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VIA ECF

Hon. Lewis A. Kaplan
United States District Court
Southern District of New York
United States Courthouse
500 Pearl Street
New York, New York 10007

Re: RSS Judgment Enforcement LLC v. Symbion Power Tanzania Limited, *et al.*
Case No. 1:21-cv-4331 (LAK)

Your Honor:

I write on behalf of Plaintiff RSS Judgment Enforcement LLC (“Plaintiff”) concerning the motion to dismiss filed by Defendants Richard Westbury (“Westbury”) and R.W. Chelsea Holdings Ltd. (“Chelsea”) (collectively, the “Westbury Defendants”) on September 7, 2021. *See* ECF Nos. 111-115, *generally*. For the reasons set forth below, Plaintiff respectfully requests: (1) that its time to respond to the Westbury Defendants’ motion to dismiss be extended, *sine die*, until jurisdictional discovery is completed; and (2) that the Westbury Defendants be included within the ambit of the expedited and jurisdictional discovery now in progress. This is the first such request by Plaintiff.

As the Court will recall, this matter concerns a number of companies, the Symbion entities and Chelsea, all of which Plaintiff alleges are the alter egos or otherwise dominated by one or both of the two individual defendants, Paul Hinks (“Hinks”) and Westbury. *See generally*, Complaint. The Court has received extensive briefing by both sides on motions for attachment and expedited discovery by Plaintiff, as well as two motions to dismiss by defendants. *See generally*, Civil Docket Report. By order dated July 25, 2021 (the “July 25 Order”) the Court, *inter alia*, permitted the proposed expedited discovery and granted additional jurisdictional discovery, which included alter ego discovery for purposes of establishing personal jurisdiction, partially based on concerns as to the accuracy of the Hinks declarations on which, *inter alia*, the motions to dismiss relied. *See* July 25 Order at ECF No. 106; *id.*, n.6-7. At that time, Westbury and Chelsea not yet been successfully served, nor had otherwise appeared. *See generally*, Civil Docket Report.

Since being served on August 17, 2021 (*see* ECF Nos. 109-110), the Westbury Defendants have moved to dismiss the claims against them on grounds nearly identical to those already before the Court in defendants’ other motions to dismiss. *See generally*, ECF No. 112. They echo the prior

motions by arguing, *inter alia*, they are not alter egos of the Symbion entities, nor vice-versa, thus among other things, the Court does not have personal jurisdiction over them. *Id.*, generally.

Following in Hinks' footsteps, the Westbury Defendants have also filed affidavits to support their arguments concerning, *inter alia*, the structure and history of the Symbion entities and their relationship thereto. The averments therein are in frequent tension with documents and information Plaintiff has gathered thus far in jurisdictional discovery.

For example, Westbury swears under penalty of perjury that: "I *do not* pay any Symbion Defendant's marketing costs, employees' salaries, or other business expenses." Westbury Affidavit, at ECF No. 113, ¶ 10 (emphasis added). However Westbury has previously admitted to paying the business expenses of Symbion entities, as evidenced by, *inter alia*, an email he sent dated April 11, 2012, to former Symbion employee Ambassador Joseph Wilson wherein Westbury stated, "[t]o be honest all this miss-focused energy on expenses/travel etc really irritates me when I have punted in US[D]m¹ in the last month to the Power Plant-quite a lot of that is personal cash." A copy of that April 11, 2012 email is attached hereto as Exhibit ("Ex.") A. The last sentence of the above sworn statement is therefore, at best, misdirecting insofar as its use of the present tense "do not pay" with respect to the listed expenses says nothing about whether Westbury has paid those expenses in the past.

