Court File No.: CV-20-00643091-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, C. c-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF GFA WORLD

Applicant

FACTUM OF THE UNITED STATES DEFENDANTS GOSPEL FOR ASIA, INC., KADAPPILIARIL PUNNOSE YOHANNAN, DANIEL PUNNOSE, AND DAVID CARROLL

June 10, 2021

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PART I - OVERVIEW

1. The Plaintiff accuses the Defendants[1] of truly loathsome conduct: using the name of God to solicit and misuse donations meant for people living in great poverty. The claim is designed to play on stereotypes of televangelists and celebrity gurus who have defrauded their followers for personal gain.

2. But allegations and stereotypes are all the Plaintiff has to offer. There is no evidence of the wrongdoing of which the Plaintiff has accused the Defendants. To the contrary, the evidence shows that the Defendants are modest people whose sole purpose is to serve their religion by helping the world's poorest people, and that the hundreds of millions of dollars they have raised have all been used for the people and purposes for which they were intended. The Plaintiff has failed to adduce "even a minimal basis in fact" for his allegations, and class certification must therefore be denied.

3. Certification is inappropriate for another reason. The claim suffers from a fundamental defect with respect to commonality: at its core, it is a claim for misrepresentation, and it does not have the elements necessary to overcome the overwhelming individual issues inherent in a misrepresentation claim.

4. The claim is especially unsuitable for certification with respect to the US Defendants.[2] The Plaintiff's case against the US Defendants depends on piercing the corporate veil – as between related companies and as between a corporation and its directors and officers. But Canadian law does not accept the "common enterprise" doctrine that would impose the liability of one

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[1] See Notice of Action and Statement of Claim for *Zentner v. GFA World et al.,* Exhibit "R" to the Morrison Affidavit, Plaintiff's Motion Record, Tab 4R, p. 203. The Defendants are GFA World, Pat Emerick, Gospel for Asia, Inc., Kadappiliaril Punnose Yohannan, Daniel Punnose and David Carroll.

[2] Gospel for Asia, Inc., Kadappiliaril Punnose Yohannan, Daniel Punnose and David Carroll.

corporation on a separate related corporation. And imposing personal liability on directors and officers for corporate acts is not available on this pleading and these facts.

5. Most concerning, however, is that the Plaintiff's own counsel has made statements in open court that directly contradict the allegations made in the claim. Marc Stanley is one of the Plaintiff's lawyers, and is also the Texas lawyer who sued the US Defendants in Arkansas on the basis of the same allegations made in this case. The US case settled in 2019. To justify the settlement and his $12 million USD fee, Stanley told the US court at the settlement approval hearing that he visited India and saw the Defendants' charitable works first hand, and that there was no evidence of any self-enrichment by the individual Defendants.

6. In no circumstance should lawyers and their clients be permitted to prosecute claims they know to be false. Certification is not appropriate in light of Stanley's comments to the US court. The Plaintiff's motion should be denied.

7. This factum focuses on issues specific to the US Defendants. The US Defendants agree with and adopt the submissions of GFA World and Pat Emerick.

PART II - SUMMARY OF FACTS

A. Preliminary observation: the Plaintiff's lack of relevant evidence

8. The Plaintiff's description of the "facts" is misleading. It is little more than a repackaging of allegations made in the Statement of Claim. Citations to the evidence are sparse. Of the few citations given, many are inaccurate. The Plaintiff's loose treatment of the facts and evidence reveals a fundamental flaw in his case: there is no evidence for many of the allegations made, or the allegations are directly contradicted by the evidence.

9. The affiant Bryan Wall's admission describes the Plaintiff's theory in a nutshell: they "believe there's reason to believe" that some misconduct occurred.[3] There is no dispute that the test for certification is low, but mere speculation and bare allegations are not enough. This Court should be wary of the Plaintiff's attempts to obscure the evidentiary deficiencies in his case.

B. GFA USA: origin, purpose, and good works

10. Gospel for Asia, Inc. ("**GFA USA**") is a non-profit, Texas-based Christian mission organization. Its principal purpose is to raise funds for humanitarian projects for the world's poorest communities and to share with them the hope of Christ. Its work is focused on South and Southeast Asia, a geographic area GFA USA refers to as the "Field" or "Mission Field".

11. GFA USA was founded in 1979 by K.P. Yohannan and his wife, Gisela Punnose. They initially established GFA USA to raise financial support for "national workers": missionaries who are from and live in the country they serve.[4]

12. GFA USA has since grown into one of the world's largest and most successful religious charities. It now sponsors a broad and diverse range of charitable endeavours: public health, literacy and health care, access to clean water, food security, medical care, and education programs, to name a few.[5] Over the years, GFA USA has raised hundreds of millions of dollars for its programs and helped to improve the lives of millions of people living in extreme poverty.[6]

13. K.P. Yohannan is the President of GFA USA and serves as Chairman of its Board of

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[3] Examination transcript of B. Wall, May 6, 2021, at q. 231, Plaintiff's Supplementary Motion Record, ("**Plaintiff's SMR**"), Tab 7, p. 1245.
[4] Affidavit of D. Punnose, sworn September 15, 2020, ("**Punnose Affidavit**"), at para. 12, Joint Responding Motion Record of the Defendants, ("**Defendants' JRMR**"), Vol. 7, Tab 3, p. 3456; As opposed to the more conventional missionary model where foreign missionaries go to countries and share the Christian message.
[5] Punnose Affidavit, at para. 7, Defendants' JRMR, Vol. 7, Tab 3, p. 3455.
[6] Punnose Affidavit, at para. 16, Defendants' JRMR, Vol. 7, Tab 3, p. 3457.

Directors. Daniel Punnose is a Director and Vice-President of GFA USA. He is also K.P. Yohannan's son. David Carroll is a Chartered Public Accountant and the former Chief Operating Officer of GFA USA, a position he held until 2017.

