superior; and the President, Executive Vice President, CEO, Secretary, and Vice Chairman positions at IGF.

In addition to the members of the Symons Family, many of the officers and directors of the Corporate Counterdefendants were also officers and directors of at least one other Corporate Counterdefendant. (*See* Facts ## 75-76) Thus, although the officers and directors of the Companies were technically distinct, their composition was made up of many of the same individuals.

### 2. Undercapitalization

CCC and 1911 Corp. maintain that the Symons Family kept IGF, Goran, SIG, Pafco, and Superior undercapitalized and financially unstable. The Counterdefendants respond that the relevant inquiry is whether the corporations were undercapitalized at their respective inceptions, not at some later date.

Indiana law provides that "'[i]nadequate capitalization' means capitalization very small in relation to the nature of the business of the corporation and the risks attendant to such businesses.'" *Community Care Centers, Inc. v. Hamilton*, 774 N.E.2d 559, 565 (Ind. Ct. App. 2002) (quoting 1 William Meade Fletcher, FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 41.33 at 652 (Perm. ed. 1999)). "The adequacy of capital is to be measured as of the time of a corporation's formation." *Id*. The exception to this general proposition "is limited to those circumstances where the corporation distinctly changes the nature or magnitude of its business." *Id*. at 653.

The evidence proffered by CCC and 1911 Corp. is not that the subject companies were undercapitalized at their inception; rather, they argue that they were undercapitalized "by 1999, if not before." (*See* Response at 75). All of the Companies at issue were formed prior to 1999, and there is no evidence to show that the Companies changed the nature or magnitude of their respective businesses.

Although the subject Companies were not undercapitalized at their inception, the fact that these Companies became undercapitalized and financially distressed in 1999 is relevant with respect to the issue of the Counterdefendants' commingling of assets and affairs and thus, cannot be ignored. (*See* Section III.D.5).

### 3. Fraudulent Representations

CCC and 1911 Corp. allege that fraudulent representations on behalf of Alan Symons and other SIG officers weigh in favor of piercing the corporate veil. Specifically, they point to the fact that Alan Symons instructed the CFO of IGF, Mr. Jones, to make misrepresentations to the FCIC regarding IGF's estimated underwriting gain that were substantially contrary to estimates that Mr. Jones had already prepared. In addition, SIG officers pressured Mr. Jones to prepare financial statements in conjunction with IGF's statutory filings in such a manner as to make him uncomfortable enough to resign. Rather than dispute the content of the communications, the Counterdefendants respond that the communications could not support a separate cause of action for fraud. The court is not aware of any case law which supports the Counterdefendants' view.

### 4. Corporate Formalities

CCC and 1911 Corp. contend that the corporate formalities maintained by the Corporate Counterdefendants, such as holding annual shareholder meetings, holding annual board of directors meetings, keeping minutes of those meetings, and occasionally issuing board resolutions of those meetings, are entirely "cosmetic." In support of this proposition, they cite to the fact that Goran's and SIG's boards met at the same time and in the same place on eight separate occasions between November 1997 through May 2001. During the same period, IGF and Superior had board meetings at the same time and in the same place on three separate occasions, and on at least one of those occasions, Pafco and IGFH held board meetings at the same time and in the same place. Finally, CCC and 1911 Corp. note that Alan Symons acted as the principal representative for each of IGF, IGFH, SIG, Goran, and Granite Re during the negotiation of the Asset Purchase Agreement with Acceptance.

### 5. Commingling of Assets and Affairs

CCC and 1911 Corp. assert that the Symons Family commingled its assets and affairs with those of IGF, IGFH, SIG, Granite Re, Superior, Pafco, and Goran. For example, IGF had no employees on its payroll; rather, it utilized IGFH's payroll in exchange for a management fee, and employees of Superior and Pafco were on the payroll of, and paid by, IGFH or Superior Management. The Companies also engaged in inter-company loans. For example, in 2001, IGF, Superior, and Pafco engaged in over $1,000,000 in inter-company purchases, sales, or exchange of loans, securities, real estate, mortgages, or other investments. Also in 2001, at a time when IGF, Superior, and Pafco were incurring substantial operating losses and were significantly undercapitalized, their holding companies received in excess of $43,000,000 from the operating companies through management agreements and service contracts between entities for that single year alone.

The individual members of the Symons Family also took out personal loans with the Companies, and received millions in salary, bonus, and/or consulting fees from Goran, SIG, and Granite Re. (See Facts ## 87-96).

The Counterdefendants respond that Alan's and Gordon's salaries are not evidence of commingling, and fail to show that their salaries were excessive. They also point out that the personal loans taken by the Symons Family were board-approved and were repaid for the most part. Finally, they cite to the fact that the Corporate Counterdefendants' observation of corporate formalities is well-documented and negates any inference to the contrary.

**6. Common Address and Business Purpose**

Goran's U.S. Headquarters shared a common business address in Indianapolis with SIG, IGF, IGFH, Pafco, and Superior. Moreover, these corporations were either in the insurance business or were holding companies of the same.

**7. Conclusion**

The evidence proffered by the parties may be interpreted in one of two ways. In the first, a reasonable juror could believe that the Individual and Corporate Counterdefendants respected the corporate form, observed corporate formalities, and had separate existences, and that therefore, the corporate form should not be pierced to hold them liable for the corporate debt of IGF. On the other hand, a reasonable jury could find that the corporate form was a mere sham to defraud CCC and 1911 Corp. Given these conflicting interpretations of the evidence, the court finds a material issue of fact remains as to whether the Counterdefendants were alter egos of the other. Accordingly, the court **DENIES** CCC and 1911 Corp.'s Motion for Summary Judgment on Count V of its Amended Counterclaim, **DENIES** the Individual Defendants' Motion for Summary Judgment on Count V of CCC and 1911 Corp.'s Amended Counterclaim, and **DENIES** the Corporate Counterdefendants' Motion for Summary Judgment on Count V of CCC's and 1911 Corp.'s Amended Counterclaim.

## IV. Conclusion

For the reasons explained above, the court **GRANTS** in part, and **DENIES** in part, CCC's and 1911 Corp.'s Motion for Summary Judgment on Their Counterclaims (Docket # 35). Specifically, the court **GRANTS** CCC's and 1911 Corp.'s Motion for Summary Judgment on Counts I and II of the Amended Counterclaim; in Count I, the IGF Parties, IGFH and SIG, are therefore liable in the amount of $25,407,182, plus interest in the amount of $4,611,404 (as of June 2006), and in Count II, the IGF Parties are liable in the amount of $5,193,153, less an offset of $953,661,31, plus interest. In addition, the court **DENIES** CCC's and 1911 Corp.'s Motion for Summary Judgment on Counts III-V on Their Counterclaims. The court also **DENIES** Goran Capital, Inc.'s and Granite Reinsurance Company, Ltd.'s Motion for Summary Judgment as to Count IV and Count V of the Amended Counterclaim (Docket # 41); and **DENIES** Third Party Defendants

Alan G. Symons' and G. Gordon Symons' Motion for Summary Judgment on Count IV and Count V of the Amended Counterclaim (Docket # 30).

**SO ORDERED** this 31st day of March 2007.

RICHARD L. YOUNG, JUDGE
United States District Court
Southern District of Indiana

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