The Westbury Defendants have also submitted the affidavit provided of Kevin Hallatt, CFO of Chelsea. This too makes some claims in sharp contrast with discovery received by Plaintiff thus far. By way of specific example, Hallatt swears that ". . . Chelsea has no ownership interest in or control over Symbion Tanzania or any other Symbion Defendant." Hallatt Affidavit, at ECF No. 114, ¶ 10 (emphasis added). On or about May 28, 2016, Westbury wrote a letter to the minority shareholders of Symbion Power Holdings, LLC stating in pertinent part that:

Following a review of its' investment strategy the majority Shareholding group (RWC) of Symbion Power Holdings LLC has decided it can not sustain further investment into S[PH]LLC especially with unpaid promissory notes in excess of \$25m outstanding in Baobab (SPV). Additional Short-term Loans made to Symbion by RW Chelsea Holdings group now total \$2m and have been transferred and assigned to Sahoun Ltd. A new company is now being established in Cyprus, Symbion Energy Holdings Ltd (SEH) for which your cash participation is now sought. . . . It is intended that the new company will be the investing/holding company for Symbion's new business opportunities and related SPVs (Special Purpose Vehicles).

That May 28, 2016 letter is attached hereto as Exhibit B. In other words, it appears that when it suits them, Chelsea is treated as the de facto majority shareholder of Symbion Power Holdings and it unilaterally makes decisions as to how the Symbion businesses are structured. *See Merino v. Beverage*

¹ Plaintiff understands this shorthand refers to \$1 million, based in part on the language immediately following which confirms that "quite a lot of that is personal cash" and in part on Westbury's other uses of "m" to indicate millions evidenced by the May 28, 2016 Letter, attached hereto as Ex. B.

Plus Am. Corp., No. 10-cv-706 (JSR) (RLE), 2011 U.S. Dist. LEXIS 94015, **17-18 (S.D.N.Y. Apr. 11, 2011) (“ . . . under New York law an ‘equitable owner’ may be found to be an alter ego of a corporation ‘where the nonshareholder defendant exercise[s] considerable authority over [the corporation] . . . to the point of completely disregarding the corporate form and acting as though [its] assets [are] his alone to manage and distribute.’”) (alterations in original) (quoting *Freeman v. Complex Computing Co., Inc.*, 119 F.3d 1044, 1051 (2d Cir. 1997)).

Lastly, Ian McCann, group controller for various Symbion entities, swears under oath in support of the Westbury Defendants’ motion that “[e]ach Symbion Company pays its own business expenses.” McCann Affidavit, at ECF No. 115, ¶ 41. His prior testimony under oath was inapposite. *See* Relevant excerpts of May 30, 2018, Rule 30(b)(6) Deposition of Ian McCann on behalf of Symbion Power LLC, annexed hereto as Ex. C, at pp. 29:20-30:7 (“A. . . . So that’s the invoices from Hart Security that remain unpaid. It was for cash injections that Hart Security made to Symbion Power LLC to basically continue the operations and the interest on those two.”); *id.*, at pp. 47:2-21 (McCann confirming Hart Security loans to Symbion of \$3 million, \$26 million, and that “by the way, the name changed to RW Chelsea from Hart Security.”) He also swears that “[e]ach Symbion Company conducts business in its own right and operates independently, as a distinct entity from all other Symbion Companies.” ECF No. 115 ¶ 42. This too is in stark contrast to his prior testimony which indicated that Symbion Power LLC, which had no employees of its own, would borrow or “succond” the employees of Symbion Power Europe and then pay that employee directly, rather than paying the employing entity or entering into a contract with its employee(s). *See* Ex. C at pp. 31:8-33:1.

Based on the foregoing, as with the Hinks affidavits discussed in the Court’s July 25 Order, Plaintiff respectfully contends that the evidence and contemporaneous documents it has gathered thus far “raise[] some issues concerning the accuracy of some of [defendants’] statements” ECF No. 106, p. 3 of 4. Thus, rather than expend party and court resources responding to the Westbury Defendants’ motion to dismiss for lack of personal jurisdiction with still a developing record, Plaintiff respectfully requests that: (1) its time to respond to the Westbury Defendants’ motion to dismiss be extended, *sine die*, until the discovery contemplated by the Court’s July 25 Order is complete as to all defendants; and, (2) that the Westbury Defendants be explicitly added to the scope of the July 25 Order, entry of which pre-dated their appearance and motion practice herein. This will permit Plaintiff to respond with concrete facts and evidence to defendants’ affidavits and give the Court the benefit of deciding the issues with a fully developed record.

Thank you for your consideration.

Respectfully submitted,

/s/

Daniel H. Oliner

cc: All Counsel (*via ECF*)