14. Employees of GFA USA, including the individual Defendants, commit themselves to modest lives with few material possessions or personal assets.[7] Many abandon well-paying careers to serve the ministry. Most fundraise their salary from friends and family.[8]

15. The Plaintiff baldly alleges that donor funds were diverted to enrich the individual Defendants. There is simply no evidence to support that allegation, even after years of litigation and exhaustive discovery in the US proceeding. Indeed, as explained in more detail below, the Plaintiff's lawyer Marc Stanley admitted as much in open court in the United States.[9]

C. Other Gospel for Asia entities

16. As the success of GFA USA grew, similar organizations were founded in different countries, including the United Kingdom, Germany, Finland, and Canada. However, contrary to the Plaintiff's allegation, there is no GFA "syndicate". Each GFA organization was created pursuant to the laws of the country in which it is based, is legally and operationally separate from the others, and is managed by its own board of directors.[10] K.P. Yohannan is a director of some of the organizations, but has no involvement in their day-to-day management.[11]

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[7] Punnose Affidavit, at para. 53, Defendants' JRMR, Vol. 7, Tab 3, p. 3467.
[8] Examination Transcript of D. Punnose, April 28, 2021, at q. 14, Plaintiff's SMR, at Tab 3, p. 739.
[9] Punnose Affidavit, Exhibit G, US Class Action Settlement Approval Hearing Transcript, ("**Settlement Hearing Transcript**"), Defendants' JRMR, Vol. 7, Tab 3, p. 3583.
[10] Punnose Affidavit, at paras. 18-19, 23, Defendants' JRMR, Vol. 7, Tab 3, pp. 3457-3459.
[11] Punnose Affidavit, at para. 19, Defendants' JRMR, Vol. 7, Tab 3, p. 3458.

D. Field partners and Believers Eastern Church

17. To carry out charitable projects in the Field, GFA USA works with "field partners". These are charitable organizations based in the Field who receive funds sent by GFA USA and mobilize those funds to carry out GFA USA's charitable programs.[12]

18. GFA USA's original field partner was Gospel for Asia India ("**GFA India**"). GFA India was founded in the early 1980s and focussed on supporting national missionaries sharing the hope of Christ and helping form congregations in the region.[13] Over time, the number of believers and congregations grew, and GFA India decided to form a church to unify these congregations under a single banner. This led to the establishment of Believers Eastern Church ("**BEC**").[14]

19. Today, BEC is GFA USA and GFA World's ("**GFA Canada's**") primary field partner.[15] BEC operates as a charitable trust and also operates several other Indian charitable trusts, including GFA India.[16] BEC's humanitarian work is carried out through these trusts.[17]

20. BEC has become one of Asia's largest Christian churches. It has approximately 4 million followers in over 15,000 parishes and 57 dioceses, in 14 different countries.[18]

21. BEC's leadership is comprised of the Synod and the Conference of Bishops. Daniel Punnose is a Bishop with BEC and a member of the Conference of Bishops. K.P. Yohannan is the

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[12] Punnose Affidavit, at para. 14, Defendants' JRMR, Vol. 7, Tab 3, p. 3456-3457.
[13] Punnose Affidavit, at paras. 25-26, Defendants' JRMR, Vol. 7, Tab 3, p. 3459.
[14] Punnose Affidavit, at paras. 27-28, Defendants' JRMR, Vol. 7, Tab 3, p. 3459; Initially, the Church was named simply "Believers Church", though it was later renamed to "Believers Eastern Church" to reflect its adherence to the Eastern Orthodox Faith.
[15] Punnose Affidavit, at para. 14, Defendants' JRMR, Vol. 7, Tab 3, p. 3456-3457.
[16] GFA India now operates under the name Ayana Charitable Trust.
[17] Punnose Affidavit, at para. 36, Defendants' JRMR, Vol. 7, Tab 3, p. 3461-3462; Including Believers Eastern Church Trust, Last Hour Ministries, Love India Ministries, and others.
[18] Punnose Affidavit, at para. 28, Defendants' JRMR, Vol. 7, Tab 3, p. 3459.

spiritual leader of BEC, and holds the position of "Metropolitan Bishop". As Metropolitan Bishop, he is "first among equals". Decisions are made collectively by the Synod and Conference of Bishops with the Metropolitan Bishop's leadership and guidance.[19]

22. As the church has grown, it has become financially independent. It receives substantial contributions from its parishioners as well as other benefactors in South Asia.[20] BEC has also engaged in revenue-generating projects to benefit the church's charitable aims. These projects include a rubber plantation, private schools and colleges, and providing private services at the BEC Medical College Hospital (though most of the hospital's services are free).[21]

23. Financial independence is important for BEC. BEC has become responsible for the health and welfare of thousands of people through its humanitarian programs. If BEC was dependent on foreign donors, the viability of those programs would always be at risk.[22]

24. K.P. Yohannan has little involvement in the finances of BEC. He is not a member of the Boards of Trustees that manage the charitable trusts operated by BEC. Contrary to the Plaintiff's assertions he does not exercise "effective control" over BEC.[23]

E. The GFA USA campus

25. The Plaintiff makes numerous allegations about a $20 million USD gift that was made to GFA USA to help with the construction of GFA USA's campus in Wills Point, Texas (the "**Campus**"). The allegations are wrong and ignore the uncontroverted evidence.

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[19] Punnose Affidavit, at paras. 31 and 33, Defendants' JRMR, Vol. 7, Tab 3, p. 3460.
[20] Punnose Affidavit, at para. 41, Defendants' JRMR, Vol. 7, Tab 3, p. 3464.
[21] Punnose Affidavit, at para. 42, Defendants' JRMR, Vol. 7, Tab 3, p. 3464.
[22] Punnose Affidavit, at para. 41, Defendants' JRMR, Vol. 7, Tab 3, p. 3464.
[23] Punnose Affidavit, at paras. 31-33, Defendants' JRMR, Vol. 7, Tab 3, p. 3460.

26. The idea for the Campus first arose in 2009. GFA USA was experiencing significant growth at that time. The vision was to create a multi-purpose facility to accommodate the growing number students entering GFA USA's School of Discipleship, provide housing for the people and families that had decided to dedicate themselves to the organization's mission, and to expand sponsorship and fundraising efforts.[24]

27. Raising more money for the Mission Field was a critical objective. GFA USA believed that the Campus would enhance donations for their humanitarian programs and also create operational savings which could be directed to the Field.[25]

28. GFA USA began extensive fundraising efforts to finance the Campus. In 2010, one donor provided the money needed to buy land in Wills Point. After purchasing the land, GFA USA focused its efforts on raising money for construction.[26] However, fundraising the entire budget proved very difficult. As of the middle of 2013, GFA USA was faced with either putting the project on hold or pursuing a bank loan to obtain the financing needed to complete construction.[27]

29. However, in July 2013, GFA USA was advised that its field partners had decided to gift $20 million USD to GFA USA to help complete the Campus. The gift had been jointly approved by the Boards of Trustees of BEC and GFA India.[28] The funds were sent to GFA USA from an account held by GFA India in Canada. At that time, GFA India had a Canadian bank account to help facilitate the transfer of donations from GFA Canada to the Field.

30. The Plaintiff alleges that the gift was directed and orchestrated by the individual

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[24] Punnose Affidavit, at para. 69, Defendants' JRMR, Vol. 7, Tab 3, pp. 3470-3471.
[25] Punnose Affidavit, at para. 69, Defendants' JRMR, Vol. 7, Tab 3, pp. 3470-3471.
[26] Punnose Affidavit, at para. 74, Defendants' JRMR, Vol. 7, Tab 3, p. 3471.
[27] Punnose Affidavit, at paras. 79-80, Defendants' JRMR, Vol. 7, Tab 3, pp. 3472-3473.
[28] Punnose Affidavit, at para. 81, Defendants' JRMR, Vol. 7, Tab 3, p. 3473.

Defendants for their own personal gain. These allegations are meritless. The minutes of the joint board meeting make clear that the field partners made the decision to give the gift independently and in good faith:

(a) the gift was made in recognition of the "significant contributions" made by GFA USA to charitable work in Asia. The minutes state:

> The members of the Board pointed out to the significant contributions made by Gospel for Asia Inc., USA for the growth and expansion of the work in India and other Asian countries… Considering the remarkable contribution made and the need for an established office in the United States, suggestions were put forward by the members to make a contribution towards the construction of the campus and the office.[29]

(b) the money was sent from GFA India's Canadian bank to avoid exchange rate related payments and fees;[30]

(c) the designations of Canadian donors would be fulfilled "[using] the funds from the local income of Believers Church";[31] and

(d) K.P. Yohannan was not present at the meeting and had no role in the decision.

31. The Campus includes an administrative building, a chapel, a large cafeteria building, and 84 homes that house GFA USA staff and their families, including K.P. Yohannan and Daniel Punnose. The homes are modest.[32] GFA USA owns the homes, not the residents.[33]

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[29] Punnose Affidavit, Exhibit I, Board of Trustees July 4, 2013 Meeting Minutes, ("**Board Meeting Minutes**"), Defendants' JRMR, Vol. 7, Tab 3, p. 3619.
[30] Board Meeting Minutes, Defendants' JRMR, Vol. 7, Tab 3, p. 3619.
[31] Board Meeting Minutes, Defendants' JRMR, Vol. 7, Tab 3, p. 3620.
[32] For pictures of the Campus and examples of the homes, see Punnose Affidavit, Exhibit J, Photographs of the GFA Campus, Defendants' JRMR, Vol. 7, Tab 3, p. 3621.
[33] Punnose Affidavit, at paras. 66-68, 85, Defendants' JRMR, Vol. 7, Tab 3, pp. 3470, 3474.

32. The Plaintiff's assertions that the Campus is "palatial", "lavish" or "luxurious" are completely wrong. It is a multi-purpose campus that was designed to meet the needs of a large and growing global Christian charity. Daniel Punnose described it this way: "It is the center of spiritual and secular life for a group of Christian believers who work to promote the humanitarian and Christian mission of GFA USA."[34]

F. The US Litigation

33. This action was commenced shortly after the settlement of a similar class action in the United States, *Murphy v Gospel for Asia, Inc. et al.* The US claim named the same defendants (with the exception of GFA Canada), and made similar allegations. Marc Stanley was lead counsel for the class in the US class action, and is now counsel to the Plaintiff in this case.

34. The Plaintiff states that his claim is based on the "same core allegations" as *Murphy*,[35] and argues that because *Murphy* was certified, his case should be certified too. However, the Plaintiff presents only a carefully curated picture of *Murphy*, and fails to disclose important elements that show why the *Murphy* litigation does not support certification in this case.

35. The *Murphy* litigation proceeded over the course of several years, resulting in voluminous court filings and productions.[36] It was certified on certain causes of action. The US Defendants did not accept the correctness of the certification decision and appealed to the Supreme Court of the United States. Moreover, contrary to the Plaintiff's characterization, the certification was not

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[34] Punnose Affidavit, at para. 68, Defendants' JRMR, Vol. 7, Tab 3, p. 3470.
[35] Factum of Greg Zentner, Motion for Representation Order and Ancillary Relief, ("**Plaintiff's Factum**"), at para. 30.
[36] Throughout, more than 200 motions, briefs, and other court materials were filed. GFA USA produced over 1,000,000 pages of documents, including detailed financial information. The parties conducted a total of 17 depositions: Punnose Affidavit, at para. 52, Defendants' JRMR, Vol. 7, Tab 3, p. 3467.

"upheld" by the Eighth Circuit – the appeal court's decision meant only that an appeal would not be heard until after a decision on the merits.

36. Of course, the certification of the *Murphy* case is completely irrelevant. A certification decision in a different case, from a different country, applying a different test, and considering different causes of action, is not relevant to the certification motion before this Court.

37. The case settled in March 2019 for $37 million USD, over $12 million USD of which was paid to Stanley for contingency fees. The case had imposed a significant financial cost on GFA USA, and had a severe adverse impact on its ability to raise money for the Field. GFA USA did not believe the case had merit, but agreed to settle so that they could move on from the litigation and focus on their humanitarian and spiritual mission.[37]

38. Consistent with GFA USA's view of the merits, in the settlement agreement Stanley agreed that all donor funds intended for the Field were sent to the Field: "The Parties also mutually stipulate that all donations designated for use in the field **were ultimately sent to the field**."[38]

39. Under the settlement agreement, Stanley also acknowledged that the funds that would be used to pay the settlement, including his legal fees, were "donated to GFA-USA for use in the field", and therefore agreed that the field partners' local funds "could be and have been or will be used… to ensure the satisfaction of all designations" made by foreign donors.[39]

40. The Plaintiff's case appears to be that every dollar must be tracked from the donor to the designation, or the charity is liable. Yet, in *Murphy*, Stanley agreed to have the settlement and his

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[37] Punnose Affidavit, at para. 57, Defendants' JRMR, Vol. 7, Tab 3, p. 3468.
[38] Examination Transcript of B. Morrison, Exhibit B, Settlement Agreement and Release, ("**Settlement Agreement**"), at s. 9.2.2, Plaintiff's SMR, Tab 5B, p. 1074, (emphasis added).
[39] Settlement Agreement, at s. 4.2.3, Plaintiff's SMR, Tab 5B, p. 1064.

legal fees paid by donor funds and to have donor designations satisfied by field partners' local funds.

41. The individual Defendants were required to swear financial statements showing their net worth as a condition of the settlement.[40] The financial statements showed that they are not wealthy, and the statements were not challenged by Stanley. At the settlement approval hearing, Mr. Stanley made submissions to the US court to justify the settlement and his legal fees and told the court that the individual Defendants did not have assets of any significant value:

> … all the financials showed that none of the defendants could possibly satisfy anything in the settlement. The net worths were negligible compared to the amounts we were seeing, and certainly no one had a net worth in excess of $1 million.[41]

42. The uncontroverted evidence that the individual Defendants are of modest means is proof positive that they did not engage in self-enrichment. The Plaintiff nevertheless alleges in this action that "the money was intentionally misdirected by the Defendants to other purposes, including without limitation, to enrich themselves."[42]

43. Mr. Stanley also confirmed to the US court that he saw first hand the charitable works supported by the Defendants. He traveled to India to confirm that there was a "there" there:

> In addition to that, we traveled to India. We didn't want to settle blind, having not been been to India to even see that there's a 'there' there.
>
> …it would have been foolish to settle, not even knowing that there was a there there, so that's why we went[43]

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[40] Settlement Agreement, at s. 4.3.7, Plaintiff's SMR, Tab 5B, p. 1067.
[41] Settlement Hearing Transcript, Defendants' JRMR, Vol. 7, Tab 3, p. 3583.
[42] Notice of Motion, Plaintiff's Motion Record, ("**Plaintiff's MR**"), Tab 1, p. 9.
[43] Settlement Hearing Transcript, Defendants' JRMR, Vol. 7, Tab 3, pp. 3583-3584.

44. During his trip, he saw many of the programs GFA USA and GFA Canada support:

> In New Delhi we saw the diocese and we saw the Bridge of Hope exemplar and we saw a leprosy clinic exemplar, we saw an exemplar of a Jesus Well. We then went to Thiruvalla, where we saw the seminary, the headquarters.[44]

45. And, he spoke with BEC representatives about how they process donations:

> By the way, the diocese in New Delhi and in Thiruvalla, we were allowed to interview and talk to clerks who were responsible for various processing of information; for instance, Bridge of Hope children, the letters that they were sending to sponsors, how they matched them, *et cetera*.[45]

PART III - LAW & ARGUMENT

46. This factum addresses the US Defendants' specific responses to certification, namely:

(a) there is no basis in law or fact to pierce the corporate veil and impose liability on GFA USA or the individual Defendants for representations made by or on behalf of GFA Canada; and

(b) the Plaintiff's claims do not otherwise disclose a reasonable cause of action against the US Defendants.

47. The US Defendants also provide brief submissions on the inherent individuality of the Plaintiff's reliance-based misrepresentation claim.

A. No basis to pierce corporate veil and impose liability on US Defendants

48. At its core, the Plaintiff's case is a claim for misrepresentation. The Plaintiff concedes that

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[44] Settlement Hearing Transcript, Defendants' JRMR, Vol. 7, Tab 3, pp. 3583-3584.
[45] Settlement Hearing Transcript, Defendants' JRMR, Vol. 7, Tab 3, p. 3584.

his claim is premised on "two critical promises" made by GFA Canada:[46] the "Donor Designation Promise"[47] and the "100% Guarantee"[48]. Every cause of action in the Plaintiff's claim – civil fraud[49], equitable fraud[50], negligent misstatement[51], breach of fiduciary duty[52], unjust enrichment[53] and civil conspiracy[54] – turns on these alleged promises.

49. The Plaintiff, however, makes no direct claim of misrepresentation against the US Defendants. There is no allegation that the US Defendants made either representation.[55] A party cannot be liable for misrepresentation if they did not make the alleged misrepresentation.[56]

50. This fundamental flaw in claim against the US Defendants is the reason for the Plaintiff's inflammatory "syndicate" allegations. To attempt to overcome the absence of any private law relationship between donors and the US Defendants, the Plaintiff alleges that GFA USA and GFA

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[46] Plaintiff's Factum, at paras. 17-23.
[47] Plaintiff's Factum, at para. 17; "donors [will be able] to direct the specific charitable purpose that their donation would be used to support".
[48] Plaintiff's Factum, at para. 17; "that 100% of all donations designated by donors for a purpose in 'the mission field' or 'the field' would actually be spent in the field".
[49] Affidavit of B. Morrison, sworn November 27, 2020, Exhibit R, Statement of Claim, ("**Claim**"), at para. 49, Plaintiff's MR, Tab 4, p. 216: "The Plaintiff pleads the tort of deceit, also known as civil fraud and states that the Defendants induced Class members to donate money by making false representations…"
[50] Claim, at para. 50, Plaintiff's MR, Tab 4, p. 217: "…[T]he Plaintiff relies on the doctrine of equitable fraud and states that…the Defendants knew that the Class members were relying on the truth of the representations…"
[51] Claim, at para. 51, Plaintiff's MR, Tab 4, p. 217: "…[T]he Plaintiff pleads the tort of negligent misstatement and states that… the representations made by the Defendants, as set out above, were false and materially misleading and that Class members relied and acted on the representations…"
[52] Claim, at para. 52, Plaintiff's MR, Tab 4, p. 217: "…the Defendants… breached their fiduciary duty by failing to use the donations in the Field and for the purposes and in the manner intended by the Class members."
[53] Claim, at para. 53, Plaintiff's MR, Tab 4, p. 218: "…[T]he Defendants intentionally made materially false representations to the Plaintiffs and the class members that resulted in their contributions of money for charitable purposes…"
[54] Claim, at para. 55, Plaintiff's MR, Tab 4, p. 218: "…making, or assisting GFA Canada in making, false or misleading representations to the public contrary to s. 52 and 74.01(1)(a) of the *Competition Act*…"
[55] The Claim refers only to GFA Canada as the source of all representations to Canadian donors; Claim, at paras. 19 and 29, Plaintiff's MR, Tab 4, pp. 210, 213.
[56] *Queen v. Cognos Inc.*, [1993] 1 S.C.R. 87, 1993 CarswellOnt 801, at para. 34, Respondents' Joint Book of Authorities, ("**Respondents' BOA**"), Tab 10.

Canada are effectively the same corporate entity controlled by the same person, K.P. Yohannan.

51. With the "syndicate" allegation, what the Plaintiff is actually trying to do is to pierce the corporate veil: the corporate veil as between separate but related corporations, and the corporate veil as between a corporation and its officers, directors, and employees.

52. In both cases the Plaintiff's claim must be rejected: (a) Ontario law has considered and rejected the "common enterprise" theory of liability, which would be the only basis to maintain a reasonable cause of action against GFA USA; and (b) the Plaintiff has failed to satisfy the minimal legal and evidentiary standards required to advance claims of personal liability against the individual Defendants.

(i) No cause of action based on "common enterprise" liability

53. The evidence is clear and uncontroverted: notwithstanding their shared history, common mission and previously overlapping directorships, GFA USA is legally separate and distinct from GFA Canada. GFA USA is its own legal entity with separate legal personality.

54. Parties have attempted to pierce the corporate veil between related corporations on the basis of a "common enterprise" theory of corporate liability. The objective of this liability theory is to undermine a corporate structure designed to disadvantage creditors: separate but related companies under common control are organized into group where one company takes on liability but the assets of the group are held elsewhere, and the separate corporate legal personality of each company can be used to fraudulently shield the group's assets from execution.[57]

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[57] *First Gulf Bank v. Collavino Incorporated (Collavino International)*, ("***First Gulf***"), 2013 ONSC 4630, at para. 106, Respondents' BOA, Tab 26.

55. Canadian courts have not embraced the common enterprise doctrine; Ontario courts have only ever rejected it. In *First Gulf Bank*, Justice Allen articulated several reasons why the doctrine has not gained traction in Canada:

(a) the common enterprise principle runs contrary to the principle of separate corporate personality from *Salomon v. A. Salomon & Co. Ltd,*, "a legal principle which, for almost 100 years, has served as a cornerstone of corporate law"[58];

(b) the right to use a corporate structure to ensure that the liability of particular future activities will fall on one member of a corporate group rather than another is "inherent in our corporate law"[59]; and

(c) in Canadian corporate law there are no "broadly enforceable standards of 'fair play and good conscience'", unlike in the US.[60]

56. Justice Allen declined to pierce the corporate veil despite evidence "demonstrating that members in the group of companies have similar names, have changed their names, share and inter-mingle assets, have a common logo, trade off the same reputation, have the same business address, or use company names interchangeably."[61]

57. The issue arose again in *CAMS Atlas, LLC v. Stang*. Justice Ferguson declined to pierce the veil using the common enterprise doctrine because it would be "clearly wrong in law."[62]

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[58] *First Gulf*, at paras. 104, 108 and 115, Respondents' BOA, Tab 26, (citing Sharpe, J., as he then was, in *Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co.* (1996), 28 O.R. (3d) 423 (Gen. Div.), aff'd 1997 CarswellOnt 3496 (C.A.)).
[59] *First Gulf*, at para. 109, Respondents' BOA, Tab 26, (citing *Adams v. Cape Industries Plc.*, [1990] Ch. 433 (C.A.), at p. 544).
[60] *First Gulf*, at para. 117, Respondents' BOA, Tab 26, (citing Bruce Welling, *Corporate Law in Canada*, (Toronto: Butterworths, 1984), at 129).
[61] *First Gulf*, at para. 113, Respondents' BOA, Tab 26.
[62] *CAMS Atlas, LLC v. Stang*, 2017 ONSC 6170, at para. 5, Respondents' BOA, Tab 27.

58. The courts' refusal to adopt the common enterprise doctrine means that, even if the Plaintiff could establish that GFA Canada and GFA USA "act in concert in a common business enterprise" or control "the operations and structure of the group of companies", it would not be enough.[63] The court "is not free to disregard the principle of *Salomon*… merely because it considers that justice so requires."[64]

(ii) No basis to impose personal liability against individual US Defendants

59. The Plaintiff's claim against K.P. Yohannan, Daniel Punnose and David Carroll also fails the certification test. The claim does not support a tenable cause of action based on piercing the corporate veil to impose personal liability. In any event, there is no basis in fact for any such claim.

60. It is well-settled that merely acting as a "directing mind" of a corporation does not give rise to personal liability. As was explained by the Court of Appeal in the seminal decision of *ScotiaMcLeod Inc. v Peoples Jewellers Ltd*., to hold directors personally liable, "there must be some activity on their part that takes them out of the role of directing minds of the corporation".[65]

61. The circumstances in which a director, officer or employee will be held personally liable for actions carried out on behalf of the corporation are rare. Personal liability will only be imposed in cases of fraud, deceit, dishonesty or want of authority, or "transactions where the use of the corporate structure was a sham from the outset or was an afterthought".[66]

62. The Plaintiff's true claim against the individual Defendants is grounded in fraud. The

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[63] *First Gulf*, at para. 113, Respondents' BOA, Tab 26.
[64] *First Gulf*, at para. 113, Respondents' BOA, Tab 26, (citing *Adams v. Cape Industries Plc.*, [1990] Ch. 433 (C.A.), at p. 544).
[65] *ScotiaMcLeod Inc. v. Peoples Jewellers Ltd.* (1995), 26 O.R. (3d) 481 (C.A.), 1995 CarswellOnt 1203, ("***ScotiaMcLeod***"), at para. 26, Respondents' BOA, Tab 28.
[66] *ScotiaMcLeod*, at para. 25, Respondents' BOA, Tab 28.

Plaintiff's fraud theory is not sustainable for several reasons.

63. First, the Plaintiff has not met the strict standard for pleading fraud. Fraud pleadings need "precision" and "full particulars".[67] This requires, at a minimum, "when, where, how, by whom and to whom" the alleged fraudulent misrepresentation was made.[68] Rather than precision and particularity, the Plaintiff has simply decorated the pleading with variations of the word "fraud" without anything more. The Plaintiff simply asserts that K.P. Yohannan was "the leader of the fraudulent conspiracy"; that Punnose and Carroll were "knowing participants in the fraudulent conspiracy"; and that the alleged misrepresentations were made "knowingly and fraudulently".[69] There is a complete absence of particulars.

64. The pleading also fails to sufficiently distinguish between defendants. In *Burns v RBC Life Insurance Claim*, the Court of Appeal considered a similar claim alleging personal liability against corporate employees. The Court struck the claims for failing to provide the "necessary, differentiating material facts" to support a claim against each individual defendant:

> [16] Rule 25.06(1) requires a statement of claim to contain a concise statement of the material facts on which the party relies for its claim. **Each defendant named in a statement of claim should be able to look at the pleading and find an answer to a simple question: What do you say I did that has caused you, the plaintiff, harm, and when did I do it?**
>
> [17] Mr. Burns' statement of claim does not provide either Ms. McLean or Ms. Oslizlok with an individualized answer to that question. The heart of Mr. Burns' claim against Ms. McLean and Ms. Oslizlok is found in paras. 29 through to 35 of his statement claim, much of which is reproduced above. None of those

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[67] *Midland Resources Holding Limited v. Shtaif*, 2017 ONCA 320, ("***Midland***"), at para. 198, Respondents' BOA, Tab 29.
[68] *Midland*, at para. 198, Respondents' BOA, Tab 29; see: *Lana International Ltd. v. Menasco Aerospace Ltd.* (1996), 28 O.R. (3d) 343 (Gen. Div.), 1996 CarswellOnt 1534, at paras. 21-22, Respondents' BOA, Tab 30
[69] Claim, at paras. 12, 14-15, Plaintiff's MR, Tab 4, pp. 209-210.

> paragraphs of the statement of claim inform Ms. McLean or Ms. Oslizlok what each did individually that Mr. Burns alleges constitutes actionable wrongs against him for which he seeks a remedy, and when did they it. Instead, his pleading lumps the defendants together, without providing the necessary separate, differentiating material facts that could support a claim against each individual.[70]

65. Second, and most importantly, there is no evidence of any fraud. The Plaintiff has led no evidence to substantiate his bald and inflammatory allegations. There is absolutely no evidence that donor funds were used for self-enrichment or anything other than charitable purposes.

66. The complete absence of evidence was highlighted during the Plaintiff's cross-examination. Plaintiff's counsel refused all questions relating to the Plaintiff's knowledge of any evidence of fraud, and then conceded that the Plaintiff is not advancing a claim based on self-enrichment:

> 196. Q. Mr. Zentner, you'd agree with me that you are not aware of any evidence that the individual Defendants named in this litigation have diverted donor funds to themselves?
>
> MR. MCKIGGAN: Greg, just a minute. The allegation in the pleadings is that funds were not used as directed. That's what the allegation is in the pleadings. You're putting a different question to him. **That's not what we're seeking to certify. We're not seeking to certify that the Defendants used the money themselves. That's not what we're seeking to certify, so it's irrelevant to certification.**[71]

67. The evidentiary standard at certification is low, but there must be "some evidence" that the proposed common issue "actually exists" for it to be certified. Justice Belobaba explained the need for the plaintiff to present "even a minimal basis in fact" in *Dine v Biomet*:

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[70] *Burns v. RBC Life Insurance Company*, 2020 ONCA 347, at paras. 16-17, Respondents' BOA, Tab 31.
[71] Examination Transcript of G. Zentner, May 6, 2021, at q. 196, Plaintiff's SMR, Tab 6, pp. 1156-1157.

> If all that is needed is some evidence of class-wide commonality and no evidence that the proposed common has even a minimal basis in fact, then almost any proposed class action would have to be certified and the certification motion's role as "a meaningful screening device" would be eviscerated.[72]

68. The only way for the Plaintiff's claim against the individual Defendants to survive is a claim for fraud. The Plaintiff has failed to advance "even a minimal basis in fact" for that claim. Accordingly, the Court must deny certification of any proposed common issue as it relates to the individual Defendants.

69. Third, the Plaintiff's allegations of fraud and self-enrichment contradict the explicit representations made by his counsel, Marc Stanley, to the US court during the settlement approval hearing for the *Murphy* class action. To justify the settlement and his more than $12 million USD contingency fee, Stanley told the Court that:

(a) he travelled to India and saw firsthand evidence of the charitable works and humanitarian programs sponsored by the Defendants;[73]

(b) the individual Defendants had "negligible" net worths;[74] and

(c) he agreed to use donations designated for use in the Field to fund the settlement, including his $12 million USD contingency fee, and donor preferences would be satisfied with field partners' local funds.[75]

70. It should be concerning that the Plaintiff is advancing claims of fraud and self-enrichment against the individual Defendants in the face of these statements made by Stanley in open court.

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[72] *Dine v Biomet*, 2015 ONSC 7050, at fn. 9, Respondents' BOA, Tab 32.
[73] Settlement Hearing Transcript, at p. 11, ll. 16-24, Defendants' JRMR, Vol. 7, Tab 3, p. 3583.
[74] Settlement Hearing Transcript, at p. 11, ll. 10-14, Defendants' JRMR, Vol. 7, Tab 3, p. 3583.
[75] Settlement Hearing Transcript, at p. 10, ll. 12-23, Defendants' JRMR, Vol. 7, Tab 3, p. 3582.

And Stanley's statements have never been explained. They were put to the Plaintiff on cross-examination and the questions were refused. Stanley was in attendance and said nothing.

71. Stanley knows that a substantial part of the claim he is prosecuting in this Court is false. He has either shared that information with the Plaintiff and Canadian counsel or intentionally withheld it; both situations are indefensible. This Court should be very skeptical of authorizing a class action to proceed in these circumstances.

B. No breach of fiduciary duty and unjust enrichment claims against US defendants

72. As stated above, all of the Plaintiff's causes of action are ultimately dependent on his claim for misrepresentation. They do not meet the standard for certification as against the US Defendants for the reasons articulated.

73. With respect to breach of fiduciary duty and unjust enrichment, there are additional reasons why the claims do not disclose a cause of action and therefore cannot be certified as against the US Defendants.

(i) No claim for breach of fiduciary duty

74. Directors of a corporation owe fiduciary duties to the corporation, not to shareholders or other stakeholders. The same rule applies to directors of a non-profit corporation.[76] Accordingly, the individual US Defendants did not owe any fiduciary duties to GFA Canada's donors.

75. The claim for breach of fiduciary duty against GFA USA is similarly devoid of merit. The proposed class is limited to persons who made donations to GFA Canada.[77] There is no claim for

[76] *London Humane Society (Re)*, 2010 ONSC 5775, at para. 19, Respondents' BOA, Tab 33.
[77] Claim, at para. 6, Plaintiff's MR, Tab 4, p. 208.

donations made to or received by GFA USA, and GFA USA has no duty, fiduciary or otherwise, to donors who made donations to GFA Canada.

(ii) No claim for unjust enrichment

76. Plaintiff's counsel has conceded that the Plaintiff is not seeking to certify claims of personal enrichment by the individual Defendants. Moreover, and in any event, there is no evidence of the individual Defendants being enriched with donor funds. There can therefore be no claim for unjust enrichment against the individual Defendants.

77. The only allegation of possible enrichment against GFA USA is that it received a gift from GFA India of $20 million USD comprised of donations from Canadian donors. Those facts cannot support a claim for unjust enrichment.

78. To succeed in unjust enrichment, the Plaintiff must prove that none of the established categories of juristic reason would deny recovery. "Donative intent" is an established juristic reason. The Plaintiff pleads that the funds making up the $20 million USD gift were all donations; those funds were therefore necessarily given with a donative intent. It is accordingly plain and obvious that any claim for unjust enrichment based on the $20 million USD gift cannot succeed.[78]

79. A further reason why the Plaintiff's unjust enrichment claim cannot succeed against GFA USA is that it is a third party to the proposed class' alleged deprivation. A benefit flowing to a third party does not satisfy the necessary element that a deprivation be accompanied by a

[78] See *Low v. Pfizer Canada Inc.*, 2015 BCCA 506, Respondents' BOA, Tab 34; This case arose out of the invalidation of Pfizer's patent for Viagra. The plaintiff alleged that consumers who purchased Viagra while the patent was in force were overcharged and should have only paid the price that would be have prevailed had there been competition from generic producers. The Court of Appeal rejected the plaintiff's claim for unjust enrichment. The Court held that the purchases were made pursuant to contracts between consumers and pharmacies and accordingly a juristic reason existed for any enrichment flowing to Pfizer.

corresponding benefit. Justice Diamond confirmed this proposition in *MVL Leasing Limited*:

> The benefit must be conferred directly and specifically upon the defendant, as the enrichment must flow directly to the defendant against whom the claim was made. ...
>
> …
>
> …Any benefit, direct or indirect, to a third party is not a corresponding one for the purposes of unjust enrichment.[79]

80. The Plaintiff pleads that the $20 million USD gift came from donors, was given to GFA Canada, then to GFA India, and then to GFA USA.[80] Given GFA USA is a "third party", the benefit received by GFA USA does not correspond to the alleged deprivation and accordingly the claim for unjust enrichment against GFA USA must fail.

C. The need to prove reliance renders this action inappropriate for certification

81. This section addresses the issue of reliance given its importance to the outcome of this motion and as a supplement to the submissions of GFA Canada and Pat Emerick.

82. The Plaintiff mischaracterizes the law relating to reliance and class actions alleging misrepresentation. The Plaintiff erroneously relies on certification decisions in cases alleging primary and secondary market misrepresentation in statutorily mandated disclosure documents such as prospectuses, circulars or press releases, and where reliance was inferred given such disclosure. Those cases are the exception, not the norm.

83. The default position in the jurisprudence is that claims for misrepresentation are not suitable for certification because of the need to prove reliance. As Justice Strathy explained in

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[79] *MVL Leasing Limited v. CCI Group Inc.*, 2018 ONSC 1800, at paras. 54-55, Respondents' BOA, Tab 35.
[80] Claim, para. 42, Plaintiff's MR, Tab 4, p. 215.

McKenna v. Gammon Gold: "Issues of reasonable reliance have usually been considered to be individual issues that are not capable of being resolved on a common basis".[81]

84. The exceptions are where "there is a single representation made to all members of the class or there are a limited number of representations that have a common import". That is not this case. Unlike the cases relied on by the Plaintiffs, there is not a single representation or set of representations that were made to every donor. Donors learned about GFA Canada through various mediums – word of mouth, books, church presentations, promotional materials, to name a few – each with distinct messages and content.[82]

85. In *Bayens v. Kinross Gold Corporation*, the Ontario Court of Appeal refused to certify negligent misrepresentation claims because they gave rise to numerous class member-specific questions.[83] The same questions arise in this case. Paraphrasing the Court of Appeal:

(a) what representations were communicated or made known to each donor, and when?

(b) what was the experience level and degree of sophistication of each donor?

(c) what representations were made to a donor in the channel leading to their donation?

(d) what connection, if any, exists between the defendants' alleged misrepresentations and each donors' decision to donate to GFA Canada?

(e) do donors want a return of their donation if the Defendants are found liable?

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[81] *McKenna v. Gammon Gold Inc.*, 2010 ONSC 1591, at paras. 135-136, appealed on other grounds, 2011 ONSC 3782 (Div. Ct.), Respondents' BOA, Tab 36.
[82] Affidavit of P. Emerick, sworn February 5, 2021, at para. 33, Defendants' JRMR, Vol. 1, Tab 1, p. 10; see also: Affidavit of R. Guy, sworn February 5, 2021, at para. 6, Defendants' JRMR, Vol. 8, Tab 5, p. 3650; Affidavit of E. Knorr, sworn February 5, 2021, at para. 3, Defendants' JRMR, Vol. 8, Tab 6, p. 3735.
[83] *Bayens v. Kinross Gold Corporation,* 2014 ONCA 901, at paras. 128-129, Respondents' BOA, Tab 37.

86. These are not only individual issues, but critical components of the proposed misrepresentation claim advanced by the Plaintiff. There is no issue that is common to the class that will advance the proposed claim in a substantial and meaningful way. The individual issues overwhelm and predominate over any common issues.

87. The need for individualized inquiries into class members' claims is supported by the expert opinion of Dr. Russell James. Dr. James is a professor in the Department of Personal Financial Planning at Texas Tech University where his research focuses on charitable giving and charitable decision making.[84] He is one of the foremost and most cited experts in the field.

88. In his report, Dr. James explains why charitable giving, and in particular religious charitable giving, is motivated by a variety of reasons that are unique to each donor. He points to historical and academic research that identifies various motivations: as an expression of a commitment to internal codes; to be seen as generous; to motivate others to be generous; to be seen as wealthy; because of friendships with other donors; or because of friendships with an organization or organization's staff members.[85]

89. Dr. James applied his knowledge and expertise to the claims made by the Plaintiff. He reviewed the Statement of Claim and concluded:

(a) "[t]he types of representations mentioned in the Statement of Claim… reference factors that academic research suggests are unlikely to have been universally or

[84] Affidavit of Dr. R. James, sworn February 5, 2021, ("**Dr. James Affidavit**"), at para. 2, Defendants' JRMR, Vol. 9, Tab 11, p. 4079.
[85] Dr. James Affidavit, Exhibit A, Expert Report, at pp. 10-13, Defendants' JRMR, Vol. 9, Tab 11, pp. 4090-4093.

commonly determinative in donors' decisions to give to a religious charitable organization such as GFA Canada"; and

(b) "the extent to which any particular donor's decision to give was induced by such representations would require individualized inquiry".[86]

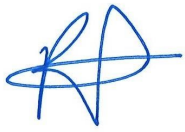
90. The Plaintiff did not tender an expert opinion in response to Dr. James. Dr. James affirmed his opinion on cross-examination. Dr. James has impeccable credentials, his expertise is directly relevant, and his evidence is uncontroverted. His opinion must be given serious weight.

91. There are other individual inquiries that are fatal to certification. On the Plaintiff's theory, the case will inevitably break down into individual inquires into how donor funds were used. The Plaintiff alleges that GFA Canada is obligated to use the donors' specific funds to support the donors' specific designations. Determining that allegation will require tracing donations from each donor's hands in Canada to a specific transaction in India – that is a fact specific, transaction-specific inquiry which cannot be determined in common.

PART IV - ORDER REQUESTED

92. The US Defendants ask that the Plaintiff's motion be dismissed with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 10th day of June, 2021.



LAX O'SULLIVAN LISUS GOTTLIEB LLP
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[86] Dr. James Affidavit, Exhibit A, Expert Report, at p. 1, Defendants' JRMR, Vol. 9, Tab 11, p. 4081.

SCHEDULE "A"

LIST OF AUTHORITIES

1. *First Gulf Bank v Collavino Incorporated (Collavino International),* 2013 ONSC 4630
2. *CAMS Atlas, LLC v Stang*, 2017 ONSC 6170
3. *ScotiaMcLeod Inc. v Peoples Jewellers Ltd.* (1995), 26 O.R. (3d) 481 (C.A.), 129 D.L.R. (4th) 711
4. *Midland Resources Holding Limited v Shtaif*, 2017 ONCA 320
5. *Lana International Ltd. v Menasco Aerospace Ltd.* (1996), 28 O.R. (3d) 343 (Gen. Div.), 1996 CarswellOnt 1534
6. *Burns v RBC Life Insurance Company*, 2020 ONCA 347
7. *Dine v Biomet,* 2015 ONSC 7050
8. *London Humane Society (Re)*, 2010 ONSC 5775
9. *Low v Pfizer Canada Inc.*, 2015 BCCA 506
10. *MVL Leasing Limited v CCI Group Inc.,* 2018 ONSC 1800
11. *McKenna v Gammon Gold Inc.*, 2010 ONSC 1591
12. *Bayens v Kinross Gold Corporation,* 2014 ONCA 901

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY-LAWS

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, C. c-36, AS AMENDED
AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF GFA WORLD

Court File No. CV-20-00643091-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

PROCEEDING COMMENCED AT
TORONTO

FACTUM OF GOSPEL FOR ASIA, INC., K.P. YOHANNAN, DANIEL PUNNOSE AND DAVID CARROLL